

Proposed Tied Pubs (Code and Adjudicator) (Scotland) Bill

Page 2: About you

Are you responding as an individual or on behalf of an organisation?

on behalf of an organisation

Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose "Member of the public".)

No Response

Please select the category which best describes your organisation

Commercial organisation (company, business)

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.

I am content for this response to be attributed to me or my organisation

Please provide your name or the name of your organisation

HEINEKEN UK

Please provide 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.

Q1. 1. Which of the following best expresses your view of establishing a statutory Scottish Pubs Code and Scottish Pubs Code Adjudicator? Please explain the reasons for your response.

Fully opposed

Comments:

HEINEKEN is the UK's leading pub, beer and cider company. We directly employ 556 colleagues in Scotland - at our UK registered office in South Gyle and the Caledonian Brewery in Edinburgh (which produces quality cask beers including Deuchars IPA as well as modern craft beers such as Three Hop and Coast to Coast). We currently own 1,050 pubs through our pub company Star Pubs & Bars, of which 107 are in Scotland (2% of the pub market).¹ We support 5,100 Scottish jobs in our supply chain and generate

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more than £370 million value added to the economy in Scotland.

Our Scottish pubs operate on a leased and tenanted (L&T) model and are therefore run independently by a range of small businesses. We are firm believers that when the tied model is run transparently and collaboratively it offers significant benefits to tenants. It allows tenants access to their own pub business for a comparatively small investment, while benefitting from our economies of scale. In our view the model is a positive small business partnership enabling shared investment, business development, job creation, and it is good for Scottish pubgoers.

As a pub company with over 500 pubs, we are covered by the statutory system in England & Wales (E&W), which this consultation broadly uses as the basis for the proposed system in Scotland. When the legislation was introduced in E&W last year, the UK Parliament agreed that the tied model had an important role to play in the pub industry – the key question was whether it was being fairly applied and if tied tenants were worse off than free of tie tenants.

HEINEKEN UK fully support the principle that a tied tenant should be no worse off than a free of tie tenant and agree with the spirit of the code in E&W. It has been argued that Scottish tenants must be afforded the same rights as those in E&W. This is to misunderstand the position in E&W. First, the code does not give rights to all tied pub tenants. In fact while 11,5002 tied pub tenants are covered by the code, a further 3,5003 tied tenants are not as the Code applies only to tenants of pub owning businesses with more than 500 tied pubs in E&W. This is more than four times the number of all the tied pubs in Scotland (8504). Therefore in E&W many more tied tenants do not operate under the code and have no MRO rights; and Scottish tenants already have the same rights as thousands of English tenants.

Second it misunderstands the principle of the legislation in E&W which is that tied pub tenants of large pub owning companies should be no worse off than free of tie tenants in E&W. The issue in Scotland is not whether tied pub tenants in Scotland are disadvantaged versus tied pub tenants in E&W by not having access to MRO. It is whether they are no worse off than free of tie pub tenants in Scotland. The Scottish Government has already considered this question and asked the CGA to undertake a review of the market in Scotland to see if there was evidence that tied tenants are worse off than free of tie tenants. After nine months of data gathering and analysis, the study (published last December) found no evidence to suggest that any one part of the pub sector in Scotland was unfairly disadvantaged over another.

It has been argued by some that a low participation rate makes these findings unreliable. Yet in E&W when the Government asked pub tenants for their views, they received high levels of response and this was used to justify action. In Scotland when offered the same, CGA were unable to find many tenants wishing to participate despite confidentiality and encouragement by the Scottish Government, pub companies, membership organisations and brewers.

To understand why there is not the same challenge in Scotland, it is important to understand that the Scottish pub market is fundamentally different to that in E&W. Almost two thirds of pubs in Scotland (64%) are independent free trade (IFT) pubs, compared to less than half (42%) in E&W. A far smaller number of pubs operate under the L&T model – in Scotland this figure stands at 17% versus nearly 40% in E&W. Of the 4,900 pubs in Scotland, only 5395 are owned by pub companies that are covered by the statutory code in E&W. There is no need for costly and complex legislation to enshrine such a small percentage of the market when it is already covered by an existing voluntary code which provides low cost routes for tenants to seek redress.

It has been suggested publicly by CAMRA that Scottish tenants have no set code of practice or independent arbitrator available if a licensee has an issue with that pub company. That is not correct. We already support protections for tied tenants in Scotland and were one of the first signatories to the Scottish specific code of practice which was launched in 2016. This code is tailored for the specific Scottish tied pub market and property law, and includes bespoke access to Scottish experts for rent resolution services. We continue to raise awareness of licensee rights under the code as well as the services of the Pub Independent Rent Review Scheme (PIRRS) and Pub Independent Conciliation & Arbitration Service (PICAS) to our licensees – for example we recently engaged all 109 of our Scottish pubs on this to mark the first anniversary of the code.

There are also a huge number of practical and technical difficulties of transposing the English & Welsh system into Scottish law via the Sewel convention, not least as Scottish tenancy law is very different to that in E&W. The consultation suggests that this new piece of Scottish legislation will be heavily based on that currently in place in E&W which has not proven straightforward. While we are fully committed to the spirit of the code and have done our best to implement it, there are a number of ongoing technical issues with implementation and interpretation of it south of the border.

Q1. 1. Which of the following best expresses your view of establishing a statutory Scottish Pubs Code and Scottish Pubs Code Adjudicator? Please explain the reasons for your response.

HEINEKEN UK has invested heavily in the brewing and pub sector in Scotland. In the past four years we have invested over £7 million to help our pubs in Scotland attract more customers, improve quality, and introduce a food offer. Earlier this year we announced that we will be investing £20 million in pubs across the UK in 2017, of which £4 million will be in Scottish pubs (as a proportion of our estate, 10 per cent of our pubs are in Scotland). Costly legislation such as this may impact on our ability to sustain this level of investment in our Scottish estate going forward.

Finally, some organisations have claimed that the tie has been leading to pub closures. This is not the case. Kantar data shows that the decline in outlet numbers across the UK is driven by the IFT (51% of net closures from a market base of 37% of all outlets). Trading conditions are increasingly tough with regulatory pressures and increased costs across the entire supply chain, but with plenty of investment still coming into the L&T and managed sectors (allowing them to better meet the needs of consumers and industry headwinds), many IFT licensees have been unable to keep trading.

In our view there is no new evidence to justify the creation of a Scottish Pubs Code and Scottish Pubs Code Adjudicator. We are absolutely committed to fair and lawful dealing with our tenants and believe that there is no need for complex legislation to enshrine an existing voluntary code. Webusiness rates and beer duty, access to labour after Brexit and a fair and balanced system of regulation. would suggest that the focus must be on helping all Scottish pubs (tied or otherwise) with measures to combat serious pressures on pubs – such as increases in business rates and beer duty, access to labour after Brexit and a fair and balanced system of regulation.

Q2. 2. Could the aims of this proposal be better delivered in another way (without a Bill in the Scottish Parliament)?

Yes (if so, you may wish to specify any possible alternative option(s))

Please explain the reasons for your response.

We believe that self-regulation remains the appropriate way to ensure that all parties are protected from any potential abuse of the tied model. Self-regulation ensures that the business potential, level of support and respective obligations are fully transparent and offer a fair deal for all parties. The bespoke Scottish code of practice provides this. We recognise some concern that there is a lack of awareness of the code amongst operators and are working to address this. We are committed to continuing to promote the benefits of self-regulation in Scotland, especially the access to the low cost rent dispute scheme.

Q3. 3. What do you think would be the main advantages, if any, of establishing a statutory Scottish Pubs Code and Adjudicator?

We do not feel this would be advantageous to the Scottish pub sector. Please see above (answer to question 1) for detailed reasons as to why.

Q4. 4. What do you think would be the main disadvantages, if any, of establishing a statutory Scottish Pubs Code and Adjudicator?

The majority of our arguments against legislation can be found above (answer to question 1).

There have been a number of claims (including in the consultation document) that pub company tied tenants are severely restricted in their choice of draught beers to stock, compared to independent pubs. We fully support the view put forward in the Scottish Beer and Pub Association response and their evidence to show that this is simply not the case. Their data shows that choice is in fact greater in L&T pubs. On average L&T pubs offer over 10 draught beer brands to their customers, compared with less

Q4. 4. What do you think would be the main disadvantages, if any, of establishing a statutory Scottish Pubs Code and Adjudicator?

than 8 in the free trade. The choice is also greater with regards to cask ale – with an average of 1.9 cask ale brands on offer in L&T pubs compared to 0.7 in the IFT.

At HEINEKEN UK, we have a strong and varied portfolio of beers and ciders which we introduce appropriately to our pubs. We work very closely with our licensees to agree what range of products would work best in each individual site - this often includes complementing our own portfolio with beers and cask ales from other producers through our Society of Independent Brewers' (SIBA) partnership and Discover Cask offering to ensure that our customers receive a wide range of choice.

Through our Beeflex scheme with SIBA, our licensees with Cask Marque accredited pubs are able to order local cask ales brewed by participants within a 30-mile radius of their pubs across the UK. There are currently over 50 Scottish breweries in SIBA's Beeflex scheme including Loch Lomond Brewery, Alechemy Brewing Ltd, Burnside Brewery and Windswept Brewing Company in Moray.

The fact that choice is not an issue was also recognised in E&W by the inclusion of stocking rights – Parliament was clear that a stocking requirement is a valid part of MRO agreements for pubs in companies owned by brewers. That is why they chose to enshrine the principle in the primary legislation and not in the pubs code. The principle that brewers should continue to be able to sell their own beer in their own pubs was also supported by the proponents of the MRO clause.

Separately, we would also point out that the legislation in E&W has resulted in a number of unintended consequences, not least a change in the nature of the market place. Companies may have little choice but to look to move pubs into direct control via management or shorter term agreements. The fact that Scottish agreements do not have Landlord and Tenant Act 1954 Protection, as in E&W, means that this is heightened.

Q5. 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?

Fully opposed

Please explain the reasons for your response

We are opposed to establishing a Market Rent Only option as part of a statutory system. As highlighted above, the mechanics of MRO have caused considerable issues in E&W. On a practical point, we find it difficult to see how MRO will work in practice in Scotland, given there is no right to renew as there is under the Landlord and Tenant Act 1954 in E&W. We would also point out that almost a year into the operation of MRO in E&W, very few tenants have gone down this route reflecting that for the vast majority of tenants the tied agreement is the most appropriate for their business model. There are some groups who see every decision by a tenant to agree a tied rent rather than MRO as a bad thing, rather than a positive decision based on a clear view of the relative risks and benefits of different models.

Q6. 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 of the consultation document?

As outlined above, we would comment that (although these mirror the powers of the E&W Pubs Code Adjudicator) the difference in the Scottish pub market (i.e. that only 17% of the total Scottish pub market is L&T compared to 40% in E&W) and the fact there have been no substantiated complaints to the voluntary system over the last few years, suggests that a Scottish Adjudicator would not have a busy workload.

The Scottish Adjudicator's fixed costs and set-up would be similar to the Adjudicator in E&W (requiring case workers, legal advisers, marketing etc.) and we would question whether the time and expense of setting it up for such a small percentage of the market would be beneficial. The cost per pub would be very high.

Q7. 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?

Fully opposed

Please explain the reasons for your response.

As above, we do not believe there should be an Adjudicator, but if one were to exist it should not be able to impose financial penalties.

Q8. 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? If you choose option (a) you will automatically be taken to question 10. If you choose (b) or (c) you will automatically be taken to question 9.

Please explain the reasons for your response.

We don't believe that a Scottish Pubs Code and Market Rent Only option is necessary for the Scottish market. Any code should apply equally to all pubs and setting an arbitrary level would lead to an un-level playing field for pub companies and licensees.

Q9. 9. How should larger pubcos be defined (e.g. by size of turnover, number of tied pubs owned in Scotland (if so, how many, etc.))?

No Response

Page 17: Financial implications

Q10. 10. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

	Significant increase in cost	Some increase in cost	Broadly cost-neutral	Some reduction in cost	Significant reduction in cost	Unsure
(a) the pub companies which own tied pubs (Pubcos)	X					
(b) Tied-pub tenants	X					
(c) Tied-pub customers			X			

Please explain the reasons for your response

(a) Pub companies such as ourselves would be expected to fund the system for which there would be significant cost. Since there are far fewer tied pubs in Scotland compared to E&W, we would be paying significantly more depending on the budget of the Adjudicator. This may have an impact on our ability to invest in our estate. As outlined above, in the past four years alone HEINEKEN UK has invested over £7 million to help our pubs in Scotland attract more customers, improve quality, and introduce a food offer. In 2017 we are investing £20 million in pubs across the UK, of which £4 million will be in Scottish pubs (as a proportion of our estate, 10 per cent of our pubs are in Scotland). The introduction of a Scottish Code and Adjudicator will increase uncertainty and could lead to a reduction in the investment which is vital for pubs to meet changing consumer needs. (b) If taking the MRO route, tenants would have in effect a standard

Q10. 10. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

free-of-tie agreement. They would lose commercial benefits offered as part of the tie which include Business Development Manager contact and assistance, marketing, drinks delivery and logistics, advice on websites and social media, commercial services and insurance. Having to source and pay for these themselves would be a significant increase in cost for tenants. (c) The tie has no impact on consumers therefore we would not expect to see any cost impact on consumers. £i€

Q11. 11. How do you think the associated costs of the proposal (predominantly the establishment and on-going running costs of a Scottish Pub Code Adjudicator) should be funded?

We do not believe there is justification for such a system in the first place and this will result in a cost burden on the Scottish taxpayer.

Page 19: Equalities

Q12. 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?

Neutral (neither positive nor negative)

Q13. 13. In what ways could any negative impact of the Bill on any of the protected characteristics be minimised or avoided?

No Response

Page 21: Sustainability of the Proposal

Q14. 14. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having future disproportionate economic, social and/or environmental impacts?

Please explain the reasons for your response

We are concerned that a proposed bill of this sort would ultimately reduce investment in the pub sector leading to further pub closures and job losses. This then has a knock-on impacts for communities more broadly.

Page 22: General

Q15. 15. Do you have any other comments or suggestions on the proposal?

N/A

