Dear Members of the Health Select Committee,

Enquiry on Minimum Unit Pricing for Alcohol
Written Evidence Submitted in Advance of the Hearing on 22 January 2018

I. Introduction

Minimum unit pricing for alcohol (MUP) is considered as one of a number of potential legislative interventions that could help reduce the burden associated with harmful alcohol consumption. In 2012 the Scottish Parliament passed the Alcohol (Minimum Pricing) (Scotland) Act 2012, the first to introduce a MUP calculated by units. The Scottish Government now seeks to implement MUP on 1st May 2018. The Republic of Ireland introduced the Public Health (Alcohol) Bill with provisions on MUP which has now passed committee stage and was debated in November in the Seanad Éireann. The Welsh Government also introduced the Public Health (Minimum Price for Alcohol) (Wales) Bill to the Welsh National Assembly in October 2017, with a view to its adoption by summer 2018.

The Health Select Committee recommended the introduction of MUP in England in 2010. Yet, after initial strong support for the policy in its 2012 Alcohol Strategy,² the Westminster Government has been very reluctant to commit to MUP. This has been attributed to persistent neoliberal beliefs in the power of the market to resolve alcohol-related problems and the unjustified nature of market intervention.³ It could also be attributed to the battle between advocates and critics of MUP to frame the policy according to their viewpoints, the result of which has built a somewhat complex and convoluted picture of MUP – such battles have been fought in UK policy circles,⁴ and in the UK media,⁵ for several years. What is certain though – as revealed by a BMJ investigation – is that industry operators were granted intimate access to key government policymakers in Westminster, and were able to significantly sway the opinion on MUP at a crucial moment before its implementation.⁶ Not only did the Westminster

Government seemingly capitulate to industry pressure, but it also presented its change of heart as a decision related to lack of ‘concrete evidence’ – a false assertion considering that evidence supporting the impact of MUP was held and embargoed by the Government while talks with industry proceeded. This turn of events shocked both public health advocates and MPs alike.

As noted in Public Health England’s review on the Public Health Burden of Alcohol and the Effectiveness and Cost-Effectiveness of Alcohol Control Policies, MUP is an effective method of protecting the health of the heaviest drinkers, who tend to favour alcohol that is cheap relative to its strength. Modelling conducted by the Sheffield Alcohol Research Group indicates that a minimum unit price of 50p would lead in Scotland to overall alcohol consumption falling by 3.5% and alcohol consumption among heavy and harmful drinkers falling by 7%. Recent modelling specific to England (cited in the PHE evidence review) shows that a 60p MUP would result in 1,166 fewer deaths per year, and that ‘High-risk drinkers in the lowest socioeconomic group experience almost double the gains in terms of reduced mortality and hospital admissions, of any other population sub-group’. Furthermore, evidence suggests that strength-based taxation or minimum pricing would lead to greater reductions in health inequalities amongst heavy drinkers in England compared to other forms of price-based intervention, such as general tax rises. Numerous other studies support the effectiveness of MUP as a targeted measure that (in addition to contributing towards the reduction of alcohol related harm generally) protects the health of heavy and harmful drinkers by reducing the availability of cheap, strong alcohol. Furthermore, the Canadian province of Saskatchewan implemented a minimum alcohol pricing policy that saw an 8.4% reduction in all beverage consumption with a 10% increase in minimum prices. Further evidence from similar measures introduced in British Colombia also showed significant reductions in chronic alcohol attributable deaths. However, MUP has been challenged as constituting a measure having an equivalent effect to a quantitative restriction, and as such contrary to Article 34 of the Treaty on the Functioning of the European Union (TFEU). On 15 November 2017, the UK Supreme Court (UKSC) ruled that the Scottish legislation was compatible with EU law. The question therefore arises as to the extent to which EU Member States (or parts thereof) are free to impose MUP without infringing EU internal market law.

---

7 I Gilmore and M Daube, ‘How a minimum unit price for alcohol was scuppered’ (2014) 348 BMJ g23.
10 See PHE 2016, n 1 above, p91-92.
15 Scotch Whisky Association and others (Appellants) v The Lord Advocate and another (Respondents) (Scotland) [2017] UKSC 76.
The Law & Non-Communicable Diseases Unit (or Law & NCD Unit) is honoured to have been asked to reflect on this question. After briefly introducing the work of the Law & NCD Unit and its relevance to the current debate (II), we will examine the extent to which the imposition of a MUP on alcoholic beverages can constitute a barrier to EU trade under Article 34 TFEU (III), and the extent of Member States’ discretion to justify such measures under Article 36 TFEU, looking specifically at the standard of review Member States are expected to meet in health-related cases under EU internal market law (IV). We will conclude with a few practical considerations governments should bear in mind when designing legislation imposing MUP on alcoholic beverages (V). Overall, this contribution provides insights as to the ‘litigation risk’ associated with the adoption of MUP and how this risk can be significantly limited.

II. The Law & NCD Unit

The Law & Non-Communicable Diseases Unit (or Law & NCD Unit) conducts research into how legal instruments can be used as tools for the prevention of NCDs, and more specifically how robust evidence-based policy interventions can be designed to support effective NCD prevention strategies at national, regional or global levels. It sits in the School of Law and Social Justice at the University of Liverpool.

Our research primarily focuses on unhealthy diets, alcohol and tobacco as three major NCD risk factors, and more overarching themes such as health inequalities, addiction, and the relationship between public health, human rights and international trade and investment law. We have also done some work on air pollution and anti-microbial resistance – though to a lesser extent. Within these broad themes, our members have developed expertise in a number of more specialised areas, including the protection of children against unhealthy food and alcohol marketing, food labelling, tobacco plain packaging, food taxation, and alcohol minimum unit pricing.

To ensure that research can be translated into effective policies, we work closely with a wide range of policy actors, not least the World Health Organization and its regional offices, UNICEF, the International Development Law Organization, as well as many governments, public health agencies, and non-governmental organisations worldwide.

III. MUP as potentially restrictive of intra-EU trade

The EU internal market is a free trade area in which goods including alcoholic beverages shall be able to move freely. This is a particularly important starting point for the analysis of the trade implications of MUP legislation, bearing in mind that cross-border alcohol sales within the EU are significant,16 and that the trade in alcoholic beverages between EU countries is extensive and a major economic driver.17

---

16 See for example, evidence presented by the Estonian Council Presidency in October 2017, that cross border sales of account for around 17% and 13% of total alcohol consumption in Finland and Sweden respectively, available online at https://www.eu2017.ee/sites/default/files/2017-10/Background%20document_cross-border%20purchases_FINAL.pdf.

Member States are primarily responsible for protecting the health of their citizens from alcohol related harm. Even though the EU has competence under Article 168(5) TFEU to adopt ‘measures’ directly concerning the protection of public health from alcohol abuse, Member State laws concerning alcohol control cannot be harmonised under this competence. Article 168(7) TFEU furthermore provides that Member States shall have responsibility for the definition of their health policies. The settled case law of the Court of Justice of the European Union (CJEU) confirms that, in the absence of common alcohol control rules, ‘it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved’. However, this same case law has also confirmed that Member States must adopt their alcohol control measures ‘within the limits set by the Treaty and must, in particular, comply with the principle of proportionality’.

Article 34 TFEU requires that ‘Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States’. The need to define the notion of a measure having equivalent effect to a quantitative restriction (MEEQR) has given rise to extensive case law. It was first interpreted in Dassonville as ‘All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade’. The notion of an MEEQR is now interpreted as including any measure whose effect is to hinder access to the market of the Member State of import.

The market access test was applied by the CJEU when assessing the compatibility of the Scottish Government’s MUP legislation in Scotch Whisky. It held that MUP by its very nature ‘prevents the lower cost price of imported products being reflected in the selling price to the consumer’, and that this in itself meant that ‘that legislation is capable of hindering the access to the United Kingdom market of alcoholic drinks that are lawfully marketed in Member States other than the United Kingdom of Great Britain and Northern Ireland, and constitutes therefore a measure having an effect equivalent to a quantitative restriction within the meaning of Article 34 TFEU’.

It should be noted that in Scotch Whisky the CJEU hardly discussed whether MUP should have fallen within the scope of Article 34 TFEU in the first place. There is still some uncertainty on this point. In this case, the Court did not actually characterise the Scottish legislation, simply concluding that it would by itself hinder market access and fall within Article 34 TFEU. This finding is not necessarily consistent with how the Court handled previous price control measures, which were held to fall within the scope of Article 34 TFEU because they were discriminatory. The fact that the parties in Scotch Whisky did not dispute the classification of the measure as an MEEQR may explain why the Court was so brief in its analysis. This being said, in a subsequent case on tobacco retail pricing, the Court also ruled that a pricing measure hindered market access without attempting to contextualise and categorise the measure in question. In any event, this should not prevent England (or other parts of the UK) from adopting

19 Aragonesa, para 16.
21 See C-110/05 Commission v Italy (Trailers) [2009] ECLI:EU:C:2009:66, para 58.
23 Scotch Whisky, para 32.
MUP – MUP legislation can be justified under Article 36 TFEU, provided that it is proportionate: in other words, only unjustified barriers to trade are problematic from an EU internal market perspective.

IV. Justifying MUP as a proportionate restriction on intra-EU trade

Article 36 TFEU states:

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 protection 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.

One should also refer to the mandatory requirement doctrine, developed in the Cassis de Dijon case, which happened to relate to alcohol control as well:

In the absence of common rules relating to the production and marketing of alcohol […], it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their territory. Obstacles to movement within the [Union] resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.  

Thus, a measure which is caught by Article 34 TFEU can nonetheless be implemented if it pursues one or more of the objectives listed in Article 36 TFEU, or a mandatory requirement of public interest, provided that it is proportionate, i.e. it must be appropriate to achieve the objective pursued and not go beyond what is necessary to attain it.  

**Appropriateness**

Establishing appropriateness involves demonstrating that there is sufficient evidence that the measure chosen is actually capable of achieving the objective(s) pursued. In Akohainen, the Court, while insisting that Finland had not demonstrated the proportionality of its licensing system, referred to the judgments in Heinonen and Gourmet, acknowledging that those cases presented a variety of plausible
arguments on the relative desirability of alcohol control measures. In doing so, the Court showed a more nuanced appreciation of the way in which alcohol control policy is shaped by evidence and context.

Scotch Whisky confirms that the Court is now prepared to more directly engage with public health evidence. The Court has explicitly acknowledged that a measure imposing a MUP ‘is part of a more general political strategy designed to combat the devastating effects of alcohol’ and that the measures ‘constitutes one of 40 measures whose objective is to reduce, in a consistent and systematic manner, the consumption alcohol’. This awareness that single interventions may play a particular role within a more complex strategy led the Court to conclude that it was not unreasonable to consider that MUP was suitable for reducing alcohol consumption. This is particularly welcome: designing an evidence-based alcohol control strategy is unavoidably difficult, given the complexity of the underlying public health problem and its multifactoriality; only a coordinated, multisectorial response can indeed address alcohol-related harm effectively.

Necessity

Establishing necessity involves demonstrating that the restriction on trade generated by the chosen measure must be tolerated in order to effectively attain the public health objective pursued. Thus, the purpose of the necessity review is to ensure that Member States have not been unreasonable in deciding how to strike the balance between cross-border trade and public health interests.

The Court’s review has increasingly focussed on the substance of alcohol control measures. In Rosengren, the Court examined the merits of monopoly rules on personal importing, distribution and age checks, concluding that the ban went manifestly beyond what was necessary for the objective sought, and that it did not appear that there was, in all circumstances, an irreproachable level of effectiveness. Nevertheless, Member States have a margin of discretion in determining which measures are ‘likely to achieve concrete results’ in pursuit of legitimate objectives, and may therefore give ‘regard to the particular social circumstances and to the importance attached … to [those] objectives’.

This flexibility is all the more essential given that Member States have now committed, as members of the World Health Organization (WHO), to the adoption of effective, evidence-based alcohol control measures. In particular, the UK has approved the WHO Global strategy to reduce the harmful use of alcohol and the WHO Global Action Plan on the prevention and control of NCDs for 2013–2020.

---

30 Scotch Whisky, para 38.
31 Scotch Whisky, para 36.
33 C-170/04 Rosengren ECLI:EU:C:2007:313, para 51.
34 ibid, para 54.
Furthermore, within the WHO European Region, the Member States have committed to a European Action Plan to reduce the harmful use of alcohol.\textsuperscript{38} These strategic documents recognise the severity of alcohol-related harm, and the need for effective, evidence based measures to tackle it, with a view to achieving ‘substantial gains in health and well-being’.\textsuperscript{39} In particular, the Global Alcohol Strategy provides ‘a portfolio of policy options and interventions that should be considered … as integral parts of national policy’.\textsuperscript{40} One of these options is the introduction of MUP, since ‘both price increases and setting a minimum price are estimated to have a much greater impact on drinkers who consume more than on those who consume less’.\textsuperscript{41} The European Action Plan further states that, ‘of all alcohol policy measures, the evidence is strongest for the impact of alcohol prices as an incentive to reduce heavy drinking occasions and regular harmful drinking’, and that ‘increased taxes do not necessarily mean increased prices … one way to manage this is to introduce a legal minimum price per litre of alcohol’.\textsuperscript{42}

However, the proportionality review now employed by the CJEU in alcohol control cases arguably increases the intensity of the burden placed upon Member States to demonstrate the effectiveness, and thus the proportionality, of their chosen measures in that it requires them to produce significant evidence to demonstrate the necessity of alcohol control measures, especially when less trade restrictive alternatives exist that may appear to achieve the same objective.\textsuperscript{43}

This high standard of necessity review was deployed in \textit{Scotch Whisky}. The Court seems to have presumed that taxation as an alternative measure was more proportionate because it was less restrictive of trade than MUP.\textsuperscript{44} The Court stated that it was examining the question of whether it was possible to prefer the adoption of [a MUP] to fiscal measures.\textsuperscript{45} This increased scrutiny of the substance of the measures chosen in light of potential alternatives – combined with the framing of the Scottish legislation as a dual-objective measure that sought to both protect heavy drinkers \textit{and} secure general population reductions in alcohol consumption – eventually led the Court to conclude that the perceived additional benefits of increased taxation over MUP ‘not only cannot constitute a reason to reject such a [taxation] measure, but is in fact a factor to support that measure being preferred to the measure imposing [a MUP]’.\textsuperscript{46}

We argue that this position is misconceived. The CJEU applied case law on tobacco taxation to the question of alcohol taxation as if the two products were the same: ‘the fact that the case-law cited in the preceding paragraph concerns tobacco products does not mean that it is inapplicable to the main proceedings, which concern the trade in alcoholic drinks. In the context of national measures which have as their objective the protection of human life and health, and \textit{irrespective of the particular characteristics} of each product, an increase in the prices of alcoholic drinks can be achieved, as was the

\begin{flushright}
\textsuperscript{38} WHO Europe, European Action Plan to Reduce the Harmful Use of Alcohol 2012–2020 (WHO 2012).
\textsuperscript{39} Global Alcohol Strategy, p4.
\textsuperscript{40} Global Alcohol Strategy, p3.
\textsuperscript{41} Global Alcohol Strategy, p32.
\textsuperscript{42} European Action Plan, p25.
\textsuperscript{43} See O Bartlett and A Garde, ‘On the Rocks’.
\textsuperscript{44} \textit{Scotch Whisky}, paras 42-48.
\textsuperscript{45} \textit{Scotch Whisky}, para 47.
\textsuperscript{46} \textit{Scotch Whisky}, para 48.
\end{flushright}
case with respect to tobacco products, by increased taxation’.\(^{47}\) This is not necessarily true, and it misses the point: tobacco is a homogenous product, whose use is always health-hazardous, while alcohol is far more heterogeneous. When the public health objective is to prevent the abuse of a particular type of alcoholic beverage by a particular type of consumer, general tax rises cannot isolate particular products and particular users, while MUP can. Furthermore, general rises in tax will impact moderate drinkers across the whole population by raising the price of most beverages across the on- or off-trade, while MUP will raise the price of only the very cheapest beverages, which are regularly consumed by a small percentage of the population. These points were recognised by both the Scottish Courts and the UKSC, and formed a significant part of their decisions that the Scottish MUP legislation was proportionate.\(^{48}\)

Although this judgment may, on its face, appear sceptical of the proportionality of MUP, the fact is that the CJEU left it to national courts, as is often the case for preliminary references, to determine whether, on the facts of the case, MUP was proportionate. The core of the CJEU’s decision is that MUP can be proportionate as long as no other measure could achieve the aim(s) it pursues as effectively. The Court insisted that even though the burden of proof lay on Member States, it did not extend to proving that ‘no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions’.\(^{49}\) Rather, a national court must ‘examine objectively whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods’.\(^{50}\) In other words, the Member State must establish objectively that other measures such as taxation are not as effective as MUP in achieving the objectives pursued, but not that MUP is the only possible way of ever achieving these objectives.

Importantly, the CJEU also left scope for national experimentation. It recognised that ‘the referring court may take into consideration the possible existence of scientific uncertainty as to the actual and specific effects on the consumption of alcohol of a measure such as the MPU for the purposes of attaining the objective pursued’.\(^{51}\) This application of the precautionary principle should also be welcomed.\(^{52}\) The Scottish Government’s MUP legislation is experimental by nature, and any conclusion on its actual effectiveness can only be made if it is allowed to be implemented and monitored. Thus, as the Court seems to acknowledge, novel public health interventions, such as MUP, which are likely to save lives, need not be disproportionate solely on account of their untested nature.

V. Practical Considerations

This standard of proportionality review adopted by the CJEU in Scotch Whisky raises four important practical points which governments envisaging the adoption of MUP measures should consider. Firstly, as a matter of EU law, the burden of proof is firmly placed upon Member States (or parts thereof) to demonstrate that their particular MUP measure is proportionate. The UKSC’s application of the CJEU’s

---

47 Scotch Whisky, para 45. Emphasis added.
48 See in particular Scotch Whisky Association and others (UKSC), paras 37-40, and para 63.
49 Scotch Whisky, para 55.
50 Scotch Whisky, para 56.
51 Scotch Whisky, para 57.
52 On this question, see A Alemanno, ‘Balancing free movement and public health’, p1060-1061.
interpretation of EU law in *Scotch Whisky* was particularly sensitive: their necessity review placed great weight on the particular situation regarding alcohol-related harm in Scotland, the Scottish Government’s entitlement to pursue ambitious alcohol control strategies to address this situation, the way in which evidence was presented to demonstrate that taxation could not achieve the particular targeted objective of protecting harmful and heavy drinkers, and the fact that the Scottish MUP legislation is the first of its kind. Other governments must be prepared to demonstrate that the circumstances in which they adopt MUP also demand a sympathetic application of EU law. A thorough impact assessment into the likely effects of MUP should be seen as constituting an important preparatory document, which must be drafted bearing in mind the risk of judicial challenge by the alcohol industry. The Scottish Government’s impact assessment was examined repeatedly throughout the litigation. In particular, the UKSC relied upon it to draw out the specific alcohol consumption situation in Scotland, and the targeted public health impact that MUP was designed to have on this situation.\(^{53}\)

Secondly, framing is key. Courts rely upon governments to identify the public health objective the alcohol control measures that they adopt pursue and adduce the evidence supporting their adoption in a clear and accurate manner. The Scottish MUP litigation is a case in point. MUP evidently results in some overall population reduction in alcohol consumption and can serve to achieve a number of public health goals. What matters is ensuring that MUP is presented in such a way that it is clear that the protection of heavy and harmful drinkers is its primary objective. Unclear framing of the legislation before the CJEU as pursuing a dual objective led the CJEU to conclude that other measures such as taxation might achieve this dual objective equally well, whilst being less trade restrictive.\(^{54}\) More careful framing of the legislation when it returned before national courts, as having a primary objective of targeting heavy and harmful drinkers, arguably played a major role in the UKSC’s conclusion that no measure other than MUP could have achieved this particular objective as effectively.

Thirdly, governments should demonstrate that while MUP and other pricing measures are complementary options within an overall strategy alcohol control strategy – as confirmed by the WHO documents cited above – they are not necessarily alternatives. The CJEU recognised in its judgement that the objective of setting high prices for alcoholic beverages ‘can adequately be pursued by their increased taxation, since increases in excise duties must sooner or later be reflected in increased retail selling prices’.\(^{55}\) The debate on the pass-through of prices to consumers aside, it is the case that taxation of alcoholic beverages is an important and effective tool in reducing alcohol related harm. However, as explained above, it would be mistaken to believe that increasing taxation will be suitable or effective in every instance in which higher prices for alcoholic beverages are sought. MUP achieves goals that taxation cannot, and indeed vice versa – hence the imperative for the two interventions to be used complementarily and concurrently.

Fourthly, and finally, the Scottish legislation contains a ‘sunset clause’: MUP will expire unless the Scottish Parliament, after reviewing the legislation, provides for its continuance.\(^{56}\) As discussed above in reference to the precautionary principle, the CJEU declared that such a clause should be taken into

---

\(^{53}\) *Scotch Whisky Association and others* (UKSC), paras 20-25.

\(^{54}\) *Scotch Whisky* para 48.

\(^{55}\) *Scotch Whisky*, para 44.

\(^{56}\) Section 2(1) of the 2012 Act.
account when determining proportionality,\textsuperscript{57} whilst the UKSC added that it was ‘a significant factor in favour of upholding the proposed minimum pricing regime’ given the naturally ‘experimental’ nature of the policy.\textsuperscript{58} Consequently, governments should provide for objective and thorough monitoring and evaluation of the MUP measures they are considering.

\textbf{VI. Conclusion}

Several factors may lead a government to implement MUP – most importantly the particular relationship that their population has with alcohol consumption, as well as their commitments as WHO Member States. The complexity of the policy rationale underpinning a decision to adopt MUP was reflected in the decision of the UKSC when it was called upon to apply the proportionality review that the CJEU has developed for alcohol control policy measures. The careful framing of the Scottish measure led to the conclusion that it was proportionate and compliant with EU free movement law. Other governments considering the adoption of MUP must be equally thorough and careful. The proportionality of an alcohol control measure cannot, as a matter of EU law, be taken for granted: it depends on establishing the appropriateness and the necessity of that measure for achieving the particular objective(s) pursued. The Scottish litigation showed that MUP can lawfully be introduced, provided that it is done carefully with the support of relevant evidence.

Yours sincerely,

Amandine Garde and Oliver Bartlett

\textit{16 January 2018}

\textsuperscript{57} Scotch Whisky, para 57.
\textsuperscript{58} Scotch Whisky Association and others (UKSC), para 63.