Performance Based Regulations Versus Prescriptive Regulation: A Case Study of the European Approach to Wine Regulation Compared to APEC Economies

Submitted by: Australia
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CONFERENCE ON GOOD REGULATORY PRACTICES
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Why do we need wine regulation?

- Regulations exist to protect consumers and producers and to create a fair trading environment.
- These regulations can be developed by global organizations (WTO, CODEX), regional country groups, nation states, or local governments.
- Self-regulations (e.g. Codes of Best Practice) can be created by producer associations or influential corporate entities.
Influences over wine regulation?

- Governments set regulations to achieve policy outcomes
- Special interest groups often have significant influence over regulations.
- Examples of these special interests are environmental groups, consumer groups, nutrition and health advocates, and pro-trade groups, such as the WWTG.

Wine regulation meets a number of policy objectives

- Social policy
- Fiscal policy
- Consumer protection
- Consumer information
- Health and safety
- Quality – Trademarks, Geographic Indications, Brands
Social policy

- Standard drinks
- Health warnings
- Allergen labelling
- Recycling symbols

Standard drinks

- Used to provide advice to drinkers on how to moderate their consumption
- Many different definitions, usually based on grams of alcohol per amount of beverage
- Can be linked to drink driving programs
- Can be a symbol or statement in different jurisdictions
Health warnings

• Used to provide advice to drinkers on harmful effects of alcohol consumption
• Different countries require different warnings
• Often linked to pregnancy / foetal alcohol syndrome
• Can be a symbol or statement in different jurisdictions

Allergen labeling

• Used to provide advice to drinkers on presence of potential allergenic material including eggs, milk, nuts, fish and sulphites.
• Regulations based on international recommendations from the Codex Alimentarius Commission
• Sulphites can be described using INS numbers in some countries.
• Issues surrounding language of declaration
Recycling symbols

- Used to provide information to consumers.
- Regulations based on horizontal legislation

Fiscal policy

- Used to collect taxes and tariffs
- Used for revenue raising purposes
- Some economies impose taxes/tariffs to try to reduce consumption (ineffective instrument that creates trade distortions; illegal trade and production and potential serious consumer impacts)
Health and safety

- Regulate additives and processing aids
- Regulate chemical usage on vineyards and residues in wine
- Hygiene standards
- Worker health and safety regulations

Consumer protection

- Ensure what is in the bottle is reflected in the label declaration
- Regulate production methods so consumers know what they are getting
- Harmonise regulations across producing economies
Quality – Trademarks, Geographic Indications, Brands

- TRIPS Agreement provides basis for GI and trademark protection – multilateral obligation for WTO members
- Key element in purchase decision and for consumer loyalty
- System requires integrity for consumer protection

Why are rules & regulations different?

- Rules that apply in each country reflect the history, culture and geography of that country.
- Differences in rules between economies give rise to barriers to trade, by increasing costs of printing different labels for different markets, in requiring different production methods, and in terms of logistics.
- Differing regulations also increases the possibility of consumer confusion.
What are the drivers to reduce these barriers?

- WTO agreements specifically instruct member governments to reduce technical barriers to trade arising from differing national regulations.
- Industry and producer groups also promote these activities because of their potential to reduce costs, facilitate trade flows and reduce consumer confusion.

What are the mechanisms to reduce these barriers?

The WTO identifies three mechanisms for facilitating trade:

1. Harmonisation
2. Equivalence
3. Mutual recognition/mutual acceptance

These three mechanisms are closely related, but not interchangeable.
Harmonisation

- Involves the adjustment of standards, regulations and procedures until they are the same.
- This can be done by:
  - Upward harmonisation
  - Downward harmonisation
  - Compromise harmonisation (new standard)

Mechanisms to harmonise

- Bilateral agreements - eg. Chile-European Free Trade Agreement
- Multilateral agreements
- International Standard Setting Organisations
  - International Organisation for Standardisation (ISO)
- International Reference bodies OIV; OIML
**Equivalence**

- Does not require adjustment of national standards (key difference to harmonisation)
- Requires a determination that the two standards/procedures address similar regulatory objectives or achieve similar results even though they are not identical.

**Mutual recognition**

- Also known as mutual acceptance
- Vehicle for regulatory cooperation
- Can be based on harmonisation, equivalence or external criteria
What is an MRA?

- The parties to a MRA agree to accept the other parties standards because they are:
  - Equivalent; or
  - Harmonised; or
  - Meet some other mutually identified criteria
- Most MRAs based on equivalence or external criteria

Why is harmonisation difficult?

- Differing regulatory philosophy
- Harmonisation requires regulatory change
  - Bureaucrats don’t like change
- Regulatory change can create precedents for other goods /services
- Differing policy objectives
The origin of MRA

- A result of the creation of the European Union
- Extended now to underpin international trade negotiations
- Fundamental principle of WTO
- Underpins APEC

The Mutual Recognition Principle

Mutual Recognition is the principle of law under which Member States must allow goods that are legally sold in another Member State to be sold within their own territory. Member States are only allowed to derogate from this principle if they adopt their own national technical rules which are proportionate and which are justified by the EU Treaty or by “overriding requirements of public interest” as defined by the European Court of Justice.
Mutual Recognition in the WTO context

- Mutual recognition is encouraged in the WTO.
- Article 7 of GATS encourages signatories to adopt measures, by way of bilateral agreements or "autonomously", in order "to recognise the education or experience obtained, requirements met, or licences or certification obtained in a particular country".
- Under the TBT agreement "Members are encouraged, at the request of other members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures...(article 6.3)."
- The TBT also includes a stronger obligation regarding unilateral recognition of equivalence: "6.1. Members shall ensure, whenever possible, that results of conformity assessment in other Members are accepted, even when those procedures differ from their own ... (article 6.1)."

Regulatory philosophies

- In the past the regulatory philosophies of the “Old World” economies differ markedly from those of so called “New World” wine production economies.
- Most issues arise when production standards within a country are applied as market standards for imported products.
- These differences are narrowing as government and industries in both the “Old” and “New” World begin to understand that inefficient and inconsistent regulation harms the sector as a whole.
Proposed wine market reform in Europe

- In the face of over-supply, decreasing consumption and increased competition. The European Commission have put forward a number of proposals for wide ranging reforms
- Proposals to adopt similar regulatory philosophy to the ‘New World’.

Common to all proposals are:

- The rigidity of procedures for adopting and adapting Winemaking practices hinders competitiveness.
- EU regulations are too complex, notably on definitions and Winemaking practices.
- No reference in Community legislation to the concept of ‘geographical indication’ as defined by the WTO’s Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement.
- Customer confusion about what a geographic indication means.
Common labeling proposals:

- Consumers are confused by wine labels resulting from a complex legal system which deal differently with several wine categories and with some particulars depending on the product;
- Inflexible labeling rules hamper the marketing of European wines.
- Non-EU countries regularly criticise European labeling policy as far as the sales designation, the use of optional indications, the reservation of bottle shapes and the policy on traditional terms are concerned.

This new found commonality between the producing economies means that we now have a real chance of harmonising trade restrictive regulations or through mutual recognition facilitating trade.
To sum up……

• Mutual recognition is a mechanism that allows access to markets after standards have been set.
• Harmonisation and equivalence allow a wine producer to make and present wine in a single fashion in all markets.

Effective Regulations

• An appropriate instrument that is sufficient to meet the objective (whether treaty, regulation, code of practice etc) in clear and easily understood language, taking into consideration the compliance requirements of both local and foreign producers.
• Each instrument is reviewed periodically to assess current relevance.
• The goal is to ensure that the overall framework of regulation is appropriate, effective, and not duplicative or overly-burdensome.
Components of the Regulatory Framework

Intergovernmental Standards

- International agreements adopted by bodies such as Codex Alimentarius have grown in significance and often serve as a catalyst to the formation of regional and national regulations.
- Allergen labeling provides a recent example of this, being adopted into the Codex Alimentarius food labeling standard in the late 1990s and stimulating member countries (beginning with Australia) to require such labeling for foods (including wine) in national regulations.
- Even where the agreements of such bodies are not directly translated into regulation, they are still important reference texts on the subjects covered, and may be used to help resolve trade disputes between WTO member countries.

Bi-lateral and Multi-lateral Agreements

- There is a plethora of agreements that help to shape the global trading environment for wine.
- Some of these are Free Trade Agreements between countries, some are commodity-specific, such as the WWTG Mutual Acceptance Agreement on Oenological Practices or the many bilateral wine trade agreements that have been negotiated between the EU and its principal trading partners.
- These play a significant part in the overall global regulatory framework for wine.
Government regulation

- This type of regulation can impose a huge burden on producers without commensurate benefits – a fact that is acknowledged in the recently proposed EU wine reform package.
- The recognition of this potential imbalance between legislative burden and beneficial outcome has led to the development among governments in Europe of the concept of “Better Regulation”, specifically for government regulations, but containing principles of general application across all facets of the regulatory framework:

General principles of ‘Better regulation’

- Regulate as a last resort and not as a first resort.
- Regulate only after all other options have been excluded.
- Be clear about the cost of regulatory proposals.
- Regulate only when the overall benefit outweighs the burden and cost to individuals and businesses
Specific principles of ‘Better regulation’

- Proportionate: The remedy must match the risk
- Accountable: To all stakeholders
- Consistent: With other regulations and risks
- Transparent: Keep it simple, clear and open
- Targeted: Focus on the problem

Industry self-regulation

- In a complete regulatory framework, there will always be a place for well constructed and targeted guidance documents, Codes of Practice etc.
- These can enter into greater detail than might be possible or desirable and can also generally be prepared and revised more rapidly than is possible for formal regulations. In the wine sector, FIVS has produced several documents of this type, including:
  - Guiding Principles for Advertising and Marketing Practices for Alcohol Beverages
  - Good Fining Practice Guidelines
  - Global Wine Sector Environmental Sustainability

Retailer “regulation”

- As retailers extend their distribution outside of national boundaries and fight for competitive positions, a new tier of technical requirements has begun to appear, as retailers have imposed their own standards on their suppliers.
- These requirements are in areas such as quality management and sustainable practices but may also include labeling to supply customers with additional data, such as nutritional or health information.

Conclusion

- APEC has led the world in establishing mutual recognition systems.
- The WWTG is also providing leadership in the field of mutual recognition for the grape and wine sector.
- MRAs are good for producers and consumers.
- MRAs allow traditional methods to be maintained while facilitating trade.
The role of APEC

• APEC contains major consuming and producing wine economies
• The SCSC has set up a wine regulatory forum
• APEC has led the world in establishing mutual recognition systems.

Wine Regulatory Forum

• The WRF will commence dialogue and exchange ideas on wine regulation.
  – These experts would share experiences and knowledge, in particular in relation to involvement and obligations with the various relevant international fora, including *inter alia*, the Codex Alimentarius Commission, World Trade Organisation (WTO), International Organisation of Wine and the Vine (OIV), and the World Wine Trade Group (WWTG).
  – This consultation would also look at the benefits for APEC Economies and the APEC region, in particular the benefits to consumers by improving consumer protection through better wine regulation, without forming a barrier to trade. A key thrust of these consultations would be to provide capacity building in the area of wine regulation.
  – This group could then bring forward a project proposal for Trade & Investment Liberalization & Facilitation (TILF) funding to be considered inter-sessionally. This would enable the holding of training workshops for wine regulators.
DRAFT TERMS OF REFERENCE

• Goal
  – To examine options to simplify and harmonise wine regulation across the APEC region, reduce technical barriers to trade and protect consumers.
  – To share information and build capacity in wine regulation across the APEC region.
  – Communications and Administrative Arrangements
    – Contact details of wine regulation focal points to be provided by member economies to the Australian contact point by the end of 14 March 2008
    – The Wine Regulatory Forum will report to SCSC via presentation and/or written statements tabled at SCSC plenary.
    – The work of the Wine Regulatory Forum will, wherever possible, be carried out via electronic communications.

DRAFT TERMS OF REFERENCE (2)

• Modalities for Cooperation
  – Establishment of a Wine Regulatory Forum, under the auspices of SCSC, to undertake a stock take on existing wine regulations and recommend action on future cooperation and harmonisation opportunities.
  – The Wine Regulatory Forum initially to be chaired by Australia and include representatives from all interested APEC economies.
  – The Food Safety Forum has a strong relationship with the intended activities of the Wine Regulatory Forum (in particular the sub-theme: Legal and technical drafting to support the development of food laws and regulations harmonized with international standards). The Wine Regulatory Forum should seek to consult with and coordinate with the activities of the Food Safety Forum to facilitate the best use of capacity building activities and ensure maximum efficiency of time and resources between both Forums.
  – Participation from domestic and regional wine regulatory agencies is encouraged.
  – The Wine Regulatory Forum will place high priority on an examination of capacity building needs in the region. It will also consider the potential benefits of running capacity building training workshops in the field of wine regulation with the support Trade & Investment Liberalization & Facilitation (TILF) funding.
Other SCSC activities

- This activity has a strong relationship with the Food Safety Forum.
- The Food Safety Forum has produced a strategic approach for SPS activities that has four key strands, including one on *Food safety regulatory systems*, with a sub-theme: *Legal and technical drafting to support the development of food laws and regulations harmonized with international standards*. This activity, which links the wine industry engagement with food regulators fits within that strand.
- This activity is a model case study for capacity building with a view to regulatory alignment, where you have an industry that is keen to foster trade, and governments keen to protect consumers, rather than use regulation as a form of protectionism.

And APEC?....

- WRF provides APEC with a springboard to reduce trade barriers for wine; strengthen regulatory capacity and develop better policy.
- Areas of activity could include:
  - Carbon accounting protocols
  - Capacity building
  - ‘Better Regulation’
  - Relationships between regulators