Minimum prices for alcoholic beverages

Minimum prices for alcoholic beverages-the Commission thinks about going to Court

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If it was a TV series, we could safely say that we are watching the second instalment of the "story" of Scottish legislation introducing minmum prices on alcoholic beverages. The end of September saw the EU Commission stating that "it had a problem" with these measures: in line with established case law the Commission expressed the view that setting a minimum prices for alcoholic beverages would not comply with the free trade and competition principles enshrined in the EU treaties (see http://www.bbc.co.uk/news/uk-scotland-scotland-politics-19757149). The Commission's letter, which also takes stock of concerns expressed by a number of wine-producing Member States, is still confidential: however, many of its possible concerns and arguments can be guessed. The 'by object' illegality traditionally attached to minimum pricing; the concern for making the Scottish market "less appealing" to foreign vintners and therefore for hampering imports into a sizeable part of the UK; and, perhaps more interestingly, the perception of these measures as "going beyond the pale" compared with other measures, such as the adoption of indirect taxation measures affecting alcohol trade are all likely to feature prominently in it.

So, what happens next? The Health Secretary for Health, Alex Neale, who has replaced Nicola Sturgeon in the last reshuffle, has confirmed the Scottish Government's commitment to these measures; He has also reiterated that the Government would "respond" to the Commission's letter within the next 3 months. After that deadline of 27 December, the ball will be once again in the Commission's court: will the Commission bring an action for infringement in respect to this piece of legislation? Or will it take the view that it's discretion is best engaged in pursuing other alleged infringements of equally weighty EU law rules?

The Scottish Whisky Association certainly hopes that the Commission, if it is not able to "negotiate" the repeal of the legislation with the Scottish Government in the period of time intervening between now and 27 December, will indeed take the United Kingdom to Court, in respect to the prima facie infringement of the Treaty arising from the conduct of one of its regions. And it is equally clear that the UK, as the Advocate General, Lord Wallace of Tankerness, has said today, will "stand shoulder to shoulder" to the Scottish Ministers in defending their actions before the EU judiciary (see: http://www.bbc.co.uk/news/uk-scotland-scotland-politics-19779696). But it simply not clear how easy it will be for the UK to do so.

There is little doubt that the measures enacted by the Scottish Parliament are problematic: minimum pricing has traditionally been regarded as something akin to "vertical" minimum pricing. Especially if these restraints on the freedom of determining prices are applied in specific areas of the Union, they have also been considered a major obstacle to the realisation of the objective of market integration. As was held by the Court of Justice of the EU in a number of judgments, any limitation on the freedom of individual firms to set their own prices, especially in the form of a "floor price", automatically hinders their ability to pass on efficiencies to their customers, in the form of lower prices (see e.g. case C-221/08, Commission v Ireland, [2010] ECR I-1699). As a result, in the Court's view it is likely to prevent "efficient traders" from doing business in areas where similar measures are imposed by domestic legislatures, and this regardless of the policy objectives pursued by them. This much the Court of Justice has reiterated in cases relating for instance the trade in tobacco products.

The SWA and the "wine producing" member states that have so far submitted papers to the EU Commission take heart from the traditional position on geographic minimum pricing and also on the principles enshrined in the "tobacco" litigation, in which the "common market goals" seem to weigh more than the concerns for public health. However, one key factor at stake in the tobacco cases was the existence of extensive harmonising EU legislation in the area, legislation which had been enacted after taking into careful account the public health concerns arising from this type of trade. Similar measures have not however been adopted by the EU legislature in the field of trade of wine, spirits, beer and other alcoholic drinks. It is also clear from the history of the Scottish legislation that the latter envisages a system of pricing that takes into account the different strength of individual types of beverages, thus giving rise to differentiated prices; it is also based on sound health evidence (i.e. the Sheffield study, see: http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6852&i=62104&c=1284513) as to the social and medical harm caused by excessive alcohol consumption an to its economic costs.

Against this background, could the system of minimum pricing provided in the Scottish legislation be regarded as a "disproportionate" restraint on competition and on free trade, as alleged by the SWA? In an earlier post on this Blog, I recognised that price competition is so important that it can never be eliminated (see: http://www.law.ed.ac.uk/clie/blogentry.aspx?blogentryref=8929). However, could the legislation in question be viewed as a framework within which a different type of competition-one arising, perhaps, between different types of drinks or between beverages of a similar nature but having different alcoholic strengths-can arise?

Perhaps more importantly, the question that should be addressed is whether we should be protecting the "cut price" sellers of, for instance, high strength lager or cider, who can market these products for less per pint than mineral water: it may be queried whether these are the "efficient" undertakings that should always and at all costs be allowed to "pass on" their alleged efficiencies (which could be suspected to originate from cross subsidisation with income coming from sales of different products) to their customers, regardless of the social and economic harm arising from the impact of these sales. In this specific respect, one dictum of the "tobacco judgments" that are much trusted by the SWA but that the Association seems to have overlooked is the following: "(...) it is (..) open to [the Member States], while allowing those producers and importers to make effective use of the competitive advantage resulting from any lower cost prices, ***to prohibit the sale of manufactured tobacco products at a price below the sum of the cost price and all taxes*** (...)" [emphasis added] (case C-198/08, Commission v Austria, [2010] ECRI-1645, para. 43).

Against this background, it could be wondered whether the "differentiated pricing scheme" de facto enshrined in the Scottish legislation could allow such "advantage" to be effectively used by "efficient" vintners and brewers while at the same time allowing Scottish authorities to prevent the sales at below-cost prices that are not only damaging public health and public order (not to mention the economy!) but also undercutting the public purse, by resulting in the tax authorities being unable to reap their revenues (see e.g. C-197/08, Commission v France, [2010] ECR I-1599, para. 43) on the sale of ultra-cheap products. It is submitted that, if the Commission decides to take the UK to court on account of these measures, this question may well be one of the issues on which the Court of Justice could decide to focus on, in addition to considerations relating to how to balance the public health gains pursued by the Scottish Parliament against the demands of genuine competition which, it could be argued, may well arise between different products and therefore ensure that rivalry is not irremediably impaired on the market.

Finally, and to go back to the main story... where does this leave the complainant, i.e. the Scottish Whisky Association? Could they be actually regarded as potential "victims" of the cut price sales of alcoholic beverages that seem to be the target of the recent minimum price legislation? Admittedly, this is a question that needs to be answered in the circumstances-what beverage can be regarded as substitutable to whisky? And how easy or difficult is it for spirit producers coming from other member states to enter and establish themselves on the Scottish whisky market? More generally, could an "efficient distiller" be prevented from "passing on" his or her

efficiency gains to consumers by the minimum price level calculated on the basis of the method established by the Scottish legislation? It is uncontestable that setting minimum prices is liable to raise concerns for the genuinity of the rivalry in any market. However, it is admittedly difficult to find as unlikely a substitute to single malt whisky as the beverages that are commonly sold at the "slashed" prices that can currently be seen in some off-licenses.

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