

Tied pubs: consultation on a Scottish Pubs Code – Part 1

November 2021

Tied pubs: consultation on a Scottish Pubs Code – Part 1

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Ministerial Foreword

On 23 March 2021, the Scottish Parliament passed the Tied Pubs (Scotland) Bill. The Tied Pubs Bill was brought forward by Neil Bibby MSP and the Government agreed to support the Bill during its passage through Parliament, subject to amendments. The Bill became an Act on 5 May 2021. The Act is intended to rebalance the relationship between tied pub tenants and landlords through the establishment of a Scottish Pubs Code and a Scottish Pubs Code Adjudicator who will oversee and enforce the code.

During the Bill's passage, my predecessor, Jamie Hepburn MSP, met with stakeholders representing and working in the sector, to inform the Scottish Government's approach to the legislation. I have continued this approach and have been engaging with businesses to arrive at these proposals on the Scottish Pubs Code.

I have taken on board the sector's need for early clarity on key aspects of the code, particularly Market Rent Only (MRO) leases and guest beer agreements. That is why we will be consulting in two parts. This first consultation will concentrate on the Scottish Government's proposals on MRO leases and guest beer agreements and the second consultation (expected in Spring 2022) will consider the rest of the code.

I recognise it is a challenging time for business, especially for a sector which has been so impacted by Covid-19. I want tenants and landlords to come out of the pandemic with successful and vibrant tied pub businesses, underpinned by a code which promotes fairness and equity, which is already at the heart of many tied pub businesses. By working together, through this written consultation, the Scottish Government's aspiration is that we can deliver a balanced, fair and workable code. Your engagement and your insight will be essential to make this work.

I welcome your views on these proposals for elements of the Scottish Pubs Code for tied pubs. Thanks to everyone who has already taken the time to speak with me or my officials.

Ivan McKee MSP

Minister for Business, Trade, Tourism and Enterprise

Glossary of terms

Tied pub: these are pubs which are owned by a pub-owning business and leased to a tenant. Tenants must buy some or all of their products and services from the pub-owning business or someone nominated by the pub-owning business (“the tie”). Ties can include, for example, beer and these products and services are often charged at a higher cost than on the open market. In return, tenants sometimes pay lower rent and receive other support from the pub-owning business.

Tied pub tenant: these are tenants under leases of tied pubs.

Pub-owning businesses: these are the landlords under leases of tied pubs.

Market Rent Only (MRO) leases: a Market Rent Only lease is a lease where the rent is set at an amount agreed between the tenant and the landlord or, failing agreement between them, at the market rate for the property and which does not include any product or service ties, complies with any requirements of the code and contains no unreasonable terms.

Guest beer agreements: this is an agreement which allows a tenant to sell to their customers at least one beer that the tenant has chosen (regardless of who produces it), at a price of the tenant’s choice. The beer can be changed as often as the tenant wishes with no penalty. The agreement also needs to meet other criteria set out in the code.

Investment agreements: an investment agreement means a written agreement between the pub-owning business and their tenant for the pub-owning business to invest in capital improvement works to the pub.

Responding to this Consultation

We are inviting responses to this consultation by 17 January 2022.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/agriculture-and-rural-economy/draft-scottish-pubs-code-part-1> You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted by the closing date of 17 January 2022.

If you are unable to respond using our consultation hub, please complete and send the Respondent Information Form to:

Food and Drink Industry Growth Team
Scottish Government
Food and Drink
Saughton House
Edinburgh EH11 3XD

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted,

please send them to the contact address above or at:

Tiedpubsconsultation@gov.scot

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Chapter 1: Introduction

Background

1. The Tied Pubs (Scotland) Bill was passed unanimously by the Scottish Parliament on 23 March 2021. It became an Act on 5 May 2021. The Act provides for a Scottish Pubs Code to govern the relationship between pub companies and tied pub tenants and establishes a Scottish Pubs Code Adjudicator to oversee and enforce the code. The aim of the legislation is to ensure that there is a balanced relationship between the position of the business which owns the pub and the tenant. The Act promotes fairness and equitable treatment within commercial agreements.

2. The Tied Pubs (Scotland) Act¹ commits the Scottish Government to lay a Scottish Pubs Code before Parliament by 5 May 2023. The Scottish Government is seeking to deliver a code that is consistent with the regulatory principles set out in the Act:

“(a)the principle of fair and lawful dealing by pub-owning businesses in relation to their tied-pub tenants,

(b)the principle that tied-pub tenants should not be worse off than they would be if they were subject to neither a product tie nor a service tie,

(c)the principle that any agreement between a pub-owning business and a tied-pub tenant should fairly share the risks and rewards amongst the parties.”²

3. The Scottish Pubs Code will be made through secondary legislation and will need to be approved by the Scottish Parliament.

4. A Pubs Code³ for tied pubs has existed in England and Wales since 2016. This only applies to pub-owning businesses owning 500 tied pubs or more.

Purpose of this paper

5. This consultation paper seeks your views on Market Rent Only lease and guest beer agreement provisions in the Scottish Pubs Code.

6. After all the responses to this consultation have been considered, Ministers will make a final decision on the proposals for Market Rent Only leases and guest beer agreements. We will be consulting separately on wider aspects of the code. Regulations setting out the whole Scottish Pubs Code will be submitted to the Scottish Parliament for approval.

¹ Tied Pubs (Scotland) Act 2021:
<https://www.legislation.gov.uk/asp/2021/17/contents/enacted>

² Tied Pubs (Scotland) Act 2021 (section 3)
<https://www.legislation.gov.uk/asp/2021/17/section/3/enacted>

³ The Pubs Code etc. Regulations 2016
<https://www.legislation.gov.uk/uksi/2016/790/contents/made>

What this consultation does not cover

7. The consultation is not about revisiting any aspect of the Tied Pubs (Scotland) Act 2021 and whether a code should be introduced or not. This consultation is rather about what the Scottish Pubs Code should contain.

8. This consultation only covers what the code could include on Market Rent Only leases and guest beer agreements. It does not cover other topics which could be included in the code such as rent assessments (outside of Market Rent Only leases) and information to prospective tenants. It also does not include information on compliance with directions from the Scottish Pubs Code Adjudicator (who will oversee and enforce the code), penalties for non-compliance, fees and expenses for arbitration and terms excluded from arbitration. It is intended these topics will be subject to a consultation in spring 2022.

What to expect in the consultation document

9. Chapters 2 and 3 set out the Government's proposals on Market Rent Only leases and guest beer agreements. Chapter 4 addresses impacts of the proposals in terms of businesses, equalities and other impacts. Annex A contains draft regulations on Market Rent Only leases and guest beer agreements and Annex B contains a partial (i.e. a draft) Business and Regulatory Impact Assessment.

Chapter 2: Proposals – Market Lease Only leases

10. The Tied Pubs (Scotland) Act 2021 (“the Act”) gives the Scottish Ministers a power to impose requirements and restrictions on pub-owning businesses in connection with tied pubs and set out topics which must be covered by the Scottish Pubs Code. This includes the right for tenants to request a Market Rent Only (MRO) lease. An MRO lease is a lease where the rent is set at an amount agreed between the tenant and the landlord or, failing agreement between them, at the market rate for the property. It does not include any product or service ties, complies with any requirements of the code and contains no unreasonable terms.

11. The Scottish Pubs Code for tied pubs must require pub-owning businesses to offer an MRO lease where a tenant requests it, except in specified circumstances. The code can also provide more information on the process for negotiating an MRO lease.

12. The Scottish Government wishes to create an MRO lease process which is straightforward, flexible and easy to use. Draft code provisions on MRO are in Annex A.

Characteristics of an MRO lease

13. The Act sets out that the default way to offer an MRO lease is through modifying an existing lease, only to the extent necessary to become an MRO lease. The lease would be changed through a deed of variation.

14. The code can set out circumstances in which a pub-owning business can offer other types of MRO leases, such as a new lease or a substantially altered lease. There may be some circumstances where a new lease or a substantially changed lease may be of benefit to both parties, for example where a longer lease is being offered. In view of the default position in the Act and in order to ensure leases change only as far as is necessary to support an MRO lease, the Scottish Government proposes that a new or substantially changed lease should be offered only where both parties agree.

Question 1. Should MRO leases be offered as new or substantially altered leases (instead of variations of the existing lease) only when both parties agree?

Yes

No

I don't know

Please explain your answer:

Question 2. Are there any other situations where an MRO lease should be offered by way of a new or substantially altered lease?

15. The code can specify terms that would be unreasonable to include in an MRO lease. In the main, the Scottish Government proposes that these are terms which would be more onerous than the existing lease. Drawing upon our discussions with pub-owning businesses, tied pub tenants and groups representing their interests,

and the experience of MRO in England and Wales⁴, the following terms are proposed:

Question 3: Do you agree or disagree that the following terms would be unreasonable for an MRO lease?

Unreasonable terms in a MRO lease	Agree	Disagree	Don't know
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 ⁵ (and carried over into the regulations) ("stocking requirement" means a contractual obligation which— (a) requires that some of the beer or cider (or both) that is to be sold in the pub is produced by the landlord, (b) does not require the tenant to procure that beer or cider from a particular supplier, and (c) neither prevents the tenant from, nor penalises the tenant for, selling in the pub beer or cider that is produced by a person other than the landlord (although a contract term may impose restrictions on such sales).			
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 ("dilapidations requirement" means a lease term under which a landlord may require their tenant to carry out			

⁴ UK Government Statutory Review of the Pubs Code and the Pubs Code Adjudicator: 2016-2019 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932249/Report_on_the_statutory_review_of_the_Pubs_Code_and_PCA_2016_to_2019.pdf

⁵ Tied Pubs (Scotland) Act 2021 (section 20 (2)): <https://www.legislation.gov.uk/asp/2021/17/section/20/enacted>

repairs or other works falling within the tenant's repairing obligations under the 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			

Question 4: Do you have any other comments or suggestions on unreasonable terms for an MRO lease? You could use this box to explain why you agree or disagree with any of the proposals above, or to explain why you think other terms in an MRO lease should be unreasonable.

Circumstances where MRO leases might not be offered

16. The Scottish Government is keen to encourage investment in the sector and recognises that pub-owning businesses need to have certainty to be able to recoup investment in tied pubs, without the prospect of a lease being converted into an MRO lease. Amendments were made during the Bill's passage so that an investment exception could be created.

17. The Scottish Government proposes that investment agreements are one of the circumstances where MRO leases might not be offered. During our discussions with the industry, we heard that an investment of £35,000 or 1.5 times annual rent (whichever is greater) was considered to represent a substantial investment. It is proposed that this threshold is used and that an investment exception would apply for 5 years.

18. The draft regulations define investment agreements as "written agreement between the pub-owning business and their tenant for the pub-owning business to invest in capital improvement works to the pub". This excludes routine maintenance, works carried out under repairing obligations or dilapidation requirements or to comply with health and safety requirements before the pub is let.

19. Sector representatives identified that there may be times where there are major investments, such as a hotel development, that may warrant a longer time frame to recoup investment. For that reason, a longer investment exception for 7 years is proposed for investments which are 10 times the annual rent or more. Your views are invited on this, especially on the timeframes and the thresholds.

Question 5: 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?

- Yes
- No

I don't know

Please explain your answer:

Question 6: 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?

Yes – Please go to Q 8

No

I don't know

Please explain your answer:

Question 7: If you have a suggestion for different investment levels and/or periods of time, please provide it here and explain why.

20. In line with the third regulatory principle, businesses should be able to enter agreements with some confidence of return and the Scottish Government recognises creating or amending leases will take time and effort. For those reasons, we propose that short-term tied tenancies (those less than 12 months) and the first half of any tied tenancy (which is longer than one year) should be exempt from the requirement to offer an MRO lease. We also propose that tenants would only be able to request an MRO lease at 2 yearly intervals to reduce uncertainty and also the administrative impact on pub-owning businesses.

Question 8: Do you agree or disagree that an MRO lease need not be offered in the following circumstances?

	Agree	Disagree	Don't know
Short-term tenancies (one year or less)			
First half of any tenancy longer than one year			
Where the tenant has previously requested an MRO lease within the past two years.			

Please explain your reasons for agreeing or disagreeing with the proposals.

Question 9: Are there any other circumstances where MRO leases should not be offered?

Process for offering an MRO lease

21. The Act says that the code must require pub-owning businesses to use their "best endeavours"⁶ to enter into an MRO lease as soon as possible following the tenant's request.

⁶ Tied Pubs (Scotland) Act 2021 (Schedule 1, paragraph 5(1)(c))
<https://www.legislation.gov.uk/asp/2021/17/schedule/1/enacted>

22. It is proposed that an offer of an MRO lease should set out any changes to the terms of the existing lease, including to the rent of the pub, and explain the legal steps to change the lease to an MRO lease.

23. The Scottish Government propose that timescales for the MRO process should be included in the code to provide some certainty to both parties about maximum time-limits, but these would be extendable by mutual agreement. The general principle, however, should be to achieve an MRO lease as soon as possible. It is proposed that pub-owning businesses should be required to offer an MRO lease within 4 weeks of receiving a request from the tenant. A negotiation period follows on from this but negotiations must conclude within 8 weeks of the date the request was received (extendable by up to 4 weeks by mutual consent).

Question 10: Which of the following should an MRO offer include (select as many as appropriate)?

- The new rent
- How the terms of the existing lease will need to change
- The legal steps required
- Anything else

If anything else – please state what else should be included

Question 11: Should the code require that an MRO lease be offered within 4 weeks of a pub-owning business receiving a request from a tenant?

- Yes
- No
- I don't know

Question 12: Should the code set out a time period for negotiation?

- Yes
- No
- I don't know

Question 13: What are your views on the proposed time period for negotiation (8 weeks, extendable up to 4 weeks by mutual agreement)?

Question 14: Do you have any other comments or suggestions on the process for offering an MRO lease?

Assessing the market rent of an MRO lease

24. Following the negotiation period, where the parties cannot agree the rent for the MRO lease they would be able to seek independent rent assessment either jointly or, where they disagree, the adjudicator can appoint a rent assessor. The rent assessor will determine the market rent. The costs of a rent assessor are to be split equally between the tenant and the pub-owning business.

25. The rent assessor will have one month to determine the rent, following their appointment. The tenant will have two weeks after this to accept the revised MRO lease offer with the market rent.

26. The adjudicator would be able to set criteria for rent assessors and the Scottish Government proposes as a minimum they should be a member or fellow of the Royal Institution for Chartered Surveyors (RICS)⁷. The aim would be for rent assessment to be accessible to tenants across all parts of the country.

Question 15: Should the rent assessor be a member or fellow of the Royal Institution for Chartered Surveyors?

- Yes
- No
- Don't know

Question 16: Do you agree with the arrangements for rent assessment for an MRO lease?

- Yes
- No
- I don't know

Question 17: If you have any suggestions or comments on the rent assessment process, please provide these here.

Referring failure to agree MRO lease to the adjudicator

27. After the negotiation period and rent assessment, if both parties have not agreed the terms of an MRO it is possible to refer this to the adjudicator for arbitration. This could only take place if there were a question about whether the pub-owning business had complied with the code. The timescales for arbitration are set out in the Act.

28. The proposed code would also require pub-owning businesses and tenants to use their best endeavours to resolve such disputes informally.

Question 18: If you have any comments on arbitration for MRO leases, please provide these here.

⁷ RICS qualifications:
<https://www.rics.org/uk/surveying-profession/join-rics/>

Chapter 3: Proposals: Guest beer agreements

29. Under the Act, the Scottish Pubs Code must require pub-owning businesses to offer to enter into a guest beer agreement with tenants in certain circumstances. A guest beer agreement allows a tenant to sell to their customers at least one beer that the tenant has chosen, at a price of the tenant's choice. The beer can be changed as often as the tenant wishes. The code can set out other criteria that a guest beer agreement must meet. The code can also describe the circumstances where a guest beer agreement must be offered.

30. The Scottish Government's policy objectives on guest beer agreements are as follows:

- To give the tenant a further opportunity to improve their business and rebalance the relationship between tenant and landlord
- To uphold the second regulatory principle in the Act – that tied pubs are not worse off than they would be if they were not subject to any tie
- To support small brewers
- To improve consumer choice.

31. Draft code provisions on guest beer agreements are in Annex A.

Guest beer agreements

Question 19: To what extent do you agree with the policy aims on guest beer agreements?

Strongly agree

Agree

Neither agree or disagree

Disagree

Strongly disagree

Please explain your reasons for agreeing or disagreeing with the proposals.

Characteristics of a guest beer agreement

32. The Scottish Government propose that guest beer agreements should be for beers with small production capacity which will support small brewers and improve consumer choice. It is proposed that guest beer agreements should be for beers whose annual production level does not exceed, or is not estimated to exceed, 60,000 hectolitres.

33. It is difficult to establish exactly what is a small production level. The UK Government's Small Brewers' Relief (a tax relief) is currently available to any brewer that produces less than 60,000 hectolitres of beer a year⁸. Whilst this is not an exact comparison, it can give an indication of what might be a small production value. We would welcome views on the proposed threshold of guest beer agreements being focused on beers whose annual production level does not exceed 60,000 hectolitres.

⁸ UK Government, Excise Notice 226: Beer Duty <https://www.gov.uk/government/publications/excise-notice-226-beer-duty/excise-notice-226-beer-duty--2> (section 8)

Question 20: Do you agree or disagree that a guest beer agreement should cover brands of beer with small production levels?

- Agree
- Disagree
- Don't know

Please explain your reasons for agreeing or disagreeing.

Question 21: Is 60,000 hectolitres the appropriate production level to capture small production beer brands?

- Yes – please go to question 23
- No
- Don't know

Question 22: If you have an alternative suggestion for a different production level, please state it here.

34. The intention is that the code will clarify that the tenant can buy a guest beer from whomever they like, in whichever format they like (e.g. casks or kegs), provided the beer in question does not exceed the given production level. The proposal is that the code will also allow for a guest beer agreement to include a reasonable service equipment charge if the pub-owning business is content to service this under a principal brewer arrangement, for example.

Question 23: Do you have any other comments on the characteristics of a guest beer agreement?

Requirement to offer a guest beer agreement

35. The Scottish Government wishes to find a balance between tenants being able to exercise their guest beer rights against the administrative time and costs for pub-owning businesses involved in offering such agreements. It is proposed that guest beer agreements need not be offered in certain circumstances.

Question 24: Do you agree or disagree that a guest beer agreement need not be offered in the following circumstances?

	Agree	Disagree	Don't know
The remaining term of the lease is less than 6 months			
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.			
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.)			
The tenant is currently involved in MRO negotiations.			

Please explain your reasons for agreeing or disagreeing with the proposals.

Question 25. If you have any comments or suggestions on the circumstances in which guest beer agreements need be offered, please provide these here.

Process for offering a guest beer agreement

36. The Scottish Government proposes that a tenant must request a guest beer agreement in writing and that the pub-owning business should send an offer as soon as possible and no later than 4 weeks after the request is made.

37. The guest beer agreement offer must offer to vary the existing lease in a minimal way to include only the guest beer agreement. The pub-owning business and tenant are to meet their own legal costs and they should minimise the costs and administrative burden of entering into any guest beer agreement.

Question 26: If you have any comments on the process for offering guest beer agreements, please provide these here.

Chapter 4: Proposals: Impact assessments

38. The Scottish Government is committed to consulting with all parties potentially affected by proposals for new legislation, or where legislation is being changed significantly. Included with this consultation paper is a partial Business and Regulatory Impact Assessment (BRIA) (Annex B). We would welcome comments particularly on whether there are any costs, benefits and options that are not captured in the analysis, ideally supported by evidence, and if there is any additional information that would inform the BRIA.

Question 27: Please give us any views you have on the content of this partial impact assessment.

Question 28: Do you have, or can you direct us to, any information that would assist in finalising this assessment?

39. Based on the information we have, we do not think there is a requirement to run a full Strategic Environment Assessment⁹ or a Child Rights and Wellbeing Impact Assessment¹⁰.

Question 29: Please give us any views you have about whether a full Strategic Environment Assessment or a full Child Rights and Wellbeing Impact Assessment are required.

40. The Scottish Government is committed to promoting equality and removing or minimising disadvantage which may be experienced by different groups of people. We have a legal duty to consider the impact of policies on people who may be differently affected in relation to the 'protected characteristics' under the Equality Act 2010. The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

41. We are also required to consider impacts in terms of data protection, socio-economic equality (Fairer Scotland Duty), rural, island communities or human right impacts.

42. We are working through the remaining impact assessments but would welcome your views on whether there are impacts in these areas, ideally with any evidence.

Question 30: Do you have any views or information on the potential impacts of the proposals in this paper on equality, data protection, socio-economic disadvantage (the Fairer Scotland Duty), people in rural or island communities, or human rights? Please provide any evidence.

⁹ Strategic Environmental Assessment guidance: <https://www.gov.scot/policies/environmental-assessment/strategic-environmental-assessment-sea/>

¹⁰ Child Rights and Wellbeing Impact Assessment guidance: <https://www.gov.scot/collections/childrens-rights-and-wellbeing-impact-assessments-guidance/#listofcrwias>

Annex A: Draft Regulations

Draft Regulations laid before the Scottish Parliament under section 24(2) of the Tied Pubs (Scotland) Act 2021, for approval by resolution of the Scottish Parliament.

SCOTTISH STATUTORY INSTRUMENTS

2022 No.

LANDLORD AND TENANT

The Scottish Pubs Code Regulations 2022

Made - - - - - ***

Coming into force - - - - - ***

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 1 and schedule 1 of the Tied Pubs (Scotland) Act 2021⁽¹¹⁾ and all other powers enabling them to do so.

PART 1

General

Citation and commencement

1. These Regulations may be cited as the Scottish Pubs Code Regulations 2022 and come into force on ***.

General interpretation

2.—(1) In these Regulations—

“the Act” means the Tied Pubs (Scotland) Act 2021,

“adjudicator” means the Scottish Pubs Code Adjudicator, an office established under section 2 of the Act,

“beer” and “cider” have the meanings given in section 1 of the Alcoholic Liquor Duties Act 1979⁽¹²⁾,

“code” means the Scottish Pubs Code as set out in these Regulations,

“group undertaking” has the meaning given by section 1161 of the Companies Act 2006⁽¹³⁾,

“landlord of a pub” includes any person who is a group undertaking in relation to the person who is actually the landlord,

“pub” means premises—

(a) in respect of which a premises licence within the meaning of section 17 of the Licensing (Scotland) Act 2005⁽¹⁴⁾ has effect, and

⁽¹¹⁾ 2021 asp 17.

⁽¹²⁾ 1979 c.4.

⁽¹³⁾ 2006 c.46.

⁽¹⁴⁾ 2005 asp 16.

- (b) in which the main activity (or one of the main activities) carried on is the sale of alcohol to members of the public for consumption on the premises,

“pub-owning business” means the landlord under the lease of a tied pub,

“stocking requirement” means a contractual obligation which—

- (a) requires that some of the beer or cider (or both) that is to be sold in the pub is produced by the landlord,
- (b) does not require the tenant to procure that beer or cider from a particular supplier, and
- (c) neither prevents the tenant from, nor penalises the tenant for, selling in the pub beer or cider that is produced by a person other than the landlord (although a contract term may impose restrictions on such sales),

“tied pub” means a pub which is being leased to a tenant who is subject to a contractual obligation which—

- (d) requires that some or all of the alcohol to be sold in the pub be supplied by—
 - (i) the landlord of the pub, or
 - (ii) a person nominated by the landlord, and
- (e) is not a stocking requirement,

“writing” includes electronic communication within the meaning of section 15 of the Electronic Communications Act 2000⁽¹⁵⁾.

(2) References in these Regulations—

- (a) to a pub-owning business include a person who has been a pub-owning business,
- (b) a tied-pub tenant include a person who has been the tenant under the lease of a tied pub.

The regulatory principles

3. In relation to their duties under this code, pub-owning businesses are required to act in accordance with the regulatory principles set out in section 3(3) of the Act—

- (a) the principle of fair and lawful dealing by pub-owning businesses in relation to their tied-pub tenants,
- (b) the principle that tied-pub tenants should not be worse off than they would be if they were subject to neither a product tie nor a service tie,
- (c) the principle that any agreement between a pub-owning business and a tied-pub tenant should fairly share the risks and rewards amongst the parties.

Tied-pub tenant not to suffer detriment

4. A pub-owning business must not subject a tied-pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under this code.

Disputes

5.—(1) Disputes between a tied-pub tenant and a pub-owning business about whether the business has complied with a term of this code may be submitted to the adjudicator for arbitration under sections 14 to 18 of the Act.

(2) But pub-owning businesses and tenants are to use their best endeavours to resolve such disputes informally.

⁽¹⁵⁾ 2000 c.7.

PART 2

Market rent only leases

Definitions relevant to market rent only leases

6. In this Part—

“dilapidations requirement” means a lease term under which a landlord may require their tenant to carry out repairs or other works falling within the tenant’s repairing obligations under the lease,

“lease” includes any agreement between the landlord and the tenant of a pub that relates to the tenant’s occupation of the pub or the activities carried on in the pub,

“market rent” means the estimated rent which it would be reasonable to pay in respect of the occupation of the pub under a tenancy, assuming that—

- (a) the hypothetical tenancy is entered into—
 - (i) on the date the estimate of the rent is being carried out,
 - (ii) in an arm’s length transaction,
 - (iii) after proper marketing,
 - (iv) between parties who are all acting knowledgeably, prudently and willingly, and
- (b) the pub will continue to be a pub,

“MRO lease” means market rent only lease,

“product tie” means a contractual obligation which—

- (c) requires that a product to be sold in a pub must be supplied by—
 - (i) the landlord of the pub, or
 - (ii) a person nominated by the landlord, and
- (d) is not a stocking requirement (as defined in regulation 2(1)),

“pub franchise agreement” means an agreement between a pub-owning business and a tied-pub tenant for the tenant to occupy the tied pub which—

- (e) grants the tenant a share of turnover,
- (f) requires the pub-owning business to offer marketing, training and other business support to the tenant,
- (g) grants the tenant a right to use an established pub business model and may require the tenant to pay a fee in respect of the use of that model,
- (h) does not require the tenant to pay to the pub-owning business any other amount in respect of the tenant’s occupation of the tied pub,
- (i) does not require the tenant to make any other payments to the pub-owning business in connection with the supply of products or services to the tenant, unless the tenant consents to such an arrangements after entering into the pub franchise agreement, and
- (j) grants the tenant a right to sell the business to a third party at market value,

“service tie” means a contractual obligation which requires that the tenant of a pub receives a service, other than insurance, from—

- (k) the landlord of the pub, or
- (l) a person nominated by the landlord

Characteristics of an MRO lease

7.—(1) An MRO lease—

- (a) sets the rent payable in respect of the tenant’s occupation of the pub at—

- (i) an amount agreed between the landlord and the tenant in accordance with the procedure described in this code, or
 - (ii) in the event that no agreement is reached in accordance with that procedure, the market rent,
 - (b) imposes neither a product tie nor a service tie in relation to the pub,
 - (c) complies with any requirements set out in this code as to the terms that a lease must contain in order to be an MRO lease, and
 - (d) does not contain any unreasonable terms.
- (2) An MRO lease modifies a tied-pub tenant's existing lease only to the extent necessary for that lease to become an MRO lease, except where the tenant consents to more extensive modification of their existing lease or to a new lease being offered.
- (3) An MRO lease may, at the discretion of the pub-owning business, be for a period longer than the remaining period of the existing lease.
- (4) The following terms are unreasonable in an MRO lease; accordingly any offer which includes such terms is not an offer of an MRO lease—
- (a) a break clause only exercisable by the pub-owning business (unless such a term is included in the existing lease),
 - (b) a lease period shorter than the remaining period of the existing lease,
 - (c) a stocking requirement other than as defined in regulation 2(1),
 - (d) a deposit requirement more onerous than in the existing lease,
 - (e) a requirement to pay rent in advance more onerous than in the existing lease,
 - (f) a term triggering dilapidations requirements in the existing lease or imposing dilapidations requirements more onerous than in the existing lease,
 - (g) a personal guarantee requirement more onerous than in the existing lease, except with the consent of the tied-pub tenant,
 - (h) a tenant repairing obligation 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.

Requirement to offer an MRO lease

- 8.—**(1) A pub-owning business must offer their tied-pub tenant an MRO lease at the tenant's request.
- (2) But a pub-owning business need not offer an MRO lease where—
- (a) the term of the tenant's lease is one year or less,
 - (b) the term of the tenant's lease is more than one year, during the first half of the term,
 - (c) the tenant has requested an MRO lease within the past two years,
 - (d) the tenant occupies the pub under a pub franchise agreement, or
 - (e) the investment exception applies.
- (3) The investment exception applies—
- (a) for 5 years from the date an investment agreement was agreed, where the pub-owning business is investing in capital improvement works to the pub to the sum of £35,000 or more, or 1.5 times the annual rent of the pub or more, whichever is the greater, or
 - (b) for 7 years from the date of an investment agreement was agreed, where the pub-owning business is investing in capital improvement works to the pub to the sum of 10 times the annual rent of the pub or more.
- (4) The investment exception does not apply unless—
- (a) the investment agreement has been entered into voluntarily by the tenant outside of any obligation arising under their lease,
 - (b) the tenant has, before entering into the investment agreement, been given the opportunity to obtain alternative estimates for the works, and

- (c) the pub-owning business has, before entering into the investment agreement, informed their tenant about how the investment agreement may affect the tenant’s right to an MRO lease.
- (5) The investment exception ceases to apply where capital improvement works arranged under an investment agreement have, without reasonable excuse—
 - (a) not started within 12 months of the date agreed in the investment agreement, or
 - (b) stopped for 12 months or more.
- (6) For the purposes of paragraph (5), “reasonable excuse” includes where the works do not start, or stop, due to circumstances beyond the control of the pub-owning business or the tenant.
- (7) In this regulation—
 - “investment agreement” means a written agreement between the pub-owning business and their tenant for the pub-owning business to invest in capital improvement works to the pub,
 - “capital improvement works” does not include routine maintenance, works carried out under landlord repairing obligations, works carried out under dilapidations requirements, or works to make a pub safe and compliant with health and safety requirements before letting it to the tenant.

Process for offering an MRO lease

- 9.—(1) The tied-pub tenant may request an MRO lease from the pub-owning business and any such request must be in writing.
- (2) The pub-owning business must send the tenant an offer of an MRO lease in writing as soon as possible and in any event within 4 weeks beginning with the day the tenant’s request was received by the business⁽¹⁶⁾.
- (3) An offer of an MRO lease must set out—
 - (a) any variation to the terms of the existing lease, including to the rent due, and
 - (b) the legal steps required to change the existing lease to an MRO lease.
- (4) Following the offer of an MRO lease there is to be a negotiation period during which the pub-owning business and the tenant are to use their best endeavours to agree terms and enter into an MRO lease as soon as possible.
- (5) The negotiation period is to last no longer than 8 weeks beginning with the day the tenant’s request was received by the pub-owning business.
- (6) The negotiation period may be extended by up to 4 weeks by mutual agreement between the pub-owning business and the tenant.
- (7) The pub-owning business and the tenant are to meet their own legal costs in connection with entering into an MRO lease.

Assessing the market rent of an MRO lease

- 10.—(1) If at the end of the negotiation period the pub-owning business and the tied-pub tenant have not reached agreement on the rent to be paid under the MRO lease, a rent assessor is to be appointed to determine the market rent which will apply to the MRO lease.
- (2) The rent assessor is to be appointed within 3 weeks beginning with the day the negotiation period ends.
- (3) The rent assessor is to be appointed—
 - (a) jointly by the pub-owning business and the tied-pub tenant, or
 - (b) if a joint appointment cannot be agreed, by the adjudicator.
- (4) The rent assessor’s terms of appointment must require the rent assessor to determine the market rent for the MRO lease, and notify the pub-owning business and tied-pub tenant of that determination, within 4 weeks beginning with the date of the rent assessor’s appointment.

⁽¹⁶⁾ See section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (2010 asp 10) for assumptions about the date of receipt of documents served as required in legislation.

(5) If the offer of an MRO lease has not been accepted by the tied-pub tenant within 2 weeks beginning with the day the tenant received the market rent determination the rent assessment period comes to an end.

(6) The rent assessor's fees are to be split equally between the pub-owning business and the tenant.

(7) The rent assessor must be a member or fellow of the Royal Institution of Chartered Surveyors⁽¹⁷⁾.

(8) The adjudicator may set additional criteria that a person must meet in order to be appointed as a rent assessor.

Referring a failure to agree an MRO lease to the adjudicator

11. If at the end of the negotiation period and any rent assessment period the pub-owning business and the tied-pub tenant have not agreed the terms the MRO lease, this failure to agree may be referred to the adjudicator as a dispute under regulation 5.

PART 3

Guest beer agreements

Definitions relevant to guest beer agreements

12. In this Part—

“request date” means the date on which a tied-pub tenant requests in writing a guest beer agreement from the pub-owning business.

Characteristics of a guest beer agreement

13.—(1) A guest beer agreement is an agreement that—

(a) allows a tied-pub tenant to—

(i) sell to the pub's customers, at a price of the tenant's choosing, at least one beer chosen by the tenant (regardless of who produces it), and

(ii) change the chosen beer as frequently as the tenant wishes,

(b) allows the tenant to do those things without penalty, and

(c) satisfies the criteria specified in paragraph (2).

(2) A guest beer agreement must—

(a) not relate to a brand of a beer of which either—

(i) more than 60,000 hectolitres was produced in the calendar year immediately preceding the calendar year in which the request date occurs, or

(ii) the producer reasonably estimates that more than 60,000 hectolitres will be produced in the calendar year in which the request date occurs,

(b) not vary the existing lease except—

(i) to the extent necessary to include the guest beer agreement, and

(ii) where a service equipment charge has been agreed by the parties, to provide for that charge,

(c) not penalise the tied-pub tenant in any way, including by requiring the tenant to cease selling any product,

(d) not restrict the tied-pub tenant from purchasing a guest beer from a person of the tenant's choosing,

(e) not contain any restrictions on how a guest beer may be purchased, stored or sold (for example, in casks, kegs, bottles).

⁽¹⁷⁾ Commonly referred to as the RICS, a UK-based professional body for surveyors founded on 15 June 1868 and incorporated by Royal Charter on 26 August 1881.

(3) In this regulation, “service equipment charge” means a reasonable charge by the pub-owning business for the cost of servicing or maintaining equipment used to sell guest beer, taking into account the proportion of use of the equipment for guest beer compared to use for other products.

Requirement to offer a guest beer agreement

14.—(1) A pub-owning business must offer to enter into a guest beer agreement with the tied-pub tenant at the tenant’s written request.

(2) But a pub-owning business need not offer to enter into a guest beer agreement where, on the request date—

- (a) the remaining term of the tied-pub tenant’s lease is less than 6 months,
- (b) the tied-pub tenant and the pub-owing business have agreed a guest beer agreement which—
 - (i) meets the criteria specified in regulation [13], and
 - (ii) was agreed on or after the date on which these Regulations come into force,
- (c) the tenant has been offered, following his or her request, a guest beer agreement within the previous two years, or
- (d) unless the parties agree otherwise, the MRO negotiation exception applies.

(3) The MRO negotiation exception applies where either—

- (a) the request date falls during the period in which an MRO lease for the pub is being negotiated between the parties, including any period of extension agreed between the parties, in terms of regulation [9], or
- (b) a rent assessor is determining the rent to be paid for the pub under an MRO lease, in terms of regulation [10].

Process for offering a guest beer agreement

15.—(1) The tied-pub tenant may request a guest beer agreement from the pub-owning business and any such request must be in writing.

(2) The pub-owning business must send the tenant an offer to enter into a guest beer agreement in writing as soon as possible and in any event within 4 weeks beginning with the day on which the tenant’s request was received by the business⁽¹⁸⁾.

(3) The pub-owning business and the tenant are to meet their own legal costs in connection with entering into a guest beer agreement.

(4) The tied-pub tenant and the pub-owning business must take reasonable steps to minimise—

- (a) the costs, and
- (b) the administrative burden

of entering into a guest beer agreement.

⁽¹⁸⁾ See section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (2010 asp 10) for assumptions about the date of receipt of documents served as required in legislation.

Annex B: Partial Business and Regulatory Impact Assessment

Title of Proposal: Scottish Pubs Code Regulations 2022 (guest beer and Market Rent Only provisions)

Purpose and intended effect:

• **Background**

Tied pubs are pubs which are owned by a pub-owning business and are rented out to tenants. Typically tenants are required to buy some or all of their products from the pub-owning business (“the tie”). Tenants sometimes pay lower rent and receive other support from the pub-owning business but the tied products are often more costly than those on the open market. Tied pubs are seen as a low cost entry route into self-employment for the pub sector.

There are around 750 tied pubs in Scotland (around 17% of all pubs) and at least 11 pub-owning businesses¹⁹. The number of pubs (not just tied pubs) in the UK has generally been declining since 1990²⁰.

Due to concerns about fair treatment of tenants, in 2016 the UK Government created a Pubs Code for England and Wales. The Pubs Code regulates the relationship between pub-owning businesses with 500 or more tied pubs and their tied pub tenants.

In the Scottish Parliament’s session 5, Neil Bibby MSP proposed and subsequently introduced a Bill providing for a statutory pubs code to govern the relationship between tied pub tenants and pub owning businesses and a Scottish pubs code adjudicator to enforce the code. In 2016, the Scottish Government carried out a study to help decide whether legislation on the operation of pub-owning businesses in Scotland needed to be introduced. The research was hampered by a lack of input from tenants but it found that whilst there was some dissatisfaction with parts of the tied pub arrangement, no part of the pub sector appeared to be unfairly disadvantaged.

A Scottish voluntary code of practice has also been in place for a number of years, and was signed up to by a majority of pub-owning businesses. The Scottish Parliament’s [Economy, Jobs and Fair Work Committee](#) found that awareness of the voluntary code was low amongst tenants.

The Scottish Government agreed to support the [Tied Pubs \(Scotland\) Bill](#) in December 2020. This was in response to the evidence put forward at Stage 1 of the Bill and also the [UK Government’s review of the Pubs Code and Pubs Code Adjudicator in England and Wales](#) and the likelihood that legislation would be required at some point to implement the Economy, Jobs and Fair Work Committee’s

¹⁹ Tied Pubs (Scotland) Bill Policy Memorandum – page 7 <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/tied-pubs-scotland-bill/introduced/policy-memorandum-tied-pubs-scotland-bill.pdf> Admiral Taverns have since acquired Hawthorn.

²⁰ House of Commons Library Briefing Paper, Pub Statistics <https://researchbriefings.files.parliament.uk/documents/CBP-8591/CBP-8591.pdf>

recommendations on the Bill. The [Tied Pubs \(Scotland\) Act 2021](#) was passed on 23 March 2021.

• Objective

The aim of the Scottish Pubs Code, and the associated Scottish Pubs Code Adjudicator, is to rebalance the relationship between tenants and landlords in tied pubs. The Scottish Government supports the principle of fair and equitable treatment within commercial agreements and has a desire to see a vibrant tenanted pub sector in Scotland. It supports achievement of the Scottish Government's Economic Strategy through tackling inequality.

The outcomes that the regulations should achieve are:

- A fairer and more balanced tied pub sector.
- Tenants feel more supported and pub-owning businesses have consistently fair relationships with tenants across their estates.
- Tenants are able to secure fairer and more equitable lease terms, despite disparities in negotiating power, through negotiations on market rent only leases.
- Tenants have more autonomy to shape their business in response to customer demands, through guest beer agreements, which may deliver better customer choice and potentially increased profits.
- Guest beer agreements can create further market space for a range of beers, including locally produced beers.
- An adjudicator is in place as a source of expertise on arbitration and on the tied pub sector. This should provide reassurance to tied pub tenants that there is a way to resolve disputes and should encourage compliance with the code by all parties (tenants and pub-owning businesses).

The Scottish Pubs Code should be developed consistently with the three regulatory principles as set out in the Tied Pubs (Scotland) Act 2021 (the "Act"):

- fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants;
- tied pub tenants should not be worse off than they would be if they were not subject to a product tie or a service tie;
- any agreement between a pub-owning business and a tied-pub tenant should fairly share the risks and rewards amongst the parties.

The code should be fair for both parties and it should be straight-forward and easy to use.

As mentioned above, the UK Government already has a Pubs Code for tied pubs in England and Wales. The tied pubs sector makes up a much larger proportion of pubs in England and Wales and their code applies only to pub-owning businesses that have 500 or more tied pubs. Given the much smaller scale of the sector in Scotland, the Act requires the Scottish Pubs Code to extend to all tied pubs and pub-owning businesses.

The code will rebalance the relationship by creating arrangements for tenants to be able to request Market Rent Only leases (at market rent rates, which are free of ties), and to request guest beer agreements (enabling the tenant to sell at least one beer of their choice). The first Government consultation, beginning in November 2021, focuses on these areas of the code.

The code may also set out arrangements, processes and information requests for other aspects of the tied tenant-landlord relationship. A second consultation, on these potential aspects of the code, is expected in spring 2022.

These regulations on the code will be complemented by other secondary legislation needed to implement the Act. For example, commencement regulations will be needed for the office of the Scottish Pubs Code Adjudicator to be set up ahead of the code being introduced.

• **Rationale for Government intervention**

There are many strong and effective relationships between landlord and tenants in the sector but evidence gathered before and during the parliamentary process of the Bill suggested this is not always the case. For reasons of fairness, the Government has decided to intervene. The Tied Pubs (Scotland) Act 2021 commits the Scottish Ministers to introduce a Scottish Pubs Code and to appoint a Scottish Pubs Code Adjudicator by 6 May 2023. The proposed secondary legislation is required to implement the Act.

The regulation on tied pubs supports the following National Performance Framework outcomes:

- We have a globally competitive, entrepreneurial, inclusive and sustainable economy
- We have thriving and innovative businesses, with quality jobs and fair work for everyone
- We respect, protect and fulfil human rights and live free from discrimination
- We tackle poverty by sharing opportunities, wealth and power more equally

Consultation

• **Within Government**

The following Scottish Government Directorates have been involved in the development of the Scottish Pubs Code and the Scottish Pubs Code Adjudicator:

Directorate for Agriculture and Rural Economy

Directorate for Equality, Inclusion and Human Rights Directorate

Directorate for Fair Work, Employability and Skills Directorate

Justice Directorate

Legal Services (Solicitor to the Scottish Government)

Directorate for Economic Development

Directorate for Housing and Social Justice

Such dialogue has contributed to policy development. For example, it was clear that a guest beer option focused on a geographical distance could disproportionately impact on island communities, so this was not progressed.

• **Public Consultation**

During summer 2021, four workshops were run with key stakeholders. This included the Scottish Licensed Trade Association (representing tenants' views), the Scottish Beer and Pub Association (SBPA) (representing some pub-owning businesses) together with some pub-owning business representatives. In addition, further consultation meetings also took place with the Royal Institute of Chartered Surveyors (RICS), individual pub-owning businesses who are not members of SBPA, Pubs Advisory Service, SIBA (the Society of Independent Brewers) and CAMRA (the Campaign for Real Ale).

Two focus groups²¹ were also run with tied pub tenants. These consisted of 5 tenants in total.

A public consultation on the MRO and guest beer aspects of the Scottish Pubs Code will run between 8 November – 17 January 2022. A further public consultation on other potential aspects of the code will follow in spring 2022.

• **Business**

As mentioned above, discussions have taken place with some pub-owning businesses and tenants directly. We plan to complete the Scottish Firms Impact Test during the public consultation by asking representative bodies to identify affected businesses.

Options

The options considered are:

Option 1 – do nothing

Option 2 – introduce a Scottish Pubs Code

Option 1 – do nothing

This option is the baseline against which the costs and benefits of Option 2 are considered. In reality this option cannot be taken forward as the Tied Pubs (Scotland) Act 2021 requires Scottish Ministers to introduce a Scottish Pubs Code and appoint an adjudicator by May 2023.

Option 2 – introduce a Scottish Pubs Code

In this option, a Scottish Pubs Code is introduced before 6 May 2023. The code will include requirements for pub-owning businesses to offer to enter into a MRO lease or a guest beer agreement (if requested by the tenant). It will also include:

²¹ Scottish Government, Tied pubs: consultation on a Scottish Pubs Code - workshops with tenants: <https://www.gov.scot/publications/tied-pubs-consultation-scottish-pubs-code-workshops-tenants/>

- Possibly information requirements on pub-owning businesses to tenants, prospective tenants and the adjudicator
- Requirement to comply with directions issued by the adjudicator in certain circumstances
- Possibly unenforceability of contract terms
- Maximum financial penalties for non-compliance with the code
- Fees and expenses for arbitration payable to the adjudicator
- Possibly terms to be excluded from arbitration
- Possibly other requirements and restrictions placed on pub-owning businesses.

Sectors and groups affected

The sectors and groups likely to be affected are:

- Pub-owning businesses
- Tied pub tenants
- Arbitration professionals and surveyors (in delivering any new code)
- Scottish Courts and Tribunal Service (in delivering any new code)
- Pub customers
- Brewers

Under option 1 – do nothing - tied pub tenants are likely to be most affected by this as they will be unable to request MRO leases and guest beer agreements and will have fewer tools to redress the power imbalance in their relationship with pub-owning businesses. Do nothing would not impact on the other sectors and groups as this retains the status quo.

Under option 2 – introduce a Scottish Pubs Code – all affected groups will be impacted. The costs and benefits to particular groups are detailed below.

Benefits

Option 1 – do nothing

Option 1 would not meet the policy objective of rebalancing the relationship between tenant and landlord, as this would be unaltered. It would, however, provide benefits in terms of stability for the sector (tenants and landlords), especially as it has been particularly affected by the Covid pandemic. It would continue to allow investments by pub-owning businesses in their estate. It would likely mean that prospective tenants have more opportunities to enter the tied pubs market, as there are likely to be more tied pub leases under this option. Modelling²² for the English and Welsh Pubs code identified that numbers of tied pubs were likely to decrease as a result of the code (although it should be noted a number were already unviable).

Option 2 – introduce a Scottish Pubs Code

²² London Economics, Modelling the impact of proposed policies on pubs and the pub sector https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/265460/Tied_Pubs_Final_Report.pdf

Pub-owning businesses

All pub-owning businesses would be required to operate in a regulated environment, under the terms of the code. This would provide consistency across the sector and reduce ambiguity about what is expected from businesses.

Tenants

Tenants would be supported to have a more balanced relationship with their landlord, where that is necessary. They would be able to request Market Rent Only leases, which might result in better tied pub leases or alternatively move to a Market Rent Only lease. This could result in improved profits. Guest beer agreements would enable tenants to offer an additional beer and buy this at a competitive price. This may result in improved profit for their business and may also result in improved choice for consumers. It should be noted many tenancies are able to request guest beer at present. The code will also provide further protection for tenants, in that they can take any concerns about non-compliance to an independent adjudicator.

There is mixed evidence about how much income tied tenants receive and it is difficult to state whether this would be improved as a result of the Scottish Pubs Code. For example in the Scottish Beer and Pub Association's submission²³ to the Parliament's Economy Energy and Fair Work Committee it stated that tenants had an average estimated net income of £38,000 based on rent reviews/new agreements in 2019. A 2014 study commissioned by CAMRA of 200 tenants, however, found that 54% of respondents stated their take home annual earnings as between £10,001 and £15,000, and 10.5% of respondents earned under £10,000²⁴. The pandemic will also have affected income levels.

Scottish Government independent research²⁵ carried out in 2016 suggested that in general no part of the pub sector was unfairly disadvantaged. The research was limited by the small sample size of tenants that took part. However, the research found that wet sales (i.e. sales revenue coming from drinks sales) dominated the tenanted pub sector in Scotland. It also made some conclusions in respect of beer and overall profits:

"The key conclusion is that beer costs remain an advantage for IFT pubs [those pubs that are wholly operated by the licensee and free to purchase all drinks from independent sources] over both the Tied models. However, none of the Fully Tied respondents stated that overall beer pricing was a specific issue of dispute within the contract itself. The analysis suggests that the 3 cohorts are making similar levels of profits, albeit at a total trade level and not specifically beer."²⁶

²³ Scottish Beer and Pubs Association submission to the Economy Energy and Fair Work Committee https://archive2021.parliament.scot/S5_EconomyJobsFairWork/Inquiries/EEFW-S5-20-TP-28-Scottish_Beer_Pub_Assoc.pdf page 4

²⁴ CAMRA submission to the Economy Energy and Fair Work Committee https://archive2021.parliament.scot/S5_EconomyJobsFairWork/Inquiries/EEFW-S5-20-TP-22-CAMRA.pdf page 1

²⁵ Scottish Government, Research on the pub sector in Scotland phase 1: scoping study <https://www.gov.scot/publications/research-pub-sector-scotland-phase-1-scoping-study/pages/5/>

²⁶ Scottish Government, Research on the pub sector in Scotland phase 1: scoping study <https://www.gov.scot/publications/research-pub-sector-scotland-phase-1-scoping-study/pages/6/>

In some cases, if tenants choose to go free of tie through Market Rent Only leases, they may be able to realise some benefits in terms of beer costs.

Consumers

Improved variety of beers provided.

Brewers

If guest beer agreements are focused on beers with small production levels, this could have knock-on benefits to the brewing sector by opening up access to on-trade venues. Brewing in Scotland, prior to the pandemic had been growing (see: [Brewing and distilling: a barrel full of employment – SPICe Spotlight | Solas air SPICe \(spice-spotlight.scot\)](#)) and the code may support further jobs and growth in the sector.

Arbitration professionals and surveyors (in delivering any new code)

Through creating arbitration arrangements for the Scottish Pubs Code, it may allow arbitrators to gain expertise in the Scottish pubs sector and provide a local low cost tailored form of arbitration for the sector in Scotland. Similarly, it may enhance the pool of experienced rent assessors.

Costs

Option 1 – do nothing

Option 1 would not meet the policy objective of rebalancing the relationship between tenant and landlord, as this would be unaltered. It would not, however, create additional costs for most of the sectors and groups to be identified. There may be some missed opportunity costs for tenants who are not able to rebalance the relationship via MRO leases or guest beer agreements.

Option 2 – introduce a Scottish Pubs Code

Pub owning businesses

The Act enables the adjudicator to impose a levy on pub-owning businesses, to contribute towards the adjudicator's expenses. The scale of any levy is as yet unknown. Fees and expenses may also be payable by a pub-owning business in respect of an arbitration under the code. The Financial Memorandum to the Bill estimated there will be 14 arbitrations per year.

In the [Impact Assessment](#) on creating a statutory code and an adjudicator in England and Wales, a cost was applied to pub-owning businesses for treating tenants more fairly but this cost was offset by a benefit of the same size. It was estimated this cost was around £7,000 per pub (excluding lower entry costs and risk). This cost took into account the wet rent minus the provision of tied pub services, and the reduction in dry rent for tied leases to identify how much less profitable a tied pub is compared to a free of tie pub. If tenants choose MRO, pub-owning businesses are likely to face reduced returns from wet rents, although they will receive market rent.

The Scottish Pubs Code may provide less flexibility and less certainty for pub-owning businesses to run their businesses, as tenants can request MRO leases. As a result, it is anticipated that some pub-owning businesses will turn their tied pub tenancies

into management agreements or other businesses. In England and Wales, it was estimated at the start of the code in 2016 there were 12,000²⁷ tied pubs captured by the code. On 31 December 2019, there were 9,126 tied pubs²⁸ (these are tied pubs that are owned by pub-owning businesses that have 500 or more tied pubs). This should be set against a general decline in tied pubs, i.e. from 1990 to 2019 there has been a fall of 26% in pubs in the UK ²⁹(based on industry data).

The code will create additional administration and require pub-owning companies to develop new processes, for example to deal with Market Rent Only (MRO) requests. Although it is proposed that a deed of variation is used to achieve MRO leases, this will also result in additional costs.

Tenants

There are likely to be fewer opportunities for tenants to rent a tied pub, as the sector is likely to contract.

Tenants may need to pay for costs to maintain equipment, as part of a guest beer agreement. There may be some costs if the pubs code does not completely mirror the voluntary code, in that some responsibilities on pub-owning businesses may be removed (although the voluntary code is a matter for the pub-owning businesses, not Government). If tenants choose to exercise their MRO rights they may lose access to special commercial or financial advantages (SCORFA). In the 2016 Scottish Government research, the loss was estimated at £18,636 by pub-owning companies but it was perceived to be substantially less by total tied tenants (£4569) and partially tied tenants (£3650)³⁰.

Pub-owning businesses have mentioned that they have paused investment in tied pubs as a result of the forthcoming Scottish Pubs Code. For example, one pub-owning business has paused expenditure of £1.5 million. This may impact tenants as they are unlikely to be able to finance capital developments in another way. Nonetheless, the code as proposed has an exception from MRO following investment which should ease pub-owning business concerns about investment.

If tied pub tenants wish to pursue an MRO only option, there are likely to be legal and other costs involved with this (such as rent assessment).

If arbitration is used to deal with MRO or other matters within the code, this will also incur a cost.

Scottish Courts and Tribunal Service

²⁷ House of Commons Library, Debate Pack, The Pubs Code and the Adjudicator

<https://researchbriefings.files.parliament.uk/documents/CDP-2017-0027/CDP-2017-0027.pdf>

²⁸ Pubs Code Adjudicator The Pubs Code Adjudicator Annual Report and Accounts 01 April 2019 to 31 March 2020

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959791/PCA-Annual_Report_2019-20_WEB.pdf (page 6)

²⁹ House of Commons Library Briefing Paper, Pub Statistics

<https://researchbriefings.files.parliament.uk/documents/CBP-8591/CBP-8591.pdf>

³⁰ Scottish Government, Research on the pub sector in Scotland phase 1: scoping study

<https://www.gov.scot/publications/research-pub-sector-scotland-phase-1-scoping-study/pages/5/>

There will be costs for the courts as they will consider any appeals to the adjudicator's decisions, but this is already set out in the Act.

Arbitration professionals and surveyors (in delivering any new code)

There will be costs to such professionals to get up to speed with the code and the new arrangements.

Brewers

There may be some costs to brewers who are linked to pub-owning businesses. If tenants choose an MRO lease or supply guest beers then the pub may sell less of the beer they currently supply. The brewers may also receive less for the beer, as tenants will be able to shop around.

Consumers

If fewer tied pubs become available this may result in fewer opportunities to drink and meet people socially. Prices may rise due to supply not meeting demand.

Scottish Firms Impact Test:

This will be carried out during the consultation.

Competition Assessment:

The proposals relate to the terms of the contract between tied-pub tenants and their landlords and seek to achieve a fairer balance between the parties in that contractual relationship.

In 2010 the Office for Fair Trading (OFT) – the UK's consumer and competition authority at the time – carried out a full investigation of tied-pub leases in response to a super-complaint from the Campaign for Real Ale (CAMRA). The OFT concluded that the pub sector in the UK is competitive overall and did not find evidence of competition problems having a significant adverse impact on consumers, therefore they declined to take any further action.

The proposals will not distort competition in this market. MRO leases and guest beer agreements may in fact promote competition through encouraging new routes to market for beer suppliers³¹. This assessment is based on the consideration of the four Competition and Markets Authority (CMA) competition assessment questions below:

- Will the measure directly or indirectly limit the number or range of suppliers?
No. The Scottish Pubs Code does not create limits on the numbers of suppliers and treats these fairly.
- Will the measure limit the ability of suppliers to compete? No
- Will the measure limit suppliers' incentives to compete vigorously? No

³¹ Tied Pubs (Scotland) Bill, Policy Memorandum: <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/tied-pubs-scotland-bill/introduced/policy-memorandum-tied-pubs-scotland-bill.pdf> (page 30)

See comments from Jamie Delap Economy, Energy and Fair Work Committee, Official Report, 18 August 2020, <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=12755>

- Will the measure limit the choices and information available to consumers?
No. The introduction of the Scottish Pubs Code does not limit the choice and information available to consumers. Guest beer agreements may increase the choices available to consumers and encourage new entrants into the on-trade market.

Consumer Assessment:

The proposals will not significantly impact on consumers.

This assessment is based on the consideration of the below questions:

- Does the policy affect the quality, availability or price of any goods or services in a market? Not directly – although MRO tenants and tied pub tenants involved in guest beer agreements could pass on potential savings on beer costs to the consumer. Evidence from the 2016 Scottish Government research³² identified that beer costs were generally highest for partially tied pubs, as opposed to independent free trade pubs and tied pubs. The code could result in fewer tied pubs being available but these could be converted into other types of pubs. Guest beer agreements may result in a greater number of beer options being available to the consumer in tied pubs.
- Does the policy affect the essential services market, such as energy or water?
No
- Does the policy involve storage or increased use of consumer data? No
- Does the policy increase opportunities for unscrupulous suppliers to target consumers? No
- Does the policy impact the information available to consumers on either goods or services, or their rights in relation to these? No
- Does the policy affect routes for consumers to seek advice or raise complaints on consumer issues? No

Digital Impact Test:

- The code should be flexible enough to respond to new ways of working. Digital ways of sourcing or monitoring beer or digital customer sales will not be affected by the code.

Legal Aid Impact Test:

The impact here is likely to be minimal. The Tied Pubs (Scotland) Act provides for appeals to be made to the Sheriff Court for certain issues. We estimate these numbers to be low. In England and Wales there has only been one appeal as a result of the Pubs Code Adjudicator applying a financial penalty for non-compliance with the code and there has been no statutory appeal on the levy.

In 2015, before the code was introduced in [England and Wales](#), it was estimated there would be around 0-4 appeals on the decisions of the adjudicator, with a best

³² Scottish Government, Research on the pub sector in Scotland phase 1: scoping study
<https://www.gov.scot/publications/research-pub-sector-scotland-phase-1-scoping-study/pages/5/>

estimate of two a year. The Pubs Code Adjudicator in England and Wales is aware of 3 cases being taken to the high court in 2019 and one case in 2020 (however these are only cases which went to a full hearing and all of these relate to appeals for arbitration cases).

Given the sector is smaller in Scotland, it is estimated that there would be around 0-2 appeals a year. Most of the appeals that could go to the Sheriff Court are likely to be made by pub-owning businesses (as only they can be charged a levy and be penalised for non-compliance). They would not normally be eligible for legal aid. There is a very small chance that the tenant may be liable for the recovery of the adjudicator costs and may wish to appeal this decision. In most instances, they should be able to pay for legal costs but there may be a minimal call on legal aid for this.

Enforcement, sanctions and monitoring:

The Scottish Pubs Code Adjudicator will enforce and oversee the Scottish Pubs Code. The adjudicator has the power to investigate pub-owning businesses' compliance with the code in certain circumstances. The adjudicator can use their enforcement powers of direction or financial penalty if a business has not complied with the code. The adjudicator must make an annual report of their activities. Scottish Ministers may issue guidance to the adjudicator following a review of their functions and the code.

Implementation and delivery plan and post-implementation review:

It is planned that the Scottish Pubs Code be in place by November 2022, with the Scottish Pubs Code Adjudicator to be appointed in summer 2022 to enable them to develop an investigation policy and any necessary guidance.

Section 5 of the Tied Pubs (Scotland) Act 2021 makes provision for reviews to be carried out at regular intervals. A first review must be carried out as soon as is practical after 31 March in the second year following the adjudicator being appointed. Further reviews must be carried out at 3 yearly intervals thereafter.

Summary and recommendations:

The Scottish Government proposes to introduce a Scottish Pubs Code. There is a legal imperative for the Scottish Government to act. Subject to the views received in the forthcoming public consultation, the proposals would appear to represent a proportionate response.

Summary costs and benefits table

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum - economic, environmental, social policy and administrative
1 – do nothing	This could result in investment in tied pubs being re-introduced,	No new costs incurred.

	possibly more opportunities for new entrants to the sector and maintained number of tied pubs.	
2 – introduce a Scottish Pubs Code	This will provide tenants with opportunities to rebalance their relationship with their landlord. MRO leases could result in improved profits for pubs, guest beer agreements could create greater consumer choice and opportunities for brewers. It will also provide a uniformly regulated environment for pub-owning businesses and provide a standard approach to arbitration.	There will be costs in terms of administering requests made under the Scottish Pubs Code and in arbitration made under the code. These will largely fall on the pub-owning businesses and tenants. It may result in fewer numbers of tied pubs.

Declaration and publication

I have read the partial Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

Minister's name: Ivan McKee

Minister's title: Minister for Business, Trade, Tourism and Enterprise

Scottish Government Contact point: Deborah Cook, Food and Drink Division

Annex C: Consultation Responses – Respondent Information Form and consultation questions



Tied pubs: consultation on a Scottish Pubs Code – Part 1

RESPONDENT INFORMATION FORM

Please note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

- Publish response only (without name)
- Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
- No

Consultation questions

Market Rent Only (MRO) leases

Question 1. Should MRO leases be offered as new or substantially altered leases (instead of variations of the existing lease) only when both parties agree?

- Yes
- No
- I don't know

Please explain your answer:

Question 2. Are there any other situations where an MRO lease should be offered by way of a new or substantially altered lease?

Question 3: Do you agree or disagree that the following terms would be unreasonable for an MRO lease?

Unreasonable terms in a MRO lease	Agree	Disagree	Don't know
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 ³³ (and carried over into the regulations) ("stocking requirement" means a contractual obligation which—			

³³ Tied Pubs (Scotland) Act 2021 (section 20 (2)):
<https://www.legislation.gov.uk/asp/2021/17/section/20/enacted>

(a) requires that some of the beer or cider (or both) that is to be sold in the pub is produced by the landlord, (b) does not require the tenant to procure that beer or cider from a particular supplier, and (c) neither prevents the tenant from, nor penalises the tenant for, selling in the pub beer or cider that is produced by a person other than the landlord (although a contract term may impose restrictions on such sales).			
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 ("dilapidations requirement" means a lease term under which a landlord may require their tenant to carry out repairs or other works falling within the tenant's repairing obligations under the 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			

Question 4: Do you have any other comments or suggestions on unreasonable terms for an MRO lease? You could use this box to explain why you agree or disagree with any of the proposals above, or to explain why you think other terms in an MRO lease should be unreasonable.

Question 5: 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?

- Yes
- No
- I don't know

Please explain your answer:

Question 6: 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?

- Yes – Please go to Q 8
- No
- I don't know

Please explain your answer:

Question 7: If you have a suggestion for different investment levels and/or periods of time, please provide it here and explain why.

Question 8: Do you agree or disagree that an MRO lease need not be offered in the following circumstances?

	Agree	Disagree	Don't know
Short-term tenancies (one year or less)			
First half of any tenancy longer than one year			
Where the tenant has previously requested an MRO lease within the past two years.			

Please explain your reasons for agreeing or disagreeing with the proposals.

Question 9: Are there any other circumstances where MRO leases should not be offered?

Question 10: Which of the following should an MRO offer include (select as many as appropriate)?

- The new rent
- How the terms of the existing lease will need to change
- The legal steps required
- Anything else

If anything else – please state what else should be included

Question 11: Should the code require that an MRO lease be offered within 4 weeks of a pub-owning business receiving a request from a tenant?

- Yes
- No
- I don't know

Question 12: Should the code set out a time period for negotiation?

- Yes
- No
- I don't know

Question 13: What are your views on the proposed time period for negotiation (8 weeks, extendable up to 4 weeks by mutual agreement)?

Question 14: Do you have any other comments or suggestions on the process for offering an MRO lease?

Question 15: Should the rent assessor be a member or fellow of the Royal Institution for Chartered Surveyors?

- Yes
- No
- Don't know

Question 16: Do you agree with the arrangements for rent assessment for an MRO lease?

- Yes
- No
- I don't know

Question 17: If you have any suggestions or comments on the rent assessment process, please provide these here.

Question 18: If you have any comments on arbitration for MRO leases, please provide these here.

Guest beer agreements

Question 19: To what extent do you agree with the policy aims on guest beer agreements?

- Strongly agree
- Agree
- Neither agree or disagree
- Disagree
- Strongly disagree

Please explain your reasons for agreeing or disagreeing with the proposals.

Question 20: Do you agree or disagree that a guest beer agreement should cover brands of beer with small production levels?

- Agree
- Disagree
- Don't know

Please explain your reasons for agreeing or disagreeing.

Question 21: Is 60,000 hectolitres the appropriate production level to capture small production beer brands?

Question 22: If you have an alternative suggestion for a different production level, please state it here.

Question 23: Do you have any other comments on the characteristics of a guest beer agreement?

Question 24: Do you agree or disagree that a guest beer agreement need not be offered in the following circumstances?

	Agree	Disagree	Don't know
The remaining term of the lease is less than 6 months			
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.			
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.)			
The tenant is currently involved in MRO negotiations.			

Please explain your reasons for agreeing or disagreeing with the proposals.

Question 25. If you have any comments or suggestions on the circumstances in which guest beer agreements need be offered, please provide these here.

Question 26: If you have any comments on the process for offering guest beer agreements, please provide these here.

Impact assessments

Question 27: Please give us any views you have on the content of this partial impact assessment.

Question 28: Do you have, or can you direct us to, any information that would assist in finalising this assessment?

Question 29: Please give us any views you have about whether a full Strategic Environment Assessment or a full Child Rights and Wellbeing Impact Assessment are required.

Question 30: Do you have any views or information on the potential impacts of the proposals in this paper on equality, data protection, socio-economic disadvantage (the Fairer Scotland Duty), people in rural or island communities, or human rights? Please provide any evidence.

More about you

Which of the following describes you, please select all that apply

- tied pub tenant – one tenancy
- tied pub tenant – multiple tenancies

- Pub-owning business
- Brewery
- Representative organisation
- Other organisation
- Consumer
- Other – please state

If you are a tied pub tenant, please answer the following questions:

- Are you a member of a trade association?
 - Yes
 - No
- Is your pub-owning business signed up to the voluntary code of practice at present?
 - Yes
 - No
 - Don't know

If you are a pub-owning business, please answer the following questions:

- Are you a member of a trade association?
 - Yes
 - No
- Are you signed up to the voluntary code of practice at present?
 - Yes
 - No
 - Don't know
- How many tied pubs do you lease?
 - Open text
- Are any of your tied pubs located in:
 - Islands
 - Cities/towns
 - Rural settings



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