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HEALTH LEGISLATION: DEVOLUTION, RESERVATION AND DEROGATION

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1. Introduction

It is trite to opine that there are some policies more capable than others of stirring public debate. Health is one of them. It is for the most part devolved to the Scottish Parliament and, perhaps significantly, consumes a large part of its budget (33% of the next budget). However, determining the competence to legislate on public health initiatives to reduce smoking and alcohol consumption is surprisingly complex.

If the Scottish Parliament is to legislate in such policy areas, the subject matter must be devolved. For example, to prevent smoking in public places, the subject matter of the legislation cannot be construed as concerning or falling within the scope of employment law, which is reserved to Westminster. So when Ministers spoke about the legislation affecting the rights of those employed in pubs, the question was how this might affect the ability of the Scottish Parliament to legislate in the area.

2. Smoking

During the *Smoking, Health and Social Care (Scotland) Act 2005 (asp 13)*, and its back bench opposition predecessor, the *Prohibition of Smoking in Regulated Areas (Scotland) Bill*, it was acknowledged that employers have an obligation to ensure public safety.

During the Stage 1 proceedings of what was then the Health Committee, Nanette Milne MSP observed that "… the ban was introduced in Ireland as a health and safety at work measure. Obviously, we cannot do that here, because health and safety is a reserved matter." Even so, Andy Kerr MSP, then Minister for Health and Community Care, said later in the same evidentiary session that "[o]ur intention is to ensure that environments that are used by non-smokers are smoke free. A day care centre fits that bill and, further, is also a place of employment for people who we would want to protect."

The Committee also took evidence from employers as represented by the Scottish Licensed Trade Association. Ian McAlpine, on behalf of the Coal Industry Social Welfare Organisation Scotland, said "My organisation's view is that we whole-heartedly support the prohibition in enclosed public places. Our stance is based solely and specifically on the fact that it is a health and safety issue. Any employer has a duty of care to employees, and that duty of care must extend to the membership, user groups and volunteers who are using the facilities."

Announcing the overwhelming response to the Smoking in Public Places Consultation (press release 23 October 2004), the emphasis of the Scottish Executive was on statistics such as, "[s]moking kills an average of 13,000 Scots every year and is responsible for thousands more hospitals admissions" and, "[i]t is estimated that at least 20-25% of all deaths in Scotland result from smoking. Scotland has the highest rates of lung cancer in Europe for both men and women, with most cases caused by smoking." Specific reference was however made in the consultation to safety "in the workplace" and a duty of care under the *Health and Safety at Work Act 1974 (c.37)*. The consultation also conceded that, "this legislation is reserved to Westminster. Any laws restricting smoking in the workplace on the basis of health and safety would need to be legislated for at the Westminster Parliament on a UK basis."

In order that the legislation falls within the competence of the Scottish Parliament, it was crucial for the Scottish Executive to place the emphasis on health. The Scottish Parliament is not competent to address initiatives that fall within the subjects reserved to Westminster by virtue of Schedule 5 to the *Scotland Act 1998*. Matters of 'health and safety', and in particular those under Parts I and II of the *Health and Safety at Work etc Act 1974*, are reserved to Westminster by Section H2 of Schedule 5 to the Scotland Act. Section H3 however creates an exception for "[p]ublic safety in relation to matters which are not reserved", and health policy is a matter not reserved to Westminster.

Nevertheless, the *Smoking, Health and Social Care (Scotland) Act 2005* placed a duty on employers to enforce the ban. Indeed, section 1(4) made it an offence to permit others to smoke in non-smoking premises, subject to a maximum penalty of Level 4 on the Standard Scale (currently £2500) following summary conviction.

The then Scottish Executive also called for a "partnership between the licensed trade and government to help tackle three serious problems facing Scotland" (press release 26 October 2004): smoking, binge drinking among young people and alcohol fuelled violence. As the issue if smoking is about trade, employment and health, it is argued that it is mostly about public health and the emphasis on the latter is crucial in ensuring admissibility.

3. Alcohol

Similarly, under European Union law, in order to fall within the public health derogation (*Directive 64/221*) from the EU principle of free movement of goods and services, national measures should be primarily concerned with the protection of the health and life of humans, animals or plants.

An example may be the bill on minimum alcohol pricing that is currently going through the Scottish Parliament: if the bill is not to fall foul of EU law on competition, free trade and free movement of goods, the issue must fall under "health", such that it is within (i) the powers granted to the member state and (ii) the competence of the Scottish Parliament. The question of competence is particularly important, as anti-competitive practices and agreements, abuse of dominant position, and monopolies and mergers are all matters reserved to Westminster by Section C3 of Schedule 5 to the *Scotland Act* – and are indeed the preserve of EU law.

On 26 November 2009, the Scottish Government announced the publication of the *Alcohol etc (Scotland) Bill*, which proposes to set minimum prices per unit of certain kinds of alcohol "favoured by problem drinkers". The *Bill* amends the *Licensing (Scotland) Act 2005 (asp 16)*, which itself concerns matters devolved to the Scottish Parliament, and the Policy Memorandum to the *Bill* is very much focused on the health effects of alcohol consumption.

Although both the Cabinet Secretary for Health and Wellbeing (Nicola Sturgeon MSP) and the Presiding Officer (Alex Fergusson MSP) made the required statements in the Explanatory Notes to the *Bill* (paras 136-137) that the *Bill* is within the legislative competence of the Scottish Parliament, these statements are conventionally not accompanied by reasons for having come to that decision.

That said, according to the Policy Memorandum to the Bill, the provisions are explicitly about health, insofar as the Policy Memorandum set out to impose "minimum pricing to protect and improve public health by reducing alcohol consumption". The question is whether such an initiative amounts to a Measure Equivalent to a Quantitative Restriction (MEQR). Such measures are prohibited under Articles 34 and 35 of the Lisbon Treaty (ex Articles 28 and 29 of the Treaty Establishing the European Community (TEC)).

In *Openbaar Ministerie v Van Tiggelei*[1] the European Court of Justice (ECJ) addressed this issue in relation to Dutch legislation that set out minimum selling prices for certain spirits. The question was whether the minimum selling prices amounted to a MEQR within the meaning of Article 30 (now Article 36 of the Lisbon Treaty) of the TEC, which prohibits actions by a state that promote or favour domestic products to the detriment of competing imports. In this case, the ECJ found that imports may be impeded where prices or profit margins are fixed at a level that places imported products at a disadvantage, but that prices fixed by reference to profit margins may be more compatible with Art 28 (now Art 34).

Discriminatory barriers to trade may however be justified under Article 30 (see above) in some circumstances, including public morality (*R v Henn and Darby*),[2] public policy (*Cullet v Centre Leclerc*),[3] public security (*Campus Oil Ltd v Minister for Industry and Energy*)[4] or indeed the protection of health and life of humans, animals, or plants.

This final category is of obvious interest here. The ECJ will be concerned that the protection of public health is in fact the purpose of the measure being contested. Where in *Commission v United Kingdom*[5] the UK banned poultry imports from France ostensibly to prevent the spread of Newcastle disease, the ECJ rejected that argument, finding that the ban had been imposed for more commercial reasons. On the other hand, in *Officier van Justitie v Sandoz BV*,[6] in which the import of certain muesli bars was banned because certain vitamins in them were harmful to health, the ECJ indicated that it will decide whether the health claim is sustainable in principle, in the face of any uncertainty about the medical principles behind a measure.

It is important, therefore, that legislatures stress that the health implications of any provision are the main concern of the legislation – to bring it first within the authority of the member state, and secondly within the legislative competence of the subordinate legislature. If, in this case, the public health derogation from the principle of free movement of goods and services applies to minimum pricing, it will also devolve the matter to the Scottish Parliament; that is to say the initiative will be possible in the United Kingdom, and hence also in Scotland. It will be permissible because we can call it "health".

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[1] [1978] ECR 25.

[2] [1979] ECR 3795.

[3] [1985] ECR 305.

[4] [1984] ECR 2727.

[5] [1982] ECR 2793.

[6] [1983] ECR 2445.