Working Group 5

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Scotch Whisky (case note)

In order to enhance the understanding of the existence of the discrepancy following Scotch whisky case, delving into the background of the case is essential. Firstly, the European Commission issued the opinion which stated that the MPU was covered by the article 34 TFEU, but it found that the measure by the Scottish authorities was not proportionate and could not be justified under the article 36 TFEU. On the other hand, totally different approach was adopted by the Advocate General and the Court of Justice. In order to grasp the meaning of why the whole case and the situation are contradictory, the case needs to be assessed in the light of the previous judgments and the approach that the court holds regarding the following issues: the role of the referring courts in the review of the measures adopted by national authorities regarding the restrictions of free movement of goods, the evidences and assessment of principle of proportionality when the restriction is adopted on the ground of public health, how narrowing the objective by the authorities could serve as the “way out” and how court distinguishes between various measures while assessing the principle of proportionality.

Assignment 3

Both parties to the dispute had accepted that MUP pricing was caught by Art 34 TFEU (the ban on measures with an equivalent effect to quantitative restrictions on imports).

 Use the [*Trailers*](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-110/05) “market access” test. A minimum pricing measure restricts access to the UK market as it prevents lower cost products from other Member States from exploiting that cost advantage in lower retail prices.

As the removal of the benefits of the cost advantage triggers the market access test there is no need to discuss whether there is any discrimination inherent within the scheme.

The majority of the ruling deals with the much more difficult question of the potential justification of the measure on health grounds and whether the restriction is proportionate.

Justification - Both targeting these “harmful and hazardous” drinkers, while also reducing general alcohol consumption in the wider population “albeit only secondarily”.

The same health benefit could be obtained through an increase in the general excise duties applied to all alcohol products, as preferred by the SWA and the European Commission. The Court argued that increased taxation could be an effective health protection measure, as it is in relation to tobacco, and that an increase in taxation - contention that an increase in taxation would be less restrictive of trade, in comparison to MUP.

 Health protection is one of the grounds for derogation in Art 36 TFEU it is also possible to justify MUP on that basis.

We argued that the wording of what is now Articles 34—36 TFEU did not itself exclude their application to these types of actions, and considered an analogy with the judgments of the Court in Walrave & Koch11 (which made it plain that rules of sporting governing bodies, in so far as they covered professional sport, have to comply with the free movement of workers and the freedom to provide services) and in Defrenne v. SABENA12 (which showed that prohibition on discrimination between men and women applied not only to the action of public authorities, but also extended to all agreements which were intended to regulate paid labor collectively, as well as to contracts between individuals). – Analogy

At the same time, they recalled that the case-law-based justifications stemming from Dassonville itself would permit certain reasonable hindrances to imports or exports for non-economic purposes.

The objections to the application of Articles 34–36 TFEU to actions of private parties were based in part on the observation that the judgments in Walrave & Koch and Defrenne had rather more to do with discrimination than with free movement as such, and in part on the possibility that collective action might amount to a concerted practice within the context of competition law.

In Buy-Irish, the Court had of course rejected the contention that only legally binding State measures were caught.

Yet the view that private parties are not bound by Articles 34–36 TFEU does not mean that their conduct is unaffected by those provisions.34 If the State shelters behind a private body, Buy Irish, and Commission v. Germany35 on the CMA quality label, demonstrate that such a construction will offer no protection against Articles 34–36

Fra.Bo - It followed, therefore, as night follows day, that in the circumstances the Court found the ambit of what is now Article 34 TFEU extended to DVGW’s standardization and certification activities.

Minimum, maximum prices.

Book of Gormley eu law and customs union oxford university press.

Law journal, browzine?

Ino and atab –fixed maximum price is so low that import does not make difference.

Conterpart to that – Vantiggele equally applicable at such a high level barrier to trade, art 34 possibkle justifications.

No facts. 12 point, single space.

Discuss key issues, advocate generals approach, coj approach – do you agree.

Style – law market review?

Westlaw international – us state reviews.

Keck case? Where how and when but coj did not agree with ag. Consider other forms of fisal interference – look up scotish court of session judgment.

Analyzing is most important. Critiquely discuss that

Narrowing objective – way out for Scotland?

<https://books.google.nl/books?id=0Js3DwAAQBAJ&pg=PA110&dq=Case+C-333/14+Scotch+Whisky&hl=en&sa=X&ved=0ahUKEwi7ocjsoerZAhXLxqQKHT5fDA0Q6AEIMjAC#v=onepage&q=Case%20C-333%2F14%20Scotch%20Whisky&f=false> - Market access – Dassonville. Dassonville definition is far from being operational, court uses terms interchangeably. Court looks at the effect rather than aim or purpose of the subject matter of the measure. However, aim can be used in justifications. As it is too broad the legality depends on articles 34 and 36 together with the proportionality test. – reduces legal certainty for traders and member states. Sunday-trading saga? The court wanted to solve the issue with keck and de minimis test (Krantz).Keck – inflexible, Krantz – too difficult to apply.

When Court has not found it to be either certain selling arrangement or regulating product characteristics, Court has subjected them to either cassis and Dassonville test or applied Kranz case.

Trailers case – market access as a new overarching test.

Look at the content, nature of law, economic access not needed.

Dassonville – measures that have potential to hinder, no de minimis test necessary.

Gormley does not think that de minimis test was used for restrictions, but agrees with oliver that use of restrictions by him would not be covered by art 34 because of Kranz case.

AG kokott criticizes Dassonville test.

Schindler case – justifications?

ORPI?

Nan binsbergen

Art XX GAAT?

<https://books.google.nl/books?id=ZKVTDQAAQBAJ&pg=PT28&dq=Case+C-333/14+Scotch+Whisky&hl=en&sa=X&ved=0ahUKEwi7ocjsoerZAhXLxqQKHT5fDA0Q6AEIJzAA#v=onepage&q=Case%20C-333%2F14%20Scotch%20Whisky&f=false>

Cassis and Dijon & Gilli and Andres about proportionality

Justification cannot be fully economical.

Kohll –healthcare from economic to non-economic

<https://books.google.nl/books?id=PKY5DwAAQBAJ&pg=PT10&dq=Case+C-333/14+Scotch+Whisky&hl=en&sa=X&ved=0ahUKEwi7ocjsoerZAhXLxqQKHT5fDA0Q6AEIQzAF#v=onepage&q=Case%20C-333%2F14%20Scotch%20Whisky&f=false> – subsidiarity?

<https://poseidon01.ssrn.com/delivery.php?ID=252085073120027108126002072011120086116042064082020028029003102121070084111072025028034036040047022047027072074020114066085081050076003080012030101005124101070031069045008066110082118023078006106092024127110001072064090091107086083123087113123123085&EXT=pdf>

Epitomizes the struggle currently faced by national courts in striking the right balance between the proper functioning of the market and due recognition and protection of national regulatory autonomy – principle of subsidiarity? What kind of competence is that?

In those circumstances, how can we pinpoint the effect of a given policy option when it is part of a set of measures? How can we distinguish the effect, in terms of health gains deriving from a drop in alcohol consumption, to be ascribed to the introduction of MUP when such a measure coexists with other measures (more than 40 in Scotland) that have been introduced?

Communication from the Commission - SG(2012) D/51683 - As regards minimum pricing, the EU secondary legislation, especially Council Directive 92/83/EEC on the harmonization of the structures of excise duties on alcohol and alcoholic beverages , does not prohibit Member States from setting minimum retail prices for alcoholic beverages. However, any such national measure and its effects still need to be compatible with other provisions of EU law, including the Treaty’s rules on the free movement of goods (Articles 34-36 TFEU).

In the case Van Tiggele (Case 82/77, ECR 1978, p. 25) the Court decided that "a fixed minimum price which, although applicable without distinction to domestic products and imported products, is capable of having an adverse effect on the marketing of the latter must be considered as a measure having an effect equivalent to a quantitative restriction in so far as it prevents their lower cost price from being reflected in the retail selling price."

For example, in recent proceedings relating to minimum prices for tobacco products, Advocate General Kokott, said that: “Where a minimum price is set by a Member State there is a danger that manufacturers from other Member States who wish to obtain a competitive price advantage on the market by charging lower maximum retail selling prices will be placed at a disadvantage. Fixing a minimum price would cancel out the

Commission opinion:

 Another effect of the policy is to create a barrier to entry into the Scottish market. Goods seeking to enter the market, and which could be sold (even if only initially) at a price below the proposed MUP to encourage supermarket listing and consumer trial, are denied the opportunity to do so.

The Scottish Government's minimum pricing policy has a dual goal: (1) to contribute to a reduction in alcohol consumption across the Scottish population to improve public health; (2) to target, in particular, a reduction in the consumption of alcohol which is cheap relative to its strength.

The measure at issue raises doubts as to its compatibility with the principle of proportionality, therefore the Commission would like to concentrate on it and the possibility to achieve the objective by other means less restrictive to intra-EU trade.

If the goal is, for health policy reasons, to reduce alcohol consumption via increasing the prices of alcoholic beverages, that goal can be achieved by raising alcohol taxation across the board. The price of alcohol would thus increase without causing the market distortions that, as shown above, can be expected to flow from MUP. It is the Commission's view that there is at least one alternative, regulatory option to MUP that is less restrictive of trade and less distorting of competition in relevant drinks markets. – see commission v. Greece – about tobacco. Tobacco v. alcohol – similar?

These potential distortions arise because the MUP will create greater incentives for retailers and supermarkets in particular, to sell more alcoholic beverages as a result of the fact that they will make higher margins on products affected by the policy.

The focus in this opinion is rather on whether a MUP policy, which would lead to higher prices of many alcoholic drinks and hence to an expectation of reduced consumption, is likely to be the least market distorting policy that could be introduced to produce such an outcome.

Directives 92/83/EEC and 92/84/EEC

The Commission observes that the Directives at issue provide a degree of discretion to the Member States (but at the same time observing the minimum rates) to allow them to formulate their alcohol fiscal policies

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AG employed in the case law”21. Under such a “standard formula”, a national measure “may constitute an obstacle not only when, as a selling arrangement, it is discriminatory, in law or in fact, but also when, irrespective of its nature, it impedes access to the market of the Member State concerned”.

When it comes to the extent of that review, the A.G. recalls that while the final assessment of proportionality is a matter for the referring court, it is for the Court of Justice to provide to that court “with information to guide it in its interpretation, in particular as regards the criteria which it must take into account when forming its assessment” – HIGHT DISCRETION TO THE REFERRING COURT.

<https://ec.europa.eu/taxation_customs/business/excise-duties-alcohol-tobacco-energy/excise-duties-alcohol_en> - excise duty, definition.

[https://link-springer-com.proxy-ub.rug.nl/content/pdf/10.1007%2F978-3-319-04903-8.pdf](https://link-springer-com.proxy-ub.rug.nl/content/pdf/10.1007/978-3-319-04903-8.pdf) p317 such a wide interpretation of “measures having an equivalent effect” in Dassonville was needed at a time where the internal market project “was in its infancy and national protectionist traditions were well-entrenched, while national judges were still often unfamiliar with EU law.”

If the ECJ had remained silent after this passage, the possibilities to justify national restrictions to trade would have been endless. It would have turned around the whole concept of classical free trade theory by allowing Member States to implement legislative measures that were formally turned down as obstacles to trade under the Dassonville formula.

However, as the ECJ made clear through its clear statement for a preference for information-related over content-related rules, these measures have to be in conformity with the EU’s market-establishing agenda, which also led to understand the ‘new approach’ as an efficiency-driven instrument rather than focusing on individual protection. This change in approach of the ECJ has hence provided the basis for the introduction of more conceptual and systematic EU product safety regulation, for example through the ‘new approach’ at European level.

Court -  It is however for the referring court, which alone has available to it all the matters of fact and law pertaining to the circumstances of the main proceedings, to determine whether a measure other than that provided for by the national legislation at issue in the main proceedings, such as increased taxation on alcoholic drinks, is capable of protecting human life and health as effectively as that legislation, while being less restrictive of trade in those products within the European Union.

 It must be observed that, in the light of the case-law cited in paragraph 35 of this judgment, it is for the Member States to decide on the level of protection of human life and health which they propose to provide, for the purposes of Article 36 TFEU, while taking into consideration the requirements of the free movement of goods within the European Union.

  It must however be stated that that burden of proof cannot extend to creating the requirement that, where the competent national authorities adopt national legislation imposing a measure such as the MPU, they must prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions (see, to that effect, judgment in *Commission* v *Italy*, C‑110/05, EU:C:2009:66, paragraph 66).

This burden of proof cannot however be interpreted as requiring the relevant Member State to prove positively that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions – para 55

In the instant case, the Court was asked to not only determine the proportionality of the measure at hand but also to define the extent of that review, when is exercised by a national court in relation to a national legislation enacted on public health grounds. It was also called upon to determine what type of evidence national court should actually consider when exercising such a review.

Primary law – art 34 and 36 TFEU.

Secondary law – CMO regulation.

Interpretation by Van Tiggele - merely cancel out the competitive advantage of imported products.

Yet, unlike Advocate General Bot, the Court of Justice did not openly address nor engage with them. It provided instead a rather concise reasoning as to why an MUP measure would constitute an obstacle within the meaning of Article 34 TFEU. After examining the measure at issue in the light of the Dassonville and Cassis de Dijon formulas, it swiftly concluded that the measure at hand, by preventing the lower cost price of imported products being reflected in the selling price to the consumer, “means, by itself, that that legislation is capable of hindering the access to the United Kingdom market of alcoholic drinks that are lawfully marketed” in other Member States.

This appears all the more surprising when one consider the Court’s most recent attempts, in Trailers76 and subsequent case law77, at codifying its relevant case law along three distinct categories measures of equivalent effect - Oliver, Oliver on Free Movement of Goods in the European Union (Hart Publishing, 2010), p. 132.

Fachverband der Buch-und Medienwirtschaft v LIBRO – Keck?

First, the language used by the Court in presenting its test appears exceptionally wideranging. It refers to “all measures of a Member States” as opposed to “all trading rules” typical of the Dassonville formula.

question of whether the criterion of the elimination of competitive advantage required by van Tiggele might also “allow discrimination to be shown”

Advocate General was at pains to demonstrate in his Opinion, the rules at stake appear to be contrary to Article 34 TFEU “from whatever standpoint they are analysed” – Court could have adopted.

criterion of the elimination of competitive advantage required by van Tiggele might also “allow discrimination to be shown”

Since the pursuit of a narrower target generally makes it easier for a measure to pass the ‘necessity’ test, it is key for the defending country to clearly define the aim (or aims) pursued by the contested measure before this is subject to proportionality review. – Way out?

Unlike the Advocate General, who suggests letting the national court make such a determination100, the Court qualifies as ‘clear’ what an MUP aims at it.

This judgment shows that also national impact assessments may enter into play in the proportionality review of national measures performed by EU Courts.

1st problem: scientific uncertainty

2nd – establishing causal link

Court established that the measure must not only be suitable to attain its objective in its own, but also “secure the attainment of that objective in a consistent and systematic manner.

Indeed, in a few isolated cases, the Court examined the proportionality, and in particularly the suitability, of a given measure by assessing it within the broader policy context within which the contested measure was adopted and called upon to operate. - 1 See, e.g., C-185/95, Franzen [1997] ECR I-5909, para 64 ; Opinion of AG Jacobs, Gourmet, para 25: ‘In general, I consider, advertising restrictions cannot but contribute to the effect to a nonnegligible degree, alongside high excise duties and State control of retail sales for home consumption’.

Necessity – analyze other measures as effective as the contested one while being less trade restrictive.

How to expect that the opponent of the contested measure may objectively put forward a full set of alternative policy options to measure the actual cost-benefit outcome of the measure it challenges? How realistic might it be to expect the defendant of the contested measure to objectively support the cost-effectiveness of such a measure while scrutinizing the alternative(s) put forward by the plaintiff?

Yet, in the Court’s view, the generalized increased in retail prices induced by a fiscal measure is not a minus (not such as to render it ‘less effective’) but a plus, in the comparative effectiveness test embedded into proportionality review.

The court did not only require the Scottish government to prove that taxation is actually equally effective as MUP in light of the available evidence.

Court leaves wide margin of manoeuvre to States in selecting policy measures whose effects cannot be proven.

It must be stated, in that regard, that, contrary to what is argued by the Lord Advocate, the fact that the case-law cited in the preceding paragraph concerns tobacco products does not mean that it is inapplicable to the main proceedings, which concern the trade in alcoholic drinks. In the context of national measures which have as their objective the protection of human life and health, and irrespective of the particular characteristics of each product, an increase in the prices of alcoholic drinks can be achieved, as was the case with respect to tobacco products, by increased taxation. – did not adopt AG’s approach regarding comparing these 2. Why did AG not elaborate more, weak argument?

Advocate General who refuses to “make generalisations as to the extent of the review”- para 87, the Court ventured to define the standard of review that a national court must apply in the review of an evidence-based measure, such as MUP.

Burden of proof - Although epistemically demanding in this formulation, the burden of proof imposed on the defending Member State does not require it to “prove, positively, that no other conceivable measure could enable the legitimate objective pursued to be attained under the same conditions”

While the resulting relaxation of the evidentiary burden, essentially justified by the experimental and temporary nature of the measure at issue, appears relatively new in the Court’s case law133, an important precedent may be found in the recent case law of the EFTA Court

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Both, the Advocate General and the Court, used this judgment to introduce some remarkable insights particularly on the future of the market access formula, the relationship of the Common Agricultural Policy to the freedom of goods and how national courts need to make recourse to scientific evidence when applying the proportionality test.