



Law Society
of Scotland

Consultation Response

Wholesalers: Minimum Unit Pricing of Alcohol and Trade Sales

29 October 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work the promotion of a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Licensing Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation: Wholesalers: Minimum Unit Pricing (MUP) of Alcohol and Trade Sales (Consultation). The issue being addressed in the Consultation relates to "sales to trade" being exempt from the Minimum Unit Pricing (MUP). Our members represent the interests of the industry and are involved in advising individuals and organisations in relation to making licensing applications. They also include those working in-house with licensing boards in relation to grant, management and enforcement measures.

We question whether the amendment to deal with "sales to trade" can be resolved by means of secondary legislation as proposed by the Consultation. Furthermore, the Consultation does not address the concerns of licence-holders where they are involved in sales to both individuals and trade.

Our comments refer to:

- Scottish Statutory Instrument – The Alcohol (Minimum Price per Unit) (Scotland) Amendment Order 2019 (the Order)
- Guidance supporting the introduction of the MUP policy

The Order:

We are aware of the background debate in relation to The Alcohol (Minimum Price per Unit) (Scotland) Order 2018 (2018 Order) where the issue with regard to sales of alcohol to trade was raised:

"...been in discussion with the Scottish Wholesale Association about the policy, and there is a small technical wrinkle..... some members, such as wholesaler organisations or companies, also have or are operating with a premises licence. It creates a bit of a loophole or a problem for them, in that they might

need to use dual pricing or have separate aspects to their building. Is the Government offering a workaround for that?’¹

We welcome the attempt to resolve the issue created regarding “sales to trade”. However, we consider that the Order as currently drafted is not going to achieve the policy that *“there is no intention and there never has been any intention by the Scottish Government that Minimum Unit Pricing would apply to trade sales”*.

The Powers:

The powers under which the Order is being made are expressed as section 146(2), paragraph 6A (4) of schedule 3 and paragraph 5A (4) of schedule 4 all respectively of the Licensing (Scotland) Act 2005 (2005 Act). Subsection (4) of both paragraphs 6A and 5A refer to:

“The Scottish Ministers are to specify by order the minimum price per unit for the purposes of sub-paragraph (3)”.

Paragraph 6A (4) and paragraph 5A (4) of the 2005 Act do not therefore provide relevant powers under which this Order can be made. All they permit is that the MUP can be set out by secondary regulations (as was achieved by The Alcohol (Minimum Price per Unit) (Scotland) Order 2018).

Section 146(1) of the 2005 Act allows Scottish Ministers to make orders or regulations but these powers in terms of subsection (2) are limited to be “incidental, supplemental, transitional, transitory or saving provision as Scottish Ministers think necessary or expedient.”² Making the change regarding “sales to trade” does not appear to fall into any of these categories that allow this to be achieved by means of secondary legislation.

We believe that the best way to resolve this issue would be by making a change to the relevant primary legislation. The required change would not be achieved by means of this Order.

Section 1 of the Alcohol (Minimum Pricing) (Scotland) Act 2012 (2012 Act) amended Schedule 3 (premises licences: mandatory conditions) and Schedule 4 (occasional licences: mandatory conditions) of the 2005 Act by inserting respectively paragraphs 6A and 5A. In both paragraphs (6A) and (5A), subsection 1 states that:

(1) Alcohol must not be sold on the premises at a price below its minimum price.

¹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11472>

² Section 146(2) of the 2005 Act.

It is that subsection that causes the issue for “sales to trade” and requires amendment. There is no mention in the policy memorandum to the 2012 Act of discussion about any exemption for “sales to trade”.

We would therefore question if the making of this Order to deal with the issue to “sales to trade” is the correct approach.

However, if an Order is to follow, we would make the following comments:

Is there a need for the proposed definition for “sales to trade” to be inserted? “Sales to trade” is already a term defined at section 147(2) of the 2005 Act. Should reference, if required, for the purposes of the Order not be made to that definition? We refer to our call for urgent consideration for consolidation of the 2005 Act as it has been described as a ‘technical jungle’³.

Article 2(2) of the Order, as currently drafted, proposes that the definition of “sales to trade” comes in after the words Article 1(2) of 2018 Order. That would mean that these words would come after “In this Order (2)” which does not appear to be the correct position.

Article 2(2) of the Order also refers to article 1(2) (interpretation) of the 2018 Order. That is also incorrect. The heading of the 2018 Order reads “Citation commencement and interpretation”. It might be appropriate would be to separate the interpretation section from the citation and commencement section.

Guidance for Wholesalers:

The Consultation refers to the ‘Guidance for wholesalers’. We consider a number of aspects relating to the Guidance remain unclear.

The preamble to the Guidance states “*Please note that this document is guidance only and you should seek your own independent legal advice*”⁴ Despite this, the Guidance seems to suggest that “*If you have a query which you consider has not been addressed in this document, please email mup@gov.scot*”. That would tend to imply endorsement by Scottish Government. Clarification regarding the status of such Guidance would be helpful.

The Consultation link refers to the “Final Draft Guidance on the Implementation of Minimum Unit Pricing for Alcohol”.⁵ Please advise if the draft status on the Guidance should be removed?

3 Preface to Third Edition Licensing (Scotland) Act 2005.

4 <https://www.scottishwholesale.co.uk/news/posts/2018/march/scottish-wholesale-association-guidance-note-for-wholesalers-on-minimum-unit-pricing-mup-and-licensing/>

5 <https://www.scottishwholesale.co.uk/news/posts/2018/march/scottish-wholesale-association-guidance-note-for-wholesalers-on-minimum-unit-pricing-mup-and-licensing/>

The Guidance refers to:

“8. Following consideration of the Scottish Parliament process, it is intended minimum pricing will come into force on 1st May 2018. There will be no period of grace allowed for the implementation of minimum pricing”.

The legislation is now in force as the Consultation refers. This should be amended to reflect this.

We would assume that the intention will be to update the Guidance following whatever steps are taken to deal with the “sales to trade” issue. We would repeat our concerns that *‘information and guidance [was to be] easily located preferably in one place and in suitable formats for all to understand.’* This was highlighted in our response to the earlier Consultation on the Minimum Unit Pricing of Alcohol⁶.

Conclusion

Irrespective of how the change to deal with “sales to trade” is resolved, this will still mean that schedule 3 (premises licence holders) and Schedule 4 (occasional licence holders) will require to comply with dual pricing where licence holders sell to the public and to the trade. How do they know that they are selling to trade? Does this involve checks? Given that they require to comply with the MUP requirements as far as their licences are concerned, if they sell to trade or the public at the incorrect price, that will have significant consequences for them. See too paragraphs 8 and 9 of the Guidance⁷.

We assume that the proposal is to resolve the current difficulty as a matter of urgency. That highlights our comments with regard to the need for the Scottish Government to ensure that all information and guidance required is issued in time for its commencement. We previously identified were concerns regarding timescales for 1 May 2018 and the implications for all involved to be adequately advised about the implications of the MUP policy changes. That remains the case in what appears to be an issue that has been outstanding from before May 2018.

⁶ <https://www.lawscot.org.uk/media/359533/consultation-minimum-unit-pricing-of-alcohol.pdf>

⁷ <https://www.scottishwholesale.co.uk/news/posts/2018/march/scottish-wholesale-association-guidance-note-for-wholesalers-on-minimum-unit-pricing-mup-and-licensing/>

We would be happy to discuss any further matter arising from our comments which we trust are helpful for your purposes.

For further information please contact:

Gillian Mawdsley
Policy Team

Law Society of Scotland

DD:0131 476 8206

GillianMawdsley@lawscot.org.uk