



Tied Pubs (Scotland) Act 2021

2021 asp 17

PROSPECTIVE

PART 2 **S**

GIVING EFFECT TO THE CODE

Agreements that are inconsistent with the code

7 Unenforceability of contract terms **S**

A term of an agreement between a pub-owning business and a tied-pub tenant is unenforceable by the business if the code provides that a pub-owning business is prohibited from enforcing a term of that kind.

Investigation by the adjudicator

8 Power to investigate **S**

- (1) The adjudicator may investigate a pub-owning business's compliance with the code if the adjudicator has reasonable grounds to suspect that the business has failed to comply with the code.
- (2) The adjudicator may not carry out an investigation until the statement required by section 13 has been made publicly available.

9 Enforcement action **S**

- (1) If, having carried out an investigation, the adjudicator is satisfied that a pub-owning business has failed to comply with the code, the adjudicator may take one or more of the enforcement actions mentioned in subsection (2).
- (2) The enforcement actions are—
 - (a) directing the business to do, or stop doing, something specified in order to comply with the code,

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- (b) directing the business to publish specified information relating to the investigation in a specified manner by a specified deadline,
 - (c) imposing a financial penalty on the business.
- (3) If the adjudicator gives a direction under paragraph (a) or (b) of subsection (2), the adjudicator must monitor whether the requirement to comply with it has been fulfilled.
- (4) In subsection (2), “specified” means specified in the direction given, in writing, to the pub-owning business by the adjudicator.

10 Financial penalties under section 9 **S**

- (1) Liability to pay a financial penalty imposed under section 9 arises when the adjudicator gives a person a notice in writing that states—
- (a) that the adjudicator is imposing a penalty on the person under section 9,
 - (b) the reason the adjudicator is doing so,
 - (c) the amount of the penalty,
 - (d) the period within which it must be paid,
 - (e) how it must be paid.
- (2) A financial penalty imposed under section 9 may not exceed the permitted maximum.
- (3) The Scottish Ministers are to define the permitted maximum by regulations.
- (4) The permitted maximum may be defined by—
- (a) specifying it as an amount, or
 - (b) setting out a methodology by which it is to be determined.
- (5) Financial penalties received by the adjudicator must be paid into the Scottish Consolidated Fund.
- (6) A person on whom a financial penalty is imposed under section 9 may appeal to the sheriff against—
- (a) the imposition of the penalty,
 - (b) the amount of the penalty.

11 Investigation report **S**

- (1) Having carried out an investigation into a pub-owning business's compliance with the code, the adjudicator must publish a report on the investigation.
- (2) A report must state—
- (a) the adjudicator's findings and the reasons for them,
 - (b) what enforcement action (if any) the adjudicator has taken or intends to take and the reasons for that decision.
- (3) A report need not identify the investigated pub-owning business.
- (4) If the adjudicator intends to identify the investigated pub-owning business in a report, the adjudicator must give the business a reasonable opportunity to comment on a draft of the report before publishing it.

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12 Recovery of investigation costs **S**

- (1) The adjudicator may require a pub-owning business to pay to the adjudicator some or all of the costs of an investigation if, at the end of the investigation, the adjudicator's finding is that the business has failed to comply with the code.
- (2) The adjudicator may require a person to pay to the adjudicator some or all of the costs of an investigation if—
 - (a) the investigation was initiated as a result of a complaint made by the person, and
 - (b) the adjudicator is satisfied that the complaint was vexatious or wholly without merit.
- (3) Liability to make a payment required under subsection (1) or (2) arises when the adjudicator gives a person a notice in writing that states—
 - (a) that the adjudicator is requiring the person to make a payment in respect of the costs of an investigation,
 - (b) the reason the adjudicator is doing so,
 - (c) the amount of the required payment,
 - (d) the period within which it must be paid,
 - (e) how it must be paid.
- (4) The total value of payments required under this section in respect of an investigation must not exceed the adjudicator's costs in—
 - (a) carrying out the investigation, and
 - (b) taking enforcement action at the end of the investigation.
- (5) A person required to make a payment under subsection (1) or (2) may appeal to the sheriff against—
 - (a) the imposition of any such requirement,
 - (b) the amount the person is being required to pay.

13 Investigation policy **S**

- (1) The adjudicator must make publicly available a statement about—
 - (a) the criteria that the adjudicator will adopt in deciding whether to carry out an investigation under section 8,
 - (b) the practices and procedures that the adjudicator will follow in carrying out an investigation under that section,
 - (c) the criteria that the adjudicator will adopt in deciding—
 - (i) whether to take enforcement action under section 9, and
 - (ii) what type of action to take,
 - (d) the criteria that the adjudicator will use in setting the amount of a financial penalty imposed under section 9.
- (2) The adjudicator must, in drawing up the criteria mentioned in paragraphs (a), (c) and (d) of subsection (1), have regard to the impact the behaviour of tied-pub tenants may have on compliance with the code by pub-owning businesses.
- (3) The criteria mentioned in subsection (1)(a) must include time limits, which may be set by reference to the suspected failure to comply with the code or otherwise, after the expiry of which an investigation may not be initiated.

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- (4) The adjudicator must take the statement into account in carrying out the functions to which it relates.
- (5) The adjudicator may modify the statement at any time.
- (6) Before preparing or modifying the statement, the adjudicator must consult any person the adjudicator considers it appropriate to consult.

Arbitration

14 Adjudicator's duty to arbitrate or appoint arbitrator S

- (1) The adjudicator must act as the arbitrator in relation to a dispute, or appoint another person to do so, if the dispute—
 - (a) is between a tied-pub tenant and a pub-owning business,
 - (b) is about whether the business has complied with a term of the code, other than an excluded term, and
 - (c) is submitted to the adjudicator for arbitration either—
 - (i) under section 15, or
 - (ii) in accordance with an agreement between the parties to the dispute.
- (2) Where the adjudicator or a person appointed by the adjudicator is, by virtue of subsection (1), the arbitrator in an arbitration, the arbitration must be conducted in accordance with—
 - (a) the rules regarding arbitration issued from time to time by the Chartered Institute of Arbitrators, or
 - (b) the rules of another dispute resolution body nominated by the arbitrator.
- (3) In subsection (1)(b), “excluded term” means a provision of the code that regulations made by the Scottish Ministers state cannot be the subject of arbitration before the adjudicator.

15 Submission of dispute to adjudicator S

- (1) A dispute may be submitted to arbitration under this section by—
 - (a) a tied-pub tenant, or
 - (b) a pub-owning business.
- (2) But a dispute may be submitted to arbitration under this section only if—
 - (a) the tenant notified the business of the alleged failure to comply with the code that is the subject of the dispute within the period specified in subsection (3), and
 - (b) the dispute is submitted within the period of 4 months beginning with the day falling 21 days after the business was notified.
- (3) The period referred to in subsection (2)(a) is the period of 6 months, beginning with—
 - (a) the day on which the alleged failure to comply with the code occurred,
 - (b) where the alleged failure was a continuing one, the day on which the failure ceased, or

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- (c) the day on which the tenant became, or could reasonably be expected to have become, aware of the alleged failure, if later than the day mentioned in paragraph (a) or (as the case may be) (b).
- (4) If—
- (a) the 4 month period mentioned in subsection (2)(b) or the 6 month period mentioned in subsection (3) begins on the 29th, 30th or 31st of a month, and
 - (b) there is no corresponding day in the month falling 4 or (as the case may be) 6 months later,
- the period expires on the last day of that month.

16 Liability for arbitrator's reasonable fees and expenses **S**

- (1) A pub-owning business that is a party to an arbitration is liable to pay the arbitrator's reasonable fees and expenses if, by virtue of section 14(1), the arbitrator is the adjudicator or a person appointed by the adjudicator.
- (2) But a pub-owning business has no liability under subsection (1) if—
- (a) the arbitration began as a result of a tied-pub tenant submitting a dispute to arbitration under section 15, and
 - (b) the arbitrator concludes that the submission of the dispute to arbitration was vexatious.
- (3) The adjudicator may, on the request of the pub-owning business and having regard to the circumstances of the arbitration and the dispute submitted to it—
- (a) relieve the business in whole or in part of the liability under subsection (1),
 - (b) determine that a tied-pub tenant who is a party to the arbitration is instead liable to pay so much of the arbitrator's reasonable fees and expenses as the adjudicator considers appropriate.

17 Further fees and expenses payable to the adjudicator **S**

- (1) The Scottish Ministers must by regulations provide for a fee to be paid to the adjudicator by a tied-pub tenant in respect of an arbitration to which subsection (2) applies (subject to any exceptions specified in the regulations).
- (2) This subsection applies to an arbitration if the adjudicator, or a person appointed by the adjudicator, is the arbitrator as a result of a tied-pub tenant submitting a dispute to arbitration under section 15.
- (3) Regulations under subsection (1) may in particular prescribe—
- (a) the fee to be paid,
 - (b) circumstances in which a tenant need not pay a fee,
 - (c) circumstances in which a fee is to be refunded.
- (4) The Scottish Ministers may by regulations require a tied-pub tenant to make a payment to the adjudicator in respect of the expenses of an arbitration to which subsection (5) applies.
- (5) This subsection applies to an arbitration if the adjudicator, or a person appointed by the adjudicator, is the arbitrator by virtue of section 14(1).
- (6) Regulations under subsection (4) may in particular—

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- (a) specify the circumstances in which a tenant may be required to make a payment in respect of expenses,
- (b) set a limit on the amount a tenant may ordinarily be required to pay in respect of expenses (either by specifying an amount or setting out a methodology by which the amount is to be determined),
- (c) specify circumstances in which a tenant may be required to make a payment in respect of expenses that exceeds the limit that ordinarily applies.

18 Information about arbitration **S**

- (1) Where, by virtue of section 14(1), the adjudicator appoints a person to act as the arbitrator in an arbitration, the adjudicator may require—
 - (a) that person, and
 - (b) any party to the arbitration,
 to provide the adjudicator with information about the arbitration for the purpose of assisting the adjudicator in carrying out the functions of the adjudicator.
- (2) A requirement under subsection (1) may be enforced, on an application by the adjudicator to the Court of Session, by an order of specific implement.

Avoidance

19 Reports on avoidance **S**

- (1) The adjudicator must report to the Scottish Ministers on cases of pub-owning businesses engaging in avoidance activity.
- (2) In subsection (1), “avoidance activity” means acts or omissions (or both) by a pub-owning business that are—
 - (a) unfair, and
 - (b) engaged in by the business in order to avoid, to the detriment of a tied-pub tenant, the operation of provision made by or under this Act.
- (3) A report under subsection (1) must include recommendations as to—
 - (a) action to be taken to prevent pub-owning businesses from engaging in the activity reported on, and
 - (b) how to provide redress for tied-pub tenants affected by those activities.
- (4) Within 3 months of receiving a report under subsection (1), the Scottish Ministers must make publicly available a statement setting out—
 - (a) what action they intend to take to protect tied-pub tenants from the activities reported on by the adjudicator, or
 - (b) if they do not intend to take any such action, the reasons for that decision.

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