1. Introduction

At the request of the Scotch whisky industry we are proposing to introduce provisions, through UK legislation to lay down rules to enhance the protection of ‘Scotch whisky’ (a registered geographical indication (GI) under Regulation (EC) No. 110/2008 of the European Parliament and of the Council and prevent consumers from being misled. Regulation 110/2008 regulates spirit drinks throughout the Community and includes protection for registered geographical indications. The stricter rules contained in the Scotch Whisky Regulations 2008 are permitted under the EC Regulation.

- Background to proposal

Scotch Whisky has been defined in UK law since the Finance Act 1933 and has been recognised as a GI in European Community legislation since 1989. The current UK legislation for Scotch Whisky is the Scotch Whisky Act 1988 and the Scotch Whisky Order made under it in June 1990. The Scotch Whisky Act and Order regulate the production and sale of Scotch Whisky, setting the minimum alcoholic strength of 40% (the same as under EC legislation), the ingredients to be used, and the minimum period of maturation of three years. The legislation prohibits the production of whisky in Scotland except Scotch Whisky. This aims to protect consumers from being sold ‘Scotch Whisky’ products not complying with the legislation, and ensure Scotch Whisky’s reputation is not undermined. The 1988 Scotch Whisky Act provides civil remedies for its contravention as read with the 1990 Scotch Whisky Order. Such remedies allow courts to grant interdicts in Scotland and injunctions elsewhere in the UK to stop breaches of the law and allow for the spirits in question to be seized and disposed of by e.g. HM Revenue and Customs.

This existing legislation gives civil protection to Scotch Whisky, and, because of this, indirectly benefits consumers. Also, the Spirit Drinks Regulations 1990 (as amended) provide for criminal remedies where the provisions of the EC Spirit Drinks Regulation are breached, which provides an overarching layer of protection for Scotch Whisky.

However, apart from the basic definition of Scotch Whisky in the 1990 Order, there are no statutory definitions for different categories of Scotch Whisky other than ‘Blended Scotch Whisky’ in the Finance Act 1969 (as amended) which is still extant, albeit it has been prospectively repealed.

Also, there are no restrictions on the use of regional descriptions for Scotch Whiskies from different parts of Scotland and no ban on Single Malt Scotch
Whisky being exported in bulk for bottling abroad or on other categories of Scotch Whisky exported in wooden barrels.

The Scotch Whisky Association have provided evidence that exports of Scotch Whisky in bulk has led to adulteration and contamination when it is bottled abroad. This risks damaging the reputation of Scotch Whisky and leaves consumers vulnerable to counterfeit products which could also have public health implications.

So far, Scotch Whisky and its consumers have been protected largely by the industry following conventions and informal understandings it has itself laid down.

The Scotch Whisky industry has therefore requested that some current industry practices be given a legislative basis and for some to be changed, and the UK Government and Devolved Administrations in Scotland, Wales and Northern Ireland have agreed.

Although all Scotch Whisky must be produced in Scotland, it is marketed and sold in the UK as a whole (as well as the rest of the world), hence the interest of all the Devolved Administrations.

We therefore put forward new proposals for consultation covering the following:

- Production of Scotch Whisky (including maturation and blending),
- Categories of Scotch Whisky,
- Protection of locality and regional geographical indications,
- New labelling rules,
- Single Malt Scotch Whisky to be bottled in Scotland before export,
- Ban on the export of all Scotch Whiskies in wooden casks unless they are inert, and
- Providing for civil liabilities for non-compliance.

This consultation sought the views of a range of stakeholders, including consumers, spirit drinks producers, retailers and enforcement agencies on the provisions contained in the proposed Scotch Whisky Regulations 2008.

2. Summary of responses

- How many responses were received - 31
- List of those who have responded to the consultation:

  Beam Global Spirits and Wine Inc.
  Blackadder International Ltd.
  Bruichladdich Distillery Co. Ltd.
  Cabrach Whisky Company
  William Cadenhead Ltd.
  Chivas Brothers Ltd. (Pernod Ricard)
  Compass Box Delicious Whisky Ltd
  Craigton Packaging Ltd
The main points that arose

The following key issues have arisen as a result of the consultation:

Definition of Scotch Whisky

- Whether we need to be more specific about what we mean by processing in regulation 3 (1)(a)(i) of the UK Spirit Drinks Regulations.

- The impact of the requirement that all maturation should take place in ‘a place of security’ on:
  
  - bottling outside of customs area;
  - duty-paid products matured outside a place of security;
  - maturing casks held in distillery visitor centres; and
  - any incidental maturation that may occur while casks are being moved between distilleries, blending sites and bottling halls.

Categories of Scotch Whisky

- The order in which the category names are listed.

- Objection to the category name ‘Single Malt Scotch Whisky’ only being available in relation to pot-stilled malt whiskies and not malt whiskies produced using a continuous still.
• What malts distilled in a continuous still should be called.

• Objections to the use of the term “Blended Malt”. Consideration of whether another category name could be used to distinguish the product from single malts.

• The use of the ‘Blended Malt Scotch Whisky’ category will adversely affect less well-established businesses because the well-established brands sell on ‘brand recognition’ and category names will have less effect.

• Objection to the use of the term “Blended Grain”

• Query about the definition of the ‘Single Grain Scotch Whisky’ category which includes malts and other types of grains.

• The need to recognise of pot still ed Single Grain Scotch Whiskies given that they are a traditional and important (albeit rare) form of whisky.

• The use of the term “Blended” which gives rise to the question of whether the category name ‘Blended Grain and Malt Scotch Whisky’ might be a better category name to make it clear to consumers what the blend contains, i.e. grain and malt whiskies.

• The compatibility of the proposed category names with the category names used for whisky in other countries e.g. in South Africa, and the impact the Regulations may have on exports of Scotch Whisky to South Africa.

**Export restrictions**

• Objections to the prohibition on the export of Single Malt Scotch Whisky except in bottles.

• Objections to the prohibition on the export of other categories of Scotch Whisky in wooden containers.

• Objections to the prohibition on the export of Scotch Whisky except in bottles only applying to Single Malt Scotch Whisky, and support for this restriction to apply to ALL Scotch Whisky on the basis that the issues concerning adulteration and contamination apply equally to all categories of Scotch Whisky. This goes further than Defra proposals which would allow categories of Scotch Whisky other than Single Malt Scotch Whisky to be exported in certain types of bulk containers.

• Concern raises by some that the prohibition on the export of Blended Malt Scotch Whisky, Single Grain Scotch Whisky, Blended Grain
Scotch Whisky and Blended Scotch Whisky other than in non-wooden containers will disproportionately disadvantage small and medium-sized enterprises (SMEs) who are much more likely to export in casks than the larger containers used by the bigger operators.

- Concern about the adequacy of the alternatives containers that may be used for the export of Scotch Whisky if export in wooden cask is not allowed.

- The export prohibitions are unnecessary and there may be advantages in having some continued maturation (over and above the 3 year minimum in Scotland) following export.

- The export restrictions do not recognise that malpractice can occur in Scotland and that non-Scottish bottling need not be inferior: quality bottling can take place elsewhere.

- Concern about wooden casks lined with plastic, being permitted for export purposes when some plastics can ‘taint’ whisky.

- Allowing lined wooden containers to be used for export will cause downstream enforcement problems.

- The need for a transitional period before bringing in the export restrictions.

- The difficulty with getting Scottish bottlers to handle single casks of malt.

- The effect that the export restrictions will have on bottlers in other parts of the UK.

**Use of distillery names**

- Objection to the name of any distillery appearing on a Single Malt Scotch Whisky except the name of the distillery in which the whisky was distilled. Claims that anything else may be regarded as misleading if not dishonest.

- Objection to the use of any distillery names on blends.

- The deception problems that may arise from allowing the name of a distillery (at which one of the whiskies making up the blend has been distilled) to appear on the labelling of the blend when only a very small amount of whisky from that distillery (e.g. a teaspoon) may have been included in the blend.
• Whether regulation 9(6) (of the proposed UK Scotch Whisky Regulations 2008) should apply to all categories of Scotch Whisky and not just Single Malt Scotch Whisky and Single Grain Scotch Whisky.

• Concern about having to provide the name of a distillery for own brand single malt whiskies where the supplying distilleries change.

• The naming of a new distillery with the name of a brand which will be distilled at that distillery, and the problem that occurs with the use of that brand name during the period when the product of that distillery cannot be sold (because of the minimum 3 year maturation period required for Scotch Whisky).

• The use of defunct distillery names for new or renamed distilleries.

• The compulsory requirement to identify the distillery at which a Single Malt Scotch Whisky or Single Grain Scotch Whisky brand names listed in Part I of Schedule 2 to the proposed UK Regulations has been distilled.

• The interrelationship between distillery and geographical names, e.g. West Highland.

• Whether it is right that there should be any exemptions from the distillery names provisions.

• Whether there should be an exemption in regulation 9(6) (of the proposed UK Scotch Whisky Regulations 2008) for existing brands of Single Malt Scotch Whisky and Single Grain Scotch Whisky that are using names that are similar to distillery names, similar to the arrangements made under regulation 9(2)(a) and Part 1 of Schedule 2 (to the proposed UK Scotch Whisky Regulations 2008) in cases where proper distillery names are used.

• The subsequent sales of Schedule 2 brands to new brand owners and their entitlement to benefit from the exemption.

Geographical labelling

• Whether the dividing line between the Highland and Lowland regions should be more accurately defined.

• Whether some of the geographical regions and localities protected by regulation 10 of the proposed UK Scotch Whisky Regulations 2008 should be broken down further, e.g. Highland into Northern Highland, Western Highland, and Eastern Highland.
• Whether it is fair that there should be exemptions for existing registered products but that future products will have to comply.

• Allowing cross-promotion labelling for a group or range of whiskies from different regions (described by many consultees as ‘multi-packs’).

• References to geographical locations in advertising and promotional communications that describe the different forms and origins of Scotch Whisky in broad terms to provide an overview and a context before focussing on a particular brand of whisky.

• The recognition and protection of other geographical regions and localities in the future.

• Whether a period of grace (e.g. one year) should be allowed during which operators are allowed to register brands.

• Query about the northern limits of the Cambeltown locality.

• Whether it should be a requirement for a whisky using a regional GI name, e.g. Highlands, to have been matured within that named place on the basis that, as Scotch Whisky must be matured wholly in Scotland to be called ‘Scotch Whisky’, the same argument should be applied to the other regional geographic indicators for Scotch Whisky, otherwise consumers may be misled.

• Whether the exemption in regulation 10(5) of the proposed UK Scotch Whisky Regulations 2008 for inaccurate geographical names used in connection with existing brand names should apply to all existing brands, regardless of whether they are registered as a trade mark.

• Whether the exemptions that will apply for the 5 protected geographical names should apply in relation to the use of other geographical names.

Other labelling issues

• Whether it should be made compulsory to state on the labelling whether caramel colouring has been added to a whisky.

• Whether it should be made compulsory to state on the labelling that whisky has been subject to chill filtration.

• Whether descriptions such as ‘double malt’ and ‘triple malt’ should be prohibited.

• The use of words such as ‘Special’, ‘Deluxe’, ‘Organic’, etc.

• The use of descriptive words as part of a brand name.
• Objection to the prohibition against the use of the description ‘pure malt’.

• The order of emphasis of the information relating to the brand range, distillery name and sales category on Scotch Whiskies marketed as part of a generic range.

• The use of the Gaelic language.

**Enforcement tools and penalties**

• The jurisdiction of the High Court in England to grant an injunction against an English company in respect of a contravention of the Regulations occurring in Scotland.

• Objections to the proposed balance between administrative and criminal sanctions.

• Objections to the maximum amount of financial penalty laid down in Regulation 31(2) of the proposed UK Scotch Whisky Regulations 2008.

• Objection in general terms to the inadequate nature of the enforcement tools provided when the contravention of similar provisions overseas can (and have) led to imprisonment.

• The use of funds collected following the serving of penalty notices.

**Verification arrangements**

• Industry desire for Her Majesty’s Revenue and Customs (HMRC) to act as the verification authority required for the purposes of Article 22 of the EC Spirit Drinks Regulation 110/2008.

**Transitional period**

• Concern about sufficient time being given to enable changes to be made to advertising and promotional materials.

**The form of the Regulations**

• Concerns about the complexity of the proposed UK Scotch Whisky Regulations and the desire for simplification, including the desire not to lose the ‘extent or depth of the content’.

**Impact Assessment (IA)**

• Questions to be considered re the IA, e.g. clarifying further the economic rationale and benefits of the proposed UK Scotch Whisky Regulations.
Consultation

- Concern that the consultation did not reach whisky consumer organisations, the wider drinks trade, consumer publication editors, specialist whisky writers and specialist whisky retailers.

General issues

- Concern that there is a risk that the new rules will restrict competition by allowing the major distillers to extend their control over the upstream market for distilling malt Scotch Whisky into the downstream market for bottling and marketing the product, resulting in restrictions on industry entry and the creation of new brands.

- The scope of the proposed UK Scotch Whisky Regulations and their applicability to imported products.

- The interrelation between the provisions of the Spirit Drinks Regulations and the Scotch Whisky Regulations, e.g. the requirements relating to age and maturation statements, and the scope to repeat provisions of directly applicable provisions of the EC Spirit Drinks Regulations in the UK Scotch Whisky Regulations.

Other issues that have arisen in connection with the draft UK Scotch Whisky Regulations otherwise than by consultees

- Need to repeal Northern Ireland Scotch Whisky legislation.

3. The Government’s response

The Consultation closed on 25 March 2008. Responses are now being actively considered and evaluated.

4. The way forward

Defra is now considering and evaluating the responses received very carefully and will decide what action needs to be taken. A number of legal issues have been raised and these are being considered by Defra in consultation with other government departments, in particular the Ministry of Justice. Consideration will be given to any changes that may be necessary to the draft Scotch Whisky Regulations 2008 and the Impact Assessment as a result of the responses received.