21 April 2010

Dear Christine

ALCOHOL ETC. (SCOTLAND) BILL – Stage 1

1. Thank you for your letter of 14 April in which the Health and Sport Committee has raised some issues in consideration of its draft report. I will respond to these in turn.

Sheffield Report

2. The final checks on the re-run of the Sheffield model have now been completed and I enclose a copy of the revised report for the Committee’s consideration. The report will be published on the Scottish Government’s website on 22 April (available from http://www.scotland.gov.uk/Publications/2010/04/20091852 following publication).

Impact on low-income groups

3. I acknowledge the Committee’s interest in this and officials are currently scoping what may be possible given limitations on the data available. I will keep the Committee informed of progress and likely timescales, recognising the Committee’s desire for information to be available at the earliest opportunity.

Legislative competence

4. The Committee has asked that the Scottish Government sets out the basis for its belief that the policy of minimum pricing will be legally compliant. I would do so as follows:

5. The Scottish Government considers that the introduction of a minimum price for alcohol based on a minimum price per unit of alcohol is capable of complying with European law.

St Andrew’s House, Regent Road, Edinburgh EH1 3DG
www.scotland.gov.uk
Whether the minimum price determined in accordance with section 1 of the Bill complies with European law can only be determined once the minimum price per unit is determined. Consideration is still being given to the proposed minimum price per unit. In setting the minimum price per unit, the Scottish Government will ensure that any proposed minimum price per unit will comply with European law.

6. It is important to be clear that European law does not per se prohibit minimum pricing of alcohol. Minimum pricing will need to comply with provisions of Community law relating to free movement of goods. Article 28 of the Treaty on the Functioning of the European Union ("TFEU") states that:

"The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and all charges having equivalent effect."

7. Article 34 of TFEU states:

"Quantitative restrictions on imports, and all measures having equivalent effect, shall be prohibited between Member States."

8. The meaning of "measures having equivalent effect to quantitative restrictions" is set out in *Procureur du Roi v Dassonville*:

"All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."

9. However a measure will nevertheless comply with Article 34 if it:

(a) is a selling arrangement which applies to all traders in the same manner, in law and in fact, regarding the marketing of products, and

(b) does not amount to a restriction on use or would influence consumers to such an extent that it affects access to the market of the Member State bringing forward the measure.

10. This is based on a line of case-law starting with the combined cases of *Keck and Mithouard*.

11. So, in broad terms, whether a minimum pricing measure is contrary to Article 34 depends on whether it hinders trade between Member States or discriminates against products from another Member State.

12. However, even if a minimum pricing measure is deemed to interfere with trade between Member States or discriminate against products from another Member State, Article 36 provides that it will not breach Article 34 if-

(a) it is appropriately directed towards achieving a legitimate objective such as the protection of health; and

(b) any interference with trade between member states or discriminatory effect is

---

1 ([1974] ECR 837 (case 8/74)).
13. Article 36 TFEU provides:

"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."

14. In order to be considered to be appropriately directed towards achieving a legitimate objective a measure must not go beyond what is necessary to achieve that objective and it must serve to achieve it. In setting a minimum price per unit, the Scottish Government will ensure that this is the case.

15. A measure will not be proportionate if a less intrusive way of achieving the same objective is available and taxation is often cited as a less intrusive method of achieving public health objectives. This was the case for example in the Commission v Hellenic Republic case. However each case needs to be considered separately and the Scottish Government does not agree that taxation is the best way of achieving our objectives. This is because we do not consider that taxation would have the same targeted effect as minimum pricing per unit, across the board tax increases are not as effective in reducing alcohol harm as minimum pricing per unit, taxation schemes applying to specific products or products priced at a specific level would not achieve the policy objective and the level of taxation does not always affect the price of alcohol as tax rises are not necessarily passed on to consumers. We believe it to be the case that there are no alternative means of achieving our objectives and therefore no alternative less intrusive way of achieving our objectives.

16. Although paragraphs 12 to 15 above deal with the use of Article 36 to justify a measure that is deemed to breach Article 34, it should nevertheless also be noted that there is a line of case-law providing that measures which are “necessary” on certain important grounds, such as the protection of health, can in certain circumstances comply with Article 34 and so do not require to be justified under Article 36. The case-law is based on the Cassis de Dijon case which concerned a requirement by Germany that fruit liqueurs should have an alcohol content of more than 25%. This established that:

“Obstacles to movement in the Community resulting from disparities between the national laws relating to the marketing of products in question must be accepted in so far as those provisions may be recognised 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.”

17. A measure which constitutes a “mandatory requirement” will only comply with Article 34 if it was proportionate to the aim being pursued. A measure will not be proportionate if there is an alternative means of achieving the aim being pursued which does not restrict the free
movement of goods to the same extent. Our comments in relation to the use of taxation as a less intrusive means of achieving our objectives apply in this regard as well.

18. The 1978 case of Netherlands v van Tiggele\(^5\) has been referred to in evidence given to the Health Committee. This case concerned the imposition of minimum prices for alcohol but the minimum price was determined differently for different types of products. Under the Scottish Government’s proposals the minimum price for each product will be determined in the same way. The European Court of Justice did not consider whether the minimum prices could be justified on grounds such as the protection of health as the court was only asked to rule on whether the relevant provisions of EU law applies to minimum pricing measures.

**Conclusion**

19. Section 1 of the Bill complies with European law as it is an enabling provision and there will be no ban on selling alcohol below the minimum price until an order has been made setting the minimum price per unit.

20. Whether a specific minimum price per unit breaches Article 34, including whether such a measure can be justified under Article 36, will depend on the facts and evidence relating to that particular measure, relating in particular to its impact on foreign and domestic products and its contribution to the protection of important social policy objectives. The Scottish Government is in the process of considering the proposed minimum price per unit and in doing so will ensure that any proposed minimum price per unit will comply with European law.

21. **For the reasons set out above, the Scottish Government considers that a minimum price for alcohol based on a minimum price per unit of alcohol is capable of complying with European law and in setting the minimum price per unit we will ensure that it does.**

**Tobacco cases**

22. In the evidence sessions to the Health Committee questions have been raised as to the relevance of the recent judgements of the European Court of Justice in cases brought by the Commission against France, Ireland and Austria\(^6\). These judgments concern the interpretation of Directive 95/99 which sets out the minimum rate of excise duty to be applied to tobacco products. Tobacco products are subject to a proportional excise duty calculated on the maximum retail selling price and also to a specific excise duty calculated per unit of the product. Article 9(1) of the Directive specifically provides that manufacturers and producers are free to determine the maximum retail price of tobacco products. France, Ireland and Austria created rules which imposed minimum prices for tobacco products corresponding to a certain percentage of the average prices of the tobacco products concerned (95% in the case of France, 92.75% for cigarettes and 90% for fine-cut tobacco in the case of Austria and 97% in the case of Ireland).

23. The Commission challenged these minimum prices on the basis that the imposition of minimum prices was contrary to Article 9(1) of the Directive as such prices limited the ability

---


\(^6\) Cases C-197/08, C-198/08 and C-221/08.

St Andrew's House, Regent Road, Edinburgh EH1 3DG

[www.scotland.gov.uk](http://www.scotland.gov.uk)
of manufacturers and producers of tobacco products to determine the maximum retail selling price of their products. The Commission did not allege any breach of what is now Article 34. France, Ireland and Austria sought to justify the minimum prices for tobacco on the grounds that such measures were to necessary to protect public health in accordance with what is now Article 36.

24. Directive 92/83/EEC relating to the taxation of alcohol does not contain any provisions relating to pricing regimes or restricting such regimes. The Directive provides for minimum excise duties on alcohol to be based on the strength of the alcohol and so are determined independently of the price of alcohol. Consequently the court's views on the application of Directive 95/99 on tobacco taxation are of no direct relevance to the minimum pricing of alcohol.

25. In interpreting the Directive 95/99 on tobacco products the court did not say that Article 9(1) prohibited all forms of minimum pricing. The judgements were based on the specific minimum pricing measures for tobacco which were introduced by France, Ireland and Austria.

26. The court did not consider whether the minimum pricing of tobacco could be justified on the grounds of protecting health under Article 36 on the basis that no breach of Article 34 had been alleged. The court considered that Article 36 was only relevant as a means of justifying a measure that would otherwise breach Article 34.

27. The court's comments about the use of taxation of tobacco to protect health are consistent with previous case law, such as the case of Commission v Hellenic Republic referred to above. However it is necessary to consider the facts and evidence before deciding whether a particular measures complies with European law.

28. The Committee has quoted from an argument made by the Commission in response to the arguments of France, Ireland and Austria that the minimum pricing measures could be justified under what is now Article 36. The relevant part of the judgement is set out below:

"Public health considerations played a role in the drafting and amendment of the Community directives on harmonisation in the field of excise duty on tobacco products, but the principle of the free determination of prices was not revoked. By contrast, a system of minimum prices is capable of producing damaging effects for public health because, by protecting producers' margins, that system provides them with extra revenue which can be invested to increase sales of manufactured tobacco."

29. As the European Court of Justice did not consider whether the minimum pricing measures could be justified under Article 36 the court did not consider the argument made by the Commission. In any event the Commission only argued that minimum pricing is capable of producing damaging effects, not that it necessarily would.

30. As set out above if minimum pricing of alcohol needs to be justified under Article 36 then this will include demonstrating that minimum pricing will achieve, rather than be detrimental to, a legitimate aim and that there is not a less intrusive way of achieving the Scottish Government's policy objective.

31. As I mentioned at the Committee meeting on 24 March, I am open to considering whether the Social Responsibility Levy could operate in such a way as to recoup some of the increased revenue from alcohol sales.
Social Responsibility Levy

32. The Committee noted that it had no clear evidence on the principles of a Social Responsibility Levy and therefore on how it would work and whether it would be effective.

33. The principle of a Social Responsibility Levy was set out in the consultation on Changing Scotland’s Relationship with Alcohol. The Scottish Government stated that its proposal was that a levy should be applied to some alcohol retailers to help offset the costs of dealing with the adverse consequences of alcohol. Paragraphs 104 to 110 of the consultation document set out more detail on the principles behind the proposal.

34. The Bill sets out the broad parameters in which a levy would operate. In particular, the Bill makes provision about who a levy could be applied to, it links the use of money raised by the levy to the Licensing Objectives and ensures that the levy is applied by and used by local authorities.

35. It is these principles we are asking Parliament to agree, pending conclusion of a dialogue with those who would be affected by a levy. Any draft regulation setting out the precise detail of a levy would be subject to further consultation before it was brought before Parliament for consideration. As I said in evidence on 24 March 2010, we should not underestimate the ability of Committees to scrutinise draft regulations and I further note that the Finance Committee has indicated that it would scrutinise any draft in addition to the lead Committee. It seems sensible to the Scottish Government that we should continue to develop the detail of a levy with stakeholders and, following Parliament’s agreement to the broad principles, seek further agreement from Parliament on the precise detail. We are also mindful that with any new policy, setting out detail in regulations would provide the flexibility to review the arrangements in light of its practical operation.

36. I appreciate that the Committee would find it helpful to have more information and while I do not want to pre-empt the discussions that are ongoing with stakeholders, I am happy to report in general terms on the different options that are being discussed.

- The first approach is a levy geared towards premises whose operation or activity have been problematic, for example licence-holders that have not acted in accordance with the licensing objectives under the Licensing (Scotland) Act 2005. Under this method, it is more likely that problem premises would be affected and there would more likely be an incentive for premises to raise their standards.

- The second approach is a levy applied to all premises (with the possible exception of the smallest premises that sell a negligible amount of alcohol). This option (or a variation of it) could include the possibility of recouping additional revenue the alcohol industry would receive through the introduction of minimum pricing.

37. Within these two options there are many detailed issues being debated among stakeholders including the criteria which may be used to determine the application of a levy and the way in which a levy could be calculated. Officials have been asked to progress these discussions and provide options that could be included in draft regulations for wider circulation and debate. Once that is completed, Ministers will consider whether to bring draft regulations to Parliament.
38. As we made clear in the Alcohol Framework, a decision to introduce a levy will be taken in the context of the wider economic climate at that time.

Finance Committee Report

39. I note the Finance Committee’s comments on the points raised concerning the costs on business, impact on small retailers and savings where no further comment from the Scottish Government is required. In respect of the Statement of Funding, that would appear to be a general point of procedure rather than one in relation to the Alcohol Bill only. I note that the Finance Committee is pursuing that matter with the Minister for Parliamentary Business.

40. On the Social Responsibility Levy two points have been raised: no indicative range of options for the levy was set out in the Financial Memorandum; and the Scottish Government should give consideration to a fault-based system as proposed by the Scotch Whisky Association and the Scottish Grocers Federation. These are dealt with in the section above on Social Responsibility Levy.

41. The remaining points are as follow:

Costs on local authorities

42. We would not expect West Dunbartonshire Council’s Licensing Standards Officers to visit every premises to check on minimum pricing compliance and I’m not sure why West Dunbartonshire Council thought that was what was required. As the Council itself has stated, we would expect a targeted approach based on intelligence and public complaints to be adopted which would seem a rational use of resources and one that is consistent with the way Licensing Standards Officers already operate. COSLA was consulted on this issue and they confirmed that they considered the additional work would be small in relation to the overall work of the Licensing Standards Officers and, as such, costs would be likely to be marginal. We agreed with COSLA that the position would be reviewed around a year after implementation.

43. The fee system introduced for the Licensing (Scotland) Act 2005 does not relate to the Alcohol Bill. However, the fee regulations were based on a system devised by independent researchers based on figures supplied from every local authority bar one. When the fee regulations based on this work were consulted on prior to their enactment, local authorities raised a concern that the cap at which fees could be set was too low, so the cap was doubled. Ministers requested that the Accounts Commission consider the 2005 Act regime and this now forms part of the Commission’s ongoing work plan. Ministers have given an undertaking to examine any recommendation they choose to make.

Definitions used in the Financial Memorandum

44. The Sheffield model is consistent with an epidemiological approach in reporting the mean values for consumption and impact within the groups the Sheffield team were analysing. Annex A shows the distributions around the mean value for each of the different groups of drinkers.
Overall level of costs and savings and margins of uncertainty

45. Firstly, I would like to point out that reference is made at paragraph 83 in the Financial Memorandum to section 3 of the Sheffield Report which details the results of the sensitivity analyses carried out on the modelling.

46. Mathematical and econometric models, such as the Sheffield model, are built to simulate complex real world phenomena and as such the models themselves are typically very complex. Probabilistic sensitivity analysis is a specific method of characterising uncertainty around values of individual input variables. It defines inputs as probability ranges (by applying a probability distribution) to determine if one or a combination of variables has an impact on a model’s outcome.

47. The analyses undertaken by the Sheffield team includes probabilistic sensitivity analysis around the price elasticities of demand and the use of alternative assumptions around the differential responsiveness of moderate and heavier drinkers (pages 53 to 57 for descriptions of the different sensitivity analyses and pages 92 to 96 for the results). This allows a range of estimates on the potential impact of minimum pricing on consumption and harm outcomes to be developed.

48. The 95% confidence intervals for changes in consumption due to each policy tested are quite narrow: for a 40p minimum price for all drinkers the change is estimated to lie between 2.6% and 2.9% i.e. there is a 95% probability that the reduction lies between 2.6% and 2.9%. For an off-trade discount ban for all drinkers the change is estimated to lie between 3.0% and 3.1%; for the combination of these policies for all drinkers the change is estimated to lie between 5.2% and 5.6%.

49. Further testing and adjusting of the baseline results took place. For example, scenario analysis was carried out around the differential responsiveness of moderate and heavier drinkers. Following this, the elasticity estimates for hazardous and harmful drinkers were reduced by one third (using a modelling assumption made by Chisholm et al (2004)).

50. I trust this reply addresses the issues raised by the Committee in consideration of its draft report.

NICOLA STURGEON
Annex A

Distribution of alcohol consumption, by units of alcohol, per week, across different groups of drinkers.

Data from the Scottish Health Survey (2003) which was the used in the ScHARR modelling (September 2009 report) has been analysed to describe the distribution of alcohol consumption across the different categories of drinker used in the model: moderate, hazardous and harmful. The units are calculated by asking people how often they drink and how much they usually drink, allowing the estimation of the weekly amount. So if someone drank one pint every month then they'd have drunk less than one unit per week. (Note: the scaling on the graphs varies so care has to be taken when making visual comparisons).

Scottish Health Survey 2003.
Estimated weekly alcohol units by level of alcohol consumption
All aged 16+ who drank alcohol

Moderate drinkers
(men under 21 units per week, women under 14 units per week)

The graph for moderate drinkers shows a right skewed distribution which shows that moderate drinkers drink very little and therefore will be largely unaffected by minimum pricing. This holds for all moderate drinkers regardless of their income. Please note that non drinkers are not included - the lowest value is actually 0.03 units.
Hazardous drinkers
(men 21-50 units; women 14-35 units)

The graph shows a clustering at 21 and 22 units, and again at 28 units.

Harmful drinkers
(men over 50 units per week, women over 35 units per week)

For harmful drinkers the graph shows a heavily skewed distribution with a tail of those drinking at very high levels.