



Law Society
of Scotland

Consultation Response

Tied Pubs (Code and Adjudicator) (Scotland) Bill

July 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Competition Law Sub-committee welcomes the opportunity to consider and respond to Neil Bibby MSP's consultation *Tied Pubs (Code and Adjudicator) (Scotland) Bill: A proposal for a Bill to establish a Pubs Code in Scotland to govern the relationship between tenants of tied pubs and their owners, and an Adjudicator to enforce the Code*. The Sub-committee has the following comments to put forward for consideration.

General remarks

This response has been prepared primarily from the point of view of competition law. We also note that where the operating model of a pub tenancy arrangement is such that effective wholesale prices of beer and other products are driven significantly above market value, the cost may be borne by consumers.

The Law Society does not have a position regarding the use of tied agreements *per se*. However, we recognise that in some circumstances a significant imbalance between contracting parties can lead to an unfair outcome and legal measures may be justified to afford the weaker party some protection.

We note the introduction of a Pubs Code and Pubs Code Adjudicator for England and Wales in Part 4 of the Small Business, Enterprise and Employment Act 2015. It would be interesting to see evidence of the effect which this legislation has had south of the border.

We therefore take no view as to whether a Scottish Pubs Code is required but if such a Code is introduced it may be sensible for an Adjudicator to be created to ensure enforcement of that Code.

Section 1: About You

1. Are you responding as:

This response is submitted on behalf of an organisation.

2B. Please select the category which best describes your organisation:

We are a representative organisation (trade union, professional association).

3. Please choose one of the following; if you choose the first option, please provide your name or the name of your organisation as you wish it to be published.

This is the response of the Law Society of Scotland.

4. Please provide details of a way in which we can contact you if there are queries regarding your response. (Email is preferred but you can also provide a postal address or phone number. We will not publish these details.)

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Section 2 – Your views on the proposal

Aim and approach

1. Which of the following best expresses your view of establishing a statutory Scottish Pubs Code and Scottish Pubs Code Adjudicator?

We do not have a view as to whether or not a statutory Scottish Pubs Code should be established. If a decision is taken to introduce a code a Scottish Pubs Code Adjudicator could be a suitable means of enforcement, subject to the arrangements for establishment and the duties and powers given to it.

As noted above we do not take a view as to whether tying practices in the context of Scottish pubs are beneficial *per se*. The tie involved here – based on the theory that a tenant enjoys a lower rent in exchange for paying more for supplies – may be helpful or harmful from the tenant perspective depending on the specific context of the tenant's individual circumstances and the terms of the arrangement itself.

2. Could the aims of this proposal be better delivered in another way (without a Bill in the Scottish Parliament)?

The Law Society has no evidence as to the extent of the underlying problem identified in the consultation which the proposal intends to target. A careful analysis is required here as to the benefit or harm of the tying arrangement which depends on the context of each individual case.

3. What do you think would be the main advantages, if any, of establishing a statutory Scottish Pubs Code and Adjudicator?

The statutory body could helpfully gather information on the market impact of tying arrangements. Where this evidence suggests a problem with exploitative / harmful tying, redress should be available. A dedicated Adjudicator function might be able to provide speedy and cost effective resolution, so long as its powers are appropriately defined and efficient processes are put in place.

4. What do you think would be the main disadvantages, if any, of establishing a statutory Scottish Pubs Code and Adjudicator?

As with any statutory regime, there is a potential risk that inflexibility may cause problems, although a level of flexibility may be afforded within the power granted to the Adjudicator. The discretion should not be so wide as to generate uncertainty.

5. Which of the following best expresses your view of establishing a Market Rent Only option for tenants as part of a Scottish Pubs Code?

The MRO option is in principle a reasonable option: for example, if evidence suggests that ties are being used in an exploitative way, an MRO break from an exploitative contract might be a reasonable remedy.

It should be noted that a tie may offer a legitimate solution to financing that will be useful to some tenants by allowing them to decrease set-up costs. This may also allow new entrants to the market a mechanism to manage their risk.

The regulator would need to exercise great care to distinguish true cases of exploitation - likely to arise eg from problems with the contract - from cases where there is simply a desire to alter commercial terms in light of subsequent developments. Where a contract is clear and well-defined, there should be an assumption that the contract will prevail, although it might be appropriate to allow greater flexibility to switch to an MRO where the contracts are less well defined. Attention to this contractual specificity point may help balance the competing interests.

6. What do you think of the proposed contents of the Bill and the Code, and the scope of the Adjudicator's powers, as detailed on pages 17-18?

The contents of the Bill and Code appear reasonable in terms of topics which these instruments should cover. However, as no detail of these is given, it is impossible to take a view as to the reasonableness of either the Bill or Code themselves.

We also note that particular care should be taken to avoid generating a Code which contains inconsistencies, albeit that a mechanism for review and amendment seems a sensible precaution.

In relation to the scope of Adjudicator's powers we observe that the relevant legislation has only been in force in England and Wales since 1 May 2016: there has not therefore been sufficient time to allow a proper analysis of the appropriateness and effectiveness of the Adjudicator's powers as defined therein.

7. Which of the following best expresses your view of the Scottish Pubs Code Adjudicator being able to impose financial penalties for breaches of the Code?

We do not wish to take a view as to whether the Adjudicator should be able to impose financial penalties. However, we would recommend that the Adjudicator be given powers to impose a variety of remedies, depending on the case, in order to provide solutions to the problem which would facilitate the continued operation of the lease, albeit on altered terms, where this is in the interests of the parties.

8. In terms of who the Scottish Pubs Code, and Market Rent Only option, should apply to, which of the following best expresses your view?

- a) The Scottish Pubs Code – including the Market Rent Only option – should apply to all tied pubs in Scotland**
- b) The Scottish Pubs Code should apply to all tied pubs in Scotland, but the Market Rent Only option should only apply to tenants of larger pubcos**
- c) The Scottish Pubs Code should apply only to larger pubcos and the Market Rent Only option should only apply to tenants of those larger pubcos.**

We consider that the answer to this question relies on a careful consideration of the evidence and the answer is ultimately most likely to be a political one.

9. If you answered “b” or “c” how should larger pubcos be defined (e.g. by size of turnover, number of tied pubs owned in Scotland (if so, how many), etc.)?

Subject to the general observations below, we have no view as to how a “larger pubco” should be defined in a Scottish context, nor is it clear how this might tie in with operations on a wider UK level.

Revenue or size alone can be highly misleading ways to look at this problem: large companies can have little market power, and sometimes small ones can be surprisingly powerful. The risk with a revenue-based / size test for large companies or similar is that some highly efficient pubs that can adapt to consumer demand might be caught by accident despite facing competition and thus limited scope to behave exploitatively – with harmful effects to consumers if the efficient large operator is mistakenly caught up in power designed to address harmfully inefficient large operators.

Another approach would be to maintain broad powers, but to exercise them with sensitivity to the above point. However, a revenue-based threshold is likely to be inflexible and might result in catching those who are not problematic – and possibly, missing out on problematic practices by those who might not meet a revenue-based threshold.

Financial implications

10. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

(a) The pub companies which own tied pubs (Pubcos)

(b) Tied-pub tenants

(c) Tied-pub customers

The Law Society does not take a view as to the likely financial impact of the proposed Bill.

11. How do you think the associated costs of the proposal (predominantly the establishment and on-going running costs of a Scottish Pubs Code Adjudicator) should be funded?

We do not have a view on this question.

Equalities

12. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, sexual orientation?

No particular impact appears likely.

13. In what ways could any negative impact of the Bill on equality be minimized or avoided?

No particular impact appears likely.

Sustainability of the proposal

14. Do you consider that the proposed bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

Yes. No particular impact appears likely. There might be some positive impact on social aspects to the extent that small business owners and customers might be assisted, and a range of entertainment options for consumers be preserved.

General

15. Do you have any other comments or suggestions on the proposal?

We have no further comments.