EPHA Briefing: Q&A on European Legal Challenge to Minimum Unit Pricing (MUP) of Alcohol
Does Europe have an Alcohol Problem?

Europeans are the heaviest drinkers in the world, consuming 11 litres of pure alcohol on average per adult each year (WHO, 2014). The last decade has seen a homogenisation of attitudes to alcohol and drinking habits among young people in terms of recorded consumption, beverage preferences and the increasing trend towards binge-drinking.[1] It is estimated that 55 million people in the EU (around 10%) drink alcohol to harmful levels and of these, 23 million are considered to be addicted.

Europe produces and consumers a disproportionate amount of the world's alcohol. Alcohol is a leading risk factor for ill-health and premature death across Europe, leading annually to over 120,000 premature deaths, in addition to the burden on families, communities, health services, social services and police in relation to road deaths, violence, anti-social behaviour and exploitation. The cost of alcohol related harm to the EU's economy was estimated to be €155.8 billion in 2010 - equivalent to 1 % of GDP.[2]

European Union legislation grants alcohol producers, an exceptionally generous regime of exemptions from legislation, for example labelling requirements and minimum rates of duty set at 0% for wine, coupled with subsidies running into billions for production and promotion of alcoholic drinks. This is in stark contrast to the EU's Treaty obligation to ensure a high level of public health.

The legal case brought against the Scottish Government by the alcohol industry at the European Court of Justice (ECJ) shows that EU legislation is currently being used to stop national governments taking effective measures to reduce alcohol harm. The ruling is important as several other European national governments are interested to adopt similar legislation – which explains why the alcohol industry has mounted this legal challenge. The Advocate General at the ECJ will publish an Opinion on the case on 3rd September 2015, which will precede the ECJ formal ruling later in the year.

Isn't there an EU Alcohol Policy?

No. The EU Strategy to Reduce Alcohol Related Harm (2006) expired in 2012. In 2015, the European Commission confirmed that there were no plans to update the Strategy, nor any plans to address the contradictions in other EU policy areas (agricultural subsidies, excise duties, taxation, food and drink labelling) which give preferential treatment to alcohol. The Directive on Minimum Rates of Duty was scheduled for review in 2015 but was dropped under President Juncker's REFIT programme and the drive for the EU to be "big on the big things, small on the small things".

[1] Alcohol in Europe: Key Facts, Eurocare
[2] OECD (2015), Tackling Harmful Alcohol Use

For this reason, in 2015, over 20 European Health NGOs jointly left the European Alcohol and Health Forum – to protest at lack of ambition to tackle the Europe-wide impacts of alcohol harm to health and to society.[3]

Does there need to be an EU Alcohol Policy?

Yes. As a start, today's policies must be revised to ensure that they are coherent and supportive of the EU's Treaty obligation to ensure a high level of human health protection (Article 168). Where EU laws block national governments from taking effective action (for example introducing a minimum unit price as Scotland proposes), these should be revised in accordance with the principle of subsidiarity (legislative action should be taken at the most effective level, closest to the citizen).

In order to reduce alcohol-related harm in Europe, the EU should rather facilitate measures to reduce overall consumption of alcohol and particularly addressing the most harmful users – most of the alcohol is consumed by the heaviest-drinking 20% of the population.[4] In particular, it is crucial that EU legislation is not a barrier to sovereign national governments introducing effective alcohol policies. The MUP case is a critical test of whether the EU gives proper priority to protecting public health.

Why do we need minimum pricing?

There is a growing body of evidence which shows that price increases can lead to a substantial reduction in consumption, and consequently on alcohol-related harm. Pricing policy is an important part of an effective policy mix to tackle hazardous alcohol consumption. International policy research, by OECD and WHO show that of all alcohol policy measures, the evidence is strongest for the impact of alcohol prices on alcohol consumption and alcohol-related harm.[5]

In the WHO Handbook for Action to Reduce Alcohol-related Harm, establishing a minimum price per unit (or per gram) of alcohol is shown to be one of the most effective options. This measure ensures that tax changes result in the desired changes in retail price and affordability, which producers or retailers may otherwise circumvent by cutting prices. Taxation has historically been used by governments to control alochol consumption, but in an EU without borders this measure is becoming less effective, as people may avoid it by buying in neighbouring countries and producers or retailers can undemine the impact of a tax increase by cutting prices or by selling alcohol below-cost. Minimum pricing can therefore be an essential additional tool to achieve public health objectives.

What is the evidence base to support action on minimum pricing?

Minimum Unit Pricing (MUP) policy targets the heaviest and most harmful drinkers, who consume strong, cheap alcohol in large quantities and incur the majority of health impacts and

[3] EPHA Press release (2015), NGOs Resign from Alcohol and Health Forum as Commission Ignores Member State and European Parliament Calls for Alcohol Strategy
[4] OECD (2015), Tackling Harmful Alcohol Use
[5] WHO Europe, Handbook for Action to Reduce Alcohol-related Harm, 2009

costs to society. MUP will have a very minor or no impact on moderate drinkers nor will it affect prices in pubs, bars and restaurants.

Studies have also shown that young people are sensitive to alcohol price changes, and that price increases lead not only to reduced frequency of drinking but also to smaller quantities drunk in each drinking event. "Binge drinking" of strong alcohol, including spirits, particularly amongst young people, is increasingly recognised across the EU including traditional wine-drinking countries. Policy makers should look to MUP as a tool to tackle this harmful trend and associated costs, not only to health, but also to society in terms of violence, anti-social behaviour and abuse – and future costs to health and social services. These findings were reconfirmed and expanded by the OECD 2015 report on harmful alcohol use.[6]

MUP is particularly relevant as a measure to reduce health inequalities as it would be most effective in reducing the burden of alcohol-induced disease and alcohol-related harm in low-income households. EPHA member Alcohol Focus Scotland, cites figures that show that almost two thirds of all alcohol-related deaths in Scotland in 2005 were amongst the most deprived members of society.[7] When, in 2004, Finland lowered taxation rates on alcohol, there was a resultant 16% increase in alcohol-related mortality. The biggest increase in the number of deaths was found to be amongst the unemployed, early-age pensioners and those with low education, social class or income.[8]

But in contrast to price increases needed to tackle the harm, over the past 50 years the real price of alcohol in Europe has fallen dramatically. As prices have fallen, the amount that the population in Europe has been drinking has risen. A study of the period 1996- 2004 found that the affordability of alcohol- a composite measure of the relative price of alcohol and of income- increased in 19 of the then 20 EU Member States.[9]

Liberal licensing laws across Europe have increased the availability of alcohol in more places and for longer periods of time.[10] This has resulted in increased competition between retailers who have responded by cutting prices and offering deep discounts and promotions. A recent report by RAND Europe on the affordability of alcohol suggests that in 18 Member States, affordability of alcohol has increased over the past twelve years. For some countries, alcohol affordability has more than doubled over this period.

In addition to the WHO and OECD recommendations for MUP, a study by the University of Sheffield into the effect of pricing policies in the UK concluded that:

- Pricing policies can be effective in reducing health, crime and employment harm;
- Pricing policies can be targeted so that those who drink within the recommended limits are hardly affected and those very heavy drinkers, who cause and suffer from the most alcohol-related harm, are the most affected;

---

[6] OECD (2015), Tackling Harmful Alcohol Use
[7] Minimum Pricing- What You Need to Know (Alcohol Focus Scotland, BMA Scotland, SHAAP)
[8] Herttua, K et al (2008) Changes in alcohol-related mortality
[9] WHO Europe, Handbook for Action to Reduce Alcohol-related Harm, 2009
[10] There are significantly more licensed premises in the UK now than there were twenty years ago (Institute of Alcohol Studies)

- Minimum unit pricing and discount bans could save hundreds of millions of pounds every year in health, crime and employment costs;
- Impact in terms of crime and accident prevention through reducing the consumption of 18-24 year-old binge drinkers, would be significantly increased by implementing policies that increase the price of cheaper drinks available in pubs and clubs as well as supermarkets.
- There will be a £12.93bn value of harm reduction if minimum pricing was set at 50p per unit

The RAND Europe report "Understanding the link between alcohol affordability, consumption and harms" found that:

- An increase in affordability is associated with an increase in consumption in the short term;
- There is a statistically significant, positive relationships between consumption and fatal traffic accidents, traffic injuries and liver cirrhosis.

Royal College of Physicians and Royal College of Nursing surveys of health professionals have found that:

- 73% of respondents felt action on low priced alcohol was needed to tackle alcohol related problems;
- 81% of respondents thought that if alcohol was more expensive, there would be a decrease in consumption;
- 62% of respondents think that there should be a minimum price per unit for alcohol to stop deep discounting in supermarkets, off-licences and shops.

According to the WHO, setting an MUP per gram of alcohol "has an impact on heavy consumers far in excess of that on light consumers".[11]

Research by the Sheffield group found that an MUP of 0.45 pence in England would lead to:[12]

- 3.7 % reduction in consumption by harmful drinkers;

- 7.6% reduction in consumption by those in the lowest income quintile;

- 87% of the increase in quality-adjusted life-years and 82% of the reduction in premature deaths to accrue to the lowest income groups.

An empirical study from British Columbia found that when the minimum price of alcoholic beverage was raised by 10% this resulted in a 32% drop in alcohol-related mortality.[13] Another

[11] 1 WHO (2013), Alcohol in the European Union. Consumption, harm and policy approaches
[12] Holmes et al. (2014) „Effects of Minimum Unit Pricing for Alcohol on Different Income and Socioeconomic Groups: A Modelling Study", The Lancet, Vol. 383, No. 9929, pp. 1655-1664 (in OECD, see note 2)
[13] Zhao J et al. (2013) The Relationship between Minimum Alcohol Prices, Outlet Densities and Alcohol Attributable Deaths in British Columbia, 2002 to 2009. Addiction

Canadian study found that a 10% increase in minimum alcohol prices was associated with a 19% reduction in alcohol-related traffic violations, a 9% reduction in crime against persons and 9% reduction in total crime.[14] The recent OECD report on alcohol lists a number of studies providing evidence for the positive health effects of MUP.[15]

Where has minimum unit pricing been implemented?

Canada has a well-established minimum pricing scheme for alcohol in place. Social reference pricing (SRP) is in effect in eight out of ten Canadian provinces and enables the government to regulate minimum prices below which alcohol cannot be sold to the public. The structure of SRP is different across the provinces, however where it has been linked the alcohol content, so that the minimum price rises as alcohol content goes up, the impact on reducing demand has been seen to be particularly effective. This system has been found to be compatible with Canada's competition laws and international trade rules.

A number of countries in Europe, including Belgium, the UK, France, Greece, Portugal and Spain, have legislation banning below-cost selling. However, "the impact of the ban on below-cost selling on average consumption and spending is estimated to be much smaller than MUP and therefore will have relatively little differential effect by income or drinking category" according to the OECD report.[16]

As well as Scotland, several other European countries, including Ireland and Estonia are considering minimum pricing measures. The Scottish Government adopted minimum pricing legislation in 2012 and was due to enter into force in April 2013. The legal challenges brought by the alcohol industry has to date prevented the law from taking effect.

Why did the Scottish Government adopt MUP? Why hasn't the law taken effect yet?

In March 2009, the Scottish Government outlined plans to introduce MUP legislation that would set a 'floor price' at which a unit of alcohol may be sold. By stopping cut-price offers on alcohol, the law should lead to a significant reduction in alcohol-related harm and it will particularly target the highest-risk drinkers, including harmful drinkers, binge drinkers, young and underage drinkers. The initiative is part of a range of measures designed to tackle the harmful consumption of alcohol. The Chief Medical Officer for England Sir Liam Donaldson also proposed this initiative in his Annual Report 2008.

The MUP legislation adopted by the Scottish Parliament in May 2012, setting the minimum price at 50 pence per unit. Currently, alcohol is available in Scotland for as little as 15p per unit, meaning that the recommended daily limit for alcohol consumption can be exceeded for as little as 60p (€ 0.74) for a man and 45p (€ 0.56) for a woman.[17]

The legislation was due to come into force in April 2013, but was delayed by a legal challenge from the Scotch Whisky Association, the European Spirits Association and the Comité Européen

[14] Zhao J et al. (2013) The Relationship between Minimum Alcohol Prices, Outlet Densities and Alcohol Attributable Deaths in British Columbia, 2002 to 2009. Addiction
[15] OECD, see note 2, p. 201
[16] 6 OECD, see note 2, p. 131
[17] Shaap (2014), Minimum Unit Pricing Advocacy Action Briefing

des Entreprises Vins. The Scottish Courts ruled in May 2013 in favour of the Government to uphold the MUP legislation, but the alcohol producers' associations appealed. In July 2014 the Court of Appeal referred the matter to the European Court of Justice (ECJ) for a preliminary ruling as the core questions concerned the interpretation of EU law.[18] Parties to the case as well as intervening Member States presented their positions during an oral session in May 2015. Ireland, UK, Norway and Sweden spoke in favour of MUP. Bulgaria, Poland, Portugal and Spain against.

The Advocate General to the ECJ will deliver an Opinion on 3 September 2015. The formal ruling of the ECJ is due later in 2015.

How is the alcohol lobby using EU law to try to stop Scotland tackling harmful drinking?

Two main objections were raised by the alcohol industry against the Scottish law[19]:

1. The Scottish law undermines Regulation 1308/2013 on the common market organization for agricultural products (CMO Regulation), particularly wine.[20]

   The corresponding legal question posed to the ECJ is the following:

   "Is it lawful for a member state to promulgate a national measure which prescribes a minimum retail selling price for wine related to the quantity of alcohol in the sale product and which thus departs from the basis of free formation of price by market forces which otherwise underlies the market in wine*?"* [21]

2. MUP is challenged as an effective quantitative restriction on imports inside the internal market, prohibited by Article 34 of the EU Treaty.[22] This is claimed to have a particular impact on wine from Southern Europe (Spain, Portugal, Bulgaria) as these countries export cheaper wines. The Scottish Government acknowledges there will be some trade impact, but maintains the measure qualifies for an exception under Article 36 TFEU, which allows measures to be introduced on grounds of "protection of health and life of humans."

To qualify for an exception under Article 36, the measure needs to be suitable, proportionate and necessary. One of the main arguments brought against MUP is that it cannot reasonably be assumed that it will deliver on its health goals. As shown in the evidence cited above from WHO

---

[18] Eur-Lex (CASE C333/14) Reference for a preliminary ruling from Court of Session, Scotland (United Kingdom) made on 8 July 2014 — The Scotch Whisky Association and others against The Lord Advocate, The Advocate General for Scotland.
[19] Section based on the "Report on oral hearing Case C333-14"prepared by Fiona Godfrey (May 2015)
[20] In fact, the current CMO was not yet adopted at the time the case was brought before court. Reference is made to its predecessor: Regulation (EC) 1234/2007). Scottish Court of Session, Opinion of Lord Doherty, [2013] CSOH 70
[21] See note 17
[22] Article 34 TFEU: „Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States"

and OECD amongst others, this assumption is not borne out by studies, which show that MUP would directly result in health benefits and reduced costs to national health budgets.[23]

Another key argument is that less trade restrictive measures, for instance excise duties, exist and should be introduced even if the Scottish government does not have the authority to introduce such duties (i.e. MUP is unnecessary). It is also argued that, should the measure be allowed, it will open a "Pandora's Box" of public health measures leading to a carving up of the internal market (i.e. it is disproportionate)

Is this a landmark case for public health policy?

Yes, and not just because other European governments are interested in following suit with MUP.

The case raises a fundamental question, namely under which circumstances public health objectives take precedence to other goals, such as trade. As most products are traded in the EU internal market, the outcome of the case would have bearing on other potential health protection measures, including policies relating to products high in fat, sugar and salt (HFSS). No less fundamentally, it is a case about the "room for manoeuvre", left to national or regional public authorities (under subsidiarity) to assess evidence and set public health policies.

According to previous positions taken by the European Commission, public health may be seen to take precedent. For instance, in a written question to the European Commission in 2009, Catherine Stihler MEP asked for clarification as to whether or not minimum alcohol retail prices violate EU law.[24] Then Vice-President Verheugen, responsible for enterprise and industry, confirmed that, in accordance with secondary legislation- including Council,[25] Community law does not a priori prohibit Member States from setting minimum retail prices for alcoholic beverages.

However, if the ECJ rules against the Scottish Act on the basis of the CMO Regulation or Article 34, this would result in a severe setback for any future attempts to regulate on public health. The perverse consequence would be that the EU, which has an ambiguous legal basis for positive action on health, can nevertheless through other (e.g. market policy) instruments effectively prevent national regulators from carrying out their legitimate public duties in the field of health policy. The EU would then, legally speaking at least, be more capable of restricting action on health than promoting it.

---

[23] Note that if the alcohol industry is successful at the ECJ, this would effectively prevent this being tested on a large scale in Europe
[24] Written Question E-2294/09 by Catherine Stihler
[25] Council Directive 92/83/EEC 19 October 1992 on harmonization of the structures of excise duties on alcohol and alcoholic beverages, OJ L 316