

Scotland's battle over alcohol pricing

This week the alcohol industry heads back to court in its latest attempt to overturn the introduction of minimum pricing. **Jonathan Gornall** investigates

In December 2010, Christmas came early for Jackie Baillie, Labour's health spokesperson in the Scottish parliament. Over the previous months, she had been at the forefront of an all-out assault on the Scottish National Party's attempt to introduce minimum pricing for alcohol in Scotland. Now the measure had been defeated in a 76-49 parliamentary vote, and Baillie and some of her colleagues were given crates of Peroni beer by grateful brewing giant SABMiller.

Some of the MSPs, including Baillie, were quick to donate the beer to good causes (pictured right). "I was pleased to receive this beer from Peroni but decided to donate it to the residents at Whitefoord House [a forces' veterans community]," she told the media. The SNP's Michael Matheson denounced the gift as a "pay-off." SABMiller, he said, had "lobbied MSPs extensively to block minimum pricing, and this is clearly Labour's reward for a job well done."^{1 2}

That kind of thing, Baillie told the *BMJ*, "doesn't have any influence. I just thought it was entirely inappropriate so I gave mine away, very publicly. The interesting thing for me is that other MSPs kept it."

Whatever the thinking that lay behind SABMiller's gesture, the company's delight would be short lived. A shift in Scottish politics saw the SNP returned to power the following May with a majority—slender, but sufficient to force through minimum pricing.

Nevertheless, the alcohol industry's experience of exploiting divided political opinion in Scotland would pay dividends when it came to undermining support for minimum pricing in England. Furthermore, the legal course on



Whisky galore: leading the fight against regulation is Gavin Hewitt of the Scotch Whisky Association

which the industry embarked after the Scottish parliament finally voted for minimum pricing in 2012 has not only delayed the implementation of the policy indefinitely in Scotland but also shows the scale of the battle that lies ahead for any Westminster government that chooses to resurrect minimum pricing after the general election in 2015.

In 2008, when the Scottish government first announced it was going to legislate to introduce minimum pricing, "a deluge of personnel" from the industry descended on



Edinburgh, recalls Evelyn Gillan, chief executive of the charity Alcohol Focus Scotland.

"A lot of the UK based trade bodies like the Wine and Spirits Trade Association virtually decamped to Scotland for a couple of years. There was a point when you couldn't attend a single meeting or consultation in Scotland during the process of the legislation that didn't have a number of industry people present."

Need for action

That Scotland pioneered minimum pricing in the UK was not surprising, given the disproportionate scale of the problem it faced, and continues to face, with alcohol. According to a 2007 report by Scottish Health Action on Alcohol Problems (SHAAP), an advocacy group set up by the Scottish Academy of Medical Royal Colleges and Faculties, alcohol related death rates among Scottish men were double those in the rest of the UK, with two out of every three men and one in three women drinking at levels that posed a risk to their health.³ With an increase in alcoholic liver disease of 52% between 1998 and 2002,

Scotland had one of the highest cirrhosis mortality rates in western Europe and alcohol related problems were costing the country £1bn (£1.2bn; \$1.7bn) every year.

Taking into account the rise in incomes, between 1980 and 2005 alcohol had become 62% more affordable and, pointing out that "as the price of alcohol has come down, consumption has risen," the report made a compelling case for price intervention.

The SHAAP report reached a simple conclusion: price should be used as a policy lever to reduce alcohol consumption and harm—and the Scottish government should introduce a minimum price for alcoholic drinks.³ Estimates from the Academy of Medical Sciences had claimed that an increase in the price of alcohol of only 10% would save the lives of more than 700 Scottish men and women a year.⁵

Convinced, in June 2008 the government launched a three month consultation on an action plan that included minimum pricing.⁶

Just after the consultation closed in September 2008, Sheffield University produced its first report on minimum pricing for the UK government.⁸ The Scottish government was "interested to note there was strong and consistent evidence linking the price of alcohol to the demand [and that] minimum pricing targets . . . alcohol that is sold cheaply" while moderate drinkers were only "marginally affected."

The following year, the Scottish government commissioned Sheffield to appraise the effects of its proposed minimum pricing strategy in Scotland and to investigate the level at which a minimum price might be set.

It concluded that if set at 50 pence per unit—the price the government went on to choose—



minimum pricing would reduce annual alcohol related hospital admissions in Scotland by 8900, cut alcohol fuelled offences by 4200, saving the country 35 000 days lost to absenteeism.

Elected in May 2007 with the slenderest of leads over Labour, the SNP government did not underestimate “the challenge of balancing competing interests to develop a proportionate, effective and legally robust framework in introducing minimum pricing.”¹⁰

Industry on the back foot

One advantage it did have, says Gillan, was a certain immunity to the lobbying wiles of the industry. “Because the SNP had never been in power before, they hadn’t developed those long term relationships with the industry that the industry invests so much in.”

Gavin Hewitt, chief executive of the Scotch Whisky Association, would admit as much in November 2013. The industry, he told WhiskyCast, had taken its eye off the ball—it should have made more overtures to the SNP in 2007, while it was still in opposition.

“If we had been able to foresee the Scottish National Party in 2007 wanting to press ahead with minimum pricing, and had we got hold of them before they actually formulated policy, I think we would have saved ourselves both a lot of time and a lot of money,” he said.

Playing politics

Unable to make inroads into the Scottish cabinet the industry was quick to exploit the traditional enmities of politics north of the border.

“It’s really difficult for people not in Scotland to understand the toxic relationship between Labour and the SNP,” said one public health campaigner who was involved in the process at the time. “Labour had been in power in Scotland, running local authorities, for 50 years, and they’ve never quite recovered from the fact that the SNP are now running the government. That was a contextual factor that the industry was happy to exploit.”

Labour’s decision to oppose minimum pricing had more to do with politics than the merits of the policy. It had its own public health legacy, having been the first in the UK to ban smoking in public places, and “they didn’t want the SNP to have a flagship health policy.”

Going negative on the SNP, however, meant going positive on the messages the industry was putting out about minimum pricing. And, as a consequence, industry generated “evidence” submitted to the parliamentary health committee fell on receptive ears.

That, says Baillie, who was opposition health spokesperson at the time, is not a scenario she recognises. “Politics is difficult in Scotland,

there’s no getting away from it, but we would not object to a measure like that based on politics. We wanted to look at the efficacy of it.”

“The health committee spent a lot of time looking at the claims and counter claims, so the suggestion that somehow the alcohol industry had undue influence I would entirely refute.”

The Alcohol Etc (Scotland) Bill, which contained several measures in addition to minimum pricing, was introduced on 25 November 2009.

Donald Henderson, head of public health for the Scottish government, told the *BMJ* the committee process for the bill had been “pretty bruising” for some of those who had given evidence. “I think both sides recognised that the war had got pretty bloody, and that some in the alcohol trade had gone beyond legitimate tactics.”

In March 2010 the health committee recalled industry witnesses to “clarify” evidence they had given.¹² John Beard, the chief executive of distiller Whyte & Mackay, had told the committee that a minimum price of 50p per unit would lead to the loss of 300 jobs at the company. “At no point during your oral evidence,” SNP committee convener Christine Grahame wrote to Beard, “did you clarify that this estimate was based on a potential UK-wide minimum price.”

Beard admitted the 300 jobs would be lost UK-wide, and only if the Westminster government also introduced the policy. In Scotland, he now said, the policy would cost 83 jobs.¹³

For SNP health secretary Nicola Sturgeon, addressing parliament on 10 November 2010, “The sad but inevitable conclusion,” was that “for Labour, the policy really has only one fatal flaw, which is that it is proposed by the Scottish National Party.” It was, she added, “pathetic.”

Undeterred by the difficulty, the SNP bounced back in 2011 with a manifesto commitment to introduce minimum pricing. In May 2011, the electorate returned the SNP to power with its first majority—69 of parliament’s 129 seats—and minimum pricing was no longer prey to party politics.

Donald Henderson, head of public health for the Scottish government, said: “Now the SNP had an overall majority, and so they had a majority on all the parliamentary committees.”

That, he said, “inevitably meant that the industry had less to work with. They could still provide material for the opposition, but the votes were against them.”

Fostering opposition

But the industry still had plenty of friends in parliament and, just four months after the SNP’s return to power with a majority, it reached out to them. In September 2011, inspired by its long

running involvement in all party groups at Westminster supporting the interests of the drinks industries,¹⁹ it played a key part in the formation of a cross party group on Scotch whisky.

There was, insisted Baillie, a founder member of the group, no relation between the two events—“Not in my mind, certainly. I can’t speak for the Scottish whisky industry.”

Neither can Mary Scanlon, Conservative MSP for Highlands and Islands and co-convenor of the group. But she concedes that, although the idea for such a group had been “on the cards” for years, the Scotch Whisky Association had suggested the group be set up and made overtures to MSPs who had expressed support for the industry or were from

regions where distilleries played a key part in the local economy.

“They said, ‘Look, there’s so much devolved to the Scottish parliament. We are a major industry in Scotland and next to North Sea oil it’s the biggest

exporter, so really we should be engaging with you guys much more.”

There was, insisted Scanlon, no contradiction between her support of the Scotch whisky industry and her membership of the parliament’s drug and alcohol misuse group. “It’s much more complex than that,” she said. “The whisky association has just set up a foundation trust to help to reduce alcohol harm. They want people to consume their product but not to do it irresponsibly.”

The group’s secretariat was supplied by the Scotch Whisky Association, the group’s corporate members included Diageo and Chivas Brothers, and the first person to address the group was Gavin Hewitt, the association’s chief executive, who helpfully offered to supply members with a distillery map, “to aid identification of constituency sites.” The meeting, attended by a dozen MSPs, closed with a whisky tasting.²⁰

“If the suggestion has been made to you by the anti-alcohol lobby that somehow we were unduly influenced, then that’s just complete nonsense,” says Baillie.

Public health groups suspected that some of the EU responses had been cut and pasted from industry propaganda



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Legal challenges

The Alcohol (Minimum Pricing) (Scotland) Bill was passed in May 2012 by 86 votes to one against, with 32 abstentions—Labour refused to support the measure²³—and achieved Royal assent on 29 June 2012.²⁴ Barely a month later, the Scotch Whisky Association announced it was challenging the legislation on two fronts. It would file a petition for judicial review with the Scottish Court of Session and lodge a complaint to the European Commission that the policy would breach EU trade rules and “artificially distort trade in the alcoholic drinks market.”

The whisky industry’s main concern—in the words of the whisky association’s complaint—was that “other countries are likely to adopt measures similar to MUP and use a ‘protection of health’ justification to target imported products.” Such “copy-cat measures,” said the association, could cost the industry £500m in lost exports.

The SWA was not alone. Its co-petitioners to the Scottish courts included the European Spirits Organisation (since renamed SpiritsEurope) and the European Wine Committee, whose members account for 90% of European wine exports.²⁵

Uncharacteristically, Europe’s bureaucrats were quick to act, issuing a detailed opinion just over two months later. Alcohol Focus Scotland, which prepared a line-by-line analysis of the European Commission’s opinion, concluded it contained inaccuracies and made “selective use of evidence and examples.” Worse, says Gillan, the opinion seemed to parrot industry views.

“The EC opinion was very poor, with factual inaccuracies. It was really clear that the industry had been doing massive lobbying over the summer months and about two days before the EC was due to issue its response to the UK and Scottish governments, a number of member states rushed in responses in opposition.”

Public health groups suspected that some of these responses had been cut and pasted from industry propaganda—and one apparently carelessly edited document, seen by the *BMJ*, seems to demonstrate this. Ostensibly from the Polish government’s department of industry, it opens

with the words, “Browary Polskie [Polish Brewers], a member of The Brewers of Europe, wishes to request that the European Commission take a negative position with regard to the application.”

Equally seriously, says Gillan, “One of our criticisms of the EC opinion was that [some of] the words they had used matched exactly a briefing that Diageo had sent round the member states.”

Diageo had commissioned this “private and confidential” report, also seen by the *BMJ*, from Irish economic consulting firm Compecon. In addition to being sent to member states, the report was presented at a meeting organised in Strasbourg by Scottish Conservative MEP Struan Stevenson on 12 September 2012, just two weeks before the EC issued its opinion.

Stevenson believed the policy had been introduced “without due care and consideration for the wider impacts [it] may have on trade within and outwith the EU.” At the meeting were Pat Massey, Compecon’s director, and representatives from the Brewers of Europe, Scotch Whisky Association, European Spirits Organisation, and Wine and Spirit Trade Association.²⁶

Doubtless buoyed by the commission’s opinion, the industry turned to its judicial review in the Court of Session, Scotland’s supreme civil court—and ran into a brick wall. In his judgment on 3 May 2013, Lord Doherty wrote: “none of the challenges to the minimum pricing measures is well founded” and the petition was refused.²⁷

The Scotch Whisky Association immediately announced it would appeal.

Meanwhile, minimum pricing is in limbo. The appeal, expected to last five days, is scheduled to start at the Inner House of the Court of Session on 6 February, though the industry did its best to bypass the Scottish legal system and fast track the case to the European Court of Justice (ECJ) in Luxembourg.³⁰

Rosemary Gallagher, communications manager at the Scotch Whisky Association, told the *BMJ*. “We are disappointed that the governments did not support ECJ referral to allow for an earlier resolution of the matter.”

Gillan has a slightly different take on the initiative. “They were desperate to get this referred to the ECJ,” she said, “because they see the climate as more sympathetic to their trade concerns.”

The case is, of course, likely to end up in Europe anyway, as the final destination in a long and costly rearguard action that will draw deeply on Scotland’s public purse and cost hundreds of lives for each year the industry manages to keep minimum pricing at bay. If the Court of Session upholds Lord Doherty’s ruling, the industry is expected to appeal to the Supreme Court in London and, should that fail, to Luxembourg.

This is a process that could drag on for years—the Supreme Court is currently listing cases for early 2015. “Because the Scottish Whisky Association were seeking an interim interdict to stop us implementing minimum pricing . . . we have given an undertaking not to . . . until the domestic judicial process is finally determined,” said a spokesperson for the Scottish government. That process, she added, included any reference to the European court from the UK courts.

It is clear the industry has been buoyed not only by its victory in London, where last year its intensive lobbying succeeded in persuading David Cameron’s government to renege on its pledge to introduce minimum pricing, but also by having talked the Westminster coalition into the relatively worthless alternative measure of banning sales at below cost price.¹⁹

Gillan believes the Scotch Whisky Association is “determined to drag out the legal process for as long as possible. In doing so, it follows in the footsteps of the tobacco industry, which spent decades delaying the implementation of public health policies.”

It was, she said, “deplorable” that powerful corporate interests were able to delay life saving legislation approved through the democratic process.

“In April this year, it will be exactly one year after the minimum pricing legislation should have taken effect,” she said. “How many lives might have been saved in that time?”

“If we are serious about reducing the widespread health and social harm that alcohol causes, then we need to get serious about curbing corporate power.”

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