Rethink Your Drink

JANUARY 2026

MINIMUM UNIT PRICING

POLICY BRIEF 11

Key considerations for alcohol minimum pricing legislation in South Africa

Alcohol pricing policy sits at the centre of South Africa's efforts to reduce harmful consumption. This policy brief examines the legislative and regulatory challenges surrounding minimum unit pricing, including the implications of provincial competencies, eCommerce, and cross-border purchasing. It sets out the case for a unified national pricing framework, highlighting the legal risks, public health evidence, and consultation requirements necessary to advance minimum unit pricing as a defensible and effective reform.

About the author

Stephen Harrison, attorney and sole proprietor of **Stephen Harrison Attorney**, a general legal practice with a focus on public interest law. His education and professional career have been at the interface of public law and public health, with experience in government, parastatal bodies, non-governmental organisations and higher education.

Publication details
Author: Stephen Harrison, Attorney
Commissioned by: DG Murray Trust (DGMT)
Place of publication: Cape Town, South Africa
Year of publication: 2026

Contents

Executive Summary 4

Key Legislative and Policy Considerations 4

4

4

4

5

5

5

5

5

5

6

Introduction 7

MUP: National or Provincial Legislation? 9

Overview of the Constitutional schema 9

Application of the Constitutional schema to MUP 12

Minimum Wholesale Pricing 12

Minimum pricing legislation: a Schedule 5 competence? 12

Other key questions affecting legislative development. 16

Cabinet portfolio for minimum pricing? 16

Which liquor sales should be subject to minimum pricing? 19

Calculating Minimum Unit Prices 21

Determining and Reviewing MUP 23

Other Drafting Considerations 25

Possible Legal challenges 26

Challenges Under Domestic Law 26

Is government acting within the scope of its powers? 26

Does minimum pricing result in unequal treatment before the law? 27

Does minimum pricing violate property rights? 30

Does minimum pricing violate freedom of trade? 32

Challenges under international law 33

Conclusion 37

References 38

ANNEXURE 43

Annexure: Draft Liquor (Minimum Pricing) Amendment Bill 44

Executive Summary

Minimum unit pricing (MUP) legislation sets a legally mandated lowest price for alcoholic beverages, preventing sales of alcohol below a set lowest price level. The purpose of a lowest minimum price is to curb harmful alcohol consumption by targeting the cheapest alcohol products, which are most consumed by consumers of high levels of alcohol. Fourteen countries have implemented this measure, often alongside excise taxes, as excise taxes alone may not sufficiently deter excessive consumption.

South Africa ranks among the highest globally for high risk and harmful alcohol consumption, with major social and economic costs. Against this backdrop, minimum pricing has emerged as a necessary intervention.

The Western Cape is exploring provincial level options, while National Treasury has signalled support for a national minimum pricing policy. This Policy Brief outlines key legislative considerations, supported by a draft Liquor (Minimum Pricing) Amendment Bill annexed for discussion, and concludes with an assessment of potential legal challenges.

Key Legislative and Policy Considerations

National vs. Provincial Implementation

The Constitution grants provinces exclusive competence over liquor licensing, extending to retail sales. Provinces could therefore enact minimum pricing laws. However, national legislation is preferable to safeguard economic unity under section 44(2)(b) of the Constitution, given the risks of cross-border purchases and the growing eCommerce trade in alcohol.

Choice of Cabinet Portfolio

While public health arguments favour oversight of this legislation by Health or Social Development, practical considerations suggest the Minister of Trade, Industry, and Competition, who already regulates the liquor trade. An inter-ministerial process will be essential for policy design and implementation.

Scope of Legislation

Decisions are needed on whether minimum pricing applies to wholesale or retail sales, on or off-premises consumption, and all or only some types of liquor. This Brief proposes coverage of both on and off-premises consumption retail sales across all

liquor types, with provision for regulated exceptions. Likely exceptions include traditional African beer, historically treated differently in tax policy, and duty-free purchases by outbound travellers.

Basis for Minimum Prices

Internationally, minimum prices are set by volume or alcohol strength. The latter is recommended for South Africa, as it avoids complex beverage-specific pricing and definitional disputes. Simple formulas, such as those in Scotland and Wales, would aid compliance and enforcement.

Periodic Review

The World Health Organisation (WHO) recommends institutionalising periodic adjustments to maintain effectiveness. Approaches vary internationally, with some countries (e.g. Scotland, Wales) also including sunset clauses to mandate reviews. Given growing evidence of effectiveness, a sunset clause may be unnecessary, though regular review remains important.

Legislative Detail

Jurisdictions differ in how much detail is set in primary law versus regulations. Given the significance of minimum pricing, South Africa may prefer to embed greater detail in the principal Act to enhance clarity and legitimacy.

Potential Legal Challenges

Domestic Law

Challenges may question the competence of the legislating authority or allege violations of rights to equality, property, and freedom of trade (sections 9, 25, and 22 of the Constitution).

Equality: While lower-income consumers may feel greater financial impact, evidence shows they also gain the greatest health benefits, supporting proportionality.

Property: MUP regulates pricing but does not prohibit sale; this is unlikely to amount to arbitrary deprivation.

Freedom of trade*:* Regulation of practice is constitutionally permissible and does not bar participation in trade or occupation.

Robust evidence linking minimum pricing to public health objectives will strengthen the legal defence.

International Trade Law

As a World Trade Organisation (WTO) member, South Africa must avoid disadvantaging imports under the General Agreement on Tariffs and Trade (GATT) Article III:4. To mitigate risk, minimum pricing should not be tied to domestic pricing benchmarks. If challenged, Article XX(b) of GATT provides a defence where measures are necessary to protect health, provided strong evidence supports the public health rationale.

Conclusion

MUP is a targeted, evidence-based tool to reduce harmful alcohol consumption, with significant potential to improve health and social outcomes in South Africa. National legislation is recommended to ensure consistency, prevent cross-border avoidance, and support enforcement. While legal challenges may arise, both constitutional and trade law frameworks provide defensible grounds for MUP if designed with clear public health objectives and supported by evidence.

Introduction

MUP[1] introduces a legally prescribed lowest price for an alcoholic product below which it cannot be sold to consumers.[1] MUP specifically impacts the sale of the cheapest alcohol, thereby effectively targeting heavy alcohol consumption because cheap alcohol tends to be drunk disproportionately by the people who consume the highest amount of alcohol.[1] MUP is therefore advanced as a complementary measure to excise tax policies,[2] which are considered to be too blunt an instrument to specifically target heavy alcohol consumption.[3] To date, MUP policies have been implemented in fourteen countries.[1]

The need to address heavy alcohol consumption is particularly acute in South Africa, which has a particularly poor record of harmful alcohol consumption patterns, ranking among the countries with the highest population of people who consume dangerous levels of alcohol in the world.[5]

There is a strong correlation between high levels of alcohol consumption and the availability of cheap alcohol products in South Africa. A study found that more than 90% of alcohol consumed by regular high alcohol consuming households had a unit value of R5,00 or less per standard drink (2019 prices), compared to 9% by moderately alcohol consuming households.[3] In recent years, minimum pricing for alcohol has been mooted by South African policymakers as an intervention requiring consideration in the country.

In 2017 the Western Cape Government (WCG) released its Alcohol-Related Harms Reduction Policy White Paper, which proposed that the WCG should "lobby national government to increase the price of alcohol through increasing excise tax and/or introducing minimum pricing".[5.]

In June 2023, the WCG issued a call for input on various policy proposals, including a proposal for the introduction of provincial legislation imposing MUP for alcoholic beverages sold in the Western Cape.[6]

[1] A technical distinction is sometimes drawn between a "minimum price", which sets a minimum price in relation to the overall volume of an alcoholic beverage, and a "minimum unit price", which sets a minimum price in relation to the volume of alcohol in a beverage.[1] In this paper, we do not make this distinction in terminology, and instead use the word "minimum pricing" as a generic term to cover both scenarios, unless the context indicates otherwise.

At a national level, National Treasury's 2014 Review of the Taxation of Alcoholic Beverages in South Africa reflected on the potential for minimum prices as a possible non-tax intervention to address high alcohol consumption and associated social harms.[7]

In November 2024, National Treasury released a discussion document in which it indicated support in principle, for the implementation of MUP presumably at national level.[8]

The discussion below does not focus on the evidence supporting a policy decision to introduce MUP for alcoholic beverages in South Africa. Instead, assuming that such a policy decision is taken, it provides guidance on some key considerations for formulating legislation on minimum pricing.

The discussion starts with the question of whether MUP legislation should be appropriately developed at national or provincial level, given South Africa's Constitutional dispensation relating to the functions and powers of the various spheres of government. The discussion then turns to more practical issues such which Cabinet Portfolio is most appropriate to manage MUP legislation, what form the legislation should take, and options around the ambit of the legislation.

The purpose of this discussion is to highlight key legal and policy issues which need to be considered and debated by policymakers and lawmakers when introducing legislation, rather than to provide definitive answers to all the questions. To illustrate the decision-points and stimulate discussion at a very practical level, a Liquor (Minimum Pricing) Amendment Bill has been drafted and is included as an Annexure.

The Bill reflects *possible* approaches to resolving the various options which are presented, accompanied by discussion on the decision-making factors which informed the drafting (highlighted in blue in the text). It must be emphasised that the Bill does not necessarily reflect the best possible approach to resolving the issues in question and therefore should be considered as a basis for discussion rather than a recommended formulation of the legislation.

Finally, this document concludes with a discussion of some of the possible legal challenges which lawmakers can anticipate when passing minimum pricing legislation. This includes legal challenges in terms of domestic law, specifically in relation to averments of Constitutional violations, and in terms of international law, with particular reference to potential allegations of breach of the GATT under the WTO.

MUP: National or Provincial Legislation?

In the last few years, proposals have been made to introduce MUP both at a provincial and a national level.

From a public health perspective, implementation of MUP at national level holds significant advantages relative to provincial MUP. Alcohol consumption is a national problem in South Africa which transcends provincial boundaries.[9] A national MUP would target harmful alcohol consumption patterns across the country and would ensure that vulnerable populations in all provinces benefit equally from resultant reductions in alcohol-related harms.

A national MUP will also prevent public health objectives being undermined by cross-provincial border shopping (both through physical outlets and eCommerce) if there is inconsistency of application of MUP between provinces.

The question then arises whether, from a Constitutional perspective, the competence to pass legislation introducing MUP vests in national government, provincial government or both.

Overview of the Constitutional schema

South Africa's Constitution provides that Parliament has the power to pass legislation with regard to any matter,[2] within limited circumstances in which it may legislate on matters listed in Schedule 5 of the Constitution, which lists the functional areas of exclusive provincial legislative competence.

[2] Section 44(a)(ii)

"Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—

(a) to maintain national security;

(b) to maintain economic unity;

(c) to maintain essential national standards;

(d) to establish minimum standards required for the rendering of services; or

(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole." [b]

As indicated above, subject to the powers of Parliament to intervene in terms of section 44(2), provincial legislatures have exclusive competence to pass legislation on matters within functional areas listed in Schedule 5. In addition, a provincial legislature shares concurrent competence with Parliament to pass legislation regarding matters falling within functional areas listed in Schedule 4. They may also pass legislation regarding other matters expressly assigned to them by national legislation.[3]

In respect of the Schedule 4 areas of concurrent legislative competence, in the event of conflict between provincial and national legislation, section 146 of the Constitution provides a framework for determining the circumstances in which national, or provincial, legislation would prevail. In relation to Schedule 5 matters, in those limited circumstances in which Parliament validly passes legislation in accordance with section 44(2), that national legislation would prevail over provincial legislation to the extent that there is conflict.[4]

For purposes of the current discussion, it is important to note that –

- "trade" falls within the functional areas listed in Schedule 4 (matters of concurrent national and provincial competence); and
- "liquor licences" fall within Schedule 5 (matters of exclusive provincial legislative competence, subject to section 44(2)).[5]

[3] Section 104(1)(b)
[4] Section 147(2)
[5] "Control of undertakings that sell liquor to the public" is also a functional area listed under Schedule 5 – specifically Schedule 5B which lists matters in respect of local government may also make laws (to the extent that they do not conflict with provincial or national legislation). It seems inconceivable that

In the 1999 Liquor Bill case,[10] which concerned the constitutionality of the Liquor Bill, 1998, the Constitutional Court provided a framework for determining the circumstances where national and provincial government respectively had the competence to legislate about liquor matters.

The Court found that national government had the power to regulate trade in all respects other than liquor licensing, including:

> *"matters pertaining to the determination of national economic policies, the promotion of inter-provincial commerce and the protection of the common market in respect of goods, services, capital and labour mobility."*[6]

The legislative competence of national government extends to manufacturing[7] and the wholesale distribution of liquor, for which national legislation is required due to that trade entailing a significant national and international dimension.[8]

The court suggested that the competence for national government to make legislation in this regard either arose from the fact that they fell outside the ambit of the exclusive competences in Schedule 5[9] or, if they did fall under the ambit of "liquor licences" in Schedule 5, because the maintenance of economic unity for the purposes of section 44(2)(b) necessitated national legislative intervention.[10]

The Court found that the retail sale of alcohol fell within the ambit of "liquor licences" in Schedule 5A of the Constitution, and as such is an exclusive legislative competence of provincial governments, subject to the provisions of section 44(2) of the Constitution. The Court's reasoning was based on an understanding that the retail sale occurred, almost without exception, intra- rather than inter-provincially.[11]

---

minimum pricing would be interpreted as falling within this functional area, though, as it cannot reasonably be construed as a local government matter.
[6] Para 58
[7] Excluding micro-manufacturing
[8] See para 72-74
[9] Para 74
[10] Para 78.
[11] See, for example, para 71.

The court explained the significance of the distinction between matters requiring regulation inter-provincially versus intra-provincially as follows:

> *"From this it is evident that where a matter requires regulation inter-provincially, as opposed to intra-provincially, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under Schedule 4, or through the powers of intervention accorded by section 44(2). The corollary is that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially."*[12]

Application of the Constitutional schema to MUP

Applying the principles outlined in the Liquor Bill case, the answer to the question of whether legislation concerning minimum pricing for liquor is a national or provincial competence depends on the nature of the legislation.

Minimum Wholesale Pricing

From the discussion on the Liquor Bill case above, it is clear that the regulation of wholesale distribution of liquor falls within the legislative domain of national government. Wholesale distribution of liquor includes distribution to other manufacturers or distributors, and to retail sellers, but excludes sales directly to consumers.[13] It follows that if minimum pricing was to be applied to the wholesale trade in liquor, this would require legislation at a national level.

See the discussion on wholesale versus retail minimum pricing under "Legislative Options" below.

Minimum pricing legislation: a Schedule 5 competence?

Provincial legislation requiring minimum pricing for liquor retailers within their province would almost certainly fall within the functional area of "liquor licences" under Schedule 5, and therefore would constitute a provincial legislative competence subject

[12] Para 52.
[13] Section 4(2) of the Liquor Act, No. 59 of 2003

to the powers of national government to intervene through legislation in circumstances contemplated in section 44(2) of the Constitution.

Any doubt on this is likely to be removed by framing provincial legislation in such a way that adherence to minimum pricing is a necessary condition for the award of a licence for the retail sale of liquor within the province.

A major confounding factor though, lies in the regulation of pricing of liquor sales through eCommerce which now constitutes a significant component of the retail trade in liquor in South Africa, a development which could not reasonably have been foreseen by the Constitutional Court at the time of the 1999 Liquor Bill case.

The eCommerce trade in alcoholic beverages expanded rapidly during the Covid-19 pandemic, with online liquor sales in South Africa growing 1787% in 2020 alone.[11] Globally, the value of the alcoholic beverage eCommerce market is expected to reach nearly US$40bn by 2027.[12]

The South African alcoholic beverage eCommerce market accounts for 55.0% of the beverages eCommerce market in South Africa and was predicted to reach US$63.2 million by 2024, with continued growth thereafter.[13] A recent court filing by one online supplier of alcohol in South Africa, Takealot Online Pty Ltd, indicated that a pause in alcohol sales in South Africa over the December 2023 / January 2024 period due to regulatory action resulted in a loss to that particular company of an average of R900,000 per day.[14]

Given the significant and growing scale of the retail sale of liquor through eCommerce, it is reasonable to assume that MUP legislation which excludes sales through eCommerce will likely be ineffective, increasingly so as consumers shift their purchasing to online platforms to avoid minimum prices.

A province may attempt to introduce MUP for eCommerce retailers but restrict the application of those prices to transactions made by purchasers within its province, thereby retaining the intra-provincial nature of the legislation. To the extent that the eCommerce retailer is licensed within the province in question, it may be possible to do so in theory, but this would soon give rise to legal and administrative challenges.

First, it is likely that eCommerce retailers will challenge such legislation on the basis, albeit tenuous in our view, that powers to regulate the retail sales of liquor vest only in the provincial licensing authority in which eCommerce sales transactions are processed electronically, typically the province in which the head office is located.[14]

More importantly, attempts by provinces to prescribe minimum prices for eCommerce sales within their own province will, for reasons set out below, be subject to national override in terms of section 44(2) of the Constitution.

This is because the separate determination of minimum prices for eCommerce retailers at a provincial level will create a chaotic business environment where an eCommerce retailer operating on a national platform will have to adjust their marketing and systems to accommodate up to nine different provincial MUP regimes.

The prospect of such a chaotic and fragmented situation would necessitate national legislative intervention to maintain economic unity in terms of section 44(2)(b) of the Constitution, which would prevail over the provincial legislation in terms of section 147(2)). Similar reasoning would apply to MUP legislation as that used by the Constitutional Court in the Liquor Bill case[10] explaining the application of section 44(2)(b) to the regulation of the manufacturing and wholesale distribution of liquor:

> *"...Our constitutional structure does not contemplate that provinces will compete with each other. It is one in which there is to be a single economy and in which all levels of government are to co-operate with one another. In the context of trade, economic unity must in my view therefore mean the oneness, as opposed to the fragmentation, of the national economy with regard to the regulation of inter-provincial, as opposed to intraprovincial, trade. In that context it seems to follow that economic unity must contemplate at least the power to require a single regulatory system for the conduct of trades which are conducted at a national (as opposed to an intra-provincial) level. ...*
>
> *"The Minister's affidavit states in this regard that duplicated or varying provincial licensing requirements would be 'unduly burdensome' for manufacturers and that it was therefore 'economically imperative that control*

[14] Similar arguments were advanced by Takealot in the matter of Takealot Online (RF) Pty Ltd // Minister of Trade, Industry and Competition and Others, Case No. 2024-002445, currently pending before the Gauteng High Court.

over the activities of manufacturers should take place at national level'. He states that major industries, including the liquor industry 'as a single integrated industry, should not have to 'run the risk of fragmentation arising out of a variety of differing regulatory regimes being imposed upon their operations in different provinces', including what he described as the deleterious effects of 'cross-border arbitrage' between competing provinces. He avers that '[w]ithout a national system of regulation and a national standard to which wholesalers will have to adhere the results would be chaotic': 'The spectre arises of a single business operation having to be separately licensed on differing terms and conditions in different parts of South Africa.'

"For the reasons given earlier, the Constitution entrusts the legislative regulation of just such concerns to the national Parliament, and I am of the view that the Minister has shown, at least in regard to manufacturing and distribution of liquor, that the maintenance of economic unity necessitates for the purposes of section 44(2)(b) the national legislature's intervention in requiring a national system of registration in these two areas."[15]

While the thorny issue of the regulation of eCommerce provides a particularly compelling case for national government intervention through a nationwide MUP in terms of section 44(2)(b), there are a range of other significant reasons to strengthen the case for a national MUP in the interests of maintaining economic unity.

In the case of a non-uniform implementation of MUP at provincial levels, retailers in provinces with higher MUPs may face competitive disadvantages, as consumers seek out lower prices in neighboring provinces or through eCommerce channels.

This is likely to lead to reduced sales and profitability for businesses operating in environments with stricter pricing, potentially driving some alcohol retailers out of business and reducing overall economic activity in provinces with stricter minimum pricing regulation. Companies will be incentivised to move their businesses to provinces without MUP, or with more lenient minimum pricing requirements.

Provincial governments may also be incentivised to attract businesses and shoppers from other provinces by lowering their own MUP requirements relative to neighbouring provinces, creating unhealthy inter-provincial competition.

[15] Para 75 to 78

Monitoring and enforcement of compliance with MUP requirements would also be significantly more complex in relation to multiple different MUP requirements, decreasing enforcement effectiveness and unnecessarily including compliance costs both for enforcement agencies and for businesses that operate in more than one province.

For all the reasons outlined above, it is reasonable to assume that while regulation of minimum pricing of liquor at the retail level is likely to fall within the functional area of "liquor licences" in terms of Schedule 5 of the Constitution, a Court would consider national legislative intervention to be necessary in the interests of economic unity in terms of section 44(2)(b).

Given this reasoning, it seems prudent to only consider the introduction of MUP legislation at a provincial level if a national MUP is considered politically infeasible, or if a decision is made through cooperative governance arrangements to introduce MUP within one or two provinces as a pilot to inform subsequent introduction of MUP at a national level.

Our illustrative draft Liquor (Minimum Pricing) Amendment Bill (see **Annexure**) is accordingly drafted as a piece of national legislation.

Other key questions affecting legislative development.

Cabinet portfolio for minimum pricing?

Assuming that a decision is made to develop minimum pricing legislation at a national level, a political decision will need to be made on the key policy question of which Cabinet Minister will be responsible for the legislation.

Internationally, there is little uniformity on the political authority responsible for legislation providing for minimum pricing for alcohol, as illustrated by the following examples.

In the Northern Territory of Australia, MUP is regulated under the Liquor Act 2019,[15] which is administered by a dedicated Minister for Alcohol Policy.[16] in Ireland, MUP requirements form part of the Public Health (Alcohol) Act 2018 which falls under the jurisdiction of the Minister for Health.[17] In Alberta, Canada, MUP requirements are imposed primarily through the policies of the Alberta Gaming and Liquor

Commission,[18] which falls under the auspices of the Ministry of Finance and President of the Treasury Board.[24]

There are multiple factors which need to form part of this political decision, including the policy objectives of the Act, the existing legislative framework governing trade in liquor in South Africa, and existing compliance and enforcement mechanisms. Although National Treasury has expressed support in principle for the introduction of MUP for liquor,[8] as MUP is not a tax mechanism but a form of regulation of the conditions of sale of liquor, the Minister of Finance is probably not the most suitable Ministry to be responsible for the legislation.

Particular contenders for administering MUP legislation in South Africa seem to be the Minister of Health, the Minister of Social Development and the Minister of Trade, Industry and Competition. The pros and cons of each option are discussed below.

If one considers that the policy intent of minimum pricing legislation is primarily to reduce the health and social harms caused by excessive and hazardous alcohol consumption behaviours, it seems most sensible to locate the legislation under the auspices of either the Minister of Health or the Minister of Social Development.

Placing the legislation under the auspices of the Minister of Health would align with the responsibilities, in terms of section 3 of the National Health Act, 2003,[20] to protect, promote, improve and maintain the health of the population, and to determine the policies and measures necessary to protect, promote, improve and maintain the health and well-being of the population. The Minister is also already responsible for administration of the regulations relating to health messages on container labels of alcoholic beverages[21] in terms of the Foodstuffs, Cosmetics and Disinfectants Act, 1972.[22]

Placing the legislation with the Minister of Social Development would align to their responsibilities for administration of the Prevention of and Treatment for Substance Abuse Act, 2008, the objects of which include to combat substance abuse in a coordinated manner.[23] The Minister of Social Development is also responsible for leading the government's Inter-Ministerial Committee on Combating Alcohol and Substance Abuse.[8] Minimum pricing could therefore be championed by the Minister of Social Development as part of a comprehensive strategy to combat substance abuse in the country.

However, the downside of developing minimum pricing legislation under either the Minister of Health or the Minister of Social Development lies in the fact that they currently have little direct jurisdiction and regulatory oversight over the trade in liquor in South Africa, a limited exception being the Minister of Health's regulatory responsibility in respect of health warnings on container labels of alcoholic beverages. The administrative and enforcement capacity of their respective departments, and their ability to exercise leverage within the liquor industry to ensure compliance with minimum pricing requirements may therefore be severely limited.

From an administrative and compliance perspective, it may then make sense to locate the MUP legislation under the auspices of the Minister of Trade, Industry and Competition. The Minister of Trade, Industry and Competition is responsible for administering the Liquor Act, 2003,[24] the objects of which include to reduce the socio-economic and other costs of alcohol abuse.

Although regulation of the retail sale of liquor falls under the auspices of provincial governments (as discussed above), the Minister of Trade, Industry and Competition does chair the National Liquor Policy Council established under section 38 of the Liquor Act. This Council includes representation of provincial authorities responsible for liquor licensing, whose cooperation is likely to be valuable in ensuring that MUP forms part of a cohesive approach to liquor regulation. The Minister also already regulates the manufacture and distribution of liquor in terms of that Act, which includes measures such as the designation of inspectors to ensure compliance with the Act, whose responsibilities could presumably be fairly readily extended to monitoring compliance with MUP.

The downside of placing MUP legislation under the Minister of Trade, Industry and Competition is that this may introduce a real or perceived bias towards prioritising trade interests which could dilute the focus on the public health objectives of minimum pricing.

In our illustrative draft Liquor (Minimum Pricing) Amendment Bill, we have placed the legislation under the auspices of the Minister of Trade, Industry and Competition due to the convenience of integrating the provisions within a legislative instrument that is already structured to regulate the trade in liquor, albeit mainly in relation to manufacturing and wholesale distribution. While the Minister of Trade, Industry and Competition is made responsible for periodic adjustments to the minimum unit price in terms of the proposed 24A of the principal Act (section 5 of the Amendment Bill), this power must be exercised in consultation with the Ministers of Finance, Health and Social Services.

Requirements for consultation with the Ministers of Health and Social Services are also inserted in the process for creating regulations regarding sales practices to ensure compliance with the legislation, in terms of the proposed section 24D(3) of the principal Act.

Which liquor sales should be subject to minimum pricing?

In determining the extent of application of the legislation there are a number of questions that need to be considered, including whether minimum pricing should apply to –

- wholesale or retail sales, or both;
- on-consumption sales, off-consumption sales, or both;
- all types of liquor, or only certain types; and
- duty-free purchases of liquor.

Internationally, most recent legislation applies only to the retail sale of liquor, i.e. sales directly to consumers, although it is applied to both in certain countries, mainly in Eastern Europe.[1] The most effective way to directly affect prices paid by consumers is to regulate sales at the retail level.[1]

Additional regulation of prices at a wholesale level seems unnecessary and, in the event of legal challenge, may not be found to be sufficiently rationally connected to the public health objectives of MUP contained in the Constitution. For these reasons, it seems prudent to restrict the application of MUP requirements to the retail sale of liquor.

In relation to the application of MUP to on-consumption sales, off-consumption sales, or both, jurisdictions such as the Northern Territory of Australia, Ireland, Scotland and Wales make no distinction between minimum prices applied to on- and off-consumption sales of liquor.[1] There is some variability of this internationally. In Canada, MUP applies to on-consumption trade only in Alberta while only applying to off-consumption trade in New Brunswick and Quebec. In other Canadian provinces, it applies to both on- and off-consumption trade, but different minimum prices apply.[1]

These distinctions should be considered within the context of differences in motivation for MUP between jurisdictions. In the Northern Territory of Australia, Ireland, Scotland and Wales, MUP legislation has the objective of reducing the negative social, economic and especially health impacts of alcohol consumption. In Canada, MUP is seen more as a fiscal and economic measure to raise revenues from government alcohol retailers and to protect alcohol markets against aggressive price discounting.[1]

The objectives of MUP in South Africa are explicitly related to reducing the health and social harms related to excessive alcohol consumption. Within this context, it does not make sense to limit minimum pricing in relation to either on- or off-consumption trade, but rather to apply it equally to both.

When considering which types of liquor products should be covered by MUP, there is again some variation internationally. While MUP requirements in most jurisdictions apply across the board to beer, wine and spirits, there are exceptions. A number of Eastern European countries restrict MUP application to spirits, and in Quebec, MUP applies only to beer.[1]

These differences may be ascribed to a range of country-specific motivations for the imposition of MUP. From a perspective of reducing excessive and harmful alcohol consumption and associated harms, there does not seem to be any rational basis for limiting the application of MUP to only specific alcohol products.

Despite this principle, consideration should be given to making an exception in South Africa for Traditional African beer.

In relation to excise taxes, Traditional African beer has been treated as an exception by government, enjoying virtually negligible excise tax rates which have not been raised even in nominal terms in the last two decades.[25] The reasons for this approach are explained by National Treasury as relating to risks of a negative distributional effect on the poor and the risks of increased home brewing in response to tax increases, with all the concomitant health risks associated with the production of homebrew.[7] Although this policy is arguably in need of review, if government persists in this policy in relation to excise taxes, it seems unlikely that there would be appetite within government for subjecting Traditional African beer to MUP requirements.

An exception to MUP seems reasonable for duty-free purchases of liquor by travellers leaving South Africa as this liquor is not intended for consumption within the country.

The suggested amendments to section 3 of the Liquor Act, in terms of section 4 of our illustrative draft Liquor (Minimum Pricing) Amendment Bill, therefore specify that the MUP provisions of the Act apply only to retail sale, and not the wholesale distribution of liquor. The MUP provisions also exclude sales of liquor in a duty-free shop to travellers departing South Africa and liquor products exempted by regulation. The last-mentioned provision is intended to create some flexibility to exempt certain types of liquor product from minimum pricing on good cause, which may or may not extend to Traditional African beer.

Calculating Minimum Unit Prices

Consideration needs to be given to whether minimum prices should be calculated on the basis of beverage volume, irrespective of alcohol content, or on alcoholic strength. As mentioned in footnote (a) above, a technical distinction in terminology is sometimes made between the former, called "minimum pricing", and the latter, called "minimum unit pricing", although for purposes of this discussion we have chosen to use the term "minimum pricing" in the generic sense to cover both unless the context indicates otherwise.

Most Canadian provinces, for example, apply minimum prices based on beverage volume.[1] However, different minimum prices per volume apply to different beverage types. For example New Brunswick's legislation provides for minimum prices of $0.11, $0.125, $0.375 and $1.50 per ounce or 29.57 ml of draught beer, beer, wine and spirits, respectively.[26]

In the South African context, setting different minimum prices for different types of alcoholic beverage is likely to be unduly cumbersome from a perspective of monitoring and enforcement. It will also inevitably give rise to definitional complexity about the classification of alcoholic beverages which will lead to interpretational issues generating further complexity as we have seen with classification of excise taxes under the Customs and Excise Act, 1964.[16] This should be avoided.

[16] See Policy Brief 1

The legislation of other jurisdictions such as the Northern Territory of Australia,[15] Scotland,[27] Wales[28] and Ireland[17] apply minimum prices by alcoholic strength, with the same MUP applied irrespective of type of beverage. This approach is likely to reduce definitional and administrative complexity, and should in our view be followed.

Even within these countries, there are differences in complexity in the calculation of the minimum price at which a beverage may be sold.

The Northern Territory of Australia's Liquor Act[15] determines MUP with reference to a "standard drink," which is defined as "the volume of a liquor product that contains 10g of ethanol alcohol when measured at 20°C.[17]

In calculating the minimum selling price at which a liquor product may be sold, a calculation is first required of number of standard drinks it contains taking into account alcohol strength and volume of the product.[18]

Ireland's Public Health Alcohol Act[17] determines minimum unit prices per gram of alcohol.[19] To determine the minimum selling prices of liquor products, a calculation first needs to be made of the number of grams of alcohol that the product contains, taking into account the alcohol content and volume of the product.[20]

The minimum pricing legislation of both Scotland[27] and Wales,[28] on the other hand, does not require this extra step. In both these laws, the "minimum unit price" is not statutorily defined in relation to either a standard drink or a gram of alcohol, it is simply a value assigned by the relevant authorities as the minimum unit price for purposes of the legislation. Calculation of the minimum price at which liquor may be sold is determined in both Acts as a single calculation involving the multiplication of the assigned minimum unit price (M) by the strength of the alcohol in the product (S) by the volume of the beverage (V).[21]

[17] Section 117
[18] Section 118
[19] Section 11(1)
[20] Section 11(9)
[21] Section 6A(2) of the Alcohol (Minimum Pricing) (Scotland) Act; 2012; Section 1(1) of the Public Health (Minimum Price for Alcohol) (Wales) Act, 2018.

In our view, the simpler the calculation required to determine the price at which liquor products may be sold, the better from a compliance and enforcement perspective. This is particularly so because enforcement of minimum pricing in South Africa will presumably rely to a large extent on reporting of non-compliance by members of the public.

In the drafting of the proposed section 24B in terms of section 5 of our illustrative draft Liquor (Minimum Pricing) Amendment Bill, we have therefore used the example of the minimum pricing contained in the legislation of Wales and Scotland as a template. Applying this provision, if M (minimum unit price) was prescribed as R8, in the case of a bottle of wine where S (percentage strength of wine) is 12,5% and V (volume of wine) is 750ml, the applicable minimum price for the wine would be calculated as R8 x 12,5 x 0.75 = R75.

Determining and Reviewing MUP

A review of international minimum pricing legislation shows that the basis for how to determine the initial minimum unit pricing for alcohol sales is not set out in the legislation.

This is presumably a complex political decision informed by economic modelling. Some countries, like Ireland, specify the initial value of the minimum unit price in the statute itself.[22] Others, like Scotland do not specify that value in the statute but rather enable the relevant authorities to specify it in secondary legislation.[23]

A WHO report has recommended institutionally embedding the adjustment of minimum prices.[1] The frequency and basis for the adjustment of the initial minimum unit price varies between jurisdictions.

Ontario's minimum pricing regulations,[29] for example, provide for annual adjustments linked to inflation.[24] Ireland's Public Health (Alcohol) Act[17] provides for the relevant Minister to adjust the statutorily determined minimum unit price no earlier than 3 years after its commencement, and thereafter no earlier than 18 months after the previous

[22] For example, section 11(1) of Ireland's Public Health (Alcohol) Act, 2018, states that the minimum price per gram of alcohol for the purposes of the Act shall be €0.10.
[23] Section 6(4) of Scotland's Alcohol (Minimum Pricing) Scotland Act, 2012, for example, provides for the Scottish Ministers to specify by order the minimum unit price.
[24] Regulation 16 read with Schedule 1

adjustment.[25] It specifies a list of considerations related to the effectiveness of minimum pricing that need to be taken into account in making the adjustment, Including evidence of patterns of alcohol consumption, societal harm caused by alcohol consumption and the price and affordability of alcohol products.[26]

Scotland's Alcohol (Minimum Pricing) (Scotland) Act[27] does not provide for a fixed frequency for adjustments. It does, however, provide for a sunset clause, in which the minimum pricing provisions were set to expire after six years unless extended before the expiry date. [27,28] In terms of the law, such a renewal needed to be preceded by the submission of a report to the Scottish Parliament on the operation and effect of the minimum pricing provision during the initial 5 year period.[29]

Public Health Scotland led a comprehensive evaluation of minimum unit pricing and concluded that minimum pricing has had a positive impact on health outcomes, namely a reduction in alcohol-attributable deaths and hospital admissions. The benefits were particularly high in men and those living in the most deprived areas, and therefore contribute to addressing alcohol-related health inequalities. There was no clear evidence of substantial negative impacts on the liquor industry, or of social harms at the population level.[30] Subsequent to that report, the Scottish Parliament voted to continue minimum pricing beyond the tentative expiry date of 17 April 2024, and to increase MUP from 50p to 65p per unit.[31]

In our illustrative draft Liquor (Minimum Pricing) Amendment Bill, we have proposed the insertion of an initial minimum unit price value in the principal legislation itself (see the proposed section 24A(1) inserted by section 5 of the Amendment Bill). It is considered prudent for this initial value to be determined by Parliament given the fact that its level will fundamentally affect the potential impact of the legislation.

We do not, however, presume to suggest a value for this price, as this lies outside our area of expertise – and therefore a placeholder value of R0.00 has been inserted.

[25] Section 11(3) & (4)
[26] Section 11(5)
[27] Section 2
[28] A similar sunset clause is included in section 22 of the Public Health (Minimum Price for Alcohol) (Wales) Act, 2018.
[29] Section 3

In terms of review of the legislation, we have not suggested inclusion of a sunset clause similar to Scottish legislation as minimum pricing can no longer, in our view, be regarded as an experimental measure. Nevertheless, inclusion of such a clause is an option which can be considered by lawmakers.

We have instead settled on a proposal of periodic adjustment of MUP (see the proposed section 24A(2) and (3)), broadly modelled on the relevant provisions of Ireland's Public Health (Alcohol) Act.

However, instead of requiring those adjustments to take place no *earlier* than 3 years after the initial price, and thereafter no *earlier* than 18 months after the previous adjustment, we have made these time frames the outer parameters of the period for adjustment. This will ensure that adjustments are made on a regular basis and are not at risk of being indefinitely delayed.

Other Drafting Considerations

Decisions will need to be made on how much detail to include in the draft principal legislation, as opposed to being left to regulation.

The Public Health (Minimum Price for Alcohol) (Wales) Act,[28] is an example of a comprehensive principal Act, with limited detail being left to regulation. By contrast, several Canadian provinces have opted for broad enabling provisions in the principal legislation, with all the detail left to regulation.

Manitoba's Liquor, Gaming and Cannabis Control Act,[32] for example, provides only that the board of the Liquor, Gaming and Cannabis Authority may make regulations.

> *"respecting the operation of licensed premises, including establishing minimum prices for liquor and regulating the service of liquor in licensed premises."*[30]

The detail of minimum pricing is left to regulations made under that Act.[33]

[30] Section 157(2)

In our illustrative draft Liquor (Minimum Pricing) Amendment Bill, we have opted to place all the key substantive provisions regarding minimum pricing in the principal Act being amended, namely the Liquor Act 59 of 2003. As minimum pricing will represent a significant policy shift in South Africa, we are of the view that the detail of the legislative provisions should be subject to the legislative processes of Parliament, including the rigour of public consultation which forms part thereof.

Nevertheless, some of the detail relating to restricting market practices has been left to regulation due to the anticipated need for responsiveness to developing business practice (see the proposed section 24D(3) inserted by section 5 of the Amendment Bill.

Possible Legal challenges

Challenges Under Domestic Law

In relation to excise taxes on alcohol, the WHO identifies common domestic legal issues that may arise as including whether –

- a government is acting within the scope of its powers;
- a tax results in unequal treatment before the law or is discriminatory; and
- tax rates are confiscatory, and interfere with the right to property.[2]

It is conceivable that minimum pricing legislation in South Africa may face similar legal challenges based on alleged Constitutional violations. In this section, we consider the specifics and merits of such challenges, as well as the additional question of whether minimum pricing would constitute an impermissible violation of the Constitutional right to trade.

Is government acting within the scope of its powers?

A legal challenge here is most likely to arise in relation to whether the sphere of government, whether national or provincial, enacting minimum pricing legislation has the Constitutional competence to do so. This question has already been extensively discussed above.

To recap, a review of the applicable Constitutional provisions suggests that if minimum pricing was to be applied to the wholesale trade in liquor, this would require legislation at a national level. If minimum pricing was to be applied to the retail sale of liquor, provinces would have the Constitutional competence to introduce minimum pricing for retail sales within their province.

However, national legislation providing for minimum pricing would most likely be considered a necessary intervention in terms of section 44(2)(b) of the Constitution, and any such national legislation would prevail over provincial legislation to the extent that there is conflict.

Does minimum pricing result in unequal treatment before the law?

A common objection to minimum pricing is that it is regressive, in that it imposes greater costs on those with lower incomes because cheaper alcohol is more likely to be purchased by poorer households.[1] This argument is likely to hold true in South Africa, where modelling has suggested that a R10 minimum unit price would result in a 27% increase in alcohol expenditures among the lowest income quintile in South Africa, compared with 0.5% in the richest quintile.[34]

However the converse is true in relation to health benefits associated with minimum pricing. The same modelling suggested that 56% of deaths averted as a result of the introduction of a minimum unit price of R10 would accrue to the bottom two income quintiles, while only 7% of total deaths averted would accrue to the richest quintile. Minimum pricing would also result in the poorest groups in South Africa facing an increased chance of avoiding catastrophic health expenditures and resultant medical impoverishment.[34]

The disproportionate impact of minimum pricing on the poor may give rise to Constitutional challenges based on an alleged violation of the equality clause of Section 9 of South Africa's Constitution. In the judgement of the 1998 case, *Harksen v Lane NO*[35,] at paragraph 53 the Constitutional Court outlined the stages of enquiry into a potential violation of the equality clause.[31]

First, it is necessary to ask whether the legislation differentiates between people or categories of people. In the current case, given the anticipated differential impact of

[31] Although the case involved application of the equality clause in section 8 of the interim Constitution, the formulation of section 9 of the final Constitution is regarded as being sufficiently similar for the court's interpretation to apply to it too.[36]

the legislation on the costs of lower income households compared to more wealthy groups, the answer to this question would probably be in the affirmative.

The next question to be asked is whether such differentiation bears a rational connection to a legitimate government purpose. If it does not, the legislation would violate section 9(1), which provides that everyone is equal before the law and has the right to equal protection of the law. In the case of minimum pricing, government has a legitimate purpose in reducing heavy and harmful alcohol consumption practices especially given South Africa's harmful alcohol consumption profile.[5] There is also ample evidence from international experience[1] and local modelling[3,34] to substantiate a rational connection between minimum pricing and this legitimate purpose.

Even if there is such a rational connection, the differentiation may fall foul of Section 9 if it is found to constitute unfair discrimination. In *Prinsloo v van der Linde*,[37] the Constitutional Court held that unfair discrimination:

> *"principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."*[32]

It seems highly unlikely that a court would find that the differential impact of minimum pricing constitutes treating people differently in a way which impairs their fundamental dignity as human beings.

This is particularly so because minimum pricing does not remove the right of anyone to drink alcohol, but is specifically targeted at reducing heavy and harmful alcohol consumption practices. The financial impact on a heavy drinker of minimum pricing can largely be mitigated by moderating their alcohol consumption practices, thereby contributing to reduction of alcohol-related harms to society as a whole and likely health benefit to the drinkers themselves.

In the unlikely scenario that a court finds that minimum pricing legislation does constitute unfair discrimination in breach of section 9 of the Constitution, a

---

[32] Para 31

determination would finally need to be made whether the provision can be justified under the limitation clause (section 36).

Section 36 provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account various factors, including: the nature of the right, the importance and purpose of the limitation, the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

In *S v Makwanyane*[38] the Constitutional Court explained that the

> *"limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality."*[33]

Without conducting an in-depth section 36(1) analysis, it seems likely that a court conducting such an analysis would find proportionality between any limitation of the right to equality, to the extent that it is found to exist, and the importance and purpose of the limitation.

It is worth taking note of the reasoning of the United Kingdom Supreme Court in its 2017 judgment in the Scotch Whisky case,[39] which paved the way for Scotland to introduce minimum pricing in 2018. The Scotch Whisky Association had challenged the Scottish government's plan to implement minimum pricing for alcohol, alleging that it breached EU law.

The court accepted that minimum pricing would involve a market distortion, including of EU trade and competition, but found that these distortions could not be regarded as outweighing the health benefits intended by minimum pricing (namely combatting alcohol-related mortality and hospitalisation and other forms of alcohol-related harm).

[33] Para 104

The court's finding that minimum pricing was a proportionate means to achieve public health objectives was justified in part of an acceptance that minimum pricing targeted cheap, high strength alcohol more effectively than trying to achieve the same aims through general taxes or duties, which would place an unintended and unacceptable burden on sectors of society whose alcohol consumption habits do not represent a significant problem.[34]

Does minimum pricing violate property rights?

A possible legal challenge to minimum pricing may arise based on an alleged violation of property rights in terms of section 25(1) of the Constitution, which provides as follows:

> *"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."*

It is conceivable that a current holder of a liquor licence may consider the imposition of minimum pricing as a deprivation of this right. In the *Shoprite Checkers v MEC for Economic Development Eastern Cape*,[40] the Constitutional Court was divided on the question of whether a liquor licence constituted property in terms of this section. Assuming that it does, a court considering a challenge in terms of section 25 of the Constitution would then need to consider whether the contested legislation deprives licence holders of their property, and if so, if that deprivation is arbitrary.[40]

In *FNB t/a Wesbank v Commissioner for SARS* (the "*FNB*" matter),[41] the court expressed the view that

> *"[i]n certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."*[35]

However, not all interference in the use and enjoyment of private property reaches the threshold of deprivation for purposes of section 25.

[34] Para 63
[35] Par 57 of the judgment.

In *Mkontwana v Nelson Mandela Metropolitan Municipality* (the "*Mkontwana*" matter),[42] the Constitutional Court held that

> *"at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation".*[36]

If it is confirmed that liquor licences are indeed private property for purposes of section 25, and if it is found that minimum pricing constitutes interference with a licence holder's interference with the use, enjoyment and exploitation of that property, it seems unlikely that such interference would be found to be sufficiently substantial to constitute deprivation of property for purposes of section 25.

Minimum pricing does not interrupt the right of licence holders to engage in the activity for which they are licensed, namely the sale of alcohol. Although minimum pricing may reduce sales volumes of the cheapest alcohol products, evidence suggests that the impact on licence holders of this drop in sales volume is likely to be substantially offset by an increase in average prices following the removal of the cheapest alcohol from the market.[1]

Assuming that a court nevertheless found that minimum pricing indeed constituted deprivation of property for purposes of section 25 of the Constitution, it is highly likely that the challenge to minimum pricing would fail on the last leg of the test, namely whether the deprivation is arbitrary.

In the *FNB* matter, it was held that deprivation of property is arbitrary when the law does not provide sufficient reason for the deprivation or when it is procedurally unfair.

In determining whether sufficient reason has been provided a complexity of relationships must be considered, and the ultimate test may range from a consideration of rationality to a consideration of proportionality.[37] In the *Mkontwana* matter, it was held that a mere rational connection between means and ends could be sufficient reason for a minimal deprivation.[38]

---

[36] Par 32 of the judgment.
[37] Para 100 of the judgment
[38] Para 35 of the judgment

Whether on the mere rationality test or the more stringent proportionality test, it seems highly unlikely that court would find any deprivation of property to be arbitrary given the importance of government's policy objectives for minimum pricing and the evidence-based nexus between minimum pricing and the intended objectives of reduction in heavy alcohol consumption and its associated societal harms.

It can therefore reasonably be concluded that minimum pricing does not constitute deprivation of property.

Does minimum pricing violate freedom of trade?

The final potential Constitutional challenge to minimum pricing which we consider is one based on an alleged violation of section 22 of the Constitution which provides:

> *"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."*

In relation to the first sentence of section 22, no plausible argument can be made that minimum pricing limits the right of a citizen to freely choose their trade, occupation or profession. Minimum pricing legislation would merely constitute the regulation by law of the practice of a trade, occupation or profession, as contemplated in the second sentence of section 22.

The Constitutional Court in *Affordable Medicines Trust v Minister of Health*[43] formulated the test to be applied as follows:

> *"What the Constitution therefore requires is that the power to regulate the practice of a profession be exercised in an objectively rational manner. As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the legislation to be inappropriate."*[39]

For reasons set out in the discussion of other Constitutional provisions above, there can be little question that the regulation of the liquor trade through minimum pricing,

[39] Para 77 of the judgment

viewed objectively, is rationally related to a legitimate government purpose. For these reasons, it seems highly probable that a challenge to minimum pricing based on section 22 of the Constitution will fail.

Challenges under international law

The provisions of the General Agreement on Tariffs and Trade (GATT) will apply to measures adopted by World Trade Organisation (WTO) members to institute minimum unit pricing for alcoholic beverages.[1]

This includes South Africa, which is one of the original signatories to the Agreement Establishing the WTO (WTO Agreement). A 1994 version of GATT forms part of the WTO Agreement.[44]

In order to form part of South Africa's domestic laws, an international agreement must be enacted into law by national legislation.[40] As GATT has not be enacted into South African law by national legislation, it does not vest rights or impose obligations under South African domestic law.[44] However, as a party to the WTO Agreement, GATT 1994 is binding on South Africa under international law.[44]

Consequently, when South Africa introduces MUP requirements for alcohol, individuals and businesses in South Africa may not directly rely on GATT as a basis to challenge these requirements.

However, other WTO member countries may seek to invoke the provisions of GATT to challenge South Africa's MUP provisions under international law.

The key basis for such a challenge is likely to be Article III(4) of GATT, which provides in part as follows:

> *"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all*

[40] Section 231(4) of South Africa's Constitution.

laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

A WHO report noted that while there is no clear precedent how MUP requirements would be analysed under WTO law, they may well be found to be incompatible with Article III(4) of GATT to the extent that MUP may prevent imported alcohol products from benefitting from potentially lower production costs, thereby affording them less favourable treatment than similar domestic products.[1]

The WHO report notes this concern in the context of the 1992 findings of a GATT Panel which was established to investigate a dispute lodged by the United States concerning Canadian provinces' practices relating to the importation of beer (the Canada Provincial Liquor Boards matter").[45.]

The Canada Provincial Liquor Boards matter arose in the context of Canadian legislation having granted provincial liquor boards an effective monopoly on the importation of alcoholic beverages, whether from a foreign country or another Canadian province. A number of related requirements imposed by provincial liquor Boards were contested by the United States government, one of which was the imposition by provincial liquor boards of minimum prices, which in some provinces was set at the price level at which domestic brewers supplied beer.[45]

The Panel found that minimum pricing requirements, which applied both to imported and domestic beer, fell within the ambit of Article III of GATT, including Article III:4. The Panel noted that minimum prices which applied equally to imported and domestic beer did not necessarily accord equal conditions of competition to imported and domestic beer. In particular, the Panel found that when minimum prices were set at the level at which domestic brewers supplied beer, those minimum prices reduced the competitive opportunities of imported beer which could otherwise be supplied below the minimum price, but did not affect domestic players.[45]

It did, however, find that maintenance by an import and sales monopoly of a minimum price for an imported product at a level at which a directly competing, higher priced domestic product was supplied was inconsistent with Article III:4. Accordingly, the minimum prices imposed by the liquor boards of various Canadian provinces were found to be inconsistent with Article III:4 to the extent that they were fixed in relation to the prices at which domestic beer was supplied.[45] However, the Panel stopped short of a general finding on whether or not minimum prices were consistent with Article III(4).

Introduction of MUP legislation would clearly be distinguishable from the scenario which formed the basis of the Canada Provincial Liquor Boards matter, as the South African government does not maintain a monopoly on the import and sales of liquor. Nevertheless, the South African government should be cognisant of the fact that Article III:4 of GATT has been found to be applicable to the minimum pricing of alcohol.

In determining the basis for the level of minimum pricing, care should be taken to avoid basing it directly or indirectly on pricing levels at which domestically produced liquor is sold (albeit that this is less likely to occur within South Africa's competitive market environment). The South African government should also be prepared for other arguments by international players that the MUP in some way undermines equal conditions of competition to imported and domestic beer in violation of Article III:4.

It should be noted, however, that even if South Africa's MUP legislation were found to be inconsistent with Article III:4, such inconsistency would not constitute a violation of the country's obligations under GATT if the measures can be justified in terms of Article XX(b) of GATT, which reads as follows:

> *"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...*
>
> *(b) necessary to protect human, animal or plant life or health."*

The application of Article XX(b) was not advanced as a justification in the Canada Provincial Liquor Boards matter. Instead, the social policy objectives of Canada's minimum pricing were considered in relation to other legal provisions which applied specifically to the attainment of social objectives through the operation of monopolies.

In the context of those provisions, the Panel recognised that it:

> *"might be desirable and indeed necessary for social policy reasons to ensure that beer not be sold to the public at low prices."*

but expressed the view that these policy objectives may be met through other measures permitted under GATT, including the application of high internal prices for beer.[45] It has been noted that this view was expressed at a time before a substantial evidence base had developed on the effectiveness of minimum pricing relative to increased taxation.[1]

To increase the likelihood that the Article XX(b) exception will be interpreted as applying to minimum pricing legislation, the WHO report advises that:

- minimum pricing measures must be clearly framed as measures that target heavy and hazardous alcohol consumption;
- the complementary relationship between minimum pricing and taxation must be highlighted, and that minimum pricing cannot simply be replaced;
- the material contribution of minimum pricing to harm reduction objectives, supported by the growing extent of modelling and observation evidence, must be emphasised;
- the fact that the impact of MUP policies is limited to prices of the cheapest and strongest alcohol should be emphasised;
- the use of objective formulae in minimum pricing legislation, applicable to all alcoholic beverages, must be emphasised to avoid it being seen as arbitrary or protectionist.[(8)]

South Africa's record of harmful alcohol consumption, despite the fact that alcohol taxes having been consistently increased above inflation over the past 20 years, together with the modelling that has been done on the predicted benefits of MUP in South Africa and the evidence of its effectiveness in other jurisdictions, are likely to provide the basis for a compelling argument for the application of Article XX(b) of GATT if South Africa's MUP legislation is found to be inconsistent with Article III:4.

Conclusion

Minimum pricing legislation presents a viable and necessary strategy to address South Africa's significant public health and social challenges associated with alcohol abuse. By setting a price floor on alcohol sales, the policy specifically targets those who consume high levels of alcohol, reducing consumption and associated harm. A nationally implemented minimum pricing approach is, in our view, constitutionally permissible and would prevent inconsistencies across provinces, minimise cross-border price arbitrage, and simplify enforcement mechanisms.

While potential legal challenges exist, including constitutional and international trade law considerations, consideration of our constitutional framework together with precedent from other jurisdictions suggests that these challenges can be overcome if the policy and legislation is clearly framed with strong public health justifications.

Policymakers should engage in thorough consultations, economic modeling, and stakeholder engagement to design a robust legislative framework, giving careful consideration to the various policy choices outlined in this report. If well-implemented, minimum pricing can serve as an effective tool in reducing alcohol-related harms, ultimately benefiting public health, safety, and the broader economy in South Africa.

References

1. World Health Organization, Regional Office for Europe. 2022. *No place for cheap alcohol: the potential value of minimum pricing for protecting lives*. Available at: https://iris.who.int/handle/10665/356597.
2. World Health Organization. 2023. *WHO technical manual on alcohol tax policy and administration*. Available at: https://www.who.int/publications/i/item/9789240082793.
3. Van Walbeek, C. & Chelwa, G., 2021. *The case for minimum unit prices on alcohol in South Africa*. South African Medical Journal, 111(7), pp.680-684.
4. World Health Organization. 2018. Global status report on alcohol and health 2018.
5. Western Cape Province. 2017. *Western Cape Alcohol-Related Harms Reduction Policy White Paper*. Provincial Gazette Extraordinary 7824, 11 September 2017.
6. Western Cape Province. June 2023. *Call for Input on Legislative Policy Proposals: Minimum Unit Pricing (MUP) and Alcohol Trading Time Parameters for WC Province*. Available at: https://d7.westerncape.gov.za/assets/call_for_input_on_mup_and_uniform_trading_times_policy_proposals_0.pdf.
7. National Treasury, South Africa. May 2014. *A Review of the Taxation of Alcoholic Beverages in South Africa: A Discussion Document*. Available at: https://www.treasury.gov.za/public%20comments/Alc/Alcohol%20Tax%20Review%20-%20May%202014%20Discussion%20Paper.pdf.
8. National Treasury. 2024. The Taxation of Alcoholic Beverages. Available at: https://www.treasury.gov.za/public%20comments/TaxationOfAlcoholicBeverages/The%20taxation%20of%20alcoholic%20beverages.pdf.
9. Peltzer, K. & Ramlagan, S., 2009. *Alcohol use trends in South Africa*. Journal of Social Sciences. 18(1):1-12. Available at: http://hdl.handle.net/20.500.11910/5017.
10. Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC).
11. *Beer, wine and liquor online sales in South Africa increased by 1,787% in 2020*. 3 November 2024. Available at: https://mybroadband.co.za/news/business/373946-beer-wine-and-liquor-online-sales-in-south-africa-increased-by-1787-in-2020.html. (Accessed: 30 October 2024).
12. *Alcohol ecommerce growth moderates, but still set to outperform overall market*. 12 February 2024. Available at: https://news.wine.co.za/news.aspx?NEWSID=42965#:~:text=Previously%2C%20the%

20share%20figure%20had,different%20directions%2C%E2%80%9D%20says%20Wolfe. (Accessed 30 October 2024).

13. *eCommerce revenue development in the Alcoholic Beverages market in South Africa*. Available at: https://ecommercedb.com/markets/za/alcoholic-beverages (Accessed: 30 October 2024).
14. *Founding Affidavit of T Sekgobela, Takealot Senior Legal Counsel in the matter of Takealot Online (RF) Pty Ltd* // Minister of Trade, Industry and Competition and Others, Gauteng High Court Case No. 2024-002445, 15 January 2024.
15. Northern Territory of Australia. 2019. Liquor Act, 2019.
16. Northern Territory Government, Australia. 2022. *The Three Year Review of the Liquor Act 2019: Discussion Paper*. Available at: https://alcoholpolicy.nt.gov.au/__data/assets/pdf_file/0010/1179433/discussion-paper-three-year-review-liquor-act2019.pdf.
17. Ireland. 2018. Public Health (Alcohol) Act, 2018.
18. Alberta Gaming, Liquor and Cannabis Commission. 2022. *Liquor Licensee Handbook*.
19. Alberta Gaming, Liquor and Cannabis Commission. 2023. *Mandate and Roles Document*. Available at: https://d.docs.live.net/c85f39a09c2add1b/Documents/DGMT_Extended%20Legislative%20Guide/MUP/Drafted%20Sections/1.%09https:/aglc.ca/sites/aglc.ca/files/aglc_files/Board_Mandate_and_Roles-Jan_2023.pdf.
20. South Africa. 2003. National Health Act (Act No. 61 of 2003).
21. South Africa. 2007. Regulations relating to health messages on container labels of alcoholic beverages. GNR, 764 of 24 August 2007.
22. South Africa. 1972. Foodstuffs, Cosmetics and Disinfectants Act (Act No. 54 of 1972).
23. South Africa. 2008. Prevention of and Treatment for Substance Abuse Act (Act No. 70 of 2008).
24. South Africa. 2023. Liquor Act (Act No. 59 of 2003).
25. Vellios, N., Zondi, M. & van Walbeek, C., October 2024. *A Review of Alcohol Excise Taxation in South Africa*. UCT Research Unit on the Economics of Excisable Products (REEP).
26. New Brunswick, Canada. Regulation 84-265 under the Liquor Control Act.
27. Scotland. 2012. Alcohol (Minimum Pricing) (Scotland) Act, 2012.
28. Wales. 2018. Public Health (Minimum Price for Alcohol) (Wales) Act, 2018.

29. Ontario. Regulation 750/21: Minimum Pricing of Liquor and Other Pricing Matters.

30. Public Health Scotland. 2023. *Evaluating the impact of minimum unit pricing for alcohol in Scotland: A synthesis of the evidence*. Briefing Paper, 27 June 2023. Available at: https://publichealthscotland.scot/media/20333/evaluating-the-impact-of-minimum-unit-pricing-for-alcohol-in-scotland-briefing.pdf.

31. Alcohol Focus Scotland. n.d. *Minimum pricing*. Available at: https://www.alcohol-focus-scotland.org.uk/work-price-mup/. (Accessed: 11 February 2024).

32. Manitoba, Canada. The Liquor, Gaming and Cannabis Control Act. C.C.S.M. c. L 153.

33. Manitoba, Canada. Liquor Licensing Regulation 61/2014.

34. Gibbs, N., Angus, C., Dixon, S., Parry, C.D., Meier, P.S., Boachie, M.K. and Verguet, S., 2022. *Equity impact of minimum unit pricing of alcohol on household health and finances among rich and poor drinkers in South Africa*. BMJ global health, 7(1), p.e007824.

35. Harksen v Lane NO 1998 (1) SA 300 (CC).

36. Currie, I. & De Waal, J., 2015. *The bill of rights handbook*. Sixth edition. Juta and Company Ltd.

37. Prinsloo v van der Linde 1997(3) SA 1012 (CC).

38. S v Makwanyane 1995 (3) SA 391 (CC).

39. Scotch Whisky Association and Others v The Lord Advocate and Another [2017] UKSC 76.

40. Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others (CCT 216/14) [2015] ZACC 23.

41. First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance (CCT19/01) [2002] ZACC 5.

42. Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) [2004] ZACC 9

43. Affordable Medicines Trust and Others v Minister of Health and Another (CCT27/04) [2005] ZACC 3

44. International Trade Administration Commission of South Africa. n.d. *Trade Remedies*. Available at: https://www.itac.org.za/pages/services/trade-remedies#:~:text=The%20WTO%20Agreement%2C%20including%20GATT,domestic%20laws%20of%20South%20Africa (Accessed: 3 February 2024).

45. World Trade Organization. 1992. *Canada – import, distribution and sale of certain alcoholic drinks by provincial marketing agencies*. (DS17/R-39S/27). Available at: https://www.wto.org/english/tratop_e/dispu_e/gatt_e/91alcoho.pdf.

ANNEXURE

Annexure: Draft Liquor (Minimum Pricing) Amendment Bill

REPUBLIC OF SOUTH AFRICA

Proposed

DRAFT LIQUOR (MINIMUM PRICING) AMENDMENT BILL, 2025

(Minister of Trade, Industry and Competition)

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Liquor Act, 2003, so as to amend and insert certain definitions; to provide for minimum selling prices for the retail sale of liquor; and to provide for matters related thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -

Amendment of long title of Act 59 of 2003 (hereinafter referred to as the "principal Act")

1. The long title of the principal Act is hereby amended by the substitution for the long title of the following long title –

"To establish national norms and standards in order to maintain economic unity within the liquor industry; to provide for essential national standards and minimum standards required for the rendering of services; <u>to provide for minimum selling prices for the retail sale of liquor;</u> to provide for measures to promote cooperative government in the area of liquor regulation; and to provide for matters connected therewith."

Amendment of section 1 of the principal Act

2. Section 1 of the principal Act is hereby amended by –

(a) the substitution for the definition of "liquor" of the following definition:

"'liquor' means –

(a) a liquor product [as defined in section 1 of the Liquor Products Act, 1989 (Act No. 60 of 1989)]; or

(b) any other substance or drink declared to be liquor under section 42(2)(e);";

(b) by the insertion after the definition of "liquor" of the following definition:

"'**liquor product'** means a liquor product as defined in section 1 of the Liquor Products Act, 1989 (Act No. 60 of 1989);";

(c) by the insertion after the definition of "micro-manufacturer" of the following definitions:

"'minimum unit price' means the minimum unit price determined in terms of section 24A;

"'minimum selling price' means the minimum selling price determined in terms of section 24B;";

(d) by the insertion after the definition of "sell" of the following definition:

"selling price" means the amount of money to be paid by a purchaser for a liquor product, inclusive of VAT and –

(a) subject to paragraph (b), inclusive of any discounts or refunds offered or given to the purchaser, whether such discounts or refunds are applied at the time of the sale or later;

(b) exclusive of any refundable container deposit; and

(c) exclusive of any amount to be paid by the purchaser for delivery, whether such amount is payable to the seller or to a third party."

Amendment of section 2 of the principal Act

3. Section 2 of the principal Act is hereby amended by the insertion after subparagraph (ii) in paragraph (a) of the following subparagraph –

"(ii) providing for minimum selling prices for the retail sale of liquor products;"

Amendment of section 3 of the principal Act

4. Section 3 of the principal Act is hereby amended by –

(a) the substitution for subsection (1) of the following subsection –

"(1) Subject to **[subsection (2)]** subsections (2) and (3), this Act applies to –

(a) all manufacturing and distribution of liquor or methylated spirits and to the regulation of impotable substances within the Republic;

(b) the retail sale of liquor products insofar as this Act provides for minimum selling prices and related matters;"; and

(b) the insertion after subsection (2) of the following subsection:

"(3) The provisions of Chapter 3A do not apply to –

(a) the sale of liquor in a duty-free shop to travellers departing South Africa;

(b) the distribution of liquor; or

(c) a liquor product exempted by regulation.

Insertion of Chapter 3A after Chapter 3 of the principal Act

5. The following chapter is hereby inserted in the principal Act after Chapter 3 –

"CHAPTER 3A: MINIMUM SELLING PRICE

24A Minimum unit price for liquor

(1) The minimum unit price for liquor shall be RX.XX.

(2) The Minister shall, by notice in the *Gazette*, adjust the minimum unit price from time to time, but no later than –

(a) in the case of the first such notice, 3 years after the commencement of this section; and

(b) in the case of a second or subsequent such notice, 18 months after the previous notice.

(3) When making an adjustment to the minimum unit price under subsection (2), the Minister shall take into account inflation and evidence of the effectiveness of the introduction of the minimum unit price in reducing alcohol-related harm, including available evidence related to prevailing –

(a) rates of alcohol consumption;

(b) patterns of alcohol consumption;

(c) health-related risks caused by alcohol consumption;

(d) data from health services relating to alcohol related presentations at health facilities;

(e) other societal harms caused by alcohol consumption;

(f) the price and affordability of alcohol products; and

(g) such other matters he or she considers appropriate.

(4) When making an adjustment to the minimum unit price in terms of this section, the Minister shall act in consultation with the Ministers responsible for finance, health and social services.

24B Minimum selling prices

(1) A person may not sell a liquor product for a selling price which is below its minimum selling price.

(2) Subject to the provisions of this section, the applicable minimum selling price for a liquor product is to be calculated by applying the formula –

M x S x V x 100

where –

(a) M is the minimum unit price, expressed in rands;

(b) S is the percentage alcohol per volume of the liquor product, determined in terms of section 24C, expressed as a cardinal number;

(c) V is the volume of the liquor product, expressed in litres.

(3) If two or more liquor products are mixed in the preparation of a beverage to be served to a customer, the applicable minimum selling price of that beverage is the sum of the minimum selling prices of each of the liquor products contained therein.

(4) If a liquor product is not precisely identified in a sale or offer, the minimum selling price is to be determined by reference to the liquor product within the possible range of liquor products which would attract the highest minimum selling price in terms of this section.

(5) If the applicable minimum selling price is not a multiple of 5 cents, it must be rounded down to the nearest multiple of 5 cents.

24C Determination of the alcohol content of liquor product

For the purposes of determining the minimum selling price of a liquor product in terms of section 24B, the percentage alcohol per volume of the liquor product is deemed to be the alcohol content displayed on its label in accordance with section 11 of the Liquor Products Act, 1989 (Act No. 60 of 1989), and the regulations made thereunder.

24D Promotions and other sales practices

(1) A liquor retailer may reduce the price of a liquor product as part of a promotion as long as the sales price of the complies with the applicable minimum selling price.

(2) A promotional offer that includes liquor products may not be structured to directly or indirectly cause the sales price of a liquor product to fall below the applicable minimum sales price.

(3) The Minister may, in consultation with the Ministers responsible for health and social services, make regulations regarding promotional offers and other sales practices related to liquor products to ensure compliance with the minimum selling price requirements of this Act.

24E Record-keeping

Subject to such conditions as may be prescribed, a retail seller must keep all of the following records for at least 6 years from the creation of the records –

(a) liquor purchase records;

(b) records of the quantity and price of liquor products and servings;

(c) liquor sales records, including quantity of liquor sold and prices charged; and

(d) liquor disposal records."

Amendment of section 26 of the principal Act

6. Section 26 of the principal Act is hereby amended by the insertion after subparagraph (ii) in subsection (2)(f) of the following subparagraph –

"(iiA) any liquor, if it appears that the liquor has been sold contrary to section 24C(1);"

Amendment of section 34 of the principal Act

7. Section 34 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection –

"(1) It is an offence to –

(a) contravene or fail to comply with section 4(2), 5(1), 6, 7, 8, 9 **[or]** 10, 24B(1), 24D(2) or 24E, or subsection (2); or

(b) fail to comply with any condition of registration imposed under this Act."

Amendment of section 35 of Act 59 of 2003

8. Section 35 of the principal Act is hereby amended by –

(a) the substitution for subsection (1) of the following subsection –

"(1) Any person who contravenes or fails to comply with a provision of –

(a) section 4(2), 5(1), 6, 8 **[or]** 10, 24B(1) or 24D(2) is liable on conviction to a fine not exceeding R1 000 000, or to imprisonment for a period not exceeding five years; or

(b) section 7, 9, 24E or 34, is liable on conviction to a fine not exceeding R500 000, or to imprisonment for a period not exceeding one year."

(b) the insertion after paragraph (a) in subsection (2) of the following paragraph –

"(aA) in terms of section 24B(1) or 24D(2), must order the forfeiture to the State of any liquor sold by that person contrary to section 24B(1) or 24D(2), and seized in terms of section 26(2)(f);"

Short title and commencement

9. This Act is called the Liquor (Minimum Pricing) Amendment Act, 2025, and shall come into operation on a date fixed by the President by proclamation in the Gazette.

DGMT

Rethink Your Drink

Stephen Harrison Attorney