

# Alcohol and Trade

**PHE's Alcohol Advisory Group  
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# PETRA

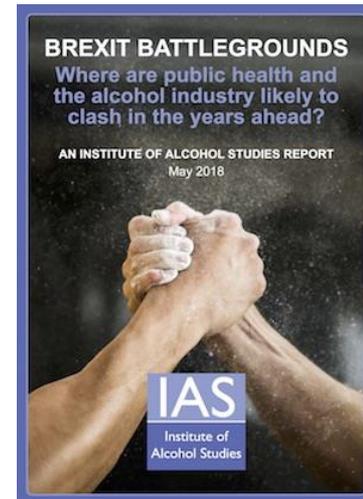


Prevention of non-communicable disease using trade agreements



# International Trade and Public Health

- Free trade has never been unlimited
- Public health is a **core responsibility** of governments
  - Legal obligation of governments to respect, protect and fulfil right to health
- **BUT** requirement to **operate within the constraints** of international trade law. E.g. principles of
  - **non-discrimination** (rules have to be origin neutral)
  - **necessity** (rules must not restrict trade excessively)
- International trade law as a key component of the strategies of **industry actors**



# Defining the UK's new trade policy

- Determining the scope of **EU rules** and clarifying its relationship with the EU
- Understanding the margin of discretion the UK retains under international trade law (particularly **WTO law**)
- Negotiating **new bilateral / multilateral trade agreements**

# EU regulation of the alcohol industry characterised by a paucity of legally binding rules



# EU legislation on alcoholic beverages

- **Three main EU internal market measures apply to alcohol:**
- **Regulation 1924/2006** (nutrition and health claims made on foods): bans the use of nutrition and health **claims** on alcohol
  - Unsuccessfully challenged in *Deutsches Weintor* (2012)
- **Regulation 1169/2011** (food information to consumers): mandates **indication of alcoholic strength by volume**
  - Exemption from the mandatory disclosure of the ingredients list and the nutrition imposed on other food
- **Directive 2010/13 as amended by Directive 2018/1808** (audiovisual media services): bans **alcohol advertising** aimed specifically at minors and encouraging immoderate consumption
  - Industry codes shall aim to reduce exposure of minors

# The *Cassis de Dijon* judgment



“**In the absence of common rules** relating to the production and marketing of alcohol [...], it is **for the Member States to regulate** all matters relating to the production and marketing of alcohol and alcoholic beverages on their territory.

Obstacles to movement in the Community resulting from **disparities** between the national laws relating to the marketing of the 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.” (at paragraph 8)

# Regaining control!?!

## From the EU to the WTO legal framework

- **Broad margin of discretion left to Member States under EU law due to the paucity of harmonising rules in this field**
  - the UK could already have done far more to regulate the alcohol industry as an EU Member State
- **What could change post-Brexit?**
  - Labelling rules / advertising rules / taxation rules
- **Compliance with WTO law:**
  - principle of non-discrimination (origin neutrality)
  - principle of necessity

# Case C-333/14 *Scotch Whisky* [2015]

Picture courtesy of Creative Commons



- Trade restriction
  - cheap imports may lose relative advantage
- Restrictions must be **justified**
  - **public health** as an objective ground of justification
- **BUT** to be justified, the restriction must be shown to be **proportionate / necessary**
- **Question of the burden of proof**

# Proportionality as a key legal principle

A MEASURE MUST BE SUITABLE  
(LEGITIMACY TEST)



IT MUST NOT EXCEED WHAT IS  
REQUIRED TO ACHIEVE A GIVEN  
OBJECTIVE (NECESSITY TEST)



A careful balancing exercise should be undertaken between potentially competing rights and interests on the basis of existing evidence

PARAMOUNT TO DEFINE THE OBJECTIVES PURSUED AND ADAPT THE MEANS TO THESE OBJECTIVES

## Case C-333/14 *Scotch Whisky* [2015]

'it does not seem unreasonable to consider that a measure that sets a minimum selling price of alcoholic drinks, the very specific aim of which is to increase the price of cheap alcoholic drinks, is **capable of** reducing the consumption of alcohol, in general, and the hazardous or harmful consumption of alcohol, in particular, given that drinkers whose consumption can be so described purchase, to a great extent, cheap alcoholic drinks' (at par. 36)



## Case C-333/14 *Scotch Whisky* [2015]

‘It is for the Member States to decide on the **level of protection of human life and health** which they propose to provide [...] while taking into consideration the **requirements of the free movement of goods** within the European Union’

‘It is for the national authorities to demonstrate that that legislation is consistent with the principle of proportionality’

‘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’ (par. 52-55)



## Case C-333/14 *Scotch Whisky* [2015]

‘In that context, it is **for the national court** called on to review the legality of the national legislation concerned to determine the relevance of the evidence adduced by the competent national authorities in order to determine whether that legislation is compatible with the **principle of proportionality**[...]

In this case, in the course of such a review, the referring court may take into consideration the **possible existence of scientific uncertainty** as to the actual and specific effects on the consumption of alcohol of a measure such as the MUP for the purposes of attaining the objective pursued.’ (at par. 56 and 57)



# Why does necessity / proportionality matter?

- Principle of **good governance**
  - **Ex ante**: a thorough proportionality assessment allows for a careful assessment of the pros and cons of an intervention (e.g. use of impact assessments) and therefore reduces the risk of successful challenges
  - **Ex post**: industry operators will challenge a measure if it does not comply with the principle of proportionality (**judicial review**)
- **Annulment**
  - waste of time and resources
  - regulatory 'chill effect' (or 'domino effect')



# LET'S SHIFT THE PARADIGM

International trade law has been used as a legal strategy to **challenge** health-promoting regulation

However, it does not prevent governments from ensuring that they effectively regulate the alcohol and other “vector-of-disease” industries

Fundamental rights should be used not only as a ‘**shield**’ to oppose industry challenges, but also as a ‘**sword**’ to regulate food industry operators