Scottish Pubs Code

Market Rent Only Leases and Guest Beer Agreement Consultation Analysis Report

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Report authors:

Stefan Durkacz, Progressive Partnership

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The views summarised in this report are those of the organisations and individuals who chose to submit them. The recommendations expressed in this report are those of the contractors appointed. The report does not represent the views or intentions of the Scottish Government.

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Executive summary

Background

The Tied Pubs (Scotland) Act 2021 requires the Scottish Government to create a Scottish Pubs Code for tied pubs. The Scottish Pubs Code will govern the relationship between tied pub tenants and their pub owning companies. The Scottish Government is currently consulting to develop a Scottish Pubs Code for tied pubs. A written consultation is being issued in two parts, to provide the sector with early certainty on key aspects of the code. The first written consultation covers the Market Rent Only (MRO) lease and guest beer agreement aspects. The purpose of this report is to present the findings from the first written consultation.

The consultation was hosted online on Citizen Space and was live from 8 November 2021 to 17 January 2022.

Consultation response and sample

Thirty-four responses were received in total, including 20 from organisations and 14 from individuals. Respondent types included:

- 7 tied pub tenants with one tenancy
- 4 tied pub tenants with multiple tenancies
- 6 pub-owning businesses
- 1 brewery
- 8 representative organisations
- 1 other organisation
- 2 consumers
- 4 other

Findings

The key theme running throughout the findings is the difference in views between pub-owning businesses and tied pub tenants. The latter broadly welcomed the proposals around MRO leases and guest beer agreements, seeing them as addressing real problems in the sector and rebalancing the relationship between them and their landlords.

Pub-owning businesses were however sceptical overall and had a number of concerns. Regarding MRO leases, they worried about unintended consequences that could negatively impact the industry and potentially offer tied pub tenants advantages that they might not achieve if seeking a free-of-tie lease on the open market.

MRO leases

- Most respondents overall felt that MRO leases should be offered as new or substantially altered leases only when both parties agree. Tied pub tenants were especially supportive, whereas pub-owning businesses were more sceptical. They generally believed the change in the nature of the agreement between a tied lease and MRO lease was significant enough to warrant a new or substantially altered lease. They also worried that a deed of variation could result in the tied pub tenant being presented with opportunities not available on the open market.
- Support was generally strong for the proposed unreasonable terms in an MRO lease. Pub-owning businesses however tended to object to: deposit requirements more onerous than in the existing lease, requirements to pay rent in advance more onerous than in the existing lease, a term triggering dilapidations requirements in the existing lease or imposing dilapidations requirements more onerous than in the existing lease, and tenant repairing liabilities more onerous than in the existing lease except where the MRO lease offered is for a period of 5 years or more, or with the consent of the tied pub tenant.
- Regarding exemptions, tied pub tenants overall opposed the idea that 'an MRO lease need not be offered for 5 years when agreement has been reached for a pub-owning business to invest £35,000 or 1.5 times annual rent, whichever is higher', whereas pub-owning businesses supported it. Tenants worried it could create a loophole allowing landlords to continually roll over the exemption by investing £35,000 every five years. They also considered £35,000 a small investment, and wanted more clarity on what qualified as investment (e.g. they felt maintenance and compliance work should not qualify). Pub-owning businesses however felt that five years was a reasonable time-frame to realise a return on investment. The proposal for a seven year exemption however was unpopular with both tied pub tenants and pub-owning businesses. They felt the proposal was arbitrary and the rationale unclear. Regarding other proposed exemptions, there was strong support regarding short-term tenancies with more mixed views on other proposals.
- There was strong support for including the new rent, how terms of existing lease need to change and the legal steps required in the MRO offer.
- Tied pub tenants mostly agreed with a proposed requirement to offer the MRO lease within four weeks of request whilst pub-owning businesses disagreed. Some businesses were concerned about dealing with a flurry of MRO lease requests when the Code comes into force.
- There was strong support for setting out a time period for negotiation in the Code. Generally, tied pub tenants said the proposed time period (8 weeks, extendable up to 4 weeks by mutual agreement) was too long or about right, whereas pub-owning businesses were more likely to feel it was too short.

- Regarding rent assessments, there was general agreement that the assessor should be a RICS member or fellow, and also with the proposed arrangements for rent assessment for an MRO lease. Some however questioned the consistency of RICS valuations and wanted to ensure RICS assessors were familiar with the industry and local markets e.g. in rural areas.

Guest beer agreements

- Tied pub tenants all agreed with the policy aims, but pub-owning businesses nearly all disagreed. Supporters felt this would improve consumer choice and improve routes to market for smaller brewers, but landlords questioned whether these were issues that needed addressing and felt they already offered good choice to tied pub tenants and good routes to market.
- The Scottish Government proposed that guest beer agreements should be for beers with small production capacity which will support small brewers and improve consumer choice. There was concern that the focus on production levels as the key qualifying characteristic for guest beers would not achieve the policy objectives. Some felt the focus should be on the nature of the brewer (e.g. its size and/or locality) rather than the production level, otherwise big brewers could misuse the system by deliberately capping production levels on certain beers. Three respondents specifically suggested that the definition used in small brewer's relief should be the qualifying characteristic.
- The 60,000 hectolitre production level proposed for brands of beer to be eligible for guest beer, was also seen as arbitrary, possibly too high in comparison to Scottish craft beer production levels, and potentially difficult for publicans to monitor in order to keep track of which beers qualify and which do not. The production level is taken from the UK Government's Small Brewers' Relief (a tax relief) which is currently available to any brewer that produces less than 60,000 hectolitres of beer a year. Whilst not an exact comparison, it gives an indication of what might be a small production value.
- Looking at proposed exemptions, there was again variation between pub-owning businesses, who tended to agree with them, and tied pub tenants who tended to disagree. However, some pub-owning businesses believed that in practice the exemptions would not apply. In their view most tied pub tenants would ask for a guest beer agreement, and leases would therefore soon all include the provision as standard.
- Both pub-owning businesses and tied pub tenants had an interest in ensuring the process of applying for a guest beer agreement was as quick and simple as possible.

Business and Regulatory Impact Assessment (BRIA)

Pub-owning businesses expressed concerns about the partial BRIA. They felt it was too optimistic and envisaged a number of unintended consequences following the introduction of the Code which they felt the BRIA did not cover adequately.

Some concerns were around the impact of the Covid-19 pandemic on the industry and a consequent need, in their view, to revisit the financial memoranda and impact assessments the Bill was based on.

A research paper by Europe Economics[1] submitted to the consultation claimed to identify two main omissions in the BRIA:

- No clear identification of the impacts and the range of unintended effects the different options are likely to trigger.
- The BRIA assumes no reaction from stakeholders in response to the envisaged regulatory change or impacts in the medium to long run.

[1] The full research paper by Europe Economics can be accessed on this webpage as an associated document in PDF format

Introduction

Background

The Tied Pubs (Scotland) Act 2021 requires the Scottish Government to create a Scottish Pubs Code for tied pubs. The Scottish Pubs Code will govern the relationship between tied pub tenants and their pub owning companies. The Scottish Pubs Code will cover arrangements such as the process for tenants to request a Market Rent Only (MRO) lease (removing all service or product ties), circumstances where a MRO lease cannot be offered, guest beer agreements (where a tenant can select and stock one beer of its choosing), financial penalties for non-compliance with the code, and information requirements on pub-owning businesses. The Act also establishes a Scottish Pubs Code Adjudicator to apply and enforce the code, including arbitrating in disputes about non-compliance between tenant and the pub-owning business. The Scottish Pubs Code could include aspects from both the voluntary code, and the English and Welsh code.

The Scottish Government is currently consulting to develop a Scottish Pubs Code for tied pubs. A written consultation is being issued in two parts, to provide the sector with early certainty on key aspects of the code. The first written consultation covers the Market Rent Only lease and guest beer agreement aspects. A second consultation is expected to run from 17 March to 12 May 2022. It will be intended to cover other aspects of the Scottish Pubs Code, and may include financial penalties for non-compliance with the code, other topics for inclusion in the code (such as rent assessments), terms excluded from arbitration, information requirements and other requirements on pub-owning businesses.

The purpose of this report is to present the findings from the first written consultation.

Method

The consultation questionnaire was developed by the Scottish Government and hosted online on Citizen Space (See Appendix A). The consultation was live from 8 November 2021 to 17 January 2022. Responses received via Citizen Space were automatically collated into a database. A number of responses were received via email. These were manually entered into Citizen Space where possible. Responses were then downloaded by Progressive into an Excel database. This raw data file was used for analysis and creating data tables. Thirty-four responses were received.

Limitations of the findings

The online survey did not prompt respondents to answer each question before moving on to the next one. Whilst this allows the respondent to complete the survey as they wished, it also means that there are a proportion of ‘not answered’ responses for each question. The sample sizes for each question state how many

respondents answered it. However, this is also an advantage as it enables respondents to respond on areas of interest and expertise, without being forced to respond on issues they have no interest/views on.

It should be borne in mind that this was a consultation, not a representative survey. Therefore the findings reflect the views of respondents, but cannot be extrapolated to those of any particular group e.g. tied pub tenants or pub owning businesses. Three identical campaign responses were submitted.

Please note also that due to the very small sample size, figures are presented as absolute numbers rather than percentages.

Consultation response and sample

Thirty-four responses were received in total. The table below shows the breakdown between responses from individuals and from organisations.

Table 1: Consultation responses

	N
Individuals	14
Organisations	20
Total	**34**

The breakdown of respondent types is detailed in the table below.

Table 2: Respondent type

	N
Tied pub tenant – one tenancy	7
Tied pub tenant – multiple tenancies	4
Pub-owning business	6
Brewery	1
Representative organisation	8
Other organization	1
Consumer	2
Other	4

Not answered	1
Total	**34**

Tied pub tenants and pub-owning businesses were asked about their membership of trade associations and whether the pub-owning business is signed up to the voluntary code of practice.

Most respondents in these categories, especially pub-owning businesses, reported being a member of a trade organisation.

Table 3: Membership of trade organisation

	Tied pub tenants (N)	Pub-owning businesses (N)
Yes – member of a trade organisation	6	6
No – not a member	4	-
Not answered	1	1
Total	**11**	**6**

All the pub-owning businesses who responded reported being signed up to the voluntary code of practice. Most of the tied pub tenants also reported that their pub-owning business was signed up.

Table 4: Pub-owning business signed up to the voluntary code of practice

	Tied pub tenants (N)	Pub-owning businesses (N)
Yes	7	5
No	1	-
Don’t know	2	-
Not answered	1	1
Total	**11**	**6**

Pub-owning businesses who responded were asked about the location of their tied pubs. Most reported having pubs located in cities/towns and rural settings. Please note that some pub-owning businesses indicated they had tied pubs in more than one type of location, therefore the responses in Table 5 below do not sum to the total number of pub-owning business respondents (six).

Table 5: Location of tied pubs

	Pub-owning businesses (N)
Islands	1
Cities/towns	3
Rural settings	4
Not answered	1

Main findings

The findings are covered in two sections: Market Rent Only leases, and guest beer arrangements.

Market Rent Only (MRO) leases

Offering MRO leases as new or substantially altered leases

Most respondents who provided an answer felt that MRO leases should be offered as new or substantially altered leases (instead of variations of the existing lease) only when both parties agree. Individuals (9 yes vs. 4 no) were more likely than organisations (8 yes vs. 9 no) to agree. Looking at respondent types, pub owning businesses tended to disagree (2 agree vs. 4 disagree) whereas tied pub tenants were more likely to agree (7) than disagree (4). Representative organisations were also more likely to agree (5 vs. 2 disagree).

Table 6: Should MRO leases be offered as new or substantially altered leases (instead of variations of the existing lease) only when both parties agree? (Q1)

	All (N)	Individuals (N)	Organisations (N)
Yes	17	9	8
No	13	4	9
Don't know	1	-	1
Not answered	3	1	2
Total	**34**	**14**	**20**

Respondents were asked a follow-up open-ended question to comment further on their answer (Q1a). The key concern that emerged was around potential opportunities for the pub-owning business to use the system to their advantage against tenants, making it harder for them to achieve an MRO lease. Overall, respondents tended to feel that a simple variation of the lease would be sufficient in the vast majority of cases.

"The MRO lease should be a simple Deed of variation whereby all terms remain the same with the exception of the tie." (Representative organisation)

For those who agreed MRO leases should be offered as new or substantially altered leases only when both parties agree, the main focus was on the importance of keeping the process as simple as possible. For tied-pub tenants and representative organisations who agreed, they generally felt that a deed of variation was the simplest approach unless otherwise agreed. Some respondents voiced

concern that the potential extra bureaucracy and expense of negotiating a new lease could potentially be used to apply pressure to the tied pub tenant and was therefore best avoided if possible.

“From what we can see it should be relatively easy to amend an existing lease and a new lease should only be required if both parties agree. Some of the pub owning companies tend to want to make things more difficult adminstratively for the tenants in order to get their way and may want to create additional hoops for the tenants to jump through to discourage them from going for a MRO. I would suspect that a new lease may well cost more in legal fees etc which will also disadvantage the tenant.” (Tied pub tenant/Brewery)

One respondent felt this was what had happened in England.

“If left to the pub operating businesses they will go for a new lease agreement every time rather than the simple deed of variation and this is one of the main issues with the process in England, the simple deed of variation should be the means of achieving this in most instances.” (Representative organisation)

Some pub-owning businesses however felt that MRO leases should always be offered by way of a new or substantially altered lease. They reasoned that the move to an MRO lease marks such a fundamental change in relationship between the business and the tenant, and also a fundamental change in the commercial model from a tied lease. They felt therefore that the new model and relationship was best achieved through a new lease, allowing the pub-owning business a full say. Special Commercial or Financial Advantages (SCORFA)[2] benefits were mentioned as a key aspect of the differences between a tied and MRO lease.

“An MRO agreement is based on a fundamentally different commercial model from a tied lease, with different obligations and responsibilities for each party concerned (i.e. tenant and landlord), and with the parties having different needs and motivations. As such we believe that it is best documented through a new agreement. The differences between a tied lease and an MRO lease are significant (i.e. the former includes a wide range of SCORFA benefits) so we think that it is simpler and clearer to document it via a new lease.” (Pub-owning business)

“The move to an MRO agreement is a fundamental change in the nature of the relationship between landlord and tied tenant and the agreement should reflect that change. A landlord must be entitled to have a say in the type of agreement it is forced to let its property on which will dictate how it wishes to run its business and the cost implications of so doing.The current proposal will create an unfair advantage between new MRO leases and existing commercial tenants that do not

[2] The SCORFA principle says that there have to be compensating benefits to lessees or free trade customers who accept ties or exclusive trading arrangements.

enjoy the SCORFA benefits in tied agreements, this will distort the market." (Pub-owning business)

There was also concern that a deed of variation could be more complex from a legal perspective than a new lease, and potentially more costly.

"By way of contrast, a deed of variation would require to be reviewed in conjunction with the existing lease and by reference to it – creating a process which is more complex from a legal perspective than reviewing a new agreement in the form of a single draft lease. A new agreement is easier and clearer for both parties to follow over the life of the lease." (Pub-owning business)

There was also a concern, again from a pub-owning business, that an unintended consequence of having deed of variation as a default position, is that the tied pub tenant could be presented with an opportunity better than would be available on the open market. They felt this was against the spirit of the Code which they interpreted as being to ensure that tied pub tenants were 'no worse off'.

"Using a deed of variation as a default position, could result in the TPT being presented with an opportunity which would not normally be available in the open market through a free of tie commercial agreement. The unintended consequence of this approach could result in those TPTs who achieve a free of tie arrangement via MRO not only being in a 'no worse off' position, as per the intention of the Code, but also in a 'better off' position than if they were not subject to any product or service tie and had arrived at that opportunity via the open market." (Pub-owning business)

Respondents were also asked whether they felt there were situations where an MRO lease should be offered by way of a new or substantially altered lease. Suggestions included:

- If the business is in jeopardy or has been affected by external factors outwith either party's control e.g. closure of a local office, factory or football ground significantly affecting trade.
- If the MRO lease is going to include a substantial increase in the length of lease.
- When a tenant or potential new tenant requests it.

These suggestions were mainly from pub tenants and representative organisations; as detailed above, pub-owning businesses tended to favour new or substantially altered leases in most or all circumstances.

Views on unreasonable terms in an MRO lease

Respondents were asked whether they agreed or disagreed with the following proposed terms as being unreasonable in an MRO lease:

- A break clause only exercisable by the pub-owning business (unless such a term is already included in the existing lease)
- A lease period shorter than the remaining period of the existing lease
- A stocking requirement other than as defined in Section 20(2) of the Act (and carried over into the regulations)
- Deposit requirements more onerous than in the existing lease
- Requirements to pay rent in advance more onerous than in the existing lease
- A term triggering dilapidations requirements in the existing lease or imposing dilapidations requirements more onerous than in the existing lease
- Personal guarantee requirements more onerous than in the existing lease, except with the consent of the tied-pub tenant
- Tenant repairing liabilities more onerous than in the existing lease, except where the MRO lease offered is for a period of 5 years or more, or with the consent of the tied-pub tenant

Overall, a majority agreed with each of these as summarised in the table below.

Table 7: Agree or disagree with proposed unreasonable terms in a MRO lease: summary (Q3)

	Agree (N)	Disagree (N)	Don't know / No answer (N)
A break clause only exercisable by the pub-owning business (unless such a term is already included in the existing lease)	25	4	5
A lease period shorter than the remaining period of the existing lease	24	5	5
A stocking requirement other than as defined in Section 20(2) of the Act (and carried over into the regulations)	23	5	6
Deposit requirements more onerous than in the existing lease	18	12	4
Requirements to pay rent in advance more onerous than in the existing lease	18	11	5
A term triggering dilapidations requirements in the existing lease or	18	10	6

imposing dilapidations requirements more onerous than in the existing lease			
Personal guarantee requirements more onerous than in the existing lease, except with the consent of the tied-pub tenant	25	5	4
Tenant repairing liabilities more onerous than in the existing lease, except where the MRO lease offered is for a period of 5 years or more, or with the consent of the tied-pub tenant	20	9	5

The tables below look at the response to each statement in more detail. After each table are other comments on the term, where applicable, from the follow-up question (Q4 - Do you have any other comments or suggestions on unreasonable terms for an MRO lease?).

A break clause only exercisable by the pub-owning business

The vast majority (25 of respondents) agreed with 'a break clause only exercisable by the pub-owning business (unless such a term is already included in the existing lease)'. Organisations were especially in favour (16 agree vs. 1 disagree).

Table 8: A break clause only exercisable by the pub-owning business (unless such a term is already included in the existing lease) (Q3a)

	All (N)	Individuals (N)	Organisations (N)
Agree	25	9	16
Disagree	4	3	1
Don't know	2	1	1
Not answered	3	1	2
Total	**34**	**14**	**20**

One respondent commented that in their view, some current tied leases or tenancies, and/or their conditions for renewal, contain break clauses 'designed solely to thwart a tenant's right to MRO – such as a lease or the right to renewal only remaining valid if the pub remains tied'. They felt that 'such clauses would be unreasonable and should be made unenforceable'.

Pub-owning businesses also voiced concerns from their side regarding break clauses. One explained in detail why they disagreed with the suggestion that 'a landlord-only break clause should be treated as an unlawful provision.' They identified in their view legitimate reasons why pub-owning businesses and tenants may want a break clause, but that their reasons may be very different. In their view this could lead to an unintended consequence.

"The unintended consequence of this provision is that landlords may well be reluctant to offer leases which extend beyond the expiry of the existing lease term if they have no right to break. Such an arrangement may suit the parties but would not be permitted by virtue of this provision." (Pub-owning business)

A lease period shorter than the remaining period of the existing lease

Again, the great majority agreed with 'a lease period shorter than the remaining period of the existing lease'. This was also driven by organisations (17 agree vs. non disagreeing).

Table 9: A lease period shorter than the remaining period of the existing lease (Q3b)

	All (N)	Individuals (N)	Organisations (N)
Agree	24	7	17
Disagree	5	5	-
Don't know	2	1	1
Not answered	3	1	2
Total	**34**	**14**	**20**

A stocking requirement other than as defined in Section 20(2) of the Act (and carried over into the regulations

Most (23 vs. 5 disagree) agreed with 'a stocking requirement other than as defined in Section 20(2) of the Act (and carried over into the regulations)', with organisations again the most likely to agree (14/20 vs. 9/14 individuals).

Table 10: A stocking requirement other than as defined in Section 20(2) of the Act (and carried over into the regulations) (Q3c)

	All (N)	Individuals (N)	Organisations (N)
Agree	23	9	14
Disagree	5	3	2

Don’t know	3	1	2
Not answered	3	1	2
Total	**34**	**14**	**20**

Some felt that more clarity was needed on potential stocking requirements. While some felt a stocking requirement would defeat the purpose of the Tied Pubs Act, others (in particular pub-owning businesses) felt there may potentially be situations where it would be reasonable, and wanted more information on the policy rationale around this.

“We are unclear what the policy rationale for this provision is and what the consequences of inclusion or exclusion would be. In any event all terms of the MRO lease are subject to the general test in Section 5(2)(d) of Schedule 1 of the 2021 Act that the lease must not contain any unreasonable terms. There may well be reasonable reasons for the inclusion of such a term but we do not know at the time of responding to this consultation whether this is the case.” (Pub-owning business)

One respondent suggested that any stocking agreement for brands produced by the landlord, if the landlord is a brewer, should be limited to no more than 50% of the pub’s draft beer range.

Deposit requirements more onerous than in the existing lease

Whilst individuals tended to agree with ‘deposit requirements more onerous than in the existing lease’, organisations were fairly evenly divided with nine agreeing and eight disagreeing. Pub-owning businesses tended to disagree (5 vs. 1 agree) whereas tied pub tenants mostly agreed (8 vs. 3 disagree).

Table 11: Deposit requirements more onerous than in the existing lease (Q3d)

	All (N)	Individuals (N)	Organisations (N)
Agree	18	9	9
Disagree	12	4	8
Don’t know	1	-	1
Not answered	3	1	2
Total	**34**	**14**	**20**

In the view of one respondent, the free of tie rent would be higher than the exisiting rent. As deposit is calculated with reference to rent, they felt this would justify a top-up to the deposit. They also felt that the potentially changing financial circumstances of the tenant could justify a reassessment of the deposit.

“The financial circumstances of a tied tenant may have changed since the granting of the tied lease. As the relationship is changing (i.e. tied to free of tie) then the deposit obligation should be reassessed... Regardless of the level of deposit held, the pub-owning business will still be subject to various contractual and statutory obligations in relation to the retention of that deposit and this will give the tenant protection outside of the Pubs Code regime.” (Pub-owning business)

Requirements to pay rent in advance more onerous than in the existing lease

Similarly, individuals tended to agree with ‘requirements to pay rent in advance more onerous than in the existing lease’, whilst organisations had mixed views with nine agreeing and seven disagreeing. Again, pub-owning businesses tended to disagree (5 vs. 1 agree) whereas tied pub tenants mostly agreed (9 vs. 2 disagree).

Table 12: Requirements to pay rent in advance more onerous than in the existing lease (Q3e)

	All (N)	Individuals (N)	Organisations (N)
Agree	18	9	9
Disagree	11	4	7
Don’t know	1	-	1
Not answered	4	1	3
Total	**34**	**14**	**20**

Pub-owning businesses pointed out that in tied leases, rents are paid weekly or monthly in advance unlike the commercial market where rent is paid quarterly in advance. This could, in their view, put MRO tenants at an unfair advantage:

“If terms were no more onerous this would provide an advantage to those in receipt of MRO leases versus the common position within the free of tie market.” (Pub-owning business)

A term triggering dilapidations requirements in the existing lease or imposing dilapidations requirements more onerous than in the existing lease

There were similar levels of agreement with ‘a term triggering dilapidations requirements in the existing lease or imposing dilapidations requirements more onerous than in the existing lease’ (18 agree vs. 10 disagree), with organisations

holding more mixed views than individuals. Pub-owning businesses tended to disagree (5 vs. 1 agree) whereas tied pub tenants mostly agreed (9 vs. 2 disagree).

Table 13: A term triggering dilapidations requirements in the existing lease or imposing dilapidations requirements more onerous than in the existing lease (Q3f)

	All (N)	Individuals (N)	Organisations (N)
Agree	18	9	9
Disagree	10	3	7
Don't know	3	1	2
Not answered	3	1	2
Total	**34**	**14**	**20**

Dilapidations were acknowledged by some to be a long-running issue in the industry. Some pub-owning businesses expected that MRO tenants would remedy dilapidations before the first rent review or end of MRO lease, whichever is first.

Personal guarantee requirements more onerous than in the existing lease, except with the consent of the tied-pub tenant

The great majority agreed with 'personal guarantee requirements more onerous than in the existing lease, except with the consent of the tied-pub tenant' (25 vs. 5 disagree), with similar levels of agreed amongst individuals and organisations.

Table 14: Personal guarantee requirements more onerous than in the existing lease, except with the consent of the tied-pub tenant (Q3g)

	All (N)	Individuals (N)	Organisations (N)
Agree	25	11	14
Disagree	5	2	3
Don't know	1	-	1
Not answered	3	1	2
Total	**34**	**14**	**20**

Tenant repairing liabilities more onerous than in the existing lease, except where the MRO lease offered is for a period of 5 years or more, or with the consent of the tied-pub tenant

Most agreed with ‘tenant repairing liabilities more onerous than in the existing lease, except where the MRO lease offered is for a period of 5 years or more, or with the consent of the tied-pub tenant’ (20 agree vs. 9 disagree). Individuals were more likely to agree than organisations; ten each agreed but only two individuals disagreed compared with seven organisations. Pub-owning businesses again tended to disagree (5 vs. 1 agree) whereas tied pub tenants almost all agreed (10 vs. 1 disagree).

Table 15: Tenant repairing liabilities more onerous than in the existing lease, except where the MRO lease offered is for a period of 5 years or more, or with the consent of the tied-pub tenant (Q3h)

	All (N)	Individuals (N)	Organisations (N)
Agree	20	10	10
Disagree	9	2	7
Don’t know	2	1	1
Not answered	3	1	2
Total	**34**	**14**	**20**

At least one pub-owning business again did not feel that the MRO lease terms around repairs should necessarily not be more onerous than the existing lease. A number of ways in which tied and open market leases differed around repairs were highlighted and how such a term could give MRO tenants an unfair advantage compared to the open market, in the view of one pub-owning business. They set these points out as follows.

- A tied lease will generally be a shorter term (5 years) and on a limited repairing liability. It is common for free of tie leases to be longer in length and for the tenant to have full repairing liability. To provide what has been proposed would create an advantage for an MRO leaseholder versus the current free of tie market.
- It is common where longer term tied leases (+5 years) are in place that these are on a full repairing liability, this is a recognised position in the tied market, as well as the free of tie market. To implement what is proposed would disadvantage not only tenants in free of tie agreements but also those in longer term tied agreements, whereby an MRO lease is on a limited repairing liability and a tied long term tied leaseholder is on a full repairing liability.
- It is common for landlords of tied pubs to have a maintenance and service agreement in place which deals with statutory testing requirements and other matters on behalf of the tied tenant. There are two challenges on what has been proposed. Firstly, the continuation of the service agreement would create an advantage to the MRO leaseholder versus the market and

secondly, the Act itself prohibits landlords from enforcing a 'service tie' where an MRO lease is adopted.

Other comments

Other comments and suggestions were made as follows:

- Generally, anything that increases the costs and liabilities to the tenant should be considered unreasonable.
- Upward-only rent reviews should be considered unreasonable.
- Any requirement for the tenant to share confidential business information such as accounts or sales data with their landlord should be considered unreasonable.
- Once the tied terms are severed, the landlord should be free to offer other terms but the tenant must have the right to refuse and stay with severing the tied terms only, if they wish.
- If it is agreed that the tenant will stock some of the landlord's products, the tenant should not be required to purchase them via the landlord, whose prices can be higher, and instead make their own arrangements.
- Shorter MRO lease periods may be acceptable for tenants new to the trade or new to MRO leases to enable them to see if the arrangement will work for them before parties are tied into a longer term arrangement.
- One respondent stressed the perceived advantages of a tied arrangement (e.g. rent lower than market rates, access to landlord's economies of scale on insurance), which in their view lowered the barriers for entry into the industry and encouraged entrepreneurs.

MRO exemptions

Overall, respondents were slightly more likely to disagree than agree (15 vs. 13) that an MRO lease need not be offered for 5 years when agreement has been reached for a pub-owning business to invest £35,000 or 1.5 times annual rent, whichever is higher. However there was a divergence in views between organisations, who were more likely to agree (10 agree vs. 5 disagree) and individuals, who were more likely to disagree (3 agree vs. 10 disagree). In particular, tied pub tenants almost all disagreed (9 vs. 2 agreed), whereas all six pub owning companies agreed. Clearly, tenants and landlords had very different perspectives.

Table 16: Do you agree that an MRO lease need not be offered for 5 years when agreement has been reached for a pub-owning business to invest £35,000 or 1.5 times annual rent, whichever is higher? (Q5)

	All (N)	Individuals (N)	Organisations (N)
Yes	13	3	10

No	15	10	5
Don't know	3	-	3
Not answered	3	1	2
Total	**34**	**14**	**20**

Respondents were invited to offer reasons for their answer to Q5. Tied pub tenants disagreed with the exemption for the following reasons.

- Creates a loophole for pub-owning companies to continually roll over the exemption by investing £35,000 every five years.
- Investment qualifying for exemption needs to be clearly defined as not including maintenance or compliance work.
- £35,000 is considered a relatively small investment; one respondent cited £200,000 and above as the current average investment in Scotland.

Pub-owning businesses, on the other hand, tended to agree as they felt this was a reasonable time-frame for them to realise a return on investment on this amount. Some did not agree with dilapidations and maintenance work being excluded from the scope of investment (Section 8(7)). One explained how this could, in their view, create an obstacle to landlord investment.

"We disagree with these exclusions as they appear to assume that these items fall under the landlord's responsibility.It may be completely reasonable for the landlord to invest to make good tenant responsible items, the proposed definition seeks to remove this ability. This could create a scenario where a landlord cannot invest as the tenant has not addressed their routine maintenance or dilapidations obligations." (Pub-owning business)

Another potential exemption put to respondents was that an MRO lease need not be offered for 7 years when agreement has been reached for a pub-owning business to invest 10 times the annual rent of the pub or more. Overall, most disagreed (19 no vs. 7 yes), with individuals and organisations both more likely to disagree. Looking at respondent types, eight out of 11 tied pub tenants disagreed, whilst four out of the five pub-owning businesses providing an answer also disagreed.

Table 17: Do you agree that an MRO lease need not be offered for 7 years when agreement has been reached for a pub-owning business to invest 10 times the annual rent of the pub or more? (Q6)

	All (N)	Individuals (N)	Organisations (N)

Yes	7	3	4
No	19	10	9
Don’t know	3	-	3
Not answered	5	1	4
Total	**34**	**14**	**20**

A follow-up open-ended question (Q6a) asked for reasons for their answer. Reasons for disagreeing given by respondents included:

- An impact assessment of this potential exemption is needed to be able to make a considered judgement.
- The calculation feels arbitrary and the rationale is not clear.
- The size of investment required to qualify could make this an irrelevant and unused provision.
- The ROI of pub-owning companies on investments at 25% of capital expenditure is usually realised in 4 years if the investment achieves its targets.

When asked for suggestions for different investment levels and/or periods of time (Q7), pub-owning businesses were keen to mirror the current position in England and Wales, which they felt was reasonable. Businesses with pubs in different parts of the UK felt this would ease the potential burden on them of having to deal with different systems in different areas. It was felt that the internal investment and sign-off process for investment projects would be fairer and consistent across all parts of the UK.

Some tied pub tenants were more focused on ensuring the meaning of ‘substantial investment’ was clearly defined and the investment level set at a meaningfully high level, in their view. One also suggested that the tenant should be able to independently verify the level of investment.

“The level needs to be a substantial and transformative investment so a minimum of £150k with the ability for the leasee to get their own tenders to verify the costs presented to them.” (Tied pub tenant)

They also suggested that the term could be flexible, so for example if the investment performs better than expected this could reduce the time period of the MRO exemption. The investment would be more similar to a loan in this sense.

Other circumstances where an MRO lease need not be offered

Respondents were also asked whether they agreed or disagreed that an MRO lease need not be offered in the following circumstances:

a) Short-term tenancies (one year or less)

b) First half of any tenancy longer than one year

c) Where the tenant has previously requested an MRO lease within the past two years

The table below summarises agreement with each. Overall, the strongest support was for exempting short-term tenancies from the requirement to offer an MRO lease (22 agree vs. 7 disagree). Views were more mixed on the other proposed exemptions, with roughly equal numbers for and against. Overall, pub-owning businesses tended to be more supportive than tied pub tenants in particular across all the proposed exemptions.

Table 18: MRO lease need not be offered in the following circumstances: summary (Q8)

	Agree (N)	Disagree (N)	Don't know / No answer (N)
Short-term tenancies (one year or less)	22	7	5
First half of any tenancy longer than one year	14	14	6
Where the tenant has previously requested an MRO lease within the past two years	14	16	4

Short-term tenancies (one year or less)

Organisations were especially supportive of MRO exemptions for short term leases (15 agree vs. 2 disagree). Looking at respondent types, all those describing themselves as pub-owning businesses and breweries agreed, whilst views were mixed amongst tied pub tenants (6 agree, 5 disagree).

Table 19: Short-term tenancies (one year or less) (Q8a)

	All (N)	Individuals (N)	Organisations (N)
Agree	22	7	15
Disagree	7	5	2

Don’t know	2	1	1
Not answered	3	1	2
Total	**34**	**14**	**20**

Pub-owning businesses supported exemptions for short term leases primarily because they perceived a risk of multiple applications from some tenants, possibly with the purpose of causing annoyance and worry to them, if MRO requests for short-term leases were allowed.

“There appears to be nothing preventing a tenant from serving multiple notices. Our view is that there needs to be some control over this to provide Landlords with certainty on when notices can be served.” (Pub-owning business)

Another respondent highlighted the perceived purpose of short-term tenancies and the importance of guarding against their abuse.

“Short term tenancies are a try before you buy period, but no tenant should be allowed to do multiple short-term agreements with the same pub company even if they use different identities or vehicles (i.e. using different limited company each time). Tenants should be restricted to just one 12-month agreement, anything longer is outlawed, or it will be used to avoid the intentions of the code.” (Other organisation)

A concern was raised regarding potential misuse of short-term tenancies, and that pub-owning businesses should be prevented from refusing to issue longer leases in an attempt to avoid the obligation to offer an MRO lease (e.g. replacing a five year tenancy with five consecutive one year tenancies).

First half of any tenancy longer than one year

Views overall were evenly split on whether MRO leases should not be offered during the first half of any tenancy longer than a year (14 agreed, 14 disagreed). Again, agreement was particularly pronounced amongst organisations. Again, all six pub-owning businesses agreed, whereas nine out of 11 tied pub tenants disagreed.

Table 20: First half of any tenancy longer than one year (Q8b)

	All (N)	Individuals (N)	Organisations (N)
Agree	14	3	11
Disagree	14	9	5
Don’t know	3	1	2

Not answered	3	1	2
Total	**34**	**14**	**20**

One pub-owning business was concerned that allowing the tenant to change a tied agreement of five years or less was unfair, as a business plan will have been provided and a fixed rent set for the duration.

“Where a tenant is willingly entering into a tied agreement for five years or less, the tenant will have provided a business plan for the length of the agreement and the rent will be fixed for those three/five years. We do not agree that the TPT should be able to then have the ability to change that agreement halfway through the term.” (Pub-owning business)

They also voiced concern that too much uncertainty around MROs could harm investment and raise barriers to entry into the industry.

“The unilateral ability to disrupt a commercial relationship at any point simply presents too much risk for any landlord or investor. This will not only significantly limit investment into this sector but also kill off a lowcost entry to entrepreneurs into the Scottish pub market. This is to the detriment of tenants, prospective tenants, customers and the communities these pubs serve. This will also encourage short term one-year deals only which will supress investment in tied pubs from both sides.” (Pub-owning business)

The same business believed that the MRO option available in England and Wales would help to balance the commercial risk to a landlord by having MRO triggers based on specific events or milestones. Generally, the preference amongst pub-owning businesses was not to have an open-ended ability for tenants to request an MRO during the second half of the tenancy but rather a defined time period or milestones.

Some pub-owning businesses also stressed their view that transitional arrangements for existing tenants needed to be set out clearly or there could, in the words of one, be:

“Chaos at outset for both landlords and the adjudicator which will undermine the perception and workings of the Code from day one.” (Pub-owning business)

Another organisation felt that there should be an absolute minimum period of 12 months before an MRO lease can be granted. In their view, it generally takes up to a year for all the benefits of a tied arrangement to be in place.

“Things can go wrong quickly, evidence showed that tied tenancies were “churning” every 9 months, this is long before the 2.5 years envisaged here. We would accept

an absolute 12-month block period to MRO so that tied pub companies can ensure the benefits of being tied are all in place." (Other organisation)

Where the tenant has previously requested an MRO lease within the past two years

Overall, views were mixed again with 14 agreeing and 16 disagreeing that an MRO lease should not be offered where the tenant has previously requested an MRO lease within the past two years. Representative organisations (6 disagree, 1 agree) and tied pub tenants (8 disagree, 3 agree) were especially likely to disagree whilst all six pub-owning businesses agreed.

Table 21: Where the tenant has previously requested an MRO lease within the past two years (Q8c)

	All (N)	Individuals (N)	Organisations (N)
Agree	14	5	9
Disagree	16	8	8
Don't know	1	-	1
Not answered	3	1	2
Total	**34**	**14**	**20**

Some tied pub tenants felt that one year rather than two years would be a reasonable time period for the MRO exemption following on from a previous request.

"MRO needs to be available at the anniversary of the tenancy or lease, a lot can happen in a year which we have found out over the last couple of years, to be tied into an agreement for 2 years is a long time in business." (Tied pub tenant)

A representative organisation stated that the exemption should only apply where the previous request resulted in an MRO lease being granted:

"Where the tenant has previously requested an MRO lease within the past two years: this should be changed to one year, and qualified by adding "and where the tenant has been offered an MRO lease and provided with MRO lease terms, and had the opportunity to take independent advice as to this option." (Representative organisation)

Other circumstances where MRO leases should not be offered

Respondents were asked if there were any other circumstances where they felt an MRO lease should not be offered. Suggestions were almost all from pub-owning

businesses. Some felt that because the Act allowed for the MRO lease period to be longer than the remaining period of the lease only at the pub-owning company's discretion, it made sense to go further and introduce an MRO lease exemption for the last 12 months of the existing lease.

"Given that a pub-owning business will not be required to offer a lease which extends beyond the expiry of the existing lease, it would make sense to provide that an MRO notice need not be served during the final 12 months of the term. This would avoid unnecessary administrative, legal and other costs being needlessly incurred." (Pub-owning business)

Other suggestions by pub-owning businesses regarding when an MRO lease should not be offered included:

- Notice to quit has been validly served by either party, either in accordance with a contractual break clause or in advance of expiry of the contractual term of the tenancy.
- After a rent review has been completed there should be a period of time, for example, two years, where an MRO lease should not be offered. Otherwise, according to one pub-owning business, 'this will lead to a TPT having two attempts at negotiating a rent, as they could request an MRO lease if they are not happy with the tied rent which has already been negotiated'.
- Where the tenant is in breach of their agreement or under notice.

MRO offers

Respondents were prompted on specific items and whether they believed they should be included in an MRO offer. For each item, the great majority of respondents believed that they should be included.

Table 22: Which of the following should an MRO offer include? (Q10)

	All (N)	Individuals (N)	Organisations (N)
The new rent	29	13	16
How the terms of the existing lease will need to change	25	13	12
The legal steps required	27	13	14
Anything else	5	-	5
Not answered	5	1	4
Total	**34**	**14**	**20**

(Please note this question allowed respondents to select as many responses as appropriate so responses may not sum to overall base size)

A follow-up question invited further comments (Q10a). Respondents made a number of suggestions for other things that could be included in MRO offers, for example:

- The terms of the new agreement and a draft form of the new agreement.
- The basis of the calculation for the new rent.
- How dilapidations, fixtures and fittings and land and buildings transaction tax will be dealt with.
- An explanatory note signposting the tenant to the statutory materials and the Pub Code Adjudicator.
- Ongoing costs, in particular increased deposit costs.
- Stocking requirement at the discretion of the pub-owning business, in order to protect their route to market.

Requirement for MRO lease to be offered within 4 weeks of request

Overall, most respondents agreed with the proposal. However, looking at respondent types, tied pub tenants and pub-owning businesses tended to take a very different view. Five out of six pub-owning businesses disagreed, whereas nine out of the 11 tied pub tenants agreed.

Table 23: Should the code require that an MRO lease be offered within 4 weeks of a pub-owning business receiving a request from a tenant? (Q11)

	All (N)	Individuals (N)	Organisations (N)
Yes	19	10	9
No	10	3	7
Don’t know	2	-	2
Not answered	3	1	2
Total	**34**	**14**	**20**

Three pub-owning businesses offered further commentary on Q11. One felt that the four week period was reasonable but that the Code needed to take into account

factors such as the MRO notice being invalid or the business not being under obligation to offer an MRO lease under regulation 8(2). They highlighted how this was addressed in England and Wales, where the obligation to offer an MRO lease is only triggered when the request is accepted.

“The Pubs Code in England and Wales deals with this by referring to a ‘full response’ which can either be to reject the MRO notice or to accept it. It is only if it is accepted that the obligation to issue an MRO offer is triggered. We would suggest the Scottish Pubs Code should make a similar distinction.” (Pub-owning business)

Another pub-owning business reiterated concerns that unless the right to request an MRO was linked to specific triggers, they could be faced with a number of requests as soon as the Code comes into force. Because of this, and the fact the regulations are new, they did not feel that four weeks was a generous period.

“The lack of transitional arrangements in this area leaves landlords faced with the possibility of a number of MRO requests being made on the first day that the Code is introduced. A period of 4 weeks to fully respond to a request made under newly-introduced regulations does not allow a landlord sufficient time to prepare itself and provide a fully-compliant response.” (Pub-owning business)

They also believed that the regulations do not set out some important processes around MRO requests.

“The regulations do not set out any process for rejecting an MRO request that may be invalid, nor do they set out the contents of what a written MRO request must contain. The current drafting appears to assume that all MRO requests will be valid but as there are exemptions as to when an MRO request may be made, there needs to be a process for rejecting an invalid notice.” (Pub-owning business)

It was also pointed out that if an MRO lease is to be delivered via deed of variation, each request would require a bespoke response which would increase the costs and time required.

Time period for negotiation of MRO lease

Respondents overwhelmingly supported setting out a time period for negotiation of an MRO lease. Support was equally strong amongst individuals and organisations, and across different respondent types including pub-owning businesses (five out of six agreed), representative organisations (eight out of nine agreed) and tied pub tenants (all 11 agreed).

Table 24: Should the code set out a time period for negotiation? (Q12)

	All (N)	Individuals (N)	Organisations (N)
Yes	27	12	15

No	3	1	2
Don’t know	1	-	1
Not answered	3	1	2
Total	**34**	**14**	**20**

Some respondents offered further comments on Q12. Some believed that the negotiation period should mirror England and Wales. For one pub-owning business, this was important as divergence in systems between different parts of Britain would increase the burden on their business.

“Creating two different systems will give rise to unnecessary administrative costs and difficulties for those businesses with pubs in both Scotland and in England and Wales... We can see the sense in having a negotiation period but since this consultation was published, the UK Government has announced changes to the process in England and Wales, which include a period of 3 months before the pub-owning business needs to issue the MRO offer. These are a sensible way to provide for a negotiation period and we recommend they are replicated in Scotland.” (Pub-owning business)

A representative organisation made a similar point.

Views on proposed time period

An open-ended question (Q13) asked for views on the proposed time period for negotiation (8 weeks, extendable up to 4 weeks by mutual agreement). Twenty-nine of the 34 respondents offered a view. Generally, tied pub tenants said the proposed time period was too long or about right, whereas pub-owning businesses were more likely to feel it was too short. Representative organisations generally felt it was reasonable.

A key concern for tenants, as elsewhere in the consultation, was ensuring they had a relatively strong position in dealings with pub-owning businesses. They were particularly keen to avoid pub-owning companies ‘dragging out’ negotiations, as they saw it.

“Some of the Pubcos are experts when it comes to dragging out rent negotiations and the use of take it our leave it proposals. It might help concentrate minds if the terms of the MRO lease were to be effective from the date that the Pubco makes the initial offer to the tenant (which has to be made within 4 weeks of receiving the request for an MRO). It then would not really matter if the Pubco's drag out negotiations.” (Tied pub tenant)

One tied pub tenant, responding to similar concerns, felt that there should be clear guidance on when the pub-owning business can access the four week extension.

“This seems to be fair but there should be a clear set of circumstances under which the landlord is allowed to access this 4 week extension.” (Tied pub tenant)

For pub-owning businesses, concerns centred on the potential additional resources needed to meet tight (in their view) timescales.

“It is very short and likely unworkable especially for smaller companies who do not have additional resource to meet these timescales.” (Pub-owning business)

Some respondents highlighted the need for a process where mutual agreement is not reached during the negotiation period.

“We support this time frame, which is in line with the process in England and Wales. However, a process is needed for any circumstance in which mutual agreement is not secured but one party wishes to continue negotiations, i.e. referral to arbitration.” (Representative organisation)

Other comments

Respondents were asked for any other comments or suggestions on the process for offering an MRO lease (Q14). A number of comments were made, including:

- The initial offer should sever the tied terms only of the tied agreement - any other terms the landlord proposes should be made in a separate offer that cannot be imposed on the tenant.
- The offer should be made in a short, concise document using non-legal terms to ensure all parties can understand it clearly.
- Ensure any clause in a lease which ends it or prevents an otherwise guaranteed renewal if the pub ceases to be tied is declared a prohibited term and made unenforceable.

Some respondents felt it was important to look at the experience in England and Wales so far to get a handle on what might happen next. Some tied pub tenants were keen to ensure that businesses were prevented from dragging out negotiations, as they believed was happening in England.

“Experience has shown that regarding the English Tied Pubs Bill, Pub Owning Businesses have not acted in line with the spirit of the bill and have used every device possible to deny or delay tenants access to MRO leases.” (Tied pub tenant)

From the pub-owning business perspective, there was concern about perceived lack of clarity over when the process ends and what happens next. One respondent noted that in England and Wales most MRO notices do not result in an MRO lease – in their view, the evidence is that some tenants use the process as a way of negotiating a more favourable tied deal, amongst other reasons that they set out. The regulations in Scotland should therefore in their view set out what happens after the end of the negotiation period.

“There is provision for a negotiation period but it is not clear what happens when that period expires. There is also provision for referral to the Scottish Pubs Code Adjudicator but this assumes that there is a dispute and this may not be the case.The Code… assume[s] that all MRO offers will end with an MRO lease being granted but… [i]n England and Wales, the majority of TPTs who serve an MRO notice do not end up entering into an MRO lease. Many do so to test the “no worse off” principle... This is a legitimate and stated objective of the legislation. Others use the MRO notice as a means of negotiating a better tied deal. Others may genuinely wish to go free of tie at the start of the process but make a commercial judgment on balance not to do so when rent and the other terms of the MRO lease are determined.” (Pub owning business)

Concerns were also raised around how to manage MRO lease applications without mechanisms to trigger them. It was pointed out that:

“In Scotland the Landlord and Tenant Act does not apply meaning that there are no automatic rights of renewal and in most cases rent reviews during the agreement. However, without a mechanism to trigger an MRO agreement this may result in an untenable position with all parties unable to effectively manage significant levels of applications.” (Representative organisation)

Rent assessment for an MRO lease

Most respondents agreed that the rent assessor should be a member or fellow of the Royal Institution for Chartered Surveyors (RICS), especially individuals. Agreement was strong across all respondent types, although two out of nine representative organisations disagreed.

Table 25: Should the rent assessor be a member or fellow of the Royal Institution for Chartered Surveyors? (Q15)

	All (N)	Individuals (N)	Organisations (N)
Yes	24	12	12
No	6	-	6
Don’t know	2	1	1
Not answered	2	1	1
Total	**34**	**14**	**20**

Most respondents agreed with the arrangements for rent assessment for an MRO lease. However, views were mixed amongst representative organisations in

particular (four agreed, four disagreed). All six pub-owning businesses agreed; amongst tied pub tenants, eight agreed and three disagreed.

Table 26: Do you agree with the arrangements for rent assessment for an MRO lease? (Q16)

	All (N)	Individuals (N)	Organisations (N)
Yes	20	7	13
No	10	5	5
Don't know	2	1	1
Not answered	2	1	1
Total	**34**	**14**	**20**

Respondents were invited to submit any further comments and suggestions on the rent assessment process at Q17. The key concern expressed was around how genuinely independent RICS rent assessors were.

Some representative organisations expressed reservations about RICS rent assessors. It was felt by some that their valuations could be variable and inaccurate and they questioned how independent they were. A genuinely independent (in their view) panel of valuers would be preferable.

"In England the RICS surveyors currently provide widely varying valuations depending on their client, a truly independent panel of valuer's paid for by the levy would be a good idea." (Representative organisation)

One respondent emphasised the importance in their view of ensuring the choice of rent assessor is led by the tenant, and the potential pitfalls of allowing too much weight in the choice of assessors to the choice of pub-owning businesses or the Adjudicator.

"Limiting the pool of potential rent assessors to those acceptable to pub companies will result in pub companies favouring assessors in that pool who give higher valuations or who may be more sympathetic to pub company arguments around valuation. Limiting the choice to those known to the adjudicator may result in unconscious bias or over-reliance on a small pool of mostly central belt based assessors. Choice of a rent assessor must be led by the tenant and the tenant must be able to appoint local surveyors/rent-assessors who are familiar with the intricacies of the local market." (Representative organisation)

Concerns about the independence of rent assessors were not limited to representative organisations, with some others also expressing reservations.

“Theoretically they are professionals and should be independent. The reality is that the Pubcos give a lot of business to RICS members (in many different areas) and there have been a number of instances where RICS members have found themselves not getting future business from certain Pubcos when they have worked with tenants against the Pubco.” (Brewery)

A number of points were also raised by pub-owning businesses, who were focused on ensuring all parties in any negotiation had a clear and equal understanding. One noted a perceived gap in the regulations around the information to be submitted to the rent assessor.

“Whilst in principle we agree with the MRO rent assessment process, the regulations do not set out the information that should be provided to the rent assessor to enable them to set the rent. Knowing this information in advance will allow the parties to prepare the same and allow a rent assessor to be instructed without any unnecessary delays.” (Pub owning business)

Experience of the industry may also be desirable for prospective rent assessors, and that similarly experienced advisors should be available to tied pub tenants.

“We also feel that where possible, an appointed rent assessor should have experience of the public house and hospitality industry... We are also firmly of the view that the key to successful rent negotiations is by ensuring that tied tenants have access to consistent and reliable advice from professional accredited advisors with relevant industry experience.” (Pub owning business)

A query was also raised around when the rent assessor should be made aware of the terms of the MRO lease. One business felt this was not set out correctly at present, and that knowledge of the terms was needed for the rent assessor to carry out a proper assessment.

“Regulation 11 appears to suggest that the terms of an MRO lease can only be referred to the Adjudicator after the negotiation period and after the rent assessment period. However, in order for the MRO rent to be assessed the assessor must know the terms of the MRO lease. If those terms have not been agreed at the time the MRO rent is assessed then it is not clear how the MRO rent could be accurately determined. In England and Wales, the terms of the MRO lease are decided before a referral for the MRO rent can be made. We therefore suggest a similar approach in this area.” (Pub owning business)

Other comments and suggestions included:

- Ensure clarity and consistency on the definition of 'market rent' between the RICS Red Book definition, the proposed legislation in the consultation, and the definition used as part of the English and Welsh Code.

- One of their first responsibilities of the Scottish Pubs Code Adjudicator should be to develop a list of qualified independent advisors to support and advise tenants on all aspects of the MRO lease process.
- Ensure rent assessors have a good understanding of the Scottish market generally and the local area. The local expertise aspect was flagged as important as it was noted that local rents outside the central belt can be very different.
- Publish decisions relating to the outcomes of independent rent assessments in order to allow tenants access to information on rental decisions which they can use to support their own rental negotiations.
- The Code should require pub-owning businesses to produce a public register of tied and Market Only rents of their properties, again for transparency and to support tenants in negotiations, contributing to a level playing field.
- Ensure the MRO rent is defined as a genuine open market commercial rent, based on comparable new letting net rents in the market, taking into account common or typical rent incentives as well as headline rents, and disregarding any goodwill or increase in business attributable to the tenant's improvements to the property or skills in developing the business.

Arbitration for MRO leases

Respondents were asked an open ended question (Q18) for their views on arbitration for MRO leases. Representative organisations focused on keeping the process simple.

A key concern for pub-owning businesses was a perceived lack of information on the expected number of referrals to the Adjudicator after the Code comes into effect, how this would be dealt with, and the potential for backlogs and delays.

"The consultation does not provide any information regarding the anticipated number of referrals and whether the Pubs Code Adjudicator will be in a position to oversee that function directly or whether alternative arbitrators will need to be appointed. Due consideration should be given to this area in order to avoid a repeat of the situation in England and Wales, where a large number of referrals were made following the implementation of the Pubs Code etc. Regulations 2016 which created a backlog of referrals and delays." (Pub-owning business)

One suggestion was to give the Adjudicator the power to appoint arbitrators to manage demand (it was also noted that this approach was used to clear backlogs in England and Wales).

"To provide additional capacity in the system and ensure high standards, we believe that the Adjudicator should have the ability to appoint an RICS Pubs Code Arbitrator as an alternative." (Representative organisation)

Other concerns and suggestions included:

- Clarify whether and how the arbitration process will be governed by the Arbitration (Scotland) Act 2010.
- There may be circumstances where expert determination may provide a more cost-effective or otherwise appropriate mechanism for dispute resolution, and this should be allowed for.
- If the pub owning business does not agree with the independent rent assessment prepared by the tenant's choice of surveyor or rent assessor then the pub owning business should be free to commission their own assessment from another independent surveyor, and both rent valuations can then be presented to the adjudicator for decision making.
- The tenant must be free to submit any information they think is relevant to the rent assessment.
- The Code should be amended to prevent pub owning businesses seeking to impose any increase in tied rent while a new MRO rent is being negotiated.
- The Code should place a temporary moratorium on pub owning businesses taking action to evict until the MRO process is exhausted to prevent pub owning businesses frustrating the MRO process by seeking to evict tenants who have served an MRO notice.
- A representative organisation claimed that currently, tenants in England and Wales have 21 days from an MRO event to serve an MRO notice on their pub-owning business, and 14 days to consider a full MRO response and whether to refer it to the PCA. They believed a longer period was needed, based on the experience south of the border, to enable tenants to access and properly consider MRO lease offers, including seeking independent advice.

Guest beer agreements

Overall agreement with policy aims

Most respondents providing a response (20 of those 31 who provided a response) agreed with the policy aims on guest beer agreements. Views of organisations were equally divided, with nine agreeing overall and nine disagreeing. Again, the key difference of opinion between respondent types was between tied pub tenants (all 11 agreed) and pub owning businesses (5/6 disagreed). Representative organisations tended to agree (six vs. two disagreed, with one not answering).

Table 27: To what extent do you agree with the policy aims on guest beer agreements? (Q19)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	12	7	5

Agree	8	4	4
Neither agree nor disagree	1	1	-
Disagree	2	-	2
Strongly disagree	8	1	7
NET Agree	20	11	9
NET Disagree	10	1	9
Not answered	3	1	2
Total	**34**	**14**	**20**

A follow-up question (Q19a) invited comments on respondents' answers to the closed question. For tied pub tenants, the benefits were clearly felt to be to their businesses and the local breweries. For these benefits to be fully realised, some felt it was important that they were able to purchase directly from local producers rather than via pub-owning businesses.

"Some of the Pubcos currently offer guest ales as part of their product range but it is quite difficult for smaller brewers to get a listing through this route and the beers have to be purchased through the Pubco, which can lead to ridiculous situations if a pub wants to order locally produced beers." (Tied pub tenant/Brewery)

"Pub tenants are best placed to know their market, customer base, and what will sell in their pub. Pub tenants should be able to offer at least one draft beer line of any type and of a product "of their choosing" to enable them to either have competitive retail pricing for that product, or to stock products that their tied pub landlord may not make available to them." (Tied pub tenant)

A representative organisation also reiterated the belief that accessing the tied pub network was a problem for small brewers, and that the guest beer provision would improve consumer choice (pub-owning businesses held opposite views).

"Ensuring that the guest beer provision helps to improve consumer choice of beers from smaller, local and independent breweries will help tenants, consumers and breweries to overcome the barriers they currently face whereby the beer tie is resulting in restricted consumer choice, as smaller brewers cannot gain access to the tied pub sector." (Representative organisation)

Pub-owning businesses raised a number of concerns and objections to the guest beer agreement and clearly had a contrasting perspective to tied pub tenants in the consultation. Most significantly, they did not tend to share the view that the guest beer provision would have an impact on consumer choice or significantly help smaller brewers. The key concerns and objections were as follows:

- Issues of consumer choice are, it was argued, competition matters which are not devolved to the Scottish Government; legislation aimed at improving consumer choice is therefore 'unlawful'.
- Provision of a guest beer from which the pub-owning business derives no benefit financially may make it uneconomic to let a pub on a tied basis.
- The majority of tied pubs are in urban areas so it is likely there will be plenty of choice for consumers without the need for a guest beer provision.
- Many pub companies already allow a tied pub tenant to stock a guest beer already, including real ales and craft beers, through the product range made available to them or sourced from a member of the Society of Independent Brewers (SIBA) - the need for the provision is therefore unclear to some pub-owning businesses.
- It was claimed that research carried out on behalf of the Scottish Government found that the guest beer provision would be used to enable the tenant to stock the beer from which they derive the most profit – this would therefore not necessarily support the Scottish Government's policy objective around increasing consumer choice.
- The argument around offering a route to market for small local brewers, supported by tied pub tenants above, was challenged by some pub-owning businesses (3) – there was a lack of awareness of any serious problems with small brewers lacking a route to market or small brewers needing protection, with pub-owning businesses tending to feel they already offered ample opportunity for pubs to stock and sell beer from smaller producers.
- Allowing beers brewed outside the UK to be eligible as guest beers was challenged, with the rationale seen as unclear.
- It was also not clear to all whether the policy applied to small brewers in Scotland only or UK-wide; one pub-owning business argued for a UK-wide eligibility as pubs in border areas may be geographically closer to a small brewer in England than Scotland.
- Perceived lack of evidence that increased consumer choice is necessarily beneficial to tied pub tenants; customer's choice of pub can be influenced by whether or not a certain product is available rather than range of choice.
- General perceived risk of unintended consequences of the Scottish Government 'intervening in a mature and sophisticated market', particularly amongst pub-owning businesses.

Small production beer brands

Brands of beer with small production levels

Respondents overall tended to agree that a guest beer agreement should cover brands of beer with small production levels, although views were somewhat mixed.

Pub-owning businesses and tied pub tenants were equally likely to agree in this case, with representative organisations more equally divided (four agree vs. three disagree).

Table 28: Do you agree or disagree that a guest beer agreement should cover brands of beer with small production levels? (Q20)

	All (N)	Individuals (N)	Organisations (N)
Yes	18	7	11
No	10	5	5
Don't know	1	-	1
Not answered	5	2	3
Total	**34**	**14**	**20**

Respondents were asked to give further comments in a follow-up question (Q20a). Again, some felt that focusing on the brewer rather than the production level was more relevant.

"I think there should be a level set i.e. you cannot go to one of the big 4 brewers for your guest beer i.e. Heineken, Molson Coors, C&C & Inbev but there are some brewers out there that do more than 60,000 hectolitres but are still no threat to the big breweries and they will be local to some outlets as well which is the main point of the agreement to support local businesses." (Tied pub tenant)

Focusing on the brand or production level could leave the guest beer provision open to abuse, according to some.

"The proposal to define guest beer in relation to a brand of beer will not achieve the policy's objectives nor ensure that the beer comes from a brewery with small production levels. Many large and Global breweries own or have significant control of smaller brands or breweries which they can promote under this scheme as defined. It will also allow them to re-badge existing brands to circumvent the new rules." (Representative organisation)

Some respondents felt the provision should instead cover brewers that qualify for small brewer's relief rather than focusing on production levels.

Proposed 60,000 hectolitres production level

Overall, then, respondents answering the closed question at Q21 tended to disagree that 60,000 hectolitres the appropriate production level to capture small

production beer brands, with a large proportion (15) either not answering or answering ‘don’t know’.

Table 29: Is 60,000 hectolitres the appropriate production level to capture small production beer brands? (Q21)

	All (N)	Individuals (N)	Organisations (N)
Yes	7	4	3
No	12	4	8
Don’t know	8	3	5
Not answered	7	3	4
Total	**34**	**14**	**20**

A follow-up question (Q21a) was asked where respondents could expand on their views. As already discussed, there were concerns around the 60,000 hectolitres figure but more importantly regarding whether focusing on the production level at all was the right approach. Focusing on a production level could also cause practical problems for tied pub tenants, according to a representative organisation.

“There is also a practical element to this definition which has not been considered. It will be difficult for tenants to know or track which guest beer brand is below or has exceeded the 60,000hl level. Whereas it is much easier for tenants to identify their local small brewery. The vast majority of small brewers produce less than 5,000hl each year and many pub tenants know or get to know their local small breweries because of their reputation and local consumer recommendation. The Pub Code is also silent on who is responsible for providing this information or what occurs in the circumstances that a guest beer is offered which exceeds this maximum production level.” (Representative organisation)

The production level was also seen as simply too high to meet the stated policy aim, according to some.

“60,000 hectolitres is not the appropriate production level to capture small production beer brands. At 60,000 hectolitres per brand, this will provide access to regional and larger breweries to price the small brewers out of the market creating the opposite effect from the stated objective. The largest selling Scottish craft beer brand stands at 30,597 hectolitres.” (Pub owning business)

In addition, pub-owning businesses made some comments regarding production levels at Q19a, summarised as follows:

- The 60,000 hectolitres per brand production level limit was queried by some as arbitrary/too high, capturing regional and larger brewers rather than the smaller brewers as intended by the policy aims.

- Some believed the focus should be on the nature of the brewer rather than the product/brand in order to be more in keeping with the policy aims. It was suggested that larger brewers could abuse the system by deliberately creating product runs capped at 60,000 hectolitres.

- Furthermore, it was seen as unclear whether 60,000 hectolitres limit applied to cider as well as beer, and whether cider-makers as well as brewers were included in the provision.

Suggested alternative production levels

At Q22, respondents were asked for any suggestions on alternative production levels. Fifteen respondents provided a response, and three broad strands of opinion emerged:

- Uncertainty or not feeling qualified to comment on what the production level should be.

- The production level should be much higher (250,000 and 450,000 hectolitres were mentioned). The rationale was that successful Scottish brewers should not be penalised.

- The production level should be much lower e.g. 5,000 hectolitres and the focus should be on brewers that qualify for small brewer's relief.

Further comments on the guest beer agreement

Respondents were asked at Q23 for any other comments on the characteristics of the guest beer agreement. The following suggestions and comments were made.

- The agreement should be based on locality of the brewer rather than production limits; encourage pubs to purchase from a local brewer within a set radius of the pub:

"This will increase customers awareness of local producers and it will also lower the carbon footprint of the beers. Is there much benefit to the world of a pub in Dumfries buying 1 keg from Inverness and having it driven hundreds of miles there and back?" (Consumer)

- Consider including cans as increasingly beer from small breweries is being offered in this format as well as cask, keg and bottles.

- The guest beer provision must make clear that every pub is entitled to one guest beer line free of tie as a new provision under the Act, of a product of the tenant's choosing, and without restriction regarding the format of the product, whether or how often that product may be changed, or volume restrictions on dispensing of the product.

- A tenant who has already in effect purchased one or more guest beer lines within an existing commercial lease/tenancy agreement should not be disadvantaged from having the same rights to a guest beer line without restriction as any other tenant.

- The tenant should be required to inform the landlord when they are changing their guest beer to a different product.

One tied pub tenant suggested that the provision should not be restricted to just one beer and that a minimum of at least two guest beers would be preferable. Some pub-owning businesses took a different view, suggesting the limit should be kept at one and/or restricted to products the landlord cannot supply.

"The guest beer arrangement should be limited to products the landlord cannot supply. This will ensure choice rather than stocking equivalent products to those produced by a brewer pub-owning business." (Pub-owning business/Brewery)

"Regulation 13 (1) (a) (i) makes reference to "at least one beer chosen by the tenant (regardless of who produces it)". This implies that the tied tenant is permitted to have more than one guest beer at a time, which we do not believe to be the intention of the legislation and should therefore be capped at one guest beer being sold at a time." (Pub-owning business)

Exemptions

Respondents were asked whether they agreed or not that a guest beer agreement need not be offered in the following circumstances:

a) The remaining term of the lease is less than 6 months

b) There is already a guest beer agreement in place which matches the definition set out in paragraph 4(3) of Schedule 1 to the Act

c) The tenant has been offered a guest beer agreement within the last 2 years. (This does not apply to agreements offered prior to the code being created.)

d) The tenant is currently involved in MRO negotiations

Overall, the key variation of note in the results here was again that pub-owning businesses tended to agree with the exemptions of offering a guest beer agreement whereas tied pub tenants tended to disagree. However, as the follow-up open-

ended question to the closed questions revealed, although pub-owning businesses agreed with the exemptions in the main, they did not envisage circumstances where they would apply. Rather, they anticipated that almost every tied pub tenant would request a guest beer agreement when the Code comes into force, meaning that it would become a standard part of the lease.

Looking at the closed questions first, a small majority agreed with an exemption if the remaining term of the lease is less than 6 months. All pub owning businesses agreed whereas seven of 11 tied pub tenants disagreed.

Table 30: The remaining term of the lease is less than 6 months (Q24a)

	All (N)	Individuals (N)	Organisations (N)
Agree	16	5	11
Disagree	12	7	5
Don’t know	1	1	-
Not answered	5	1	4
Total	**34**	**14**	**20**

Again, a small majority agreed with an exemption if there is already a guest beer agreement in place which matches the definition set out in paragraph 4(3) of Schedule 1 to the Act. All pub owning businesses agreed whereas eight of 11 tied pub tenants disagreed.

Table 31: There is already a guest beer agreement in place which matches the definition set out in paragraph 4(3) of Schedule 1 to the Act (Q24b)

	All (N)	Individuals (N)	Organisations (N)
Agree	16	5	11
Disagree	13	8	5
Don’t know	-	-	-
Not answered	5	1	4
Total	**34**	**14**	**20**

A small majority disagreed with an exemption where the tenant has been offered a guest beer agreement within the last 2 years. Five of six pub-owning businesses agreed, and nine of 11 tied pub tenants disagreed.

Table 32: The tenant has been offered a guest beer agreement within the last 2 years (Q24c)

	All (N)	Individuals (N)	Organisations (N)
Agree	11	3	8
Disagree	16	10	6
Don't know	2	-	2
Not answered	5	1	4
Total	**34**	**14**	**20**

Views were almost evenly split on whether an exemption is justified when the tenant is currently involved in MRO negotiations (14 agree, 15 disagree). Again, five of six pub-owning businesses agreed whilst eight of 11 tied pub tenants disagreed.

Table 33: The tenant is currently involved in MRO negotiations (Q24d)

	All (N)	Individuals (N)	Organisations (N)
Agree	14	4	10
Disagree	15	9	6
Don't know	-	-	-
Not answered	5	1	4
Total	**34**	**14**	**20**

Respondents were asked for further comments on the proposed exemptions to guest beer agreements in a follow-up open-ended question (Q24a). Generally speaking, tied pub tenants and some representative organisations stressed the importance of guest beer agreements and that they should be as flexible as possible with minimum restrictions.

"Possibly the Guest Beer provisions will be useful for tenants not able or not willing to access MRO. Therefore the Guest Beer provisions should as flexible as possible to encourage tenants to make use of them." (Tied pub tenant)

"There are no good reasons to preclude any tenants from being able to access a guest beer agreement. If the lease is less than 6 months, this is still time to have a guest beer. While an agreement may be in place that matches these definitions, there could be different terms that applied to the old agreement and tenants should

have the opportunity to start a new agreement. Similarly, there is no rationale for the two year gap and there could be reasonable circumstances meaning they could not enter an agreement initially." (Representative organisation)

"The right to a guest beer agreement should be absolute, and not be limited by duration of lease remaining." (Representative organisation)

As mentioned, pub-owning businesses agreed with the exemptions in general but those who offered further comment tended to feel that the exemptions would not be relevant in practice as all tied pub tenants would want a guest beer agreement. One believed that the provision would become standard in new agreements, rather than pub-owning businesses risking the administrative burden of dealing with multiple requests.

"From a tenant's perspective, there is no disadvantage that we can see to a guest beer provision in a tied tenancy. Tenants may or may not choose to stock a guest beer. However, they will want to have the flexibility to decide this and given there is no downside to such a provision we anticipate that every tied tenant will request this as soon as the legislation comes into force whether or not they choose to use it. That will also mean that in the case of new agreements this provision will be automatically included from the outset. Our view therefore is that the scenarios envisaged above will simply not materialise because a guest beer provision will become a standard term of every lease or tenancy agreement." (Pub owning business)

A further open-ended question (Q25) was asked inviting any further comments and suggestions on circumstances in which guest beer agreements need be offered. Comments here generally reiterated points made elsewhere in relation to guest beer agreements.

Process of offering guest beer agreements

An open-ended question (Q26) asked for comments on the process for offering guest beer agreements. Tied pub tenants raised the following concerns and suggestions.

- Clarification around costs and responsibilities involved for installing beer pumps and using pub owning business lines.
- Right to insist on removal of any tied beer dispenser monitoring equipment on the line to be used for the guest beer.
- Ensure there are no rent increases or other requirements or restrictions attached to getting a guest beer agreement or on sourcing the guest beer.
- Deed of variation removing the tie from one line, to be offered and presented to the tenant within 14 days.
- Ensure that the process is generally as simple and cost effective as possible.

Pub-owning businesses were also keen to keep the process as simple as possible to reduce administrative burden:

“Guest beer agreements to an existing tied lease should be offered via a side letter to the existing lease. To avoid cost and complexity for all parties, a simple side letter with the appropriate provisions should also include accompanying details (e.g. relating to service charge requests).” (Pub owning business)

Business and Regulatory Impact Assessment (BRIA)

Respondents were asked at Q27 whether they had any views on the content of the partial BRIA. Only seven substantive comments were received. Broadly speaking, pub-owning businesses expressed concerns about the potential impact and deemed the BRIA to be too optimistic. They envisaged a considerable number of unintended consequences from the introduction of the Code which they felt were not adequately covered by the BRIA. The following perceived issues were identified, chiefly by pub-owning businesses:

- The initial impact assessment states that the guest beer agreement could have knock-on benefits to the brewing sector by opening up access to on-trade venues. It was perceived that these benefits are unlikely to be felt by small brewers based in Scotland under the current definition of the Guest Beer Agreement as it is viewed as focused on brands rather than small brewers.

- There was a perception that some small brewers have become heavily indebted during the Covid-19 pandemic, despite prospering in the years before the pandemic.

- It was perceived that brewers are also likely to be impacted by other Scottish Government policies such as the deposit return scheme.

- For some tied pub tenants, a key concern is the perceived lack of security when a lease comes to an end. There is a concern that the Code will not address this sufficiently, making it easier in their view for pub owning businesses to ‘move the goalposts’ to evade the MRO lease obligation.

- It was perceived that the financial memoranda and impact assessments the Bill was based on need to be reviewed in light of the Covid-19 pandemic and forced restrictions on the industry.

- The perceived uncertainty created by the Bill is also perceived to have limited investment by some pub owning businesses, adding to the perceived need to revisit impact assessments.

A research paper by Europe Economics[3], requested by the Scottish Beer & Pub Association, was submitted alongside the consultation responses. It claims to identify two main omissions in the BRIA:

"(1) there is no clear identification of the impacts and the range of unintended effects the different options are likely to trigger, but more importantly; (2) the BRIA assumes no reaction from stakeholders in response to the envisaged regulatory change or impacts in the medium to long run." (Scottish Pubs Code: A critique of the regulatory impact assessment (Europe Economics))

The report argues that failing to address these omissions could result in damage to all players in the sector. It argues that the BRIA has a number of issues, including:

- Lack of evidence to quantify the extent of the problem in the pub sector that the Act seeks to address i.e. that pub tenants are unfairly disadvantaged at present.

- Lack of consideration by the Scottish Government of why tied contracts exist, why tenants sign up to them freely, and what would happen if tied contracts disappeared.

- The BRIA only considers two policy options: do nothing or introduce a Scottish Pubs Code. The report argues this is insufficient and details a number of other options that could be analysed in a framework. This would involve unpacking and looking at different aspect of the Code (e.g. guest beer agreements, MRO lease) as separate options.

- The report also claims to identify a number of potential unintended effects of the Code e.g. reduced investment, fewer tied contracts offered, the impact of the guest beer provision on revenues.

[3] The full research paper by Europe Economics can be accessed on this webpage as an associated document in PDF format.

Conclusions

A number of themes emerged from the analysis of consultation. The overarching challenge is balancing the views of pub-owning businesses, who tended to be more sceptical of MRO leases and guest beer agreements and their potential impact on the sector e.g. in terms of unintended consequences, and tied pub tenants who are concerned about the potential for pub-owning businesses to find ways to make the new provisions work to their advantage.

MRO leases

- Tied pub tenants tended to favour MRO leases being offered as a simple deed of variation, whilst pub-owning businesses preferred a new or substantially altered lease. The stated motive for both was around keeping the process simple.

- Tied pub tenants favoured a simple deed of variation as a way to minimise the opportunity for pub-owning businesses to make it difficult to agree an MRO lease. Pub-owning businesses were concerned that having a deed of variation as a default position could present tenants with an opportunity better than available on the open market.

- Support was strong across the board for proposed unreasonable terms in a MRO lease around break clauses, lease period shorter than remaining period of existing lease, stocking requirements, and personal guarantee requirements. For the other proposed unreasonable lease terms at Q3, tied pub tenants tended to agree whilst pub-owning businesses tended to disagree.

- Views were mixed on MRO exemptions. Regarding the 5 year exemption (Q5), views were fairly even split; tied pub tenants tended to disagree whilst pub-owning businesses all agreed. On the 7 year exemption (Q6), most disagreed across respondent types. Some felt the calculation was arbitrary, the rationale not clear, and that 4-5 years was sufficient to realise a return on investment.

- Exemptions for short-term tenancies were broadly supported, but there were mixed views on the other potential exemptions at Q8.

- There was strong support for including all the items at Q10 in an MRO offer. Other suggestions for inclusion in an MRO offer included ingoing costs (especially increased deposit costs), the basis of the calculation of the new rent, and the terms of the new agreement.

- On timings, pub-owning businesses tended to disagree with the proposed requirement to offer an MRO lease within 4 weeks of receiving a request. A

key concern was that a flurry of applications could be received on the day the Code comes into force. Processing these in a short timescale could be challenging for pub-owning companies, putting strain on resources. There was however strong support across the board for a time period on negotiation to be set out in the Code.

- Pub-owning businesses with pubs in Scotland and England/Wales were keen for systems for MRO lease applications to be as similar as possible across jurisdictions, in order to minimise the administrative burden.

- Looking across responses to the questions on MRO leases, a concern that emerged quite frequently from pub-owning businesses in particular was around the potential for unintended consequences. In particular, they were keen to avoid situations where the MRO lease offered a better deal for tied pub tenants than they would find on the open market, which they felt would be unfair and not in the spirit of the Code.

- The rent assessment proposals were generally supported. However, tied pub tenants voiced concerns about whether RICS rent assessors were genuinely independent. There was a general desire for the process of choosing a rent assessor to be tenant-led.

Guest beer agreements

- Tied pub tenants strongly agreed with policy aim on guest beer agreements, but pub-owning businesses largely disagreed. The latter did not perceive that there was a problem getting small brewers' products to market and claimed to offer small production beers to tied tenants already. Tied pub tenants and most representative organisations however did perceive a problem, and so supported the policy.

- Many participants felt that the focus in terms of eligible products should be on the nature of breweries rather than the production level of the beer. It was pointed out that large brewers could easily cap production on certain products to make them qualify under the guest beer agreement proposals.

- The guest beer agreement exemptions (Q24) were generally supported by pub-owning businesses and opposed by tied pub tenants. However, some businesses felt that in practice the exemptions would mostly rarely apply if ever. It was suggested that all tied pub tenants would apply for a guest beer agreement when the Code comes into force, therefore pub-owning businesses would start to offer the agreement as a standard part of any tied lease.

- Tied pub tenants were especially keen that the Code ensures that pub-owning businesses are not allowed to attach conditions to the guest beer agreement and that the process for applying is as quick and simple as possible.

Business and Regulatory Impact Assessment (BRIA)

Pub-owning businesses expressed a number of concerns with the partial BRIA. Overall they deemed the BRIA to be too optimistic. They envisaged a considerable number of unintended consequences from the introduction of the Code which they felt were not adequately covered by the BRIA.

Technical appendix

Method

1. The data was collected by online survey designed and scripted by the Scottish Government and hosted on Citizen Space.

2. The consultation survey was open to all – customers, tied pub tenants, representative organisations and pub-owning businesses.

3. 34 valid responses were received via the online consultation.

4. The consultation was live from 8 November 2021 to 17 January 2022.

5. Respondents to internet self-completion surveys and consultations are self-selecting and complete the survey without the assistance of a trained interviewer. This means that the consultation is not representative of any particular group.

6. An overall sample size of 34 will provide a dataset with a margin of error of between ±0.36% and ±1.8%, calculated at the 95% confidence level (market research industry standard). Each sub sample of 500 will provide a dataset with a margin of error of between ±3.34% and ±16.81%.

7. All research projects undertaken by Progressive comply fully with the requirements of ISO 20252, the GDPR and the MRS Code of Conduct.

Data processing and analysis

8. Raw data was imported into Progressive's SNAP analysis software package. Responses were checked for completeness and sense, and for campaign responses.

9. A computer edit of the data carried out prior to analysis involves both range and inter-field checks. Any further inconsistencies identified at this stage are investigated by reference back to the raw data on the questionnaire.

10. Responses to open-ended questions were spell and sense checked. There were too few to code and group into a codeframe, so they were read by a member of the executive team and key themes and quotes identified for each question.

11. A SNAP programme was set up with the aim of providing the client with useable and comprehensive data. Cross breaks were discussed with the client in order to ensure that all information needs are met.

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