INTRODUCTION

The Law Society of Scotland (“The Society”) welcomes the opportunity to comment upon the Alcohol Etc. (Scotland) Bill as introduced in the Scottish Parliament on 25 November 2009 and has the following comments to make upon its terms.

GENERAL COMMENTS


Copies of the Society’s response to the consultation paper can be made available to members of the Parliament’s Health and Sport Committee.

The Society should like to respond to the terms of the Bill as follows.

SPECIFIC COMMENTS

Section 1 – Minimum Price of Alcohol

The Society notes the policy objective of minimum pricing to protect and improve public health by reducing alcohol consumption. The Society has had an opportunity to consider the issue of minimum price of alcohol as outlined in Section 1 of the Bill.

In particular, the Society notes that the minimum price of alcohol is set as the purchase price available to the purchaser and calculated in accordance with the formula as set out in Schedule 3, 6A(3) of the Licensing (Scotland) Act 2005 (“The 2005 Act”) as amended by Section 1(2) of the Bill where, in terms of paragraph 6A(4), the minimum price per unit is such price as Scottish Ministers may by order specify.

It can therefore be construed as not being a matter of competition law as effectively Scottish Ministers fix the price as opposed to licence holders.

Accordingly this is a devolved matter within the legislative competence of the Scottish parliament.

The Society, however, notes that there are issues raised by the imposition of minimum pricing at EU level.
This brings into focus the compatibility or otherwise of the Scottish Government’s proposals with the obligation of the United Kingdom under the Alcohol Duty Directive (92/83/EEC) and (since the coming into force of the Treaty of Lisbon on 1 December 2009) Articles 34 and 36 of the Treaty on the Functioning of the European Union namely:-

Article 34

“Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”

Article 36

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transits 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;

The Society notes that the issue of compatibility of the proposal under Section 1 of the Bill of European Union Law has been brought into sharp focus as a result of Advocate General Kokott’s opinion concerning the pricing of tobacco products (joint cases 197/08, 198/08 and 221/08 Commission v France, Austria and Ireland).

The Society further notes, however, that opinions in these cases are yet to be issued by the European Court of Justice, but that opinions should be issued in the near future.

In the tobacco cases, Advocate General Kokott observed:

“The decisive question is whether the measures at issue (which in this instance would be the minimum pricing of alcohol) to achieve the protection of public health, or whether there are equally suitable, but less restrictive alternatives”, and “It must be recognised that the Member States can determine the level at which it would like to protect public health and how that level is to be achieved”.

In that respect Member States enjoy considerable discretion.

In the above cases, the view of the Advocate General was, however, that

1. by maintaining in force a system of minimum price for cigarettes and a prohibition on selling tobacco products at a promotional price, which is contrary to public health objectives, the French Republic failed to fulfil its obligations under the Tobacco Duties Directive;
2. by enacting and retaining legal provisions under which minimum selling prices for cigarettes and for fine cut tobacco for the rolling of cigarettes are set by the State, the Republic of Austria failed to fulfil its obligations under the Tobacco Duties Directive: and

3. by imposing minimum retail prices for cigarettes, Ireland failed to fulfil its obligations under the Tobacco Duties Directive.

The Society notes that Madame Kokott’s opinions are with regard to the Tobacco Duty Directive 95/59/EC and that the structure for duty for tobacco is different from that for alcohol which is set out in terms of the Alcohol Duty Directive 92/83/EEC in that tobacco duty is a function of the maximum retail price of tobacco, a maximum which the Directive requires the manufacturers to be free to set.

Alcohol duty is based, however, on the volume of alcohol as opposed to its price and accordingly interference with pricing of alcohol may not affect the duty regime in the same way as it does in the case of tobacco. However, it is not only the compatibility with the EC Duty Directives which require to be taken into account in fixing a minimum price but also the legal issues concerning the free movement of alcohol.

With regard to free movement, the terms of the EU Treaty have been interpreted by relevant case law as setting a number of questions (in this instance, these questions would be applied to the minimum pricing of alcohol).

1 Is this a measure having equivalent effect to a quantitative restriction on imports?

2 If so, is it capable of being justified on grounds of public policy or public security, the protection of health and life of humans, while not constituting “a means of arbitrary discrimination or a disguised restriction on trade between Member States”?

3 If so, does it operate as a restriction only to an extent that is proportionate to the legitimate objective pursued (put differently) is it really impossible to achieve the objective in a way that causes less disruption or disadvantage to trade in imported products?

The Society takes the view that, in answer to the first question, this measure would have an equivalent defect to quantitative restriction of imports. It may be argued that minimum pricing as set out in Section 1 of the Bill could be challenged successfully on the following grounds:

i. Minimum pricing reduces the price advantage of non premium products over premium products.

ii. Minimum pricing is a measure having equivalent effect to a quantitative restriction on imports.
iii. The effect of deterring consumption by increasing the cost of alcoholic liquor could be achieved with less or no impediment to imports simply by increasing duty across the Board (the Society notes that this is the European Commission’s view).

iv. Even if minimum pricing were acceptable, it should be fixed by reference to volume rather than the British “unit”.

v. That the proposal is therefore not a proportionate response.

The Society further notes, however, that minimum pricing as set out in Section 1 of the Bill may be justified on the following grounds:

i. Minimum pricing legislation may well be a measure having equivalent effect, but Article 36 of the European Union Treaty referred to above should be taken into account.

ii. The health and public order issue is not simply that people drink too much alcohol but that there is credible evidence that certain identified health and public order problems are attributable to a significant extent to certain identified patterns of purchase of alcohol.

iii. The proposed minimum pricing legislation is a fine tuned measure that precisely targets those patterns and there is credible evidence that it will disrupt them and thereby diminish the incidence of the identified health and public order problems on the basis that it treats equally all types of alcoholic drink such as beers, wines, spirits and tonic wines.

iv. The “unit” to be defined in the pricing order as 10 millilitres of ethyl alcohol is a simple volume of measure with an objective scientific basis being (in that case) the amount that the human body can break down in one hour.

v. In all the circumstances, the proposed minimum pricing legislation as set out in Section 1 of the Bill is a less disproportionate response to the identified problem than would be an across the Board increase in duty.

In all the circumstances, the Society holds that these are the issues arising from Section 1 and that the issue of law arising from Section 1 is a matter which is yet to be determined by the European Court of Justice.

With regard to enforcing the minimum price of alcohol, the Society is of the view that Licensing Standards Officers will have difficulty in enforcing the proposed mandatory condition of a premises licence that alcohol must not be sold on the premises at a price below the minimum price.

Also, is a licence holder in breach of paragraph 8(2)(e) of Schedule 3 to the 2005 Act by encouraging or seeking to encourage a person to buy or consume a larger measure of alcohol than the person had otherwise
intended to buy or consume by, for example, offering food or other non alcoholic products with alcohol?

This point, in the Society’s view, requires clarification.

The Society also notes that the use of both ‘sold’ and ‘supplied’ requires clarification.

Section 2 – Minimum price of packages containing more than one alcoholic product

The Society refers to its comments above. It is the Society’s view that the proposal as set out in Section 2 of the Bill restricts specific types of promotion to consumers and accordingly is a law which is aimed at the conduct of the seller. Accordingly, this measure relates to consumer protection and competition law and is reserved to the United Kingdom Parliament. The Society is concerned that this proposal has the potential to create two separate markets within the United Kingdom for alcohol products as it may lead to shoppers purchasing in England and Wales to take advantage of savings not available in Scotland. This is a real possibility in view of the existence of internet retailing and ease of transportation between Scotland and England.

With particular reference to paragraph 6(B)(3) of Schedule 3 to the 2005 Act as inserted by Section 2(2) of the Bill, the Society welcomes clarification as to whether the container which can be included in the package has to be capable of being sold separately for the purposes of calculating the cost of the package.

The Society also believes that one of the unintended consequences of Section 2, if enacted, would be to discourage licence holders from selling items individually as Section 6(B)(1) only applies where each of the alcoholic products is for sale on the premises separately. This may, conversely, encourage a person to buy a larger measure of alcohol than the person had otherwise intended to buy and may be considered an irresponsible drinks promotion in terms of paragraph 8(2)(e) of Schedule 3 to the 2005 Act.

Section 3 – Off-sales: Restriction on supply of alcoholic drinks free of charge or at reduced price

The Society notes that Section 3(2) of the Bill extends the application of paragraph 8(2)(b) of Schedule 3 of the 2005 Act to include off-sales. Moreover, drinks promotions encouraging persons to buy or consume larger measures will now only apply to alcohol sold on the premises.

The Society notes that “measure of alcohol” is undefined, and on the basis that it is now to apply to on-sales, it requires clarification.

The Society would also question whether the restriction on supply of alcoholic drinks free of charge would in effect prohibit tastings in off-sales premises.
Section 4 – Off-sales: Locations of drinks promotions

The Society notes this proposal seeks to extend the provisions of paragraph 13 of Schedule 3 to the 2005 Act (as inserted by the Licensing (Mandatory Conditions 2) (Scotland) Regulations 2007 (SSI 2007/546)) to provide that any drinks promotion in respect of off-sales of alcohol in a premises may take place only in the alcohol display areas, or any tasting rooms such as those operated by some specialist retailers. Regard requires to be paid to e.g. beer gardens which are normally unlicensed and therefore taking alcohol outside becomes an off-sale transaction.

With regard to the definition of “drinks promotion”, the Society believes that this should be correctly defined as “off-sales drink promotion” as “drinks promotion” is defined in paragraph 8(5) of Schedule 3 to the 2005 Act. The Society refers to its comments above with regard to beer gardens.

The Society seeks clarification with regard to the terms of paragraph 13(1)(B) as inserted by Section 4(3) of the Bill. The Society questions whether tastings will be permitted on the shop floor or whether a licence holder requires to provide a separate room for tasting, and if that room requires to be fixed or flexible to meet the particular circumstances of the tasting.

This brings into focus the question of whether signage simply advertising the premises as licensed premises will be permitted.

The Society also seeks clarification as to whether advertising of e.g. wine clubs, wine, beer and spirits etc by way of supplements in national newspapers and magazines etc will be permitted given the terms of Section 4.

There is also the issue of television and radio advertising of alcohol to consider.

Section 5 – Requirements for age verification policy

The Society notes that Section 5(2) inserts a new paragraph 9(A) to Schedule 3 to the 2005 Act to impose a further mandatory condition of premises licence in that there must be an age verification policy in relation to the sale of alcohol on the premises.

The Society also notes that certain premises already operate such premises voluntarily and questions whether the requirement to operate such a policy requires to be a mandatory condition of a premises licence.

The Society refers to Section 102(1) of the 2005 Act whereby it is an offence for a person to sell alcohol to a person who is under the age of 18, subject to the defence as outlined at Section 102(2) of the 2005 Act.

The Society questions why there is any requirement for this additional condition of premises licence taking into account the terms of Section 102 of the 2005 Act.
A premises licence holder may curiously find himself or herself subject to a review of the premises licence on the basis that he or she did not have an age verification policy in place with regard to premises where no sale of alcohol to a child or young person had actually taken place. The Society also highlights Section 102 which requires the licence holder to take reasonable steps to establish the child or young person's age and that this is covered in compulsory training.

The Society further notes that such a policy will require to be put in place for holders of occasional licences.

The Society also notes that the 2005 Act only came into effect on 1 September 2009 and many provisions, not least those relating to underage sales and consumption, have not had a sufficient period of time to be properly evaluated.

Sections 6 and 7 – Premises licences and Occasional licences: Modification of mandatory conditions

The Society notes that Section 6 (Premises Licences) and Section 7 (Occasional Licences) will now amend Section 27 and Section 60 of the 2005 Act respectively in order to allow the Scottish Ministers to delete or amend conditions contained in Schedules 3 and 4 of the 2005 Act. The Society notes that, at present, Scottish Ministers can only add or extend the application of mandatory licence conditions for premises licences in Schedule 3 and for occasional licences in Schedule 4. The Society welcomes these provisions.

Section 8 – Off-sales: Sale of alcohol to under 21’s etc.

The Society is concerned from a practical point of view as to how a Licensing Board includes in its licensing policy statement to be published in terms of Section 7 of the Act, a detrimental impact statement as to the extent to which the Board considers that off-sales to persons under the age of 21

(a) in its area; or
(b) in any locality within its area

are having a detrimental impact in that area of locality.

It is clear from the terms of the new Section 7(A) of the Act as inserted by Section 8(3) of the Bill that, in preparing a detrimental impact statement, the Board must consult with the local licensing forum and, at its request, the Chief Constable or the relevant Council must provide to the Board such statistical or other information as the Board may reasonably require for the purpose of preparing or reviewing a detrimental impact statement.

The question arises as to how the Board, upon receipt of such information, can properly and reasonably identify and pinpoint any locality within its area where off-sales to under 21s are having a detrimental impact. Detrimental
impact is defined in Section 7(A)(2)(b) as any adverse effect on one or more of the licensing objectives.

In particular, it would be difficult for the Board to make such a statement upon information which does not disclose that anti social behaviour which emanates from those persons under the age of 21 to whom alcohol has been sold.

The Society suggests that if such a condition were to be imposed upon licensed premises in respect of off-sales, then it could be attached as a condition following a review of the premises licence in terms of Section 39 of the Act.

The Society further outlines the practical difficulty of the imposition of this blanket condition where premises licences have both an on and off-sales facility and accordingly, this would bring into place two age limits dependent on whether the alcohol is sold for consumption on or off the premises. The beer garden issue would also apply.

The Society identifies a further practical difficulty where a detrimental impact assessment applies in one locality of a Board’s area, but not in another in that those persons under 21 wishing to purchase alcohol will simply do so from a neighbouring locality within the Board’s area which is not subject to a premises licence variation of conditions in terms of Section 9.

Section 9 – Premises licence: Variation of conditions

The Society refers to its comments above. In particular, the Society notes that, unlike review of procedure in terms of Sections 36 to 40 of the 2005 Act, there is no provision to afford the licence holder a hearing and, furthermore, there is no appeal. The Society notes the terms of Section 27(7) of the 2005 Act where a Licensing Board may not impose a premises licence condition inter alia which would have the effect of making any such condition more onerous or more restrictive than the mandatory conditions as contained in Schedule 3.

The Society therefore questions the imposition of Section 27A as inserted by Section 9(1) of the Bill allowing Licensing Boards to vary premises licence conditions. The variation can apply to all licensed premises without the premises licence holder being afforded the right to be heard nor afforded the right to appeal against the decision to vary. The Society believes that a suitable mechanism must be put in place in order to afford protection to premises licence holders who object to a variation being made under the new Section 27(A).

Sections 10 and 11 – Social responsibility levy

The Society questions whether holders of licences other than premises licences can be called upon to contribute to the in that the purpose of the levy is to meet or contribute to expenditure incurred or to be incurred by any local
authority in furtherance of the licensing objectives and which the authority considers necessary or desirable with a view to remedying or mitigating any adverse impact on those objectives attributable (directly or indirectly) to the operation of businesses or relevant licence holders in the authority’s area.

Such licence holders defined as “relevant licence holders” at Section 10(2)(b)(c) and (d) of the Bill are not subject to the licensing objectives which are contained only in the 2005 Act.

The Society notes that the regulations are to be made by Scottish Ministers by statutory instrument for the imposition of these charges upon relevant licence holders, but questions how such a scheme can operate in practice and be fairly imposed, particularly where there are a number of premises licences and other relevant licence holders whose sale of alcoholic liquor or overall participation in night time economy is negligible.

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19 January 2010

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