

TIED PUBS (SCOTLAND) ACT 2021

EXPLANATORY NOTES

THE ACT

Part 2: Giving Effect to the Code

Agreements that are inconsistent with the code

Section 7: Unenforceability of contract terms

21. This section provides that any contract terms between pub-owning businesses and their tied tenants are not enforceable by the business if they are prohibited in the code. It therefore provides tenants with a legal remedy they may wish to explore. This section should be read together with paragraph 3 of schedule 1, “restriction on enforcing certain terms of agreement” (see paragraph 16), which sets out the kinds of terms which a pub-owning business cannot enforce on a tied tenant.

Investigations by the adjudicator

Section 8: Power to investigate

22. This section enables the adjudicator to investigate whether a pub-owning business has failed to comply with the code, but only after the adjudicator’s statement of investigation policy has been published (under section 13, see below).

Section 9: Enforcement action

23. If the adjudicator concludes following an investigation that a pub-owning business has failed to comply with the code, the adjudicator may do one or more of the following: direct the pub-owning business on how it should comply with the code; direct the pub-owning business to publish information; and/or impose financial penalties on the pub-owning business (section 10 says more about financial penalties – see below).
24. Failing to comply with a direction under this section will be a breach of the code (see schedule 1, paragraph 2). If, at the conclusion of an investigation, the adjudicator directs a pub-owning business, the adjudicator must then monitor the business’s compliance with those directions (under section 9(2)). If the adjudicator finds that the directions have not been complied with, the adjudicator may impose a financial penalty. The decision about what enforcement action to take at the end of any investigation will be for the adjudicator to take in light of all the facts and circumstances of the case.
25. If the adjudicator directs a pub-owning business to publish information relevant to the investigation then the adjudicator can specify in writing to the pub-owning business what the information is, how it should be delivered or presented, and by what deadline the information should be provided.

Section 10: Financial penalties under section 9

26. Under section 9, the adjudicator may impose a financial penalty on a pub-owning business if, following an investigation, the adjudicator concludes that the business has failed to comply with the code. The business becomes liable to pay the penalty when the adjudicator sends a notice under section 10 confirming that a penalty has been imposed, setting out the reason for the penalty, the amount, and when and how it is to be paid. The amount of the penalty may not exceed whatever maximum penalty is fixed by the Scottish Ministers (subsections (2) to (4)). The imposition and amount of the penalty may be appealed to the sheriff. Under existing legislation, the sheriff's decision may be further appealed to the Sheriff Appeal Court.
27. Any money received from financial penalties must be paid into the Scottish Consolidated Fund (subsection (5)) rather than being kept by the adjudicator.

Section 11: Investigation report

28. This section requires the adjudicator to publish a report at the end of an investigation.
29. Subsection (2) specifies that an investigation report must set out and explain any findings and any actions taken or proposed.
30. Under subsection (3), the report does not have to disclose the identity of the pub-owning business in question (for example, because the adjudicator considers that the objectives of the code can be effectively achieved whilst dealing with the relevant pub-owning business privately). If the adjudicator does choose to identify the pub-owning business in an investigation report, the business must be given an opportunity to comment on a draft before it is published (subsection (4)).

Section 12: Recovery of investigation costs

31. The adjudicator may require a pub-owning business to pay some or all of the costs of an investigation if the adjudicator finds that the pub-owning business has failed to comply with the code.
32. Subsection (2) states that where a person (for example, a tenant) has made a complaint which was found to be vexatious (intended to frustrate or delay without any chance of success) or wholly without merit, the adjudicator may require that person to pay some or all of the costs of the resulting investigation.
33. Subsection (3) provides that the business or person required to pay costs becomes liable to pay those costs when they receive a notice in writing informing them of the requirement; the reasons for imposing the requirement; the amount; and when and how it must be paid. The adjudicator cannot seek to reclaim in this way more than the total cost of the investigation (subsection (4)). The imposition and amount of the costs being recovered may be appealed to the sheriff. Under existing legislation, the sheriff's decision may be further appealed to the Sheriff Appeal Court.

Section 13: Investigation policy

34. This section requires the adjudicator to publish the details of its investigation policy. Such a statement must include the criteria that the adjudicator will use when deciding whether to investigate and set out the practices and procedures that will be followed by the adjudicator when investigating. The statement must also set out criteria relating to enforcement decisions and actions and setting levels of financial penalties (see paragraphs 69 to 73). In drawing up the criteria (other than those relating to practices and procedures) the adjudicator must have regard to the impact the behaviour of tied-pub tenants may have on compliance with the code by pub-owning businesses. The criteria (which the adjudicator will adopt in relation to whether to carry out an investigation under section 8 of the Act) must also include time limits within which an investigation may be initiated (therefore ensuring that tenants and pub-owning businesses do not

remain subject to, and the adjudicator is not able to take action under, the code indefinitely including, for example, after the tied lease comes to an end).

35. Subsection (2) confirms that the adjudicator must be guided by the statement when investigating and subsection (3) confirms that the adjudicator can amend the statement at any time. As the statement must be published, any changes made to it will therefore be available for all to see. Subsection (4) requires the adjudicator to consult before preparing or amending the statement.

Arbitration

36. Disputes about the application of the code can be referred to arbitration which, it is intended, will usually be carried out by the adjudicator directly. The intention of this is to ensure that the code is being complied with, by both tenants and pub-owning businesses, and that where it is not working, and either side feel it is not being complied with, then constructive action can be taken, via arbitration, to resolve a dispute.

Section 14: Adjudicator's duty to arbitrate or appoint arbitrator

37. This section requires the adjudicator to act as arbitrator, or appoint another person to do so, if there is a dispute between a tied-pub tenant and a pub-owning company about whether the business has complied with a non-excluded term of the code and if the dispute is submitted for arbitration either under section 15 (see below) or in accordance with an agreement between the tenant and pub-owning company.
38. In most circumstances, the adjudicator is expected to arbitrate such disputes. However, the adjudicator is also able to appoint another person to do so if, for example, the adjudicator does not have enough time to act as the arbitrator (due to caseload volume), or because the adjudicator considers that a conflict of interest may exist (for example, where the adjudicator has previously advised on or investigated an issue which is relevant to the dispute).
39. Subsection (2) confirms that arbitration proceedings must be conducted in accordance with the rules of the Chartered Institute of Arbitrators or any other dispute resolution body nominated by the arbitrator. This will ensure that arbitrations are conducted in line with recognised sectoral rules and guidelines.
40. Subsection (3) gives the Scottish Ministers power to make regulations to exclude a term, or terms, of the code from being subject to arbitration by the adjudicator. Under section 24, any such regulations are subject to the affirmative procedure in the Scottish Parliament, which means that they must be laid in draft for approval by the Parliament.

Section 15: Submission of dispute to adjudicator

41. This section provides a statutory right of arbitration for Scottish Pubs Code disputes for tied pub tenants and pub-owning business. Such arbitrations will be “statutory arbitrations” as set out in section 16 of the Arbitration (Scotland) Act 2010. (Section 16 of the 2010 Act sets out certain rules that apply to statutory arbitrations, although the section had not been brought into force at the time of Royal Assent of this Act.) Section 17 of the 2010 Act, which is in force, allows Scottish Ministers to make further provision about the handling of statutory arbitrations.
42. A dispute may be referred to arbitration only if the tenant has first notified the pub-owning business that they consider there has been a failure to comply with the code. The notification must be given within 6 months, beginning on the day the alleged failure occurred (or the last day of a continuing failure, or the day when the tenant became aware, or could reasonably have become aware, of the alleged failure). There is then a window, beginning 21 days after the business is notified of the alleged failure and ending 4 months later, within which either party (tenant or pub-owning business) may refer the dispute, to arbitration. The 21-day period is to allow the parties a reasonable

time to try to resolve the dispute without the need for arbitration. The six-month and four-month limits ensure that any alleged failures to comply with the code are addressed reasonably promptly. The four and six months periods are always measured in calendar months, so if either begins on the 29th, 30th, or 31st of a month, and there is no corresponding date four or six months later, then the period ends on the last day of that later month (e.g. a four month period would end on 28th February if the period began on 31st October).

Section 16: Liability for arbitrator's reasonable fees and expenses

43. Under this section, a pub-owning business that is party to an arbitration is normally liable to pay the arbitrator's fees and expenses if the adjudicator, or someone appointed by the adjudicator, is the arbitrator. However, under subsection (2), this does not apply if the referral was made by a tied pub tenant and the arbitrator considers the referral to be vexatious (intended to frustrate or delay without any chance of success). A pub-owning business may also ask the adjudicator to relieve it of a liability for any fees and expenses, or to transfer a portion (as the adjudicator sees fit) of a liability to a tied-pub tenant who was a party to the arbitration.

Section 17: Further fees and expenses payable to the adjudicator

44. Subsections (1) and (2) provide that the Scottish Ministers must make regulations to require tied pub tenants to pay a fee to the adjudicator in situations where the adjudicator, or a person appointed by the adjudicator, is the arbitrator (under section 15) because of a referral or request made by the tenant. Subsection (3) states that such regulations may set out the amount of the fee to be paid, and situations where the fee would be refunded, or need not be paid at all.
45. Subsections (4) and (5) allow the Scottish Ministers to make regulations to require tied pub tenants to pay towards the expenses of the adjudicator in any other situations where the adjudicator, or a person appointed by the adjudicator, is the arbitrator. Subsection (6) states that such regulations may set out the circumstances in which payment towards expenses may be required; limit the amount payable (by amount or methodology); and/or specify circumstances where a tenant may be liable for expenses beyond any limit that is set.

Section 18: Information about arbitration

46. This section enables the adjudicator to obtain information on an arbitration carried out by a person appointed by the adjudicator, either from that person or from the parties to the arbitration. The purpose of this is to help the adjudicator carry out their functions, such as preparing annual reports and providing advice and guidance on the code. Subsection (2) states that the adjudicator may enforce this requirement through civil proceedings.

Section 19: Reports on avoidance

47. This section requires the adjudicator to report any cases of pub-owning businesses trying to avoid the code to the Scottish Ministers. Subsection (2) defines "avoidance activity" as acts or omissions (or both) which are unfair and intended to avoid the code to the detriment of tenants. A similar provision was added to the 2015 Act, by the Enterprise Act 2016, in response to allegations of pub-owning businesses trying to find ways around the England and Wales code.