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BRIEFING



MINIMUM PRICING OF ALCOHOL

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This briefing contains the following chapters:

- Minimum Unit Pricing in the UK and Ireland
- Ban on below cost sales

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Minimum pricing of alcohol

Summary

- Minimum pricing is not a tax, but rather a legally mandated 'floor price' below which retailers are not permitted to sell alcohol
- Some governments have tended to favour minimum *unit* pricing (MUP), a specific version of minimum pricing whereby the floor price is set according to the alcoholic content of a drink
- In 2012, Scotland became the first nation to pass legislation introducing a 50p (MUP), subject to a sunset clause after six years; it came into force in 2018 following a court challenge from alcohol producers
- Analyses of Scottish MUP suggest it has contributed to a drop in alcohol sales and consumption, with the largest falls occurring among the heaviest drinkers
- Another form of minimum pricing involves banning below cost sales of alcoholic beverages, a policy adopted in some European countries to prevent anti-competitive 'predatory pricing'
- In the UK, a milder version of the below cost ban (excluding invoice and transportation costs) came into force in May 2014

Introduction

In recent years, minimum alcohol pricing has attracted substantial attention in a number of countries. Minimum pricing is not a tax, but rather a legally mandated 'floor price' below which retailers are not permitted to sell alcohol. Unlike a tax, any additional revenue from raising prices is retained by retailers, rather than the government. Most Canadian provinces have had minimum prices in place for several decades.¹ Over the past 15 years, many former Soviet countries have also introduced floor prices for certain alcoholic products: Russia, Ukraine, Moldova, Armenia, Belarus, Kyrgyzstan, Kazakhstan and Uzbekistan.

More recently, governments have tended to favour minimum *unit* pricing (MUP), a specific version of minimum pricing whereby the floor price is set according to the alcoholic content of a drink. For example, under a 50p MUP, the minimum legal price of a drink would be the number of units of alcohol it contained multiplied by 50p.

MUP came into force in Scotland and Australia's Northern Territory in 2018, Wales in 2020. The Republic of Ireland has legislated for MUP, though it is still to be implemented, and there are plans to introduce MUP in Northern Ireland. MUP is under consideration by the Dutch parliament.²

¹ Thompson K, Stockwell T, Wettlaufer A, Giesbrecht N & Thomas G. Minimum alcohol pricing policies in practice: A critical examination of implementation in Canada. *Journal of Public Health Policy* doi:10.1057/s41271-016-0051-y. 2016

² Van Dalen W. Hope for a Dutch MUP. *Institute of Alcohol Studies blog*. 2020 May 29
<<http://www.ias.org.uk/Blog/Hope-for-a-Dutch-MUP.aspx>>

Minimum Unit Pricing in the UK and Ireland

Minimum Unit Pricing in Scotland

In 2012, the Scottish Government passed legislation introducing a 50p minimum unit price.¹ However, the implementation of the policy was delayed by six years as a result of a series of legal challenges from alcohol industry bodies.

The case against MUP in Scotland was brought forward by a set of alcohol producer trade associations – The Scotch Whisky Association, the European Spirits Association and Comité Européen des Entreprises Vins. They claimed that minimum unit pricing is incompatible with European Union law because:

- it impedes trade between EU member states (contravening Article 34 of the Treaty on the Functioning of the European Union² and Article 6(2) of Regulation (EC) 110/2008)³
- it undermines the harmonisation of agricultural policy, specifically with respect to wine production (which would breach Regulation (EC) 1234/2007 (as amended by Regulation (EC) 491/2009)⁴

The case was initially ruled on in May 2013 by the Scottish Court of Session, which found that MUP is not inconsistent with EU law, holding that insofar as MUP represents a restriction on trade, this is justified 'on the grounds of the protection of the life and health of humans' (as laid down in Article 36 of the Treaty on the Functioning of the European Union).⁵ MUP was also held to be consistent with EU agricultural regulations.

However, in April 2014, the Court of Session referred the case to the European Court of Justice. It judged that 'although at first sight the tests to be applied under article 36 [which allows the restriction of trade to protect human life and health] might appear to be relatively well established... it would be of help to have the guidance of the Court of Justice of the European Union'.⁶

In December 2015, the European Court of Justice (ECJ) gave its ruling, confirming the earlier judgement that MUP is restrictive of trade, but that this may be justified on the basis of protecting human life and health. However, it raised the question of whether MUP is *proportionate* to this objective, pointing out that this goal might also be achieved by raising taxes on alcohol. Ultimately the court did not issue a final ruling, but referred the case back to the Court of Session, setting it the task of determining 'whether measures other than that provided for by the Scottish legislation, such as increased taxation on alcoholic drinks, are capable of protecting human life and health as effectively as the current legislation, while being less restrictive of trade in those products within the EU'.⁷

In October 2016, the Scottish Court of Session returned to the question and ruled that MUP is consistent with EU law. In response to the ECJ's suggestion that alcohol taxes might be a suitable alternative, the Court of Session noted that i) increases in tax, unlike an MUP, could be absorbed by retailers and not passed onto consumers; and ii) MUP, unlike tax, can be linked to the strength of a drink (unlike wine and cider duty).⁸

The Scotch Whisky Association lodged a further appeal with the UK Supreme Court, which on 15 November 2017 unanimously ruled that MUP is consistent with EU law.⁹ The Court accepted that MUP is better targeted at harmful drinking than alcohol duty, and that it is legitimate for the Scottish Government to prioritise the health benefits of minimum pricing over avoiding distortions to the European alcohol market.

The judgement cleared the way for the Scottish Government to finally implement MUP, which came into force in Scotland on 1 May 2018. The measure remains subject to a 'sunset clause', which means it will have to be renewed or will expire after six years.

In the two years following its introduction, some analyses reported a drop in alcohol sales (of around 4–6%), while the most robust available evidence suggested MUP reduced per adult alcohol consumption by 7–8%, and that the reduction appeared to be greatest among the heaviest drinkers.¹⁰ The evidence on health harms was found to be less conclusive – alcohol-specific deaths fell 7% in Scotland in the eight months following MUP, but they fell by the same amount in England. Hospitalisations due to alcohol were flat in the first 12 months of MUP in Scotland, compared with an increase in England. It is important to note that more data and robust analysis are needed to accurately distinguish the causal effect of MUP on health harms from random fluctuations, a process which may take years.¹¹

Minimum Unit Pricing in Wales

In 2015, the Welsh Government published a draft bill proposing a minimum unit price for alcohol in Wales of 50p.¹² However, in September 2016 the UK Government rejected the opportunity to devolve competency over alcohol pricing to Wales, blocking the move.¹³

Nevertheless, in November 2017, the Welsh Government introduced legislation for a 50p MUP on the basis that it has the competence to legislate for the promotion of health and prevention of disease.¹⁴ The measure was passed by the Welsh Assembly in June 2018.¹⁵ Its implementation was delayed in June 2019 after the Portuguese government registered an objection to the European Union.¹⁶ The objection was overturned and MUP came into force in Wales on 2 March 2020.

Minimum Unit Pricing in Ireland

The *Public Health (Alcohol) Bill*, which was introduced to the Irish Seanad (parliament) in December 2015.¹⁷ Among its provisions was an MUP of €1 per standard drink (10g/12.7ml pure alcohol). Because of opposition to certain aspects of the Bill (particularly mandatory cancer warning labels) from lobbyists,¹⁸ it did not pass into law until October 2018.¹⁹

The government in the Republic of Ireland had originally agreed to introduce minimum unit pricing simultaneously with Northern Ireland to avoid the minimum price being undermined by cross-border sales.²⁰ However, with the Northern Irish assembly suspended from January 2017 to January 2020 due to the collapse of the power-sharing government, MUP was further delayed. In March 2020, Irish Health Minister Simon Harris wrote to Northern Ireland's Health Minister to encourage him to move forward with the policy. Swann responded that he will 'be giving this active consideration as part of the development of a new substance misuse strategy for Northern Ireland'.²¹

Minimum Unit Pricing and the UK Government

In March 2012, the Westminster administration announced plans for a UK-wide minimum unit price, as part of its *Alcohol strategy*. This was followed by a consultation on the strategy, in which the government sought stakeholder views on the appropriate level of the minimum unit price, the mechanism for adjusting this level over time and the impact of the policy.²² The consultation based its assessment of the impact of a 45p MUP, implying that this was the government's preferred level.

However, in July 2013, the government reversed its plans. The then Home Secretary Theresa May claimed:

That consultation has been extremely useful. But it has not provided evidence that conclusively demonstrates that Minimum Unit Pricing (MUP) will actually do what it is meant to: reduce problem drinking without penalising all those who drink responsibly. In the absence of that empirical evidence, we have decided that it would be a mistake to implement MUP at this stage. We are not rejecting MUP – merely delaying it until we have conclusive evidence that it will be effective.²³

In responding to the alcohol strategy consultation in parliament, then Minister of State for Home Affairs, Jeremy Browne, described MUP as 'under consideration'.²⁴ This has remained the government's position: responses to subsequent parliamentary questions show that it is not taking any active steps towards introducing the policy, but will continue to follow developments in Scotland:

There are no plans for the introduction of MUP in England. The Government will continue to monitor the progress of MUP in Scotland and will consider available evidence of its impact, including the report by NHS Scotland.

- Lord Bethell, Parliamentary Under-Secretary (Department of Health and Social Care), 15th December 2015²⁵

¹ Legislation.gov.uk, Alcohol (Minimum Pricing) (Scotland) Act 2012.

<<http://www.legislation.gov.uk/asp/2012/4/contents/enacted>>

² *Treaty on the Functioning of the European Union*, 13 December 2007, 2012/C 326/01

<<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>>

³ *Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89*, 15 January 2008 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008R0110>>

⁴ *Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)*

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:299:0001:0149:EN:PDF>>

⁵ Judiciary of Scotland (2013), *Petition for Judicial Review by Scotch Whisky Association and Others: Summary of Lord Docherty's decision in the Petition for Judicial Review*.

<<http://www.scotland-judiciary.org.uk/9/1040/Petition-for-Judicial-Review-by-Scotch-Whisky-Association-And-Others>>

⁶ *Scotch Whisky Association and Others v The Lord Advocate, The Advocate General for Scotland* [2014] CSIH 38.

<<https://www.scotcourts.gov.uk/search-judgments/judgment?id=482a86a6-8980-69d2-b500-ff0000d74aa7>>

⁷ Court of Justice of the European Union. The Scottish legislation introducing a minimum price per unit of alcohol is contrary to EU law if less restrictive tax measures can be introduced, *Press Release No 155/15*. 2015

<<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-12/cp150155en.pdf>>

⁸ Judiciary of Scotland. *Scotch Whisky Association and others v Lord Advocate and Advocate General for Scotland: A summary of the Opinion of the Court in the reclaiming motion by the Scotch Whisky Association and others against the Lord Advocate and the Advocate General for Scotland* 2016 <<http://bit.ly/2m2TgaS>>

⁹ *Scotch Whisky Association and others (Appellants) v The Lord Advocate and another (Respondents) (Scotland)* [2017] UKSC 76 <<https://www.supremecourt.uk/cases/docs/uksc-2017-0025-judgment.pdf>>

¹⁰ The Institute of Alcohol Studies (May 2020) 'Minimum unit pricing in Scotland: What we know so far', p. 2

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- ¹¹ The Institute of Alcohol Studies (May 2020) 'Minimum unit pricing in Scotland: What we know so far', p. 2
- ¹² BBC News. Proposed minimum alcohol price law is published, *BBC News*. 2015 July 15
<<http://www.bbc.co.uk/news/uk-wales-politics-33522647>>
- ¹³ BBC News. Doctors criticise alcohol minimum pricing block, *BBC News*. 2016 September 15
<<http://www.bbc.co.uk/news/uk-wales-politics-37318469>>
- ¹⁴ Welsh Government. *Public Health (Minimum Price for Alcohol) (Wales) Bill. Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes*. 2017 <https://senedd.wales/laid_documents/pri-ld11246-em/pri-ld11246-em-e.pdf>
- ¹⁵ BBC News. An end to cheap booze? Minimum alcohol price law passed. *BBC News*. 2018 June 19.
<<https://www.bbc.co.uk/news/uk-wales-politics-44520991>>
- ¹⁶ Deans D. Minimum alcohol price law in Wales delayed to 2020. *BBC News*. 2019 June 19
<<https://www.bbc.co.uk/news/uk-wales-politics-48675251>>
- ¹⁷ Shiels McNamee M. Alcohol pricing: Here's how the planned change will affect your pocket. *The Journal*. 2016 December 9 <<http://www.thejournal.ie/alcohol-pricing-advertising-announced-2491642-Dec2015/>>
- ¹⁸ O' Rourke A. 1,000 days and counting but long-awaited public alcohol bill faces further delays. *The Journal*. 2018 September 17 <<https://www.thejournal.ie/alcohol-bill-faces-further-delays-4239424-Sep2018/>>
- ¹⁹ O'Halloran M. Alcohol Bill is finally passed by the Oireachtas. *The Irish Times*. 2018 October 10
<<https://www.irishtimes.com/news/politics/oireachtas/alcohol-bill-is-finally-passed-by-the-oireachtas-1.3659222>>
- ²⁰ O'Halloran M. Alcohol Bill is finally passed by the Oireachtas. *The Irish Times*. 2018 October 10
- ²¹ O'Halloran M. Government, NI Executive under pressure over alcohol pricing. *The Irish Times*. 2020 March 4
<<https://www.irishtimes.com/news/health/government-ni-executive-under-pressure-over-alcohol-pricing-1.4193023>>
- ²² Home Office. A consultation on delivering the Government's policies to cut alcohol fuelled crime and anti-social behaviour. 2012 <<https://bit.ly/2RAAwdH>>
- ²³ Home Office. *Next steps following the consultation on delivering the Government's alcohol strategy*. 2013
<<https://bit.ly/3kslfYE>>
- ²⁴ *Hansard HC Deb*. Vol 566. 2013 July 13
<<https://hansard.parliament.uk/Commons/2013-07-17/debates/1307172000005/AlcoholStrategyConsultation>>
- ²⁵ HL Deb 6 March 2020 WA1749 <<https://bit.ly/3mrUi9y>>

Ban on below cost sales

In its statement that it would not be introducing minimum unit pricing, the UK Government presented a ban on below cost sales as an alternative policy addressing the same issue. For example, in the parliamentary debate on the *Alcohol strategy* consultation, then Minister of State for Home Affairs, Jeremy Browne announced: 'We will tackle the most egregious examples of cheap alcohol by banning sales of alcohol below the level of alcohol duty plus value-added tax'.¹ However, this measure has been strongly criticised for its minimal impact and for failing to address neither the issue of cheap alcohol nor that of 'predatory pricing'.

The low prices of some alcohol in supermarkets have elicited not just health concerns, but also concerns about fair economic competition. In 2007, ten grocery retailers, including the 'big four' supermarkets (Asda, Morrisons, Sainsbury's and Tesco), admitted to a Competition Commission inquiry that alcohol, along with packaged groceries, was one of the two leading types of 'loss leader'. In other words, supermarkets sold alcohol for less than they paid for it from wholesalers, for the following reasons:

- To 'avoid being beaten on price by competitors'
- To 'tempt customers into store at certain times of the year'
- To cushion the impact of changes in supplier costs
- To 'support the launch of a new product'

In total (across all products), it was estimated loss leaders account for 3% of sales.²

Regularly selling goods at a loss is seen as problematic because it can be a sign of anti-competitive 'predatory pricing', whereby large incumbent retailers use sharp discounts to ward off or force out smaller competitors who cannot subsidise these losses for so long from other goods.

A number of countries, such as Poland, France, Spain, Italy and Belgium, address this issue by banning below cost sales (for a number of goods, including alcohol).³ For example, in France, retailers are forbidden from selling goods for less than the invoice price plus transportation costs and taxes.⁴

In the UK context, discussion of a ban on below cost sales has centred around a much weaker proposal – as described above, banning sales only below the rate of duty and VAT (and excluding invoice and transportation costs). The measure was originally included as part of the Conservative/Liberal Democrat programme for government in 2010.⁵ Having been dropped from the 2012 *Alcohol strategy* on the grounds that the policy was superseded by minimum unit pricing,⁶ the policy returned following the dropping of MUP in the response to the consultation on the strategy.⁷ It then came into force in May 2014.⁸

Ban on multi-buy promotions

A further policy to address cheap alcohol is to restrict the use of multi-buy promotions, which offer discounts for the bulk purchase of alcohol – for example, 'Buy One Get One Free' and 'Two for the Price of One' deals. Multi-buy discounts were banned by the Scottish Government as part of the *Alcohol Scotland Act*, which came into force in October 2011.⁹

As part of its 2012 *Alcohol strategy*, the Westminster administration carried out a consultation on the introduction of a ban on multi-buy discount across the whole UK. However, they ultimately opted against the move, claiming 'there is no convincing evidence that it would have a significant effect in reducing consumption'.¹⁰

¹ *Hansard HC Deb.* Vol 566, 2013 July 13

² Freeman P, Almond J, Donoghue B, Gregory A, Hamlin A, Lyons B. *The supply of groceries in the UK market investigation.* Competition Commission. 2008

³ Hunt P, Rabinovich L, Baumberg B. *Preliminary analysis of the economic impacts of alcohol pricing policy in the UK.* Brussels: RAND Europe. 2010 <<https://bit.ly/3mvdoeU>>

⁴ OECD. *Resale below cost laws and regulations.* 2006 <<https://www.oecd.org/competition/abuse/36162664.pdf>>

⁵ Gov.uk. The Coalition: our programme for government', The Coalition documentation. 2010 <<https://bit.ly/35HAFy3>>

⁶ HM Government. The Government's Alcohol Strategy. 2012 <<https://bit.ly/3hzCplH>>

⁷ Home Office. *Next steps following the consultation on delivering the Government's alcohol strategy.* 2013 <<https://bit.ly/3kslfYE>>

⁸ Home Office. Guidance on banning the sale of alcohol below the cost of duty plus VAT For Suppliers of alcohol and enforcement authorities in England and Wales, 2016 <<https://bit.ly/3c6rheM>>

⁹ BBC News. Scots ban on supermarket alcohol deals comes into force. *BBC News* 2011 October 11 <<https://www.bbc.co.uk/news/uk-scotland-15125064>>

¹⁰ Home Office. *Next steps following the consultation on delivering the Government's alcohol strategy.* 2013