MINIMUM PRICING
AND
OTHER STATUTORY CONTROLS

Introduction

The Licensing (Scotland) Act 2005 contains a considerable number of restrictions on how alcohol is to be sold insofar as it seeks to control drinks promotions. It did not deal with quantity discounts or minimum pricing. In the last few years there have been further legislative steps towards greater control over how much we drink and of course the cost of that drink.

Minimum pricing has proved controversial. It is now subject to a legal challenge to the legislation and which has been brought by the powerful and well-funded Scotch Whisky Association. The exact basis of that challenge is not yet known as the action is yet to call in court, but it is likely to take the form of a challenge based on possible breaches of European Community law, in particular that the measures are anti-competitive.

Before going on to look at minimum pricing I would like to set the scene as it were by examining the attempts to control drinking practices, other than by a control on price. I would suggest that by getting the public to accept more limited forms of control in advance of minimum pricing, the task of the Scottish Government in getting minimum pricing passed, has proven somewhat easier than if it had “gone in cold” with minimum pricing forming part of the 2005 Act when it was passed.

As I understand the position in England and Wales, the licensing authority can impose conditions on a premises licence. Many of these conditions are based on the Guidance issued under Section 182 of the Licensing Act 2003. Many of these conditions relate to irresponsible promotions or irresponsible drinking practices. We have Guidance in Scotland as well issued under Section 142 of the 2005 Act. So far it has not suggested types of practices which could be tackled—probably because the 2005 Act is fairly comprehensive in that regard. Equally there would be nothing wrong for a Scottish
Licensing Board to look at some of the conditions used in England and Wales, if they could tackle issues not obviously caught by the 2005 Act conditions framework.

In Scotland control can take the form of mandatory conditions laid down in the 2005 Act or conditions prescribed by Regulation or by way of local conditions. The latter are conditions developed by the Licensing Board—see Section 27 for the basis for conditions.

I want to look at the controls on drinking and in particular irresponsible promotions laid down by the Act.

**Controls on Drinking and Irresponsible Promotions**

These controls are mostly set out in paragraphs 7 and 8 and 9 of Schedule 3 to the Act. They take the form of mandatory conditions on the premises licence. Similar provision is made in Schedule 4 for occasional (temporary) premises licences.

Paragraph 7 deals with “Happy Hours” and was originally only extended to on-sales premises. As we shall see this control has been extended to off sales via the Alcohol Etc (Scotland) Act 2010. As originally drafted it was as follows:-

“Pricing of alcohol
7 Where the price at which any alcohol sold on the premises is varied—
(a) the variation (referred to in this paragraph as “the earlier price variation”) may be brought into effect only at the beginning of a period of licensed hours, and
(b) no further variation of the price at which that or any other alcohol is sold on the premises may be brought into effect before the expiry of the period of 72 hours beginning with the coming into effect of the earlier price variation.”

In debates on paragraph 7 in the Scottish Parliament it was made clear that this provision was not to be seen as a form of minimum pricing—the operator sets the price—nor was it to be viewed as enshrining linear pricing.

That being said this was about as close as the original legislation came to controlling price. As we shall see later on, earlier attempts by Licensing Boards under the
Licensing (Scotland) Act 1976 to attempt to establish a minimum price had been found to be ultra vires the 1976 Act.

Paragraph 8 deals with the “meat” of controls on irresponsible promotions. This too has been extended by the 2010 Act to introduce controls on volume discounts and multibuys. As originally enacted and before the 2010 Act changes it provided:

“Irresponsible drinks promotions

8 (1) An irresponsible drinks promotion must not be carried on in or in connection with the premises.

(2) Subject to sub-paragraph (3), a drinks promotion is irresponsible if it—

(a) relates specifically to an alcoholic drink likely to appeal largely to persons under the age of 18,

(b) involves the supply of an alcoholic drink free of charge or at a reduced price on the purchase of one or more drinks (whether or not alcoholic drinks),

(c) involves the supply free of charge or at a reduced price of one or more extra measures of an alcoholic drink on the purchase of one or more measures of the drink,

(d) involves the supply of unlimited amounts of alcohol for a fixed charge (including any charge for entry to the premises),

(e) encourages, or seeks to encourage, a person to buy or consume a larger measure of alcohol than the person had otherwise intended to buy or consume,

(f) is based on the strength of any alcohol,

(g) rewards or encourages, or seeks to reward or encourage, drinking alcohol quickly, or

(h) offers alcohol as a reward or prize, unless the alcohol is in a sealed container and consumed off the premises.

(3) Paragraphs (b) to (d) of sub-paragraph (2) apply only to a drinks promotion carried on in relation to alcohol sold for consumption on the premises.

(4) The Scottish Ministers may by regulations modify sub-paragraph (2) or (3) so as to—

(a) add further descriptions of drinks promotions,

(b) modify any of the descriptions of drinks promotions for the time being listed in it, or

(c) extend or restrict the application of any of those descriptions of drinks promotions.

(5) In this paragraph, “drinks promotion” means, in relation to any premises, any activity which promotes, or seeks to promote, the buying or consumption of any alcohol on the premises.”
Paragraph 9 enshrines in law the right to ask for a soft drink at an (undefined) “reasonable price”. It provides:

“Provision of non-alcoholic drinks
9 (1) The conditions specified in this paragraph apply only to the extent that the premises licence authorises the sale of alcohol for consumption on the premises.
(2) Tap water fit for drinking must be provided free of charge on request.
(3) Other non-alcoholic drinks must be available for purchase at a reasonable price.”

It can be seen that although these controls were fairly extensive they did not go as far as introducing minimum pricing. Nor did they tackle the off sales trade and in particular, volume discounting or the multi-buy.

Due to lobbying from both the health groups and the on sales trade the Scottish Parliament has introduced a series of additional controls to tackle claimed gaps in the controls imposed by the 2005 Act. Accordingly we now have the provisions of the Alcohol Etc., (Scotland) Act 2010. This adds a series of further mandatory conditions to premises licences by adding to the existing provision in Schedule 3 of the 2005 Act.

Section 2 of the 2010 Act provides:

“ 2Minimum price of packages containing more than one alcoholic product
(1)The 2005 Act is amended as follows.
(2)In schedule 3 (premises licences), before paragraph 7 insert—
“6B(1)A package containing two or more alcoholic products (whether of the same or different kinds) may only be sold on the premises at a price equal to or greater than the sum of the prices at which each alcoholic product is for sale on the premises.
(2)Sub-paragraph (1) applies—
(a)only where each of the alcoholic products is for sale on the premises separately, and
(b)regardless of whether or not the package also contains any item which is not an alcoholic product.
(3)In this paragraph, “alcoholic product” means a product containing alcohol and includes the container in which alcohol is for sale.”
(3) In schedule 4 (occasional licences), before paragraph 6 insert—

“5B(1) A package containing two or more alcoholic products (whether of the same or different kinds) may only be sold on the premises at a price equal to or greater than the sum of the prices at which each alcoholic product is for sale.

(2) Sub-paragraph (1) applies—

(a) only where each of the alcoholic products is for sale on the premises separately, and

(b) regardless of whether or not the package also contains any item which is not an alcoholic product.

(3) In this paragraph, “alcoholic product” means a product containing alcohol and includes the container in which alcohol is for sale.”.

Section 2 makes provision in respect of the minimum price of a package containing two or more alcoholic products (for example, a case containing 12 bottles of wine, or a pack containing 6 cans of beer). The price of such packages must be equal to or greater than the sum of the prices at which each product is for sale. This provision only applies where each alcoholic product in the package is available for sale on the premises. This provision means the retailer cannot both sell an alcoholic product individually and offer a discount to the buyer for buying a package containing a multiple of alcoholic products which includes that product.

For example, if a bottle of wine is sold at £12, then a retailer would not be able to sell a package of 2 of those bottles for less than £24. If one bottle of wine is sold for £8 and another bottle of wine is sold for £8.50, a retailer would not be able to sell a package of one of each of those bottles for less than £8.50.

Similarly, a case of 24 x 440ml cans of beer may not be sold at a price less than the cost of buying 24 of those cans (provided that individual 440ml cans of that beer were available for sale on the premises).

Sub-paragraph (3) of inserted paragraph 6B provides that the packaging of the bottles or cans in a case does not make the bottle or can a different product. That is, the product is the bottle or can and its contents, not the case. This means that under sub-paragraph (1), a pre-packed package containing multiples of an alcoholic product is not a separate product but a package to which sub-paragraph (1) may apply.
The packaging of the alcohol with non-alcoholic products would not affect the rule. That is, in the above example, a non-alcoholic product could be packaged with the 2 bottles of wine or case of beer without the price having to be raised.

Section 2(3) makes the same provision in respect of occasional licences granted under the 2005 Act.

Here are some more thoughts. The term package is not further defined and the discussions in the Scottish Parliament are not particularly helpful. Some insight might be had with reference to the comments from the Cabinet Secretary, Nicola Sturgeon MSP in the Official Report of the Health and Sport Committee of 22 September 2010 (Cols. 3377-3378) when an amendment was moved aimed at dropping paragraph 6B from the then Bill. Her comments seem to support the view that paragraph 6B is concerned with a particular practice of packaging drinks in the sense I have described.

She said that paragraph 6B –

“...is intended to complement the quantity discount ban and prevents retailers packaging products together and selling them for less than the cost of the individual product.”

She continued-

“The provision means that the retailer cannot both sell a product individually and offer a discount to the buyer for buying a package containing a multiple of alcoholic products that includes that product. As some members have indicated, it would prevent a retailer from shrink-wrapping two bottles of wine or vodka to suggest that they are one item and selling them as one item at a price lower that the cost of buying the two bottles individually. Section 2 complements the quantity discount ban; it is important to recognise that distinction. It is an important provision, notwithstanding the decision that the committee took on minimum pricing a wee while ago.”

It seems to me that paragraph 6B is concerned with the retailer packaging two more drinks together and offering a discount as compared with the unit price of each drink.

Such a practice would arguably have escaped paragraph 8(2) (b) of Schedule 3 of the 2005 Act—the “quantity discount ban” referred to in the above passage-as it could be argued that as the drink was presented as a stand alone package it could not be maintained that there was any element of “buy one, get one free” or “buy one, get one half price” or the like.
In my view paragraph 6B was brought into deal with this gap in the provisions dealing with discounting practices. That is one distinct legislative aim.

Looking at matters more broadly, where there is not a package it seems to me that the provisions of paragraph 8(2) (b) as extended to off-sales by section 4 of the Act is now the relevant means by which the legislature has secured the goal of eliminating quantity discounts.

Recent news reports suggest that as of 1 October 2011 when this provision came into effect that some online retailers are shifting their multi-buy business to dispatch of the items from centres in England. This is because the point of sale is deemed to be the place of dispatch and if so that does not need a Scottish premises licence! I have certainly given advice to that effect to some national retailers-another possible loophole to be closed?

Off-sales are now subject to the 72 hour rule due to Section 3. It provides:-

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3 Off-sales: variation of pricing of alcoholic drinks

(1) The 2005 Act is amended as follows.

(2) In paragraph 7 of schedule 3 (pricing of alcohol: premises licences), after “premises” in both places it occurs insert “for consumption on the premises”.

(3) After that paragraph insert—

“7A Where the price at which any alcohol sold on the premises for consumption off the premises is varied—

(a) the variation (referred to in this paragraph as “the earlier price variation”) may be brought into effect only at the beginning of a period of licensed hours, and

(b) no further variation in the price at which that alcohol is sold on the premises may be brought into effect before the expiry of the period of 72 hours beginning with the coming into effect of the earlier price variation.”.

(4) In paragraph 6 of schedule 4 (pricing of alcohol: occasional licences), after “premises” in both places it occurs insert “for consumption on the premises”.

(5) After that paragraph insert—

“6A Where the price at which any alcohol sold on the premises for consumption off the premises is varied—

(a) the variation (referred to in this paragraph as “the earlier price variation”) may be brought into effect only at the beginning of a period of licensed hours, and
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Paragraph 7 of schedule 3 to the 2005 Act imposes a condition in premises licences that prohibits the price for alcohol being varied before the expiry of 72 hours since the price of any alcohol sold on the premises was last varied. Section 3(2) and (3) amends this to provide that in respect of sales of alcohol for consumption off the premises, the 72 hour restriction on varying prices is only maintained in relation to the price of individual products. This means that in relation to off-sales of alcohol, retailers may vary the price of different products at different times provided that the price of each individual product is maintained for at least 72 hours and the price variation takes effect at the beginning of a period of licensed hours. Section 3(4) and (5) makes the same provision in respect of occasional licences granted under the 2005 Act.

Note though that in relation to on sales premises there is now authority for the view that discount cards (eg a student or OAP discount and presumably store loyalty cards) do not breach the 72 hour rule—see Mitchell and Butlers plc v Dundee Licensing Board, 6 December 2010, Dundee Sheriff Court, Sheriff Principal Dunlop QC.

Will this lead to another need for more law reform? Has all the emphasis on off sales meant the eye has been of the ball in relation to key aspects of the law of on sales drinks promotions?

Further work has been done on drinks promotions. Section 4 provides:-

“Drinks promotions

4 Off-sales: restriction on supply of alcoholic drinks free of charge or at reduced price

(1) The 2005 Act is amended as follows.

(2) In paragraph 8(3) of schedule 3 (premises licences: restriction on certain irresponsible drinks promotions to apply to on-sales only), for "(b) to (d)" substitute "(c) to (e)".

(3) In paragraph 7(3) of schedule 4 (occasional licences: restriction on certain irresponsible drinks promotions to apply to on-sales only), for "(b) to (d)" substitute "(c) to (e)".

Paragraph 8 of schedule 3 to the 2005 Act imposes mandatory licence conditions prohibiting irresponsible drinks promotions.

Paragraph 8(2)(b) provides that one of the ways in which a drinks promotion can be irresponsible is if it “involves the supply of an alcoholic drink free of charge or at a reduced price on the purchase of one or more drinks (whether or not alcoholic
drinks).” Paragraph 8(2)(e) provides that a drinks promotion is irresponsible if it “encourages, or seeks to encourage, a person to buy or consume a larger measure of alcohol than the person had otherwise intended to buy or consume.” Paragraph 8(2)(b) applies to on-sales of alcohol only. Paragraph 8(2)(e) applies to both on-sales and off-sales of alcohol.

Section 4(2) extends the application of paragraph 8(2)(b) of schedule 3 to off-sales. This means that “quantity discount” and similar promotions would not be permitted for off-sales. Examples of such promotions include:

- buy one, get one free
- three for the price of two
- five for the price of four, cheapest free
- 3 bottles for £10 (where the total cost of buying the individual products is more than £10)
- buy six, get 20% off.

Section 4(2) also disapplies the application of paragraph 8(2)(e) of schedule 3 in respect of off-sales of alcohol. This means that drinks promotions encouraging persons to buy or consume larger measures will only apply to on-sales of alcohol. Section 4(3) makes the same provision in respect of occasional licences granted under the 2005 Act.”

Even the location of drinks promotions has come to be subject to control. Section 5 provides:-

“5Off-sales: location of drinks promotions

(1)Schedule 3 to the 2005 Act (premises licences) is amended as follows.

(2)In the italic cross heading before paragraph 13 (display of alcohol for consumption off the premises), after “Display” insert “, or promotion of the sale,”.

(3)In paragraph 13, after sub-paragraph (1) insert—

“(1A)Sub-paragraphs (1B) to (1D) apply where the premises, in so far as they are used for the sale of alcohol, are so used only or primarily for the sale of alcohol for consumption off the premises.

(1B)Any drinks promotion on the premises may take place only in any one or more of the following—

(a)an area referred to in sub-paragraph (1)(a) and (b),
(b) a room on the premises which is used for offering the tasting of any alcohol sold on the premises (for consumption off the premises) and the resulting tasting and is separate from those areas.

(1C) A drinks promotion in connection with the premises may not take place in the vicinity of the premises.

(1D) For the purposes of sub-paragraph (1C), the “vicinity” means the area extending 200 metres from the boundary of the premises (as shown on the layout plan).”.

(4) In that paragraph—

(a) after sub-paragraph (2)(a) omit “or”,

(b) after sub-paragraph (2)(b) add—

“(c) a branded non-alcoholic product, or

(d) a newspaper, magazine or other publication.”,

(c) after sub-paragraph (2) insert—

“(2A) Sub-paragraph (2) is without prejudice to sub-paragraph (1B).”.

(5) In that paragraph, after sub-paragraph (3), add—

“(4) In this paragraph—

• “branded non-alcoholic product” means a product which does not consist of or contain alcohol and which—

(a) bears a name or image of, or

(b) is an image of,

an alcoholic product (namely, a product consisting of or containing alcohol),

• “drinks promotion” means any activity which promotes, or seeks to promote, the buying of any alcohol sold on the premises for consumption off the premises but does not include the display of any product which is—

(a) a branded non-alcoholic product for sale on the premises, or

(b) a newspaper, magazine or other publication—
(i)
for sale on the premises, or

(ii)
if not for sale on the premises, which does not relate only or primarily to alcohol.”.

Paragraph 13 of schedule 3 to the 2005 Act (inserted by the Licensing (Mandatory Conditions No. 2) (Scotland) Regulations 2007 (SSI 2007/546)) imposes a mandatory condition in premises licences restricting the display of alcohol that is for sale for consumption off the premises. Such alcohol can only be displayed in either or both of (1) a single area of the premises agreed between the Licensing Board and the holder of the licence and (2) a single area of the premises which is inaccessible to the public. These areas are known as “alcohol display areas”.

Section 5(3) inserts new sub-paragraphs into paragraph 13 of schedule 3 of the 2005 Act restricting the location of drinks promotions on the premises and prohibiting certain drinks promotions from taking place in the vicinity of the premises. These restrictions only apply to premises which, to the extent that they are used for the sale of alcohol, are used only or primarily for the sale of alcohol for consumption off the premises. A “drinks promotion” is only a promotion relating to the buying of alcohol for consumption off the premises. As amended, paragraph 13 provides that any drinks promotion undertaken in connection with the premises in respect of off-sales of alcohol on the premises may take place only in the alcohol display areas or in a tasting room. A drinks promotion in the vicinity of the premises will only be prohibited under paragraph 13 if it is “in connection with the premises”. This means that a licence-holder will not breach the licence condition if there is a drinks promotion in the vicinity of the premises that is not in connection with the premises. The “vicinity” means the area extending 200 metres from the boundary of the premises as shown on the layout plan.

Section 5(4) and (5) amends paragraph 13 to provide that the display of branded non-alcoholic products (products that bear a name or image of an alcoholic product such as football tops, slippers, tea towels etc.) which are not for sale may constitute a drinks promotion and, if so, may only be displayed in alcohol display areas or in a tasting room. Newspapers, magazines and other publications which are not for sale
may only constitute a drinks promotion if they relate only or primarily to alcohol. If newspapers, magazines or other publications do constitute a drinks promotion then they may only be displayed in an alcohol display area or a tasting room. Where newspapers, magazines and other publications are for sale then they will not be drinks promotions and so may be displayed anywhere on the premises.

Section 10 was introduced to give more power to Boards to introduce conditions during the currency of a licence and not just at grant or on a review application.

Variation of licence conditions

10 Premises licences: variation of conditions

(1) After section 27 of the 2005 Act, insert—

"27A Power of Board to vary premises licence conditions

(1) A Licensing Board may, in relation to any prescribed matter, make a variation of the conditions to which a premises licence in respect of licensed premises within its area is subject.

(2) The Scottish Ministers may not, under subsection (1), prescribe the age at which persons aged 18 or over may purchase alcohol as a matter in respect of which the conditions to which a premises licence is subject may be varied under this section.

(3) A variation under subsection (1) may apply to—

(a) all licensed premises,

(b) particular licensed premises,

(c) licensed premises within particular parts of its area, or

(d) licensed premises of a particular description.

(4) A variation under subsection (1) has effect for such period as the Board may specify in it.

(5) The Board may make a variation under subsection (1) only where it is satisfied that the variation is necessary or expedient for the purposes of any of the licensing objectives.

(6) Before making a variation under subsection (1), the Board must—

(a) publish, in the prescribed manner, notice of the proposed variation, and

(b) give notice of the proposed variation to—

(i) the persons mentioned in section 21(1)(b), (c), (ca), (d) and (e), and

(ii) the holders of premises licences in respect of premises to which the proposed variation would apply."
A notice under subsection (6) must state that any person may, by notice to the Licensing Board, make representations to the Board concerning the proposed variation before such date as the Board specifies in the notice under subsection (6).

If the Board receives any representations before the date specified, the Board—

(a) must hold a hearing in relation to the proposed variation, and

(b) may give such persons who have made representations as the Board considers appropriate an opportunity to be heard at the hearing.

Where a Licensing Board makes a variation under subsection (1), the Board must—

(a) amend the premises licence,

(b) within the period of one month, give notice of the variation to—

(i) the appropriate chief constable, and

(ii) the holders of premises licences in respect of premises to which the variation applies,

(c) send a copy of the variation to the address of the premises to which the variation applies, and

(d) publicise the variation in such manner as the Board thinks fit.

A variation under subsection (1) does not have effect unless notice under subsection (9)(b)(ii) has been given.

In subsection (1), the power to make a variation of the conditions to which a premises licence is subject includes—

(a) a power to make a revocation of such a variation in the same manner and subject to the same conditions, duties and limitations as the variation, and

(b) a power to make a variation (or a revocation of a variation) of the conditions to which a provisional premises licence is subject.”.

(2) In section 146 (orders and regulations), in subsections (4)(b) and (5)(b), after “27(2)” insert “, 27A(1)”.

A Licensing Board can only impose conditions in a premises licence when it grants the licence under section 27(6) of the 2005 Act or if it reviews a premises licence under sections 36 to 40 of the 2005 Act. In those circumstances it may only do so on a case by case basis. Section 10 inserts a new section 27A into the 2005 Act which will enable Licensing Boards to vary the conditions of premises licences in respect of all the premises in its area or vary a category or group of licences in respect of matters prescribed by the Scottish Ministers. Examples of the matters that could be prescribed include a requirement for shatter proof glasses in all premises of a particular description, CCTV in all premises in a particular town that sell alcohol for consumption off the premises, or a requirement for a specific number of door staff in
city centre establishments. Section 27A(2) prevents Scottish Ministers from prescribing an age over 18 at which persons may purchase alcohol as a matter that a condition imposed under section 27A(1) could relate to. A Licensing Board will only be able to exercise the power in the new section 27A if the Board considers it necessary or expedient for the purposes of any of the licensing objectives (set out in section 4 of the 2005 Act). Licensing Boards will also be restricted to exercising this power in relation to matters to be prescribed in regulations. Such regulations will be subject to the affirmative resolution procedure.

Section 27A(6) requires a Licensing Board, before making a variation under section 27A, to publish a notice of any proposed variation in the manner prescribed in regulations made by the Scottish Ministers. The Licensing Board is required to give notice of the proposed variation to premises licence-holders whose licences the proposed variation would apply to and to certain other persons including the local authority, relevant health board and appropriate chief constable. Section 27A(7) requires these notices to state that any persons may make representations to the Licensing Board about the proposed variation and set out the date by which such representations must be made. Section 27A(8) requires that if a Licensing Board receives any representations, then it must hold a hearing in relation to the proposed variation.

**MINIMUM PRICING**

The 1976 Act—much like the Licensing Act 1964—did not address in any shape or form how much alcohol could be sold for. An attempt to link the grant of late night extensions in return for giving an undertaking to the Licensing Board not to sell certain measures or pints below a certain price was found to be unlawful in *Mitchells & Butlers Retail Ltd v Aberdeen City Licensing Board 2005 SLT 13*. That case, in which I acted for M&B, effectively put paid to any attempt to enforce any system of minimum pricing via the 1976 Act.

No European competition law challenge was needed. However as the 2005 Act as amended has introduced minimum pricing as a statutory “given”, it is plain that it will be to European law that arguments will have to be addressed to challenge the regime.
The SNP Government tried to pass minimum pricing before when it passed the Alcohol Etc (Scotland) Act 2010. As a minority Government it failed to secure support for the measure. However re-elected with a greater majority the Scottish Parliament has passed the Alcohol (Minimum Pricing) (Scotland) Act 2012. The Act works on the basis that there is now a new mandatory condition inserted into all premises licences which require a minimum price per unit of alcohol.

The key provision is section 1. It provides:

Minimum price of alcohol

5 (1) The Licensing (Scotland) Act 2005 is amended as follows.
(2) In schedule 3 (premises licences: mandatory conditions), before paragraph 6B insert—
   "6A(1) Alcohol must not be sold on the premises at a price below its minimum price.
   (2) Where alcohol is supplied together with other products or services for a single price, sub-paragraph (1) applies as if the alcohol were supplied on its own for that price.
   (3) The minimum price of alcohol is to be calculated according to the following formula—
       MPU x S x V x 100
       where—
       MPU is the minimum price per unit,
       S is the strength of the alcohol, and
       V is the volume of the alcohol in litres.
(4) The Scottish Ministers are to specify by order the minimum price per unit for the purposes of sub-paragraph (3).
20 (5) For the purposes of sub-paragraph (3), where—
   (a) the alcohol is contained in a bottle or other container, and
   (b) the bottle or other container is marked or labelled in accordance with relevant labelling provisions,
   the strength is taken to be the alcoholic strength by volume as indicated by the mark or label.
(6) The Scottish Ministers are to specify by order the enactments which are relevant labelling provisions for the purposes of sub-paragraph (5)."

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(3) In schedule 4 (occasional licences: mandatory conditions), before paragraph 5B insert—
   "5A(1) Alcohol must not be sold on the premises at a price below its minimum price.
   (2) Where alcohol is supplied together with other products or services for a single price, sub-paragraph (1) applies as if the alcohol were supplied on its own for that price.
   (3) The minimum price of alcohol is to be calculated according to the following formula—
       MPU x S x V x 100
       where—
       MPU is the minimum price per unit,
       S is the strength of the alcohol, and
       V is the volume of the alcohol in litres."
(4) The Scottish Ministers are to specify by order the minimum price per unit for the purposes of sub-paragraph (3).

(5) For the purposes of sub-paragraph (3), where—
(a) the alcohol is contained in a bottle or other container, and
(b) the bottle or other container is marked or labelled in accordance with relevant labelling provisions,
the strength is taken to be the alcoholic strength by volume as indicated by the mark or label.

(6) The Scottish Ministers are to specify by order the enactments which are relevant labelling provisions for the purposes of sub-paragraph (5).

(4) In section 146—
(a) in subsection (4)(a), for “or 150(2)” substitute “, 150(2), paragraph 6A(4) of schedule 3, or paragraph 5A(4) of schedule 4”;
(b) in subsection (5)(a), for “or 123(6)” substitute “, 123(6), paragraph 6A(4) of schedule 3, or paragraph 5A(4) of schedule 4”.

The provisions came into effect on 29 June 2012. The Act provides that they will endure for six years but is capable of renewal. There is a “trial” aspect to this legislation. Inevitably legal action has followed. The Minimum Unit Price (MUP) has been set at 50p. This will hit cheaper drinks consumed in volume such as ciders and strong wines, but on one view is less likely to impact on higher end products.

The Scotch Whisky Association has announced that it is taking action in Europe and the UK against the Scottish Government's minimum unit pricing legislation, including a complaint to the European Commission. The announcement states that the SWA is also taking action through the Court of Session by applying for Judicial Review of the legislation on the grounds that the law on minimum pricing is in breach of the UK's EU Treaty obligations and so contrary to the terms of the Scotland Act 1998. The competition law argument is likely to be that other sanctions or controls should be looked at first—and fail-before pricing is looked at. This is a proportionality argument. Another line may be that the measure is not based on sufficient evidence.

The Scottish Government, through the UK Government Department of Business, Innovation and Skills has notified the legislation to the European Commission under Directive 98/34/EC. This means that at least one Directorate of the Commission is already engaged in the matter. It will assess whether the legislation does or does not fall foul of the UK’s EU obligations. Its assessment will be authoritative on that issue and subject to judicial review only by the European Court of Justice and only on the
grounds of a defect in the assessment process. If the legislation did fall foul of EU law this would automatically make it contrary to the Scotland Act too.

It has sometime been suggested that the fact that a price is compulsory by law might not be enough to rule out a competition law aspect to the matter, separate from the trade barrier aspect and requiring the involvement of the Competition Directorate. While it is true that state backing for agreed prices does not necessarily make them lawful under EU law, the position is quite different where the state imposition of prices is done without any industry involvement at all.

It has also been suggested that minimum pricing could be a consumer protection measure and so outside the powers of the Scottish Parliament as consumer protection is not an area of devolved competence. Related issues arose in a recent case on a ban on tobacco vending machines imposed by legislation of the Scottish Parliament. The ban was upheld by the Court of Session at first instance and on appeal-see *Sinclair Collis Ltd, Petitioner* [2011] CSOH 80; [2011] CSIH, reported as *Imperial Tobacco Ltd v Lord Advocate* [2012] CSIH 9. I understand that this has also been the outcome of the parallel litigation in England and Wales. The decisions were reached on the view that the measures were concerned with health and that had primacy.

The SWA is being joined in its opposition by other UK and European Union wine, beer and spirits organisations and companies. The SWA has consistently argued that a MUP will be ineffective in tackling alcohol misuse; will penalise responsible drinkers and put more pressure on household budgets; and will damage the Scotch Whisky industry!

The SWA believes the Scottish Government's minimum pricing policy is misguided. They argue that the Government's own modelling illustrates that MUP will not reduce the number of hazardous drinkers and will instead force responsible drinkers to pay much more. Scottish Government figures show 73% of alcohol sold in the "off trade" will have to go up in price. Recent statistics reveal that alcohol consumption and alcohol-related harm have been falling, calling into question the need for MUP. But the Scottish Government has decided to press ahead with its plans.
During the Parliamentary process, the Cabinet Secretary for Health Nicola Sturgeon said she expected the policy to be subject to legal challenge. The Scottish Conservatives have called for legal clarity and Scottish Labour has raised doubts over the legality of the legislation.

Now the Scottish Government has notified its plans for a minimum price of 50 pence to the EC, other alcohol drinks industry organisations in the UK and across Europe are raising objections to the legislation with the Commission.

The SWA's complaint to the EC states that the scheme breaches EU trade rules. It says that minimum pricing of alcohol would artificially distort trade in the alcoholic drinks market, contrary to EU law. There may also be an argument that the changes create two markets in the UK when in EU competition terms, the UK is one market.

In the Court of Session the SWA has been joined by The European Spirits Organisation (CEPS) and Comité Vins (CEEV), the European wine body.

Gavin Hewitt, chief executive of the Scotch Whisky Association, said:

"We agree that Scotland must address the harmful use of alcohol, but policy needs to be targeted on the problem. Some 30% of those who drink, consume 80% of the alcohol sold. Despite warnings that minimum pricing of alcohol would be illegal, the Scottish Government has pressed ahead with its ill-targeted policy and misguided legislation. The Scotch Whisky industry is left with no option but to oppose the legislation in Europe and through the Scottish Courts.

"We're far from alone in our objections. Others in the UK and Europe share our views and will also be raising objections with the European Commission.

"Scottish Ministers repeatedly claimed during the Parliamentary process that as a premium product Scotch Whisky would not be affected by minimum pricing. The truth is now out. The Scottish Government's own final impact assessment reveals 85% of Blended Scotch Whisky will be increased in price as a result of an MUP of 50p."
"Moderate drinkers are being forced to pay for an un-targeted, misguided and illegal policy. MUP will not tackle the problem of harmful and hazardous drinkers and will damage one of the country's leading industries. We employ 10,000 people in Scotland, with many jobs in rural communities or economically vulnerable areas, and support a further 35,000 jobs in the supply chain across the UK."

Jose Ramon Fernandez, secretary general of Comité Vins, a co-petitioner to the Scottish Courts on behalf of the European Wine Committee, said:

"We believe the setting of a minimum price contravenes rules governing the wine common market organisation across the EU. It will also act as a discriminatory barrier to trade for imported wines from companies which enjoy a competitive lower cost base, incompatible with EU and international trade law."

Paul Skehan, director general of the European Spirits Organisation (CEPS), another petitioner to the Court of Session, said:

"European law is clear - minimum pricing is an illegal barrier to trade. We agree alcohol misuse must be tackled, but other more effective, more proportionate, less trade restrictive measures are available."

Only time will tell what the outcome of all of this will be. It is inevitable that the outcome will have a considerable, if not decisive impact on proposals for England and Wales.