POLICY NOTE

THE TIED PUBS (FEES AND FINANCIAL PENALTIES) (SCOTLAND) REGULATIONS 2024

SSI 2024/187

The above instrument was made in exercise of the powers conferred by sections 10(3) and 17(1) of the Tied Pubs (Scotland) Act 2021. The instrument is subject to the affirmative procedure.

Summary Box

The Tied Pubs (Scotland) Act 2021[1] requires the creation of a statutory Scottish Pubs Code and the appointment of a Scottish Pubs Code Adjudicator to oversee and enforce the code.

The purpose of this instrument is to set out the maximum financial penalty that the Adjudicator can impose on a pub-owning business for non-compliance with the code. The instrument also sets out the fee level for tenants to submit a dispute to the Adjudicator for arbitration. This instrument will support compliance with the code.

Policy Objectives of the Act

The Tied Pubs (Scotland) Act 2021 received Royal Assent in May 2021. The Act establishes the Scottish Pubs Code Adjudicator. The purpose of the Act is to regulate the relationship between tied pub landlords and tenants through the introduction of a statutory Scottish Pubs Code. The role of the Adjudicator is to oversee and enforce the code.

The Adjudicator's powers include:

- arbitration in disputes between the pub owning business and tenants;
- setting criteria for a rent assessor or appointing a rent assessor for market rent only negotiations;
- publishing an investigation policy;
- investigating non-compliance with the code;
- giving advice and guidance on the code and carrying out enforcement actions (which include financial penalties).

The role of the Adjudicator is also to raise awareness of the code and the Adjudicator's role amongst tied tenants and the pub-owning companies in scope of the code.

Policy Objectives of the SSI

[1] https://www.legislation.gov.uk/asp/2021/17/contents/enacted

The purpose of this instrument is to set maximum limits on financial penalties and determine the arbitration fee for tenants in disputes. This will fulfil the Scottish Ministers duty to define the permitted maximum financial penalty and the duty to provide for a fee to be paid, both of which are required under the Act. The instrument will therefore support the Adjudicator's role in the investigation and enforcement of the code.

Financial penalties

The Tied Pubs (Scotland) Act 2021 provides for the Adjudicator to take enforcement action, such as a financial penalty when they are satisfied that a pub-owning business has failed to comply with the code. The enforcement action might include imposition of a financial penalty on the business. To ensure that pub-owning businesses, which vary in size, are impacted proportionally, the SSI determines the maximum financial penalty as 1% of the pub-owning business's annual turnover. Where the business is part of a wider pub-owning group then the percentage will apply to the combined annual turnover of the group in the UK. This represents a significant penalty. The Adjudicator can also apply a smaller penalty to take into account the nature and severity of the breach.

Fees for arbitration

The Tied Pubs (Scotland) Act 2021 allows the Adjudicator to arbitrate in disputes between a tied pub tenant and pub-owning business on whether the latter has complied with the Scottish Pubs Code.

Under section 17(1) to (3) of the Act, Scottish Ministers must provide for a fee to be paid to the Adjudicator, or a person appointed by the Adjudicator, by a tied-pub tenant who submits a dispute for arbitration. The fee should be fair and proportionate and set at a level that both discourages vexatious or minor disputes being brought forward but does not prevent the submission of necessary requests for arbitration. We have considered relevant comparators. The equivalent fee for arbitration under the Pubs Code for England and Wales, which was set in 2016, is £200. Given inflationary pressures, we have concluded that the fee should be £250 and this should be payable at the time the dispute is submitted for arbitration.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

Substantial formal and informal consultation has taken place on the implementation of the Act more generally, specifically on the development of the Scottish Pubs Code. A written consultation was run from 17 March to 12 May 2022, which included proposals on financial penalties and fees and expenses for arbitration. An analysis[2] of the consultation responses was produced.

Financial penalties

There were mixed views in response to the consultation proposals. On financial penalties some respondents wanted a higher maximum penalty and others had concerns about the method used to calculate turnover. Some pub-owning businesses commented that any penalty

[2] https://www.gov.scot/publications/scottish-pubs-code-consultation-2-analysis-report/pages/3/

should be based on turnover for their Scottish pub business only, and it was not fair to calculate turnover based on other parts of their business. We have decided to keep it at this level to act as a deterrent and to encourage compliance with the Scottish Pubs Code. From analysis of final penalties imposed under the Pubs Code in England and Wales, Scottish Ministers anticipate that the maximum financial penalty would only be applied in cases of repeated non-compliance.

Fees for arbitration
Most respondents to the consultation agreed that the fee should be set at £250.

Impact Assessments

The following Impact Assessments have been prepared for the supporting instruments which implement the Act:

- Business and Regulatory Impact Assessment
- Child Rights and Wellbeing Impact Assessment (screening)
- Equalities Impact Assessment
- Data Protection Impact Assessment
- Strategic Environmental Assessment (pre-screening notification)
- Fairer Scotland Duty
- Island Communities Impact Assessment (screening)

These impact assessments will be published on the Scottish Government website.

The instrument is anticipated to have minimal to no impacts on children, environment, island communities and data protection. The fairer Scotland duty assessment identified there could be a difference in awareness and take-up of information about changes to the Adjudicator and rights (parts of the code) between tied pub tenants with less and those with more socio-economic disadvantage and between those with better and worse IT skills, based on the England and Welsh experience. This could also apply to tenants' rights to arbitrate disputes – however all tenants responding to the consultation were content with the arbitration fee being set at £250.

On equality impact, it was identified that we do not have data on the demographic make-up of the tied pub tenant population in Scotland. However, in general, successful implementation of the Act would mean that tenant and pub-owning business relationships are fairer and more balanced, which should minimise discrimination on any basis, protected characteristic or otherwise.

Impacts on business are detailed in the financial effects section below.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed for the following SSIs:

- Scottish Pubs Code Regulations 2024;
- The Tied Pubs (Fees and Financial Penalties) (Scotland) Regulations 2024
- The Tied Pubs (Scottish Arbitration Rules) Amendment Order 2024

The BRIA is attached and are also available on the Scottish Government website. The BRIA sets out the cost and benefits of various options for pub-owning businesses and tied pub tenants.

Financial penalties

The option to set financial penalties as a maximum 1% of annual turnover is the same maximum penalty that is in place for the Pubs Code in England and Wales. Scottish Ministers anticipate that the maximum penalty will only be used in cases of persistent non-compliance. A financial penalty has only been set once in England and Wales to Star Pubs & Bars which represented 0.16% of turnover (although the fine was subsequently reduced). The maximum 1% fine would have been just over £12 million. The main benefit of this approach setting the maximum penalty with reference to turnover is that businesses are proportionately impacted, taking into account their size. Financial penalties would only impact on pub-owning businesses, not tenants.

Fees

The option to set a fee for arbitration at £250 impacts mainly on tenants and creates a small cost for the tenant bringing disputes forward for arbitration. The Financial Memorandum[3] to the Bill assumed in the first year there would be 13 arbitration cases which would reduce to 8 arbitration cases in year 3. The approach of setting fees at £250 also provides some benefit to pub-owning businesses, as it should discourage tenants from submitting minor and vexatious cases.

Scottish Government
Directorate for Agriculture and Rural Economy

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[3] https://www.parliament.scot/-/media/files/legislation/bills/s5-bills/tied-pubs-scotland-bill/introduced/financial-memorandum-tied-pubs-scotland-bill.pdf