

# Scottish Pubs Code and Related Regulations

## Business and Regulatory Impact Assessment (BRIA)

### 1. Title of Proposal

#### Scottish Pubs Code Regulations 2024

1.1 This Business and Regulatory Impact Assessment covers the Scottish Pubs Code Regulations 2024 which are provided for by section 1 of the Act. It also covers the Tied Pubs (Scotland) Act 2021 (Fees and Financial Penalties) Regulations 2024 and the Tied Pubs (Scottish Arbitration Rules) Amendment Order 2024.

1.2 This document is written subject to the best available information at the time, based on evidence gathered from engagement with relevant stakeholders.

1.3 This BRIA is structured into the following sections:

- [Section 2](#) covers the purpose and intended effect of the regulations as well as background to the Act
- [Section 3](#) provides details of the consultation within government, with the public and with businesses that has informed this BRIA
- [Section 4](#) provides an assessment of the options considered to deliver the intent of the legislation, and the cost and benefits to different identified groups
- [Section 5](#) provides details of regulatory impacts and EU alignment
- [Section 6](#) provides an assessment of the impact of the legislation on Scottish firms, the competition assessment and consumer assessment
- [Section 7](#) provides the summary and recommendation
- [Section 8](#) contains the declaration and publication statement

1.4 Additional supporting analysis is contained in accompanying annexes and is referred to throughout this BRIA.

## 2. Purpose and Intended Effect

### Background to the Scottish Pubs Code Regulations 2024

2.1. Tied pubs are owned by a pub-owning business and leased to a tenant. It is estimated at May 2023, that there are just under 700 tied pubs in Scotland<sup>1</sup> and at least 10 pub-owning businesses<sup>2</sup>. For the purposes of modelling in this BRIA we have assumed that there are 700 tied pubs in Scotland. Based on estimates and industry data, tied pubs represent 16% of Scotland's total licensed premises<sup>3</sup>.

2.2. Tied pub tenants must buy some or all of their products and services ("the tie") from the pub-owning business or someone nominated by the pub-owning business. Ties can include, for example, beer and spirits, and tied products and services are often charged at a higher cost than on the open market. Income from tied drinks is often referred to as 'wet-rent' and forms part of the pub-owning businesses' income from a tenanted pub, with the other part being normal rental income (known as the 'dry rent'). In return, tenants sometimes pay lower 'dry rent' than the market rate and receive other support from the pub-owning business which can include providing business support for tenants, training to licensees and their staff, and investment in maintaining or improving pubs.

2.3. The tie can also be viewed as a profit and risk-sharing mechanism. Broadly, the tenant will pay more 'wet rent' when demand and sales of beer are strong and will pay less 'wet rent' when demand is weaker. For the tenant this means operating a pub has lower entry costs, lower fixed costs and less downside risk compared to alternative models. For the pub-owning business the risk sharing element of the tie makes getting new tenants easier by reducing upfront cost, whilst not necessarily reducing their overall rental income depending on the success of the business. Crucially, under the tie, both the pub-owning business and the tenant has an incentive to increase sales of beer and other tied products.

2.4. Concerns about fairness in the relationship between tied pub tenants and their landlords led to the UK Government creating a Pubs Code and a Pubs Code

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<sup>1</sup> This estimate is based on a partial return from the Scottish Beer and Pub Association (SBPA) in May 2023 and applies a 7% reduction to the number of tied pubs since 2019 (2019 figure from [Policy Memorandum](#) to the Tied Pubs (Scotland) Act 2021), which mirrors the reduction in the number of all pubs in Scotland between 2019 and 2023, based on ONS UK Business Count number of local units and using industry code 56.302 Public houses and bars via NOMIS.

<sup>2</sup> Estimate based on pub-owning businesses who responded to the Scottish pubs code consultation, returns from the SBPA and the list of pub-owning businesses mentioned [Policy Memorandum](#) to the Tied Pubs (Scotland) Act 2021).

<sup>3</sup> As of 2023, there were 4,380 Scottish licenced premises based on figures from the British Beer and Pub Association (BBPA). The differences between ONS and BBPA/SBPA data is understood to be due to a difference in terminology, i.e., the BBPA/SBPA having a broader definition of what constitutes a pub which includes some hotels (pubs with rooms), inns and restaurants.

Adjudicator for tied pubs in England and Wales in 2016. The [UK Government](#) identified that there were issues with, for example, some pub-owning businesses not informing tenants of their rights. The UK Government also found that the tie itself gives more control to the pub-owning business, as they are able to maintain profits, in the context of market fluctuations, through making frequent changes to the beer prices to protect 'wet rent', whilst the 'dry-rent' remains more consistent. The UK Government pointed to the asymmetry of information and resources between tenants and pub-owning businesses as a possible factor contributing to an unfair relationship between tenant and landlord. The legislation applies to pub-owning businesses owning 500 tied pubs or more, as concerns were concentrated on the larger pub-owning businesses and their tenants in England and Wales.

2.5. Similar concerns about fairness were raised in Scotland despite a Scottish voluntary code of practice being in place and signed up to by a majority of pub-owning businesses. In 2020, the Tied Pubs (Scotland) Bill ("the Bill") was introduced by Neil Bibby MSP as a Member's Bill. The aim of the Bill was to regulate the relationship between tied pub landlords and tenants through the introduction of a statutory Scottish Pubs Code and the appointment of a Scottish Pubs Code Adjudicator.

2.6. The Scottish Government agreed to support the Tied Pubs (Scotland) Bill in December 2020. This was in response to the evidence put forward at Stage 1 of the Bill, the UK Government's review of the Pubs Code and Pubs Code Adjudicator in England and Wales, and the likelihood that legislation would be required at some point to implement the Economy, Jobs and Fair Work Committee's recommendations on the Bill. The [Tied Pubs \(Scotland\) Act 2021](#) was passed unanimously by the Scottish Parliament on 23 March 2021 and became an Act on 5 May 2021<sup>4</sup>.

2.7. The purpose of the Tied Pubs (Scotland) Act 2021 ("the Act") is to regulate the relationship between tied pub landlords and tenants through the introduction of a statutory Scottish Pubs Code and the appointment of a Scottish Pubs Code Adjudicator. The Adjudicator will oversee and enforce the code. The legislation promotes fairness and equitable treatment within tied pub lease agreements. It covers all tied pubs and pub-owning businesses in Scotland, regardless of the size of the pub-owning business.

2.8. Implementation of the Act was due to be completed by 6 May 2023, but this was delayed because of legal challenge to the Act by initially three and then two pub-owning businesses by way of judicial review. The challenge was on the basis that the Act was not within the legislative competence of the Scottish Parliament. Alongside the legal challenge, the pub-owning businesses successfully sought an interim interdict order preventing the Scottish Ministers from making or laying any

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<sup>4</sup> [Tied Pubs \(Scotland\) Act 2021 \(legislation.gov.uk\)](#)

SSIs under the Act. Lord Harrower's [Opinion](#) was published on 9 December 2022 and found that the Act was within competence. This judgement was subject to appeal, which was refused by the [Inner House of the Court of Session](#) on 7 July 2023. A further request to appeal to the UK Supreme Court was also refused by the Inner House on 14 November 2023.

2.9. On the 8 March 2024 the UK Supreme Court refused permission to hear an appeal on the Act, thereby allowing these regulations to be laid before the Scottish Parliament.

## **Objectives**

2.10. The objective of the Scottish Pubs Code is to improve the position of tied pub tenants through creating a statutory framework to govern the relationship between pub-owning businesses and their tied pub tenants. The Scottish Government supports the principle of fair and equitable treatment within tied pub lease agreements and has a desire to see a vibrant tenanted pub sector in Scotland. The Scottish Government recognises that pub-owning businesses, tenants, and brewers all have a vital role to play in the health of the tied pubs sector. The investment by pub-owning businesses in the tied pub system supports our hospitality sector, which is for the benefit for the wider community, and pub-owning businesses and tenants must have the ability to determine how their business works, underpinned by a fair and transparent regulatory framework set out in the Scottish Pubs Code. Moreover, the Scottish Pubs Code supports achievement of the Scottish Government's National Strategy for Economic Transformation through tackling inequality.

2.11. The outcomes that the regulations should achieve, in addition to the fulfilment of the regulatory principles (specified below), are as follows:

- A fairer tied pub sector in terms of the share of risk and reward between tenants and pub-owning businesses, through Market Rent Only (MRO) leases, rent reviews and assessments, information requirements and guest beer agreements.
- All pub-owning businesses have a standard level of minimum requirements towards tied pub tenants, supported by an effective arbitration regime.
- Tenants in Scotland are afforded at least similar rights to their counterparts in England and Wales.
- Information asymmetry between tied pub tenants and pub-owning businesses is reduced, giving tenants the information to make more informed choices and providing pub-owning businesses with clarity about what is expected from them by Government.

- Guest beer agreements can create further market space for a range of beers, including locally produced beers.
- Penalties, fees and expense provisions encourage good practice and compliance with the Scottish Pubs Code.
- Effective arbitration in cases of dispute.

2.12. The Act provides for the Scottish Pubs Code Adjudicator to be a source of expertise on arbitration and on the tied pub sector. This should provide reassurance to tied pub tenants that there is a process to resolve disputes and should encourage compliance with the code by all parties (tenants and pub-owning businesses).

2.13. The Scottish Pubs Code has been developed consistently with the three regulatory principles as set out in the Act:

- Fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants.
- Tied pub tenants should not be worse off than they would be if they were not subject to a product tie or a service tie.
- Any agreement between a pub-owning business and a tied pub tenant should fairly share the risks and rewards amongst the parties.

2.14. The code should be fair for both parties, and it should be straightforward and easy to use for both pub-owning businesses and tenants.

2.15. The code will help to rebalance the relationship by creating arrangements for tenants to be able to request MRO leases (at market rent rates, which are free of ties), and to request guest beer agreements (enabling the tenant to sell at least one beer of their choice).

2.16. The code sets out arrangements, processes and information requests for other aspects of the tied tenant-landlord relationship. The regulations on fees and financial penalties will support compliance with the code whilst the regulations on arbitration will ensure effective arbitration in cases of dispute.

2.17. These regulations are complemented by other secondary legislation needed to implement the Act, for example commencement regulations for the office of the Scottish Pubs Code Adjudicator.

## Rationale for Government Intervention

2.18. The [Policy Memorandum](#) for the Tied Pubs (Scotland) Bill stated that with the establishment of a tied pubs code and Adjudicator for England and Wales, tied pub tenants in Scotland did not have equivalent statutory rights and protections to their counterparts in England and Wales. The Memorandum stated that this also meant that pub-owning businesses which operated in Scotland as well as England and Wales were operating in very different statutory environments north and south of the border. The Bill would therefore help to ensure that tied pub tenants in Scotland were no worse off than their colleagues in England and Wales.

2.19. During the final debate on the Bill on 23 March 2021, the Minister for Business, Fair Work and Skills noted that the legislation would promote fair and equitable treatment in tied pub leases and would help to rebalance the relationship between pub-owning businesses and tied pub tenants.

2.20. The Minister had listened carefully to views and concerns from across the industry. He had heard about the support provided to many tenants by their pub-owning businesses, especially during Covid, which showed the value of the tied pubs model. Tied pubs also provided a low-cost entry point for people looking to take their first steps into business. However, the Minister noted that the picture across the sector was not uniform and said, “I have also heard from some tenants that they have not had that level of support and believe that change is required.”<sup>5</sup>

2.21. The Minister confirmed that “whether we would support the Bill’s progress was a balanced decision”<sup>6</sup> and Ministers had “sought to ensure that the Bill is fair and balanced for both landlords and tenants”<sup>7</sup>. He wanted “to preserve the benefits of the tied pubs system” but also “to ensure that there is a better balance in landlord-tenant relationships, and a proportionate approach”<sup>8</sup>. He said that he wanted “a level playing field for tenants and landlords. I want tenants to be treated fairly and landlords to be able to see a return for their investment”<sup>9</sup>.

2.22. The Act went further than the legislation in England and Wales by introducing the right for all tenants to request an MRO lease at any time, except in specified circumstances, to make the MRO process less complex. The Act assumes that an MRO lease will be made through a deed of variation, rather than through a new lease, unless the tenant consents to a new lease. The other key difference with England and Wales is that the Act requires the Scottish Pubs Code to include a guest beer agreement, which is the ability for a tenant to request a beer of their

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<sup>5</sup> [Meeting of the Parliament: 23/03/2021 | Scottish Parliament Website](#)

<sup>6</sup> [Meeting of the Parliament: 23/03/2021 | Scottish Parliament Website](#)

<sup>7</sup> [Meeting of the Parliament: 23/03/2021 | Scottish Parliament Website](#)

<sup>8</sup> [Meeting of the Parliament: 23/03/2021 | Scottish Parliament Website](#)

<sup>9</sup> [Meeting of the Parliament: 23/03/2021 | Scottish Parliament Website](#)

choice from any supplier. There is no guest beer agreement within the English and Welsh code. Neil Bibby MSP, in evidence to the Economy, Energy and Fair Work Committee 01 September 2020, said that the “guest beer right is about giving publicans the opportunity to stock more beers and to stock the beers that they want to stock. It will also allow consumers the opportunity to demand more choice at the bar.”<sup>10</sup>. Allowing tenants more autonomy could potentially increase profits for certain tenants and potentially support smaller brewers, bolstering the wider community of tied pubs.

2.23. Section 1 of the Act requires Scottish Ministers, by regulations, to impose requirements and restrictions on pub-owning businesses in connection with tied pubs.

2.24. Section 4 of the Act requires Ministers to lay before the Scottish Parliament a draft Scottish statutory instrument containing regulations under section 1. This set of regulations is the Scottish Pubs Code.

2.25. Section 10(3) and section 17(1) of the Act require Ministers to define permitted maximum penalties for failure of pub-owning businesses to comply with the code and also to provide for fees that may require to be paid by a tied pub tenant. Ministers may also make provision for payment by tenants of Adjudicator expenses in certain situations.

2.26. The Tied Pubs (Scottish Arbitration Rules) Amendment Order 2024 has been prepared because Ministers consider there to be value in making provision to treat the Arbitration (Scotland) Act 2010 (“the 2010 Act”) as commenced for the purposes of statutory arbitrations under the Act, so that the Scottish Arbitration Rules (SARs) and processes set out in the 2010 Act could apply to cases brought to the Adjudicator. The Order enables the Adjudicator to choose that arbitration should be carried out in accordance with the SARs.

2.27. The regulations that are the subject of this impact assessment will support the implementation of the Act and contribute to our economic national outcomes, particularly towards the vision to “ensure the benefits of economic growth, wealth and opportunities are fairly shared”<sup>11</sup>.

### **3. Consultation**

#### **Within Government**

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<sup>10</sup> [Official Report - Parliamentary Business : Scottish Parliament](#)

<sup>11</sup> [About the National Outcome | National Performance Framework](#)





analyses of the first and second consultations were published on 13 April 2022<sup>13</sup> and 15 August 2022<sup>14</sup> respectively.

3.6. For the first consultation, respondents generally had mixed views on the proposals. Tenants broadly welcomed the proposals around MRO leases and guest beer agreements. However, pub-owning businesses had a number of concerns, especially on the unintended consequences of the proposals. Where possible and appropriate we have sought to address these consequences as identified by the changes made to the legislation as set out in paragraphs 3.17 to 3.42.

3.7. Respondents had mixed views on the proposal to exempt tenants which had received a significant level of investment from being able to receive an MRO lease for 5 years; tied pub tenants tended to disagree with the proposal whilst pub-owning businesses agreed.<sup>15</sup>

3.8. On guest beer agreements, some participants felt that the focus in terms of eligible products should be on the type of brewery rather than on the production level of brands of beer. The Tied Pubs (Scotland) Act 2021 sets out that a guest beer agreement must allow a tenant to sell at least one beer of their own choice, regardless of who produces it. This means we cannot use the code to restrict guest beer agreements to any particular type or category of producer, such as small brewers.

3.9. As a result of the findings from the first consultation, changes to the draft code on MRO included:

- Making the MRO negotiation period separate from the MRO offer time period.
- Having a single investment exemption whereby pub-owning businesses do not need to offer an MRO lease.
- Continue to exempt short-term leases from MRO but provide that short-term leases cannot be continually renewed as a way of preventing access to MRO.

3.10. On guest beer agreements, as a result of the first consultation, further work was carried out to refine the appropriate production level. Additionally, cans were added to the draft code as being eligible for a guest beer and most of the exemptions from the draft code were removed to keep arrangements straightforward.

3.11. On the second consultation, there was general support for most of the proposals around providing information and advice to new and renewing tenants.

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<sup>13</sup> [Scottish Pubs Code - Part 1 consultation: analysis report](#)

<sup>14</sup> [Scottish Pubs Code - Part 2 consultation: analysis report](#)

<sup>15</sup> [Tied Pubs - Scottish Pubs Code - part 1: consultation analysis - gov.scot \(www.gov.scot\)](#) Question

3.12. On rent review, pub-owning businesses had concerns about the proposed triggers for the proposed rent reviews, which they felt were not clearly defined. As a result, we removed the right to a rent review in response to changing material circumstances and focused the rent review arrangements on those tenants in a longer lease who might not have the opportunity to assess their rent.

3.13. Further discussions took place with the SBPA, their pub-owning businesses and the SLTA towards the end of 2022.

3.14. A short, focused consultation was carried out on the MRO process from 19 July 2023 to 21 August 2023. Four responses were received from two pub-owning businesses and two representative organisations. There was general agreement on most of the proposals. There were however mixed views on certain topics. For example, on whether a process for considering if a valid MRO request has been received should be included in guidance rather than legislation. The feedback from the consultation was considered and this has not been included in the code to help keep the MRO process simple and provide flexibility.

3.15. A short, focused consultation on the arbitration rules that should apply to disputes brought to the Scottish Pubs Code Adjudicator under the Tied Pubs (Scotland) Act 2021 ran from 17 May to 7 June 2022. The one response that directly addressed the question in the consultation was supportive of the proposal. No respondent opposed the proposal.

3.16. The results of the consultations, and further discussions with stakeholders, have been carefully considered in the ongoing development of the code and corresponding secondary legislation. Some of the changes made in response to stakeholders' feedback are detailed below.

## **Scottish Pubs Code**

### **MRO Leases: Unreasonable Terms**

3.17. In the first written consultation there was disagreement with some of the unreasonable terms. Five out of six responding pub-owning businesses disagreed with the following unreasonable terms that have since been removed or amended:

- Deposit requirements which are more onerous than in the existing lease (amended) so that any increase is proportionate to any increase in rent and for tenants to be able to agree to any further increase in deposit.
- Paying rent in advance more onerous than in the existing lease (removed).
- A term triggering dilapidations requirements in the existing lease or imposing dilapidations requirements more onerous than in the existing lease (removed).

- Tenant repairing liabilities more onerous than in the existing lease, except where the MRO lease offered is for a period of 5 years or more, or with the consent of the tied-pub tenant (removed).

### **MRO Leases: Investment**

3.18. In the first written consultation 19 respondents (eight out of 11 tied pub tenants and four out of six pub-owning businesses) disagreed that an MRO lease need not be offered for 7 years when agreement has been reached for a pub-owning business to invest 10 times the annual rent of the pub or more. This was removed resulting in a single-tier investment exemption (£35,000 or 1.5 times annual rent) being included in the code.

### **MRO Leases: Circumstances**

3.19. All pub-owning businesses and breweries responding to the consultation agreed that an MRO lease need not be offered for short-term tenancies (one year or less). Tied pub tenants had mixed views, six agreed and five disagreed. To reduce concerns raised that this could become a loophole with 1 year tenancies being renewed annually, this exemption has been changed so it would not apply to tenants whose initial lease term of one year or less has been renewed automatically or by negotiation with their landlord, or where the tenant has been given a new one year lease, as a result of which they have occupied the same pub premises for longer than a year.

3.20. A further circumstance where an MRO lease should not be offered has been added to the code, as suggested by a pub-owning business. This is when either side has served a notice to bring the lease to an end (as both parties should have the right to end the contractual relationship).

### **MRO Leases: MRO Process**

3.21. Following on from suggestions of what else the MRO offer should include the items below have been added:

- A draft of the deed of variation/new agreement (where the latter has been agreed to by the tenant) and an explanation of how the new rent has been calculated and any other assumptions, information or sources of information relied on to assess the proposed rent.

3.22. Following on from a suggestion from a pub-owning business that there should be information about what a written MRO request should contain, we have included the requirement that a request should include the tenant's name, postal address,

email address (if any), telephone number and the name of the tied pub which an MRO request is being made for (as tenants sometimes lease more than one pub).

3.23. Pub-owning businesses generally said the time period of negotiation set out in the consultation was too short. The negotiation period was kept the same (8 weeks, extendable by up to 4 weeks by mutual agreement), but this will be additional to the time period within which an MRO offer must be made. In other words, the negotiation period would follow on from 4 weeks from an MRO request.

3.24. Some pub-owning businesses said in the first consultation that they would like clarification on when each step of the MRO process ends. In the short, focused July 2023 consultation, we proposed that when the rent assessment process ends the MRO process ends. All respondents to the 2023 focused consultation agreed with this proposal. Further, all respondents agreed that the code should set out that the tenant can end the MRO process at any point.

### **Guest Beer: Characteristics**

3.25. In the first written consultation several respondents suggested focusing on the nature of the brewer and specifically using the definition used in small brewers relief. This was not possible. The Tied Pubs (Scotland) Act 2021 sets out that a guest beer agreement must allow a tenant to sell at least one beer of their own choice, regardless of who produces it. This means we cannot use the code to restrict guest beer agreements to any particular type or category of producer, such as small brewers.

3.26. Twelve respondents (including five out of six pub-owning businesses and three tenants) to the first written consultation disagreed that 60,000 hectolitres (hL) was the appropriate small production level for beer brands. Some thought this level was arbitrary and possibly too high, others thought a higher production level should be used. We therefore commissioned research into the sales data of brands of beer (as a proxy for production, given production data is not available). The data informed the options on guest beer brands and the code includes a much smaller production level of 5,000hL for eligible guest beers. One representative organisation also raised the issue that it would be difficult for tenants to identify what qualifies as a guest beer. Keeping the guest beer threshold at 5,000hL might also make it easier for tenants and pub-owning businesses to identify which beers qualify as a guest beer.

3.27. The code states that guest beer agreements can cover cans alongside casks, kegs, bottles, following this suggestion being raised at the first consultation.

3.28. In the first consultation the SLTA suggested that charges by pub-owning businesses to maintain equipment and beer lines used by guest beer should be a simple technical expenses charge at cost price. The requirement for the charge to be reasonable has been included in the code.

## **Guest Beer: Circumstances**

3.29. The written consultation proposed four circumstances where guest beer agreements should not be provided, these were as follows:

- The remaining term of the lease is less than 6 months.
- There is already a guest beer agreement in place which matches the definition set out in paragraph 4(3) of Schedule 1 to the Act.
- The tenant has been offered a guest beer agreement within the last 2 years. (This does not apply to agreements offered prior to the code being created.)
- The tenant is currently involved in MRO negotiations.

3.30. The code does not include these apart from where there is a guest beer agreement already in place which matches the definition of a guest beer in the code. Tenants tended to disagree with the inclusion of these circumstances and although pub-owning businesses tended to agree with these exemptions, they did not envisage the circumstances where they applied. Some anticipated that every tied pub tenant would request a guest beer agreement when the code comes into force, so it would become a standard part of the lease. Removal of these exemptions was also made to keep the process as simple as possible.

## **Guest Beer: Enforcement**

3.31. In the consultation, a respondent highlighted difficulties in both tenants and pub-owning businesses being able to identify whether a brand qualifies as a guest beer and what happens when a brand exceeds the maximum production level. The code sets out a process for requiring tenants to change a guest beer brand in that situation and that the timescale must be fair and reasonable.

## **Tenant's Business Plan**

3.32. In the second consultation, three out of six responding pub-owning businesses strongly disagreed with the proposed requirement in the code that they should take into account a tenant's business plan when negotiating the lease. One pub-owning business elaborated that a business plan can be used to negotiate commercial terms such as rent, but it wouldn't be used initially to set the rent and terms and conditions. As a result, the code has been changed so that pub-owning businesses are required to "have due regard to" the tenant's business plan where it is available, to clarify that it should be considered alongside other information during the negotiation process.

## **Information to be provided to Tenants**

3.33. In response to suggestions about what other information should be provided to tenants to ensure there is a fair share of risk and reward, two additional requirements on pub-owning businesses have been added:

- To provide information on any initial repairs required at the start of the lease and whether the pub-owning business or tenant are responsible for these, as well as completed repairs during the previous tenancy.
- To provide the volume of alcohol, including the number of barrels purchased through the pub-owning business or its agents over the past 3 years.

3.34. These were to provide transparency on repairs, and the requirement for barrelage figures are available under the English and Welsh Pubs Code.

### **Rent assessment**

3.35. Following on from feedback from RICS, this section clarifies that pub-owning businesses, or someone preparing a rent assessment statement on their behalf, should take into account professional standards, rules and guidance of the Royal Institution of Chartered Surveyors.

### **Rent reviews**

3.36. There were mixed views on the proposals for rent reviews contained within the second consultation. Some pub-owning businesses strongly disagreed with the proposals to allow any lease longer than 12 months to be able to request a rent review or when changes in material circumstances allow<sup>16</sup>. They raised concerns about how a non-contractual rent review would sit alongside a contractual rent review and thought there was no evidence for this. For UK pub-owning businesses in particular the impact of the rent review proposals depends on how much they would vary from arrangements in England and Wales and the existing voluntary code for Scottish tied pubs. One identified that the proposals as they stood would lead to continued uncertainty, impacting on ability to invest and possibly moves away from tied pubs to other pub arrangements.

3.37. Given there was general support for most respondents on rent review<sup>17</sup>, the code keeps a rent review option. However, this has been modified so that it will only apply to tenants who do not have a contractual rent review and who have not previously had a rent review or rent assessment within the past five years and have a lease which is longer than 12 months, to reduce the impact on pub-owning businesses. This helps support fair and lawful dealing by pub-owning businesses by providing some uniformity on rent reviews, as well as allowing both parties to check if there is a fair share of risk and rewards through a rent review at an appropriate interval. There are also similar rights in England and Wales for tenants to be able to request a rent assessment.

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<sup>16</sup> [Scottish Pubs Code Consultation 2: analysis report - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/scottish-pubs-code-consultation-2-analysis-report/pages/16.aspx)

<sup>17</sup> [Scottish Pubs Code Consultation 2: analysis report - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/scottish-pubs-code-consultation-2-analysis-report/pages/17.aspx)

3.38. Four out of six responding pub-owning businesses disagreed with the time-frame to prepare a rent assessment statement in relation to a rent review, identifying this should be longer. One pointed to the administrative burden of dealing with a number of requests as soon as the regulations come into effect, and they would have a much longer time frame for planned rent review.

3.39. In response, the timeframe to provide a rent assessment proposal has been extended. Where the rent review has been requested by a tenant, they now have 6 weeks to prepare the proposal and the ability for this to be extended by 4 weeks on agreement by both parties. Where it relates to a contractual rent review, the rent assessment must be provided 6 months before the rent is due to change as a result of the rent review.

3.40. The second consultation proposed that the rent review process take 12 weeks in total. Some pub-owning businesses in particular felt this was too short given their business workload, the unexpected nature of rent review requests, and the need to carry out the process thoroughly in terms of gathering information, making a site visit and so on around other ongoing business activity. In response, the code now includes that the rent review process either ends where both parties have mutually agreed a new rent or after a period of 6 months from when the tenant has received the rent assessment statement.

3.41. One consultee also suggested that the code needed to be clearer about when the new rent following from a rent review should be payable. The code confirms that it applies the day after the new rent has been agreed.

### **Repairs and Dilapidations**

3.42. The proposals to require pub-owning businesses to act fairly and reasonably when enforcing any repairs and dilapidation clauses in the Act was removed from the code following concerns raised in the consultation. For example, one pub-owning business raised the concern about how this would interact with clauses in the existing lease. However, tenants and other respondents to the consultation, and in an earlier focus group, raised concerns about dilapidations. As a result of considering both tenants and pub-owning businesses' concerns and in accordance with the principle of fair and lawful dealing the code has been drafted to include a requirement for pub-owning businesses to provide a copy of the tied pub dilapidations report for the previous tenancy to prospective tenants.

### **Business**

3.43. We have spoken with key representative organisations: the SLTA and the SBPA. Additionally, individual businesses have taken part in the public consultation and as mentioned above, we have also run workshops with pub-owning businesses.

3.44. The SBPA ran a short survey with their pub-owning business members on the impacts of the code and provided this data in May 2022.

3.45. During 2022, we also spoke with six businesses through separate meetings as part of the Scottish Firms Impact Test. Four businesses were small businesses (fewer than 50 employees), one business was a medium business (with 50 to 249 employees) and the remaining business was a large business (with 250 or more employees). The business types were as follows:

- Brewer
- Three tied pub tenants
- Two pub-owning business

3.46. We also approached four other pub-owning businesses (these included small, medium and large businesses) and four tenants (these were tenants who responded to the written consultations and gave their consent to be contacted) and one large brewer, however they did not want to take part or did not respond to our invitation.

3.47. Throughout the policy development process, it has been difficult to get independent, publicly available data specific to Scotland. The Scottish Firms Impact Test section refers to some of the ways that we have sought to access more information. Specifically, it has been challenging to hear from tenants directly and get evidence which is representative of all tenants. That is why in 2021 we commissioned workshops with tenants, with nominees from both pub-owning businesses and the SLTA. We also worked with the SLTA to help shape a tenants' survey which they undertook.

3.48. On guest beer, it was challenging to get accessible information on the production levels of beer brands. Scottish Government library service ran a literature search of relevant academic and grey literature but didn't find enough to do a review of the literature. We spoke with sector experts. Ultimately, we resolved to commission CGA/Nielsen IQ to give us access to information they held on the volume of beer sales by brands to inform the options for a guest beer agreement. Helpful information on the beer sector was also gathered from the British Beer and Pub Association (BBPA) in their annual statistical handbook.

3.49. It has also been difficult to get sector wide verifiable quantitative information about the impact of our proposals. Both consultations asked for information about the impact of the proposals on the sector, but much of this was organisation specific or anecdotal. The SBPA helpfully provided some information about possible impacts in 2022, through a survey of their pub-owning business members. To fully understand the impact and to inform the BRIA, we had tried to commission economic modelling on the options in 2022 and went out to tender three times unsuccessfully.



3.50. After the Scottish Firms Impact Test meetings, it became clear that we needed further focused information and asked for this from the SBPA. Their members were able to provide some information, but the exercise was limited by the ongoing legal action. We tried to get pub-owning businesses who were not members of the SBPA to take part in the Scottish Firms Impact Test, but the ones that were contacted did not wish to take part.

## 4. Options

### Sectors and groups affected by the Scottish Pubs Code and related regulations

4.1. In this BRIA, the impact(s) of various requirements of the Scottish Pubs Code and related regulations are considered for two main groups in detail: pub-owning businesses (landlords) and pub tenants that are in a tied pub contract. Further impacts are also considered on other groups such as consumers, beer producers, surveyors and public sector actors such as the Scottish Courts and Tribunals Service (SCTS). There is no anticipated impact on local authorities or organisations in the third sector. The impacts of each option are set out in the costs and benefits paragraphs 4.22 to 4.86.

4.2. Under the Act, the Scottish Pubs Code must include certain requirements. The two requirements with the largest impact(s), as assessed in this BRIA, are:

- MRO leases – the landlord must, in certain circumstances, offer a tenant a lease, which does not include any product or service ties.
- Guest beer agreements – the landlord must, in certain circumstances, offer a guest beer agreement (allowing the tenant to buy and sell a beer outside of the tie).

4.3. In the BRIA we have also assessed the proposals on rent reviews/assessments, for although these are not required by the Act, they could have a significant impact on the sector, depending on the option selected:

- Rent reviews – rent reviews typically occur as per the terms of existing contracts between tenants and pub-owning businesses. Under the code, the landlord must allow for a rent review if there is more than 12 months left on a lease and a rent review has not been requested or a rent assessment has not been carried out in the past 5 years.

4.4. The code, if passed, will also clarify certain technical functions of the Scottish Pubs Code Adjudicator, including specifying the level of potential financial penalties for breaches to the code, the level of fees for bringing cases to the Adjudicator, and rules around arbitration, including Adjudicator expenses. This BRIA considers options to deliver these aspects of the code and the functions of the Adjudicator and identifies impacts to different groups.

4.5. This BRIA primarily considers first round effects of the regulations on different sectors and groups; however, it is recognised that there may be indirect second round effects arising from the implementation of certain elements of the code. This BRIA considers potential second round effects to the various options set out.

## Options

4.6. The options set out in this BRIA are grouped into two parts. The first part relates to three specific features of the code as set out in the regulations - MRO leases (A), guest beer agreements (B) and rent reviews/rent assessments (C) - with three or four options considered under each of the three features which may have substantial impacts on groups such as pub-owning businesses and tenants.

4.7. The second part considers a more technical set of options with respect to financial penalties (D), fees (E) and expenses (F), and arbitration rules (G). A summary of the options in these two parts is provided in Table 1 and Table 2. The options preferred by the Scottish Government are highlighted in blue. The various impacts of these options are considered in the costs and benefits paragraphs 4.87 to 4.97.

4.8. It is standard practice that costs and benefits of policy options in a BRIA are compared to a 'do nothing' or status quo baseline. However, it is also the case that all options examined must be genuine policy options. As it is already a requirement under the Act, as agreed by the Parliament, for the code to require pub-owning businesses to offer MRO leases and to offer to enter into a guest beer agreement in certain circumstances, a do-nothing option for these aspects of the code would not be genuine policy options. To avoid any confusion arising from this point, a do-nothing option is not considered in this case.

4.9. It should be noted that currently a voluntary code of practice exists in the pub sector for pub-owning businesses and tenants. However, this voluntary code has been found to be ineffective in delivering the objectives as set out in this BRIA. The voluntary code has not been signed by all pub-owning businesses and the Scottish Parliament's Economy, Jobs and Fair Work Committee found that awareness of the voluntary code was low amongst tenants<sup>18</sup>. Doing nothing would not satisfy the requirements of the Act and would also prevent the Scottish Government from achieving its aims through the Scottish Pubs Code, to improve the position of tied pub tenants through creating a statutory framework to govern the relationship between pub-owning businesses and their tied pub tenants. Tied pub tenants in Scotland would also have fewer opportunities than tenants in England and Wales as they could not require their pub-owning business to offer an MRO lease which is currently available to tenants in England and Wales under their statutory Pubs Code.

4.10. Pub-owning businesses will be required to operate in a regulated environment under a statutory code, which will benefit all parties through providing consistency across the sector as a whole and reducing ambiguity about what is expected from pub-owning businesses that operate under the tied pub model. We recognise that

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<sup>18</sup> Scottish Parliament, [Stage 1 Report on the Tied Pubs \(Scotland\) Bill](#), November 2020.

intervention in tied lease agreements should only be carried out where necessary to bolster a sector for the benefit of the wider community, and the selection of the preferred options has been focused on finding a fair balance between the rights of the different parties.

## **Scottish Pubs Code**

**4.11. MRO Leases (A):** the code will require pub-owning businesses to offer MRO leases in certain circumstances when requested by tenants. An MRO lease is a lease which is free of ties and does not contain any unreasonable terms. MRO leases support the sector as a whole by providing a clear route for tied pub tenants to become free of tie and clarity for both parties about when that can occur. The MRO lease requirement is one of the main ways that a tenant can establish that they are not worse off than they would be if they did not have any ties and ensure a fair share of risk and reward, particularly for experienced tenants. The options considered in the BRIA for MRO leases are set out in Table 1. It is already a requirement under the Act, as agreed by the Parliament, for the code to require pub-owning businesses to offer MRO leases and therefore there is no 'do nothing option' considered. The Scottish Government's preferred approach is Option 3 (see Table 1).

**4.12. Guest beer agreements (B):** the code will require businesses to offer a guest beer agreement in certain circumstances when requested by tenants. A guest beer agreement allows a tenant to sell to their customers at least one beer that the tenant has chosen, at a price of the tenant's choice. The beer can be changed as often as the tenant wishes as long as it meets the requirements set out in the code. The options considered in this BRIA for guest beer agreements are set out in Table 1. It is already a requirement under the Act to require pub-owning businesses to offer to enter into a guest beer agreement in certain circumstances therefore there is no 'do nothing option'. The Scottish Government's preferred approach is Option 2.

**4.13.** Through guest beer agreements and being able to sell at least one guest beer, tenants may have more autonomy to shape their business in response to customer demands locally, which may deliver better customer choice and increased profits for the tenant. Indirectly, it may potentially support brewers, which would in turn support the wider community of tied pubs and brewers. It was recognised in the consultation that some pub-owning businesses already permit tenants to stock some non-tied beers, in which case a guest beer agreement provision in the code could have limited impact on current business practice.

**4.14. Rent reviews/rent assessments (C):** a rent review is a mechanism by which the 'dry' rent paid by the tied pub tenant to the pub-owning business is re-evaluated and potentially adjusted. The purpose of the process is to ensure that the rent paid by the tied pub is fair and reflects market conditions. The rent review can be

influenced by various factors such as changes in market conditions, the pub's performance, and any investment made by either party.

4.15. Rent reviews typically occur as per the terms of existing contracts between tenants and pub-owning businesses. Rent assessments are normally initiated only by pub-owning businesses. As part of the code, a pub-owning business may be required to give the tenant a rent assessment statement as part of a rent review process either within their contract or when appropriate within the code. The code sets out what information must be provided and what must be included in a rent assessment statement. Most of this is similar to the voluntary code and the English and Welsh Pubs Code. It includes additional requirements, such as basing profit and loss estimates on actual costs relevant to the pub or if not available, to a comparable pub in the vicinity. Option 1 would not place requirements or restrictions on pub-owning businesses in relation to rent reviews and assessment and is an available option under the Act. The Scottish Government's preferred approach is Option 3.

4.16. Insights from stakeholder engagements show that there is a level of information asymmetry in the industry, with tenants calling for increased transparency around the process of determining rent. Obligating the pub-owning businesses to provide the tenant with a rent assessment statement is expected to close some of the gaps in information disclosure and support greater transparency around the process, as the statement discloses all the matters that have been relied upon to determine the rent. This increased level of information is expected to increase a tenant's bargaining power and codify best practice. It will help pub-owning businesses by having more informed tenants and manage their expectations. By enabling tenants to be more informed about the costs of running tied pubs and current market conditions this could improve tenant's management of their pub and thereby potentially deliver benefits to consumers, local community and the wider supply chain.

**Table 1: Overview of Scottish Pubs Code Options considered in the BRIA**

Options	Option 1: Do Nothing	Option 2: Minimal Code	Option 3: Limited Code	Option 4: Maximum Code
<b>MRO (MRO) leases (A)</b>	Not applicable*	MRO leases are only to be offered as part of new leases and no unreasonable terms are specified.	An MRO lease must be offered to tenants if requested, except where investment by pub-owning businesses meets or exceeds an exemption threshold, or where an exemption applies Unreasonable terms would be specified.	MRO leases must be offered to tenants if requested, regardless of circumstance. Unreasonable terms would be specified. No exemptions apply.
<b>Guest beer agreements (B)</b>	Not applicable*	A guest beer agreement must be offered but only in relation to beer with a production level under 5,000 hectolitres.	A guest beer agreement must be offered but only in relation to beer with a production level up to 100,000 hectolitres <sup>19</sup> .	A guest beer agreement must be offered on any types of beer, regardless of production level or other circumstances.
<b>Rent reviews or rent assessments (C)</b>	Rent reviews occur as per the terms of an existing contract and are normally initiated only by pub-owning businesses.	Reviews only occur when the landlord is proposing a rent change (excluding indexation).	Reviews only occur when the lease does not include a rent review mechanism. The rent review could only be requested in certain circumstances e.g., lease is longer than 1 year and only if a rent review has not been requested within the past 5 years. No rent review for material circumstance change.	Reviews occur every 5 years or when material circumstances change, regardless of whether they have a contractual rent review clause or not.

<sup>19</sup> In our first consultation, we proposed setting a brand production level of 60,000hL but the feedback was that this was arbitrary. The evidence showed that 100,000hL was more appropriate, as it gave greater access to beer brands with higher sales volumes. Moreover it also mirrored the changes made by the new [Small Producers Relief](#) for alcohol duty, which replaced Small Brewers Relief. The new relief increased the volume that is eligible for alcohol duty discount to 100,000 hL (assuming a beer strength of 4.5% ABV), previously Small Brewers Relief (the old scheme) capped this at 60,000 hL.

\*A do-nothing option is not possible under the Act for the MRO lease and Guest Beer Arrangement, hence these are not considered. Options highlighted in blue are Scottish Government preferred options.

## **Financial Penalties, Fees, Expenses and Arbitration Rules**

4.17. **Financial penalties (D):** the Act already provides for the Adjudicator to take action, including by imposing a financial penalty, if a pub-owning business fails to comply with the Scottish Pubs code. The Act also requires Scottish Ministers to define the permitted maximum penalty either by specifying it as an amount or by setting out a methodology by which it is to be determined. A do-nothing option is therefore not a genuine policy option. The Scottish Government's preferred approach is Option 3 (see Table 2). The rationale for this is set out under Costs and Benefits.

4.18. **Fees (E):** the Act requires Scottish Ministers to set out arrangements for a fee to be made by tenants to the arbitrator when submitting a dispute for arbitration under the code. A do-nothing option is not a genuine option as the legislation requires a fee.

4.19. **Expenses (F):** the Act requires 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 because of a referral or request made by the tenant. Option 1 is the preferred Scottish Government option and would not require tenants to be liable in some cases, under the terms of section 17(4) to (6) of the Act, for reasonable fees and expenses in relation to an arbitration. Instead, under this option, the matter of expenses will rely on the discretion already provided to the Adjudicator.

4.20. **Arbitration (G):** the Act 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 business about whether the business has complied with the code. Option 1 would mean it would be up to the Adjudicator to conduct arbitration either in line with rules issued by the Chartered Institute of Arbitrators (CIARb) or the rules of another dispute resolution body. The Scottish Government's preferred option is to enable the Scottish Arbitration Rules and processes set out in the Arbitration (Scotland) Act 2010 to allow the Adjudicator to determine whether to apply these, the CIARb rules or those of another dispute resolution body to cases brought to the Adjudicator.

**Table 2: Overview of Financial Penalties, Fees, Expenses and Arbitration Rules options considered in the BRIA**

Options	Option 1: Do Nothing	Option 2	Option 3
<b>Financial penalties (D)</b>	Not applicable*	The permitted maximum would be defined as a specific figure.	The permitted maximum would be defined as a percentage of annual turnover, intended to be 1%.
<b>Fees (E)</b>	Not applicable*	A nominal fee of £10, fulfilling the requirement for Scottish Ministers to provide for a fee to be paid.	A set fee of £250 would be payable by a tenant when submitting a dispute for arbitration under the code.
<b>Expenses (F)</b>	Do not require tenants to be liable in some cases for reasonable fees and expenses in relation to an arbitration. Rely on discretionary rules.	Specify circumstances when a tenant is required to make a payment to the Adjudicator in respect of the expenses of an arbitration.	Not applicable
<b>Arbitration Rules (G)</b>	The Adjudicator can use the CIARb arbitration rules or those of another dispute resolution body to arbitrations.	The Arbitration (Scotland) Act 2010 would be treated as if it were commenced for the purposes of statutory arbitrations under the Tied Pubs (Scotland) Act 2021, allowing the Adjudicator to apply these, or the CIARb or rules of another dispute resolution body to arbitrations.	Not applicable

\*Options highlighted in grey are not genuine options under the Act. Options highlighted in blue are Scottish Government preferred options.



## Costs and Benefits of Market Only Leases (A)

### Costs and Benefits to Tenants

4.22. **Option 2 – Minimal Code** would allow for tenants of new leases (after the code comes into effect) to request, and subsequently shift onto, an MRO lease. The expected impact upon tenants of making this transition would be for them to benefit from the ability to source formerly tied products independently and do so at a lower cost, relative to when ‘tied’. In realising these benefits, it is also expected that in moving onto an MRO lease, benefits would be offset (to some degree) by the tenant incurring additional costs as they forego discounted property rent, and goods and services offered as a part of the ‘tie’ by the pub-owning business (sometimes referred to as SCORFA<sup>20</sup>). Whilst the tenant will have the opportunity to retain more profit out with a tie, the tenant will also take on more risk under an MRO lease.

4.23. In the analysis of costs and benefits it is supposed that risk-averse tenants, who may view the tied contract as preferable to an MRO lease under conditions of uncertainty with respect to future sales of beer, will not choose an MRO lease and will continue in a tied contract. It would of course be possible that some tenants could be worse off after moving to an MRO lease, if the change in the lease was combined with lower-than-expected future beer sales. For the purpose of this BRIA, it is assumed that there is similar future demand for beer under all options considered, as market fluctuations in beer demand would not be a direct result of a chosen policy option in the context.

4.24. In engaging with industry and stakeholders, the scale of these costs and benefits (as well as the net position) are highly varied, situation-specific and their value can be highly subjective. As such, it is estimated that the illustrative net annual benefit for an individual tenant would range from £0 to £23,800 per year. Taking these figures and multiplying by the estimated 700 (assuming, in the upper bound, that all tied pubs move over to an MRO lease) tied pub tenants within Scotland (assuming no change in the number of tied pubs), gives an estimated transfer of profits of between £0 and £16.7 million per year (the upper bound reflecting a situation where all tied pubs move over to an MRO lease), with the true figure likely falling in this range. This estimate presumes market conditions remain broadly similar. Further details on the costs and benefit estimates and relevant sources, assumptions and dependencies are included in Annex A.

4.25. The impact for tenants overall and the estimated transfer of profits will be dependent upon how many tenants would wish to request and, subsequently, move on to an MRO lease. With reference to Option 2, some of these factors will be outside the control of the tenant, as the option states that MRO leases would only be

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<sup>20</sup> Special Commercial or Financial Advantages

offered as a part of new leases and no unreasonable terms will be prohibited by the code<sup>21</sup>. Despite engagement with stakeholders, given the commercially sensitive nature of the information and non-uniformity of tied pub agreements, it has not been possible to suitably estimate how many tenants would be eligible per annum. However, it is highly likely that this would be realised over a much longer period of time compared to options where tenants could request an MRO lease option at any time as fewer numbers of tenants will be able to request MRO leases initially. Therefore, the transfer of any profits from pub-owning businesses to tenants will likely be at a slower rate under Option 2 compared to Options 3 and 4.

4.26. Under Option 2 it is also conceivable that pub-owning businesses may use strategies to make MROs unattractive to tenants or to thwart them completely as no unreasonable terms would be specified under this option. For example, it was found in England and Wales that following the introduction of the Code, pub-owning businesses sought brand new tenancy agreements for MROs<sup>22</sup>. These new tenancies reportedly included new, unfavourable terms, such as requiring rent in advance, the requirement for large deposits and dilapidation requirements<sup>23</sup>. This would potentially reduce the number of MRO leases that are pursued by tenants and therefore ultimately reduce the benefits to tenants in the form of profit transfers when compared to options 3 and 4.

4.27. **Option 3 – Limited Code** and **Option 4 – Maximum Code** offer increasingly greater flexibility and eligibility for tenants relative to Option 2, with Option 3 requiring MRO leases to be offered except following specific levels of investment being made to the pub by the pub-owning business and except when there are other exemptions. It is perceived that the benefits for an individual tenant here would be similar to or the same as those set out in Option 2, but they may be realised earlier under Option 3 and 4.

4.28. Determining the eligibility of tenants to a right to request an MRO lease under Option 3 depends on the specific criteria added to the level of investment exemption. Option 3 provides that in circumstances in which the pub-owning business has invested significantly in the tenant's pub, there is a level of reassurance and guarantee that the pub-owning business can realise sufficient returns on this investment through 'wet rent' and other terms of the tie. Due to the investment, it is supposed that under this option the tenant is sufficiently compensated to forgo their right to request an MRO lease option for a period of time following the investment.

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<sup>21</sup>This refers to terms that would be unreasonable to include in an MRO lease, such as the lease term being shorter than the existing lease.

<sup>22</sup> [Statutory Review of the Pubs Code and the Pubs Code Adjudicator: 2016-2019 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

<sup>23</sup> [Statutory Review of the Pubs Code and the Pubs Code Adjudicator: 2016-2019 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

Further analysis of the potential impact of different investment thresholds on tenants and pub-owning businesses is set out in Annex A.

4.29. **Option 4** would offer the greatest degree of flexibility and eligibility to tenants in being able to request an MRO lease option and the greatest opportunity for a transfer of profits from pub-owning businesses to tenants.

4.30. It is expected that the number of requests for MRO leases will increase, progressing from Option 2 through to Option 4. This is because the restrictions on a tenant's ability to request an MRO lease option will become less limited. However, with an MRO lease under Options 2-4, tenants would be exposed to more risk, including from market fluctuations, due to losing the risk-sharing mechanism of the tie. As such, it should not be assumed that, even if eligible to request an MRO, a tenant would seek to switch to an MRO lease under Options 2, 3 or 4. Given the varying nature of tenant's circumstances, as described above, any benefits might be considered insufficient against the associated costs and additional responsibilities and risks for tenants. Equally, upon requesting an MRO lease offer, tenants might choose not to move forward with such an option – either because they feel better informed about the benefits which a tied lease brings or that they are able to negotiate a 'better' tied lease with the pub-owing business (which may in itself lead to a transfer of profits).

4.31. The evidence that not all tenants will choose to pursue an MRO is borne out in figures on the adoption of MRO options in England and Wales, reported by the British Beer and Pub Association (BBPA)<sup>24</sup>. Of the 1,381 MRO notices which have been received and where an outcome has been reached between 2016 and 2023, 26% resulted in a free-of-the agreement, whilst 58% resulted in a new tied arrangement being agreed.

4.32. It should however be noted that take-up of MRO leases in Scotland is expected to be higher than it has been in England and Wales<sup>25</sup>, as there is more flexibility in the code on when tenants can request MRO leases.

4.33. Where the tenant and pub-owning business are unable to agree on the terms of an MRO lease, tenants may face some additional costs with respect to appointing an independent rent assessor. This is covered in more detail in paragraphs 4.44 to 4.46. Briefly, the cost of appointing an assessor is likely to be between £3,000 and £6,000 per case, with costs split equally between the tenant and pub-owing business. Costs to tenants may be between £1,500 and £3,000 per MRO lease that is disputed. Based on an analysis of the number of MRO cases that may go to

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<sup>24</sup> [Pub Partnerships | BBPA \(beerandpub.com\)](https://www.beerandpub.com/)

<sup>25</sup> Further information on this is provided in the [Financial Memorandum](#) to the Tied Pubs (Scotland) Bill

independent arbitration, this could cost tenants collectively around £12,000 to £24,000 per year.

4.34. Under these options – and in particular under Option 4 – pub-owning businesses may over time react by looking to move existing tenants from tied pub contracts to other styles of management agreements when leases expire in order to protect against any risks arising from MRO requests to their profits. This would have the effect of reducing the choice of business models available to future prospective tenants of tied pubs. There is some evidence underpinning this. The survey of SBPA pub-owning businesses in summer 2022, when asked as a result of the code as proposed in the written consultations, what pub owning businesses would do with their pubs– amongst 3 responding pub-owning businesses, 30% of their total pubs would be turned into other pub models, 8% of pubs would be sold and 1 % would be closed, would turn these into other pub models. However, if there were no MRO exemptions, amongst responding pub-owning businesses all said they would look to turn tied pub businesses into other pub models, all also said they would look to sell tied pubs as an ongoing business and 43% said they would close tied pubs (this does not necessarily mean changing, selling or closing their entire estate but rather changing, selling or closing part of their tied pub estate).

4.35. In England and Wales, where a code has been in existence since 2016, the number of non-managed pubs (which includes tied pubs) has decreased over time<sup>26</sup>, but in the Second Statutory Review of the Code and the Pubs Code Adjudicator the [UK Government](#) state this cannot be attributed to the code, given a similar decrease has been experienced in Scotland. What is evident is the proportion of pubs which are managed, such as franchises, have increased in England and Wales. However, having a wider range of business models may support the pubs sector as a whole by providing different opportunities for people to enter the sector and run their own pub and by providing different options for pub-owning businesses to tailor their estate.

### **Costs and Benefits to Pub-owning Businesses**

4.36. **Option 2 – Minimal code**, would introduce the requirement for pub-owning businesses to offer MROs but only in restricted circumstances, i.e., at the time at which a new lease is being prepared. We have not formally consulted on this option, but we believe this is likely to be the preferred option of most pub-owning businesses, given they have expressed concerns through our consultation exercises about all tenants being able to request MRO leases from day one of the code and how this could be managed. As outlined under the costs and benefits to tenants, as the option to start an MRO lease is likely to transfer profits from a pub-owning businesses to tenants, pub-owning businesses will incur costs under Option 2 of

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<sup>26</sup> [Report on the second statutory review of the Pubs Code and PCA October 2023 \(publishing.service.gov.uk\)](#)

between £0 and £23,800 per tied pub per year. It is also the case that under Option 2 there is scope for pub-owning businesses to adopt strategies to make MRO leases less attractive to tenants through introducing unreasonable terms into new leases.

4.37. Pub-owning businesses would be increasingly impacted by **Options 2-4** as the terms of eligibility of tenants to request an MRO lease option would lead to less control by pub-owning businesses over a tenant's management of the pub. This could lead to the pub-owning business having a lower share of any profits generated from tenant business, but this would be potentially offset by a reduction in risks from market fluctuations due to higher dry rent under an MRO lease and savings made on SCORFA benefits that were provided under a tied lease.

4.38. Specification of unreasonable terms under **Option 3** and **Option 4** would lead to less control over the content of leases and potentially less favourable terms for the pub-owning business. Under these options – and in particular Option 4 - pub-owning businesses may over time react by looking to move existing tenants from tied pub contracts to other styles of management agreements when leases expire in order to protect against any risks arising from MRO requests to their profits.

4.39. As part of the consultation on the Scottish Pubs Code, proposals were included to specify circumstances when an MRO lease option need not be offered by pub-owning businesses. These circumstances included when the pub-owning business had invested significantly in the tenant's pub. In doing so, the aims were to provide businesses with a level of reassurance and guarantee that they can realise sufficient returns on their investment and the tenant is sufficiently compensated to forgo their right to request an MRO lease option. This would ensure a fair share of risk and reward under regulatory principle 3.

4.40. The proposed investment exemption under Option 3 is for 5 years from the date an investment agreement was agreed, where the pub-owning business is investing in capital improvement works to the pub to the sum of £35,000 or more or 1.5 times the annual rent of the pub or more, whichever is the greater.

4.41. The existence of an investment threshold under Option 3 may have a number of different impacts on the level of investment into tied pubs. In some circumstances, pub-owning businesses may be disincentivised from making investments which, combined, amounted to less than the set threshold. In other circumstances, pub-owning businesses may be incentivised to make additional investments (above those planned) to meet or exceed the threshold in order to guarantee the tied lease against an MRO lease request. It might also be possible that some tenants choose to invest in pubs themselves under an MRO lease – offsetting any reductions in investment by pub-owning businesses – however such investments would be subject to greater credit-constraints and higher borrowing costs faced by tenants relative to pub-owning businesses. Further analysis of the potential impact of different investment thresholds on tenants and pub-owning businesses is set out in Annex A.

4.42. Under **Option 4**, an MRO lease available to all tied pubs at any time has scope to disincentivise and reduce investment made by pub-owning businesses into tied pubs. This has been highlighted by stakeholders during the consultation process. However, should investment from pub-owning businesses decrease, impacts could be partly mitigated through more investment into pubs managed under an MRO lease via tenant self-funding through loans or other means. Responses to the consultation showed that some tenants would welcome the freedom to invest and run their businesses as they saw fit under an MRO lease.

4.43. Under **Options 2-4**, in instances where the tenant and pub-owning business are unable to agree on the terms of an MRO lease, it is possible that it will be referred to an independent assessor for market rent assessment and possibly arbitration. In these instances, there will be an associated administrative cost, composed of the anticipated cost of an independent assessor being appointed and the frequency at which one will be needed.

4.44. As an indication, guidance shared by the Pubs Code Adjudicator in England and Wales suggest that the fees of an appointed independent assessor will range between £3,000 to £6,000<sup>27</sup> - subject to an agreed structure, which is banded - based on the annual rental value of the pub.

4.45. As part of the Tied Pubs (Scotland) Bill Financial Memorandum and based on the Pubs Code Adjudicator Arbitration data in England and Wales<sup>28</sup>, it was estimated that there could be an average of 23 MRO requests made in Scotland each year. A proportion of these MRO requests may require independent assessment. As set out in Annex A, we estimate that around a third of such cases may require an independent assessment.

4.46. The independent assessor's fees are to be split equally between the pub-owning business and the tenant in such cases. This means total costs based on the Financial Memorandum analysis for pub-owning businesses would be between £12,000 and £24,000 per year.

### **Costs and Benefits to Other Groups**

4.47. Under **Options 2, 3 and 4**, there potentially could be an impact on consumers who might see changes to the running of some pubs and more choice in the drinks and food available. The number of pubs where this might happen would be likely to increase from **Option 2** through to **Option 4**, as the number of MROs might be expected to increase in line with the opportunity.

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<sup>27</sup> [Independent Assessor fee structure - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

<sup>28</sup> [Tied Pubs Bill Financial Memorandum \(parliament.scot\)](http://parliament.scot)

4.48. Although difficult to quantify, it is possible that some consumers could face increased prices if the adoption of a MRO lease and the, subsequently, greater responsibility for their businesses resulted in low profit margins for some tenants.

4.49. Conversely, some consumers could face lower prices (or greater choice) due to tenants having greater flexibility and choice in the drinks and services that they provide.

4.50. With **Options 2-4**, there could be some impact on groups such as surveyors who contribute to the MRO development process, and those working on arbitration, such as the Adjudicator, and in the SCTS who would be involved in any appeals taken under the Scottish Arbitration Rules. The greatest impact is likely to be under **Option 4**, where more tenants could be expected to request MRO leases because they would be available regardless of circumstances. The number of arbitration decisions appeals occurring under the equivalent provisions in England and Wales have given rise to only 4 appeals since provisions came into force and no appeals have been made since 2021<sup>29</sup>. On this basis, the SCTS considers that any additional costs will be subsumed within existing SCTS budgets. The SCTS also highlighted that an applicant in an appeal before either the Outer or Inner House may incur additional court fees and separate costs incurred should they instruct/ obtain legal representation.

## Second Round Effects

4.51. As with any intervention, there is a high degree of uncertainty around the eventual outcomes, owing to the dynamic and unpredictable nature of markets. Tenants and pub-owning businesses could respond in several ways to the provision of tenants being able, dependent upon eligibility, to request an MRO lease option from their landlord – with the responses likely to vary between individuals and businesses. Tenants and/or pub-owning businesses may feel that the strength of their tied-lease offer is such that there is little response required. Pub-owning businesses may also seek to better communicate the benefits of the tie to their tenant(s) or, indeed, look to improve what they offer as part of the tie.

4.52. It is also likely that, in response to tenants seeking and taking up an MRO lease, pub-owning businesses may decide to manage more pubs directly, in order to guarantee ongoing sales to those pubs, or may choose to abandon the tie altogether. So, whilst the provision would initially expand the number of options available to both current and prospective tenants, it may well result in fewer tenancies being offered in future, although other entry routes to the pubs sector may become more available. It may also mean a change in the nature of pub-owning

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<sup>29</sup> [Judgments in Arbitration Appeals and Publication of Arbitration Awards - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/91422/judgments-in-arbitration-appeals-and-publication-of-arbitration-awards.pdf)

businesses, with fewer requirements for staff in SCORFA related roles such as business development and branding roles.

## **Costs and Benefits of Guest Beer Agreements (B)**

### **Costs and Benefits to Tenants**

4.53. **Option 2 – Minimal Code** would require pub-owning businesses to offer a guest beer agreement if requested by their tenant except where the tenant already has an agreement in place which matches the criteria of a guest beer agreement set out in the Act and code<sup>30</sup>. The guest beer agreement will allow tenants to sell a beer of their choosing in addition to the tied beers required by their lease, provided that the annual production level of the chosen beer brand does not exceed 5,000hL. According to analysis of beer brand sales data from market research company, CGA by Nielsen, this would include the vast majority (96%) of beer brands in the UK, but only a small proportion (4%) of total annual UK sales of beer (see table 1B in Annex B).

4.54. The expected impact on tenants of having a guest beer agreement would be for them to benefit from greater autonomy and flexibility, enabling them to buy a guest beer directly from the supplier at market prices and potentially increase their income and their customer base. However, whilst the tenant will have the opportunity to make more income from the guest beer line, the tenant will also take on more risk by choosing to sell a free-of-tie beer line, in accordance with the regulatory principle of a fair share of risk and reward. As set out in Annex B, a key uncertainty in assessing the benefits and costs associated with a guest beer agreement is the extent to which consumers will choose to substitute tied beer purchases with a guest beer. We have limited evidence on which to base appropriate assumptions, with stakeholders claiming the impact could range from 2% of tied beer sales being substituted (in the case of a small production beer) to 40% being substituted (in the case of the guest beer being a popular brand). The net benefits calculated here should therefore be treated as illustrative.

4.55. It is estimated that the illustrative net annual benefit per individual tenant could range from £800 to £5,900 per year. All tied pub tenants are not expected to take up a guest beer agreement under the code. A survey of 31 tenants, conducted by SLTA, suggests that 20 tenants (65% of those responding) would choose to take up a guest beer agreement under the code<sup>31</sup>. It is expected that under Option 2, there will be less take-up, owing to the relatively higher restrictions than in other options.

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<sup>30</sup> It is possible that existing Guest Beer agreements between POBs and tenants will be for beers that exceed 5,000hL in sales. It is possible such agreements would be withdrawn in future to align with the guest beer agreement under the Code.

<sup>31</sup> In the same survey, 3 tenants (10% of survey respondents) answered that they would not request a guest beer agreement through the code, and 8 tenants (25% of respondents) were unsure.



As a result, it is assumed that 25% of the 700 tied pubs would request for a guest beer agreement under the code. This gives an overall estimated benefit to tenants ranging from £0.1 million to £1.0 million per year. Further details on costs and benefit estimates and relevant sources, assumptions and dependencies are included in Annex B. This option supports the third regulatory principle that a pub-owning business and tenant should fairly share the risks and rewards amongst parties. Tenants have greater access to the rewards of a tied pub tenancy, alongside a greater share of the risk as the guest beer brand they select may not sell well in their pub. Pub-owning businesses are also likely to have reduced reward – ensuring this is fair informs the selection of option 2, with the smallest impact on the pub-owning business. Lastly, this is a practical option, as it should be easier for both tied pub tenants and pub-owning businesses to identify whether a beer brand qualifies as a guest beer.

**4.56. Option 3 – Limited Code** offers tenants access to more beer brands relative to Option 2, with the maximum threshold for annual production of a qualifying beer brand being set higher at 100,000 hL. This would include 99% of all beer brands in the UK, adding an additional roughly 240 beer brands to that offered in Option 2. Similar to Option 2, under this option a guest beer agreement need not be offered by the pub-owning business if one is already in place, and it meets the criteria of a guest beer agreement set out in the Act and the code.

4.57. The illustrative net benefit per individual tenant would range from £5,900 to £11,800 per year under Option 3. The benefit is expected to be relatively higher than in Option 2 as tenants would have access to more popular beer brands which may mean more consumers will switch from a tied beer. As a result, it is expected that take-up of guest beer agreements would be higher under this option, with approximately 50% of tied pub tenants assumed to take up a guest beer agreement. Therefore, the total benefits seen by tenants as a whole is expected to range from £2.1 million to £4.1 million. Further details on these illustrative estimates are included in Annex B.

**4.58. Option 4 – Maximum Code** offers tenants greater eligibility and no restrictions in selecting a beer brand as a guest beer. Under this option, it is expected that tenants would choose the highest selling and most popular beer brands to offer under their guest beer agreements. As a result, the illustrative estimated net benefit to an individual tenant is expected to range from £11,800 and £15,700 per year. The expected higher sales and lower risk from choosing to sell a more popular beer brand is anticipated to result in greater take-up of the guest beer agreements provision, with an assumed 75% of tied pub tenants taking up a guest beer agreement. The total benefit by tenants as a whole is therefore expected to range from £6.2 million to £8.2 million per year. Further details on these illustrative estimates are included in Annex B.

4.59. Under Option 4, tenants are expected to see a loss in investment from the pub-owning business, with pub-owning businesses stating that they would be looking to reduce investment by 75-100% if guest beer agreements were unrestricted. The impact of this reduced investment has not been quantified as there is a lack of data available to help us understand the current level of investments made by pub-owning businesses, the drivers of such investments and the speed/ability for pub-owning businesses (and tenants) to realise their returns. This is partly to be expected, given the varying nature and scale of any such investments within business.

4.60. The Scottish Pubs Code Regulations 2024 state that a guest beer agreement must not vary the existing lease except to the extent necessary to include the guest beer agreement and to provide for a service equipment charge, if such a charge has been agreed between parties. It is therefore not possible for pub-owning businesses to mitigate against any losses through increasing 'dry rent' in the short-run. In the long-run, however, under Options 2-4, it is possible that a pub-owning business may, when a lease is renewed, seek to recover lost revenue arising from any displacement of sales of tied-beer due to a guest beer agreement, through increasing dry-rent. Even if a tied pub has not chosen to introduce a guest beer agreement, the pub-owning business may reasonably expect that the tenant will introduce one under a renewed lease and therefore seek to increase dry rent higher than it otherwise would be in a new lease. Therefore, it is important to note that the profit transfer benefits of a guest beer agreement under each option may be partially or fully offset in the long run for tenants. The tenant will also bear higher risks and be more exposed to market fluctuations in demand if dry rent is set higher than in Options 2 or 3.

4.61. The degree to which pub-owning businesses seek to increase dry-rent is expected to be less likely under Option 2. As discussed in Annex B, the net benefits calculated in this BRIA are on the assumption that total sales of beer before and after the introduction of a guest beer agreement are unchanged for a given pub. Therefore, it is a 'zero-sum game': each pint of guest beer sold will mean one less tied beer sold. This simplifying assumption may be less likely to hold in the case of Option 2, as smaller, less popular, niche or local guest beers could attract new consumers<sup>32</sup> and increase overall beer sales - limiting any impact on wet sales for pub-owning companies. This is less likely under Options 3-4 if the beer chosen is likely to be popular with existing consumers. Some pub-owning businesses already permit tenants to sell some non-tied products which demonstrates that the sale of a small production guest beer is unlikely to have a significant impact on tied beer sales in practice.

4.62. Under **Options 3-4**, it should be noted that the incentive for pub-owning businesses to increase dry rent at the point of the renewal of a lease to mitigate

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<sup>32</sup> [The Scottish Beer and Pub Association](#) note that consumers are increasingly attracted to local, natural and unusual beers, searching for beers of different origins, styles, strengths and tastes.

against any possible reductions in wet-rent caused by the introduction of a guest beer agreement would have to be weighed against the risk that the tenant would have more of an incentive to request an MRO lease or a rent review in circumstances of rising dry rent.

## **Costs and Benefits to the Pub-owning Businesses**

4.63. **Option 2 – Minimal code** would require pub-owning businesses, if requested, to offer guest beer agreements to tenants, allowing tenants to sell a guest beer brand with an annual production of up to 5,000hL. Pub-owning businesses need not offer a guest beer where they already offer one that meets the criteria set out in the code. Sales of guest beer are expected to substitute some of the sales of tied beer, resulting in a negative impact on the pub-owning business' profits or wet-rent (at least in the short-run). As set out above, the degree to which tied beer is substituted for guest beer under each option is a key uncertainty. The estimates below should therefore be treated as illustrative.

4.64. Under Option 2, the illustrative expected impact on the pub-owning business' wet-rent will range from a loss of £800 to a loss £5,900 per tied pub tenant requesting a guest beer agreement per year<sup>33</sup>. With an estimated 25% of tied pub tenants expected to request and be eligible for a guest beer agreement, the total cost to pub-owning businesses as a whole will range from £0.1 million to £1.0 million per year. These estimates relate solely to possible changes in wet rent. Annex B shows that revenue for a tied-beer brewer will also decline. Further details on these estimates and relevant sources, assumptions and dependencies are included in Annex B. Option 2 does have the benefit to both pub-owning businesses and tenants in the sense that it should be easier for them to identify whether a beer brand qualifies as a guest beer brand.

4.65. **Option 3 – Limited code** would similarly require pub-owning businesses, if requested, to offer guest beer agreements to tenants. However, tenants can choose a guest beer brand with an annual production level of up to 100,000hL. Similar to Option 2, pub-owning businesses need not offer a guest beer where they already offer one that meets the criteria set out in the code. Tenants are expected to choose the highest-selling and more popular brands, therefore resulting in greater substitution from the tied beer, relative to Option 2. As a result, the illustrative impact on pub-owner turnover will range from a loss of £5,900 to a loss of £11,800 per tied pub tenant per year. With an estimated 50% of tied pubs requesting a guest beer agreement under this code, the total cost to pub-owning businesses will range from £2.1 million to £4.1 million per year. Further details on these estimates and relevant sources, assumptions and dependencies are included in Annex B.

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<sup>33</sup> Note, these changes in profits are equal and opposite to the benefits calculated for tenants.

4.66. **Option 4 – Maximum code** would require pub-owning businesses to offer guest beer agreements to tenants, if requested, regardless of circumstances, and with no restrictions to the production level of beer chosen by tenants. Tenants are expected to choose the highest-selling and most popular brands to maximise profits. As a result, substitution from tied beer is expected to be high, resulting in greater negative impacts on pub-owning business' profits, relative to Option 2 and Option 3. The estimated illustrative losses to pub-owner turnover are expected to range from £11,800 and £15,700 per year. With an estimated 75% of tied pub tenants seeking to take-up a guest beer agreement, the total cost to pub-owning businesses as a whole is expected to range from £6.2 million to £8.2 million per year. Further details on these estimates and relevant sources, assumptions and dependencies are included in Annex B.

4.67. As mentioned earlier, the Scottish Pubs Code Regulations 2024 state that a guest beer agreement must not vary the existing lease except to the extent necessary to include the guest beer agreement and to provide for a service equipment charge, where such a charge has been agreed between parties. It is therefore not possible for pub-owning businesses to mitigate against any losses through increasing 'dry rent' in the short-run. It is important to note however that this situation is likely to change when a lease is renegotiated, and as such, some of the annual losses calculated may overstate the impact on pub-owning businesses in the long-run.

### **Cost and Benefits to Other Groups**

4.68. **Options 2, 3 and 4** are expected to benefit consumers through increased consumer choice. The impact is expected to be great under **Option 2** and only marginally increase from that with **Option 3**. Although **Option 4** provides the most choice for the tenant, it is expected that gains to consumers in terms of improving choice will be marginal as tenants are predicted to choose one of the few top selling brands to sell as guest beer.

4.69. **Option 2, Option 3, and Option 4** may also benefit consumers through potentially cheaper priced beer, depending on the cost achieved by the tenant in negotiation with the supplier and the type of beer selected.

4.70. **Options 2, 3 and 4** would benefit beer producers through the potential for increased market access. **Option 2** would only benefit producers of brands with smaller production levels, which covers the majority of beer brands. **Option 3** would benefit producers of larger brands. **Option 4** would potentially impact all beer producers, particularly larger producers as their brands of beer will potentially be competing with other rival bestselling brands of beer.

4.71. Under **Options 2, 3 and 4**, a tied pub tenant with a guest beer agreement would be free to choose how and from where to source the guest beer, subject to

any criteria. Under **Option 2**, suppliers/brewers of guest beer, as a whole, would benefit from increased annual turnover ranging from £0.3m to £2.4m. Guest beer suppliers/brewers, as a whole, will benefit from increased annual turnover ranging from £4.9m to £9.7m under **Option 3**, and turnover ranging from £14.6m to £19.4m under **Option 4**. It should be noted that increases in turnover for guest beer brewers will be offset by equal declines in revenues of brewers of tied beer products. This is set out in Annex B.

## **Costs and Benefits of Rent Reviews/Rent Assessments (C)**

### **Costs and Benefits to Tenants**

4.72. **Option 1 – Do Nothing**, would have no impact on tenants. They would have no less or greater protection than is afforded at present with respect to the frequency of rent reviews. This is a viable option as the Scottish Government is not required to include rent reviews or rent assessments within the Scottish Pubs Code by the Act.

4.73. **Option 2** would provide greater protection for tenants but only in limited circumstances, when the landlord is proposing a rent change not linked to indexation. **Option 3** would provide greater protection for tenants than **Options 1 and 2** but only for tenants whose existing lease does not include a rent review.

4.74. **Option 4** would provide the greatest protection, applying as it does to all tenants. Under all of the options, the ability to request a rent review could result in increased opportunities for tenants to negotiate rent and therefore potentially more favourable rent arrangements. There would also be greater transparency for the tenant with regard to the rent review process.

4.75. There would be time and resource costs for tenants of understanding the rent assessment statement and negotiating rent, or through seeking legal or other independent advice. The cost of each rent review will depend on the amount of work involved and who is employed to complete the review. Our understanding is that most rent reviews are conducted by the pub-owning business' own staff. While tenants may face some time-related costs in preparing for a rent review, these are expected to be fairly nominal and with the pub-owning business bearing most of the associated costs.

### **Costs and Benefits to Pub-owning Businesses**

4.76. The status quo of **Option 1 – Do Nothing** would have no impact on pub-owning businesses.

4.77. **Option 2** would place new requirements and restrictions on pub-owning businesses, in limited circumstances, and would place some additional costs on them e.g., legal costs, costs in relation to the provision of information or ensuring

staff were in place to meet the statutory deadlines. The new requirements could prevent pub-owning businesses from setting rents without mutual agreement, thereby increasing uncertainty about rent levels and future revenues for the business.

4.78. **Option 3** would have a greater impact than Option 2 because it would apply to a greater number of leases, although we have been unable to quantify how many leases it would impact. We understand that the market is moving to shorter leases (i.e., less than 5 years) and many existing leases do already have rent review arrangements within them. The impact is therefore expected to be small for the sector as a whole. **Option 4** would have the greatest impact and at the greatest cost, since it would allow rent reviews every 5 years or when material circumstances change, regardless of the terms of an existing contract.

4.79. We have estimated the likely cost of a rent review to pub-owning businesses. The detail on the methodology and assumptions are set out in Annex C. Based on insights shared by the SBPA, the average cost of rent reviews carried out by responding pub-owning businesses in 2022 was £1,750 – within a range of £1,500 to £2,500.

4.80. Most of the estimated total 700 tied pubs in Scotland will not be directly affected by the rent review requirement under Option 3, as most pub-owning businesses will already have frequent rent reviews (less than every 5 years) as part of existing lease agreements. Based on intelligence from the sector, it is estimated that between 105 to 175 tied pubs will be eligible to seek a rent review in total.

4.81. There exists uncertainty on the number of tied pub tenants who would ultimately request a rent review under the code. To reflect this uncertainty, upper and lower bound estimates have been calculated for 21 to 35 pubs seeking a rent review per year (upper bound) to one to two pubs per year (lower bound). The total monetised costs to pub-owning businesses are expected to range from £1,750 to £61,250 per year. More details on the methodology behind these estimates is provided in Annex C, including the basis for the range of pubs expected to request a rent review.

### **Cost and Benefits to Other Groups**

4.82. **Option 1** would have no impact on consumers or beer producers. **Options 2-4** may have a small but increasingly significant (from Option 2 through to Option 4) impact on consumers, if more favourable rent assessments and reviews led to more profitable business for the tenant and consequently, potentially cheaper prices and better conditions in the pub. Similarly, beer producers may benefit from greater annual beer volumes under Options 2-4.

## Second Order Effects

4.83. There is also the possibility that Options 2-4 could lead to shorter tenancies or a movement away from tied pub arrangements to management agreements. This could lead to uncertainty for tenants and, in time, fewer opportunities for prospective tenants to benefit from tied pub leases. Additionally, pub-owning businesses may increase the dry-rent in new leases to account for the risk related to rent reviews.

4.84. This poses a problem to any future tenants who may choose to start a business by running a tied pub as a tied pub lease may no longer be as accessible compared to Option 1.

4.85. An increased dry rent could be passed on to consumers in potentially increased beer prices. This may arise from the second order effect of increased dry-rent which pub-owning businesses may start charging as a result of an increased risk from Options 2-4, thus inclining tenants to increase the price at which they sell the beer in order to offset the costs.

4.86. Ultimately, while the provision of rent reviews is expected to act as an incentive for future tenants to pursue a tied lease, it is also anticipated to act as a disincentive for pub-owning businesses to offer tied leases. One pub-owning business in the consultation<sup>34</sup> “voiced concern that the new rent review arrangements could lead to continued uncertainty in the sector, impacting on ability to invest and possibly moving more pubs on to management agreements rather than tied leases.”. There is a risk that this could create an imbalance in the market for tied pubs as it is expected to create more demand but less supply of tied leases. An option with restrictions to this right, such as option 2 or 3 could partly mitigate this risk and effect.

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<sup>34</sup> [Scottish Pubs Code: Consultation 2: analysis report \(www.gov.scot\)](http://www.gov.scot)

## Costs and Benefits of Arrangements for Financial Penalties, Fees, Adjudicator Expenses and Arbitration.

### Financial Penalties

4.87. **Option 2** would define the maximum penalty as a specific figure. It would support the Adjudicator in enforcing the code and fulfil the legal requirement to define a maximum penalty by specifying the penalty as an amount. Under the Act, appeals could be brought by a pub-owning business to the Court about the imposition and amount of the penalty. Pub-owning businesses that do not comply sufficiently with the code would incur increased costs, whereas tenants would benefit from effective enforcement of the provisions of the code.

4.88. Defining the maximum penalty as a specific figure could allow the maximum penalty to be applied regardless of the size of the business. The Adjudicator could impose the penalty on any pub-owning business which fails to comply with the code and could impose any figure up to the maximum regardless of the size of the business. However, this could disproportionately impact on smaller pub-owning businesses.

4.89. **Option 3** would define the maximum penalty as a proposed 1% of annual turnover. Where the business is part of a wider pub-owning group, the percentage would apply to the annual turnover of the group.

4.90. The benefit of setting the maximum penalty with reference to the turnover of a pub-owning business is that it ensures that any costs to pub-owning businesses are proportionate to the size of the business, ensuring that penalties are non-trivial for large businesses on the one hand, and are not overly burdensome to smaller businesses on the other hand.

4.91. A maximum penalty of 1% of turnover allows for a significant penalty, if required, but the Adjudicator is able to impose a smaller penalty where they consider this appropriate under Option 3. We anticipate that the maximum penalty may only be used in cases of persistent non-compliance. This is on the basis that the only financial penalty in England and Wales that has been applied is to Star Pubs & Bars; this was set at over £2 million and was subsequently reduced to £1.25 million by the Adjudicator. The maximum 1% fine would have been £12,325,770.<sup>35</sup>

### Fees

4.92. **Option 2** would ensure that tenants pay a nominal fee when submitting cases for arbitration and is similar to the fee charged in low value consumer arbitration

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<sup>35</sup> [Notice of a financial penalty addressed to Star Pubs & Bars Limited.pdf \(publishing.service.gov.uk\)](#)



cases. **Option 3** represents a more substantial but still modest fee, similar to the fee charged for tied pub tenants under the Pubs Code in England and Wales (and for the Pubs Independent Conciliation and Arbitration Service, which is £200) and updated to take into account the inflation pressures. There was general support (although not unanimous) in the consultation across both tenants and pub-owning businesses for a fee to be set at £250. Option 3 in particular would be a fee level sufficiently high that is intending to discourage tenants from submitting minor and vexatious cases. We cannot know for certain how many additional minor and vexatious cases would come forward if a small fee was required for arbitration under Option 2, but we would assume that more cases would come forward which would create additional costs for both tenants and pub-owning businesses and the Adjudicator too.

## Expenses

4.93. Both **Option 1** and **Option 2** would benefit pub-owning businesses. Under either option, where the arbitration has resulted in an award in favour of the pub-owning business, they would be able to request that the Adjudicator relieve the business of liability for the Adjudicator's fees and expenses and make the tenant liable for reasonable fees and expenses.

4.94. Option 1 provides the Adjudicator with discretion to determine whether or not to make the tenant liable for reasonable fees and expenses, given there were mixed views on Option 2 in the consultation.

4.95. The extent of any fees and expenses potentially due to the Adjudicator from the tenant would depend on the individual case. In England and Wales, in their most recent review report<sup>36</sup>, 65 cost awards resulted in eight tied pub tenants paying towards the pub-owning businesses expenses. Six tenants paid the maximum £2,000 and two tenants paid £500 (however our legislation only allows a cap to be set for the Adjudicator's expenses, not for the pub-owning business).

## Arbitration Rules

4.96. Option 1 would mean no change to existing arrangements since the Act already provides for Chartered Institute of Arbitration rules (CI Arb), or the rules of another dispute resolution body nominated by the arbitrator. It would be for the Adjudicator to decide whether the CI Arb rules or another set of rules would apply in arbitration. This would ensure that arbitrations were conducted in line with recognised sectoral rules and guidelines, for the benefit of all parties involved in the dispute.

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<sup>36</sup> [Report on the second statutory review of the Pubs Code and PCA October 2023 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

4.97. Option 2 would enable the arbitrator to choose the Scottish Arbitration Rules, in addition to the choice of the CI Arb rules or rules from another nominated body. It would be for the Adjudicator to decide what set of rules would apply in arbitration. However, the additional option of the SARs would allow the Adjudicator to use modern Scotland-specific arbitration provisions if the Adjudicator wished, which would benefit all parties involved in the dispute. It is not expected that this would lead to additional costs for any of the parties involved in the dispute.

## **5. Regulatory and EU Alignment Impacts**

### **Intra-UK Trade**

5.1. This policy is not expected to impact on intra-UK trade. A Pubs Code and a Pubs Code Adjudicator was established in 2016 in England and Wales and although the schemes are not identical north and south of the border, the Tied Pubs (Scotland) Act 2021 and the related secondary legislation brings the tied pubs sector in Scotland more aligned with its counterparts in England and Wales.

### **International Trade**

5.2. This policy will impact on the relationship between tied pub tenants and pub-owning businesses. It is not expected to impact on international trade and investment or to affect imports or exports, trade flows or international standards.

### **EU Alignment**

5.3. This policy is not expected to impact on the Scottish Government's policy to maintain alignment with the EU. It does not reduce standards or impede access to EU markets.

## **6. Other Impact Assessments**

### **Scottish Firms Impact Test**

6.1. The Scottish Government has ensured that careful consideration is given to the impact on businesses so that the legislation is informed by a sound understanding of these impacts. Given that the main changes are introduced by the Scottish Pubs Code, our focus has been on understanding the impacts of this on businesses.

6.2. We sought to understand impact through our formal and informal consultations on the Scottish Pubs Code and informal consultation on the Arbitration and Fees and Financial Penalties SSIs.

6.3. A tailored approach to inviting views on the preparation of the BRIA, as part of the Scottish Firms Impact Test was adopted, and meetings were held with six

businesses. Other businesses were invited to meet, but they did not take up this offer. The businesses who did not take up the opportunity to speak include some of the smaller pub-owning businesses who only operate in Scotland.

6.4. The questions asked depended on the business and their time available. A list of questions to one of the pub-owning businesses can be found in Annex D. In general, all businesses were asked about the size of their business and how the different proposals on MRO and guest beer would impact on them.

6.5. In addition to this, at our request, the SBPA also ran a short survey with their pub-owning business members on their pub estate, the impact of the Pubs Code (where applicable) in England and Wales and the likely impacts of the Scottish Pubs Code. This data was provided in May 2022. We asked for further data in May 2023, but they were unable to supply all of this, citing the ongoing Judicial Review. The SLTA ran a survey with tenants in June 2023, the results of this are in Annex E.

6.6. The findings from the meetings with businesses varied. Some key points are summarised below:

- For the craft brewers we spoke with, the guest beer arrangements were seen as an opportunity for their beers to be considered for more taps in tied pubs. An unrestricted option would likely result in benefits for major beer brands and their producers. Options based on production levels of brands would deliver more benefits for smaller brewers. There were mixed views about where to set the production level cap.
- For the tenants we met, the MRO (MRO) option was of central importance since this could deliver savings on beer, even when this was partially offset by higher dry rent; this would allow them to fairly recoup the benefits of their pub operation. One tenant mentioned it could improve consumer choice. Another thought it would encourage tenants to seek further investment in their pubs, as they would receive a greater share of any additional profit/turnover.
- On guest beer, an unrestricted guest beer would deliver the most financial benefit to tenants. One tenant we met, however, thought the benefits would likely be offset by increases in rent over time so would be cost neutral. The benefits would also vary depending on the type of pub – some would be more focused on beer. The ability to request a rent review when material circumstances change would also be useful, with two tenants experiencing local economic changes recently.
- For the two pub-owning businesses we spoke to, they confirmed that an unrestricted guest beer approach would likely support sales of one particular beer, reducing their financial benefits. The more brands that were eligible for

guest beer, the more this would likely reduce their profits and impact on their longer-term viability. In turn this could impact on investment.

- On MRO, pub-owning businesses highlighted that this created risk and uncertainty, particularly around investment. The longer the timescale that pub-owning businesses have to recoup investment through any MRO waiver provides more certainty. The benefits and costs for MRO would depend on a number of factors including the type of pub and tenant. The pub-owning businesses viewed administrative costs for dealing with MRO as a substantial impact (one pub-owning business in the Scottish Firms Impact Test said in England and Wales it cost £36,000 for a MRO notice, which is when a tenant submits a notice for an MRO lease and pub-owning businesses are required to provide an MRO proposal and considerably more to ensure compliance). For one pub-owning business, a deed of variation would create additional costs. Tenants undertaking MRO would also lose SCORFA benefits such as not having free Portable Appliance Testing. In their view, MRO could result in fewer opportunities for new entrants to enter the leased market.
- Both pub-owning businesses pointed to additional costs of rent review. As mentioned earlier, the SBPA found that amongst a survey of responding pub-owning businesses the average cost of a rent review was £1,750 in 2022.

## **Competition Assessment**

6.7. The guest beer agreement policy may have an impact on competition amongst beer producers. The other policies would not impact on competition, although the creation of a statutory framework regulating pub-owning businesses' relationships with tenants could change the pub market indirectly, as mentioned above. It could result in fewer pub-owning businesses leasing tied pubs, creating less competition for tied pub tenants. However, we understand that some of this is likely to result in tied pubs being converted into other pub models which could provide other opportunities for both tenants and pub-owning businesses to explore other types of pub management/ownership. The introduction of a levy for pub-owning businesses, which will be used to fund the office of the Scottish Pubs Code Adjudicator, could also act as a barrier to new potential pub-owning businesses, increasing the barriers to entry and potentially reducing competition.

6.8. Responses to the four Competition and Market Authority (CMA) assessment questions used to provide an initial assessment of competition are as follows:

- 1. Will the measures directly or indirectly limit the number or range of suppliers?**

6.9. None of the guest beer agreement policy options will directly distinguish between suppliers. Options 2 and 3 focus on beer brands and the level of production of these brands.

6.10. **Options 2 and 3** may provide greater opportunities for small-scale producers to sell beer to tied pub producers than is currently the case but large-scale producers could also benefit under these options if they were to release a brand of beer with a limited production level. **Option 4** would provide scope for all producers to sell produce to tied pubs. It would probably provide more benefit for large-scale producers with well-known beers which are popular with consumers but not currently sold alongside tied beers.

**2. Will the measures limit the ability of suppliers to compete?**

6.11. The situation is as described above under Question 1.

**3. Will the measure limit suppliers' incentives to compete vigorously?**

6.12. The situation is as described above under Question 1.

**4. Will the measure limit the choices and information available to consumers?**

6.13. The policy is expected to increase choice for consumers. An in-depth competition impact assessment has been considered but is not required.

### **Consumer Assessment**

6.14. The policy will have a positive impact on consumers.

**1. Does the policy affect the quality, availability or price of any goods or services in a market?**

6.15. The policy would not negatively impact on consumers including those whose circumstances may be more vulnerable.

6.16. There may be a wider choice of beers available in tied pubs as a result of the policy on guest beer agreements. These may or may not be sold at a higher price than other beers offered but the choice of beer purchased will remain a decision for the individual consumer.

6.17. The opportunity to request MRO leases might impact on consumers if these arrangements led to previously tied pubs being operated more or less efficiently, potentially with a wider choice of goods.

**2. Does the policy affect the essential services market, such as energy or water?**

6.18. No

**3. Does the policy involve storage or increased use of consumer data?**

6.19. No

**4. Does the policy increase opportunities for unscrupulous suppliers to target consumers?**

6.20. No

**5. Does the policy impact the information available to consumers on either goods or services, or their rights in relation to these?**

6.21. No

**6. Does the policy affect routes for consumers to seek advice or raise complaints on consumer issues?**

6.22. No

### **Test Run of Business Forms**

6.23. There is no intention at this point to introduce new forms for business or others to complete. If this were to happen then we commit to test run these forms before introduction, with those who would be using them, in order to ensure they are easy to use and fit for purpose.

### **Digital Impact Test**

6.24. The policy will not have an impact on, or be impacted by, digital processes.

6.25. A Data Protection Impact Assessment has been completed for implementation of the Tied Pubs (Scotland) Act 2021.

### **Legal Aid Impact Test**

6.26. The Tied Pubs (Act) 2021 already makes provision for a number of appeals and it creates a legal framework for new legal processes and arrangements to deal with disputes. This section does not seek to cover these here.

6.27. The Tied Pubs (Scottish Arbitration Rules) Amendment Order 2024 will enable parties to appeal and challenge a decision by the Adjudicator under Part 8 of the Arbitration Act 2010 to the Outer House of the Court of Session. The Order could

also result in parties being liable for any Adjudicator fees and/or Court fees, in addition to their own legal expenses, which could result in request for legal aid.

6.28. In England and Wales (where a similar regime is already in existence) only four appeals against arbitration decisions have been made since 2016, and the last one was made in 2021 (however this only relates to cases which went to a full hearing in the High Court). There are much higher numbers of tied pubs covered by the scheme in England and Wales (over 8,000) compared to Scotland (just under 700). We therefore anticipate that the need for any request for legal aid will be low, given that legal aid is means tested on the basis of both income and disposable capital. In a non-representative survey of tenants, 25 out of 31 had a take home pay of less than £25,000, indicating that there could be some call for legal aid, however due to the very low number of appeals against arbitration that have been made in England and Wales it is likely that this SSI will only have a minor impact on the legal aid fund in Scotland.

### **Enforcement, Sanctions and Monitoring**

6.29. Oversight and enforcement of the Scottish Pubs Code is the responsibility of the Scottish Pubs Code Adjudicator.

6.30. Financial penalties are set out in the Tied Pubs (Fees and Financial Penalties) (Scotland) Regulations 2024.

### **Implementation and Delivery Plan**

6.31. The legislation required to implement and support the Scottish Pubs Code, including legislation with regard to financial penalties and fees and arbitration, is expected to come into force on 7 October 2024. It will be for pub-owning businesses to ensure that they operate in accordance with the code, in relation to their tied pub tenants. Oversight and enforcement will be a matter for the Scottish Pubs Code Adjudicator.

### **Post-implementation Review**

6.32. Scottish Ministers are required to review the Scottish Pubs Code and the performance of the Adjudicator, once these are established, over the first two years of operation and then at three yearly intervals thereafter. The first review period would conclude on 31 March 2026 and the Scottish Government is required to prepare a report as soon as possible after that date.

6.33. The Adjudicator is also required to prepare and make public an annual report of its activities during the financial year, which will inform the review. Scottish Ministers must lay a copy of the annual report before the Scottish Parliament every year.

## 7. Summary and Recommendation

7.1. Tables 3 and 4 summarise the annual costs and benefits identified in this BRIA associated with the options to deliver the key features of the Scottish Pubs Code – MRO Leases (A), guest beer agreements (B) and rent reviews (C) – for tenants and pub-owning businesses respectively. The options that are included in the Scottish Pubs Code are highlighted in blue.

7.2. For MRO leases, Option 3 – limited code, is the preferred policy option for the code. This provides some tenants with the opportunity from day one of the code to check that they are no worse off than they would be if they weren't subject to any ties (regulatory principle 2). However, option 3 recognises that pub-owning businesses have a right to enter into lease agreements and that there is an expectation that the business will make a return on their investment(s) in the tenant's pub(s) over a reasonable period of time. Option 4 – maximum code, would have been possible under the Act but may have unintended consequences for the tied-pub model, such as possibly a substantial reduction in the number tied pubs. Option 4 would have created substantial uncertainty for pub-owning businesses and an unfair share of risk and reward. Option 2 – minimal code, whilst delivering similar benefits to tenants in the long-term, was not selected, given it would take several years for tenants to realise the benefits and it creates a strong incentive for pub-owning businesses to turn tied pubs into other types of pubs, reducing the ability for the code to deliver benefits to tied pub tenants.

7.3. For guest beer agreements, Option 2 – minimal code, is the preferred policy option for the code. This option enables tenants to select the vast majority of beer brands as a guest beer and source this from any supplier. By partly removing one tie it supports regulatory principle 2. It also allows for a fair share of risk and reward between the parties. Risk for tenants is increased, but so is the potential reward for tenants and guest beer providers. Risk is also increased for pub-owning businesses in so far as achieving returns through guest beers and reward in the short-term is reduced. To minimise this impact and achieve a fair balance, the lowest intervention (Option 2) was selected for the code, as there should be a lower impact on sales of tied beer compared to other options. Importantly, this is also the most practical option, as it should be easier for the whole community to identify whether a beer brand qualifies.

7.4. For the options on Rent Review, Option 3 – limited code, is the preferred policy option for the code. Whilst the option “do nothing” exists for rent reviews, a limited code provides comparable rights and arrangements for tenants and pub-owning businesses as currently exists in England and Wales, where tenants can ask for a rent assessment where a rent assessment hasn't occurred for the past 5 years<sup>37</sup>. It

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<sup>37</sup> [The Pubs Code etc. Regulations 2016 \(legislation.gov.uk\)](https://www.legislation.gov.uk)



delivers increased bargaining power for tenants in rent negotiations, leading to potentially lower rents and greater transparency for tenants with regard to the rent review process, which is in accordance with the overall objective of the code. To address pub-owning businesses concerns about the interaction between an existing rent review under a lease agreement and the statutory rent review under the code, we have narrowed the requirement to offer a rent review to where a lease agreement doesn't contain a rent review clause and further, where a rent review or a rent assessment hasn't taken place in the past 5 years. Tenants of short-term leases which are less than a year are also disqualified from being able to request a rent review, recognising the effort and time involved in producing rent reviews. This provides eligible tenants with the opportunity to check that there is a fair share of risk and reward in respect of their dry rent.

**Table 3: Summary of Costs and Benefits of Features of the Scottish Pubs Code (A – C) for Tenants**

Features of the Scottish Pubs Code:		MRO Lease (A)	Guest Beer Agreement (B)	Rent Reviews (C)
<b>Option 1: Do nothing</b>	Benefits	Not applicable	Not applicable	No impact on tenants.
	Cost	Not applicable	Not applicable	No impact on tenants – fewer opportunities for tenants to be able to check and negotiate their rent.
<b>Option 2: Minimal Code</b>	Benefits	Greater operational flexibility for tenants. A net transfer of profits to tenants estimated at £0 to £16.7 million per year which may take a number of years to be fully realised.	Enables tenants to buy a guest beer directly from a supplier at market prices. Increase in profits for the tenants (at least in the short run). Estimates at paragraph 4.55.	Increased bargaining power in rent negotiations, leading to potentially lower rents. Greater transparency for the tenant with regard to the rent review process.
	Costs	Potential reduction in the number of pubs that operate on the tied model, reducing the opportunity for new tenants to enter sector.	When a lease is renewed, pub-owning businesses may seek to recover lost revenue by increasing dry-rent, therefore benefits of a guest beer	Time and resource costs for tenants of understanding the rent assessment statement and negotiating rent or seeking legal or other independent advice.

Features of the Scottish Pubs Code:		MRO Lease (A)	Guest Beer Agreement (B)	Rent Reviews (C)
		Independent assessor for arbitration costs of between £12,000 to £24,000 per year for all pubs.	agreement may be partially or fully offset in the long-run.	
<b>Option 3: Limited Code</b>	Benefits	Greater operational flexibility for tenants. A net transfer of profits to tenants estimated at £0 to £16.7 million per year.	Enables tenants to buy a more popular guest beer directly from a supplier at market prices. Increase in profits for the tenants (at least in the short run). Estimates at paragraph 4.57.	Increased bargaining power in rent negotiations, leading to potentially lower rents. Greater transparency for the tenant with regard to the rent review process.
	Costs	Potential reduction in the number of pubs that operate on the tied model, reducing the opportunity for new tenants to enter sector.	When a lease is renewed, pub-owning businesses may seek to recover lost revenue by increasing dry-rent, therefore benefits of a guest beer agreement may be partially or fully offset in the long-run.	Time and resource costs for tenants of understanding the rent assessment statement and negotiating rent or seeking legal or other independent advice.
Independent assessor for arbitration cost of £12,000 to £24,000 per year for all pubs.				
<b>Option 4: Maximum Code</b>	Benefits	Greater operational flexibility for tenants. Transfer of profits to tenants estimated at £0 to £16.7m per year. Benefits will be fully realised sooner than under Option 2 or 3.	Enables tenants to buy a very popular guest beer directly from a supplier at market prices. Increase in profits for the tenants (at least in the short run). Estimates at paragraph 4.58.	Increased bargaining power in rent negotiations, leading to potentially lower rents. Greater transparency for the tenant with regard to the rent review process.

Features of the Scottish Pubs Code:		MRO Lease (A)	Guest Beer Agreement (B)	Rent Reviews (C)
	Costs	Potential reduction in the number of pubs that operate on the tied model, reducing the opportunity for new tenants to enter sector.	A reduction in investment from pub-owning businesses of between 75-100% if guest beer agreements are unrestricted.	Time and resource costs for tenants of understanding the rent assessment statement and negotiating rent or seeking legal or other independent advice.
		Potential reduction in level of investment into tenant pubs from pub-owning businesses.	When a lease is renewed, pub-owning businesses may seek to recover lost revenue by increasing dry-rent, therefore benefits of a guest beer agreement may be partially or fully offset in the long-run.	
		Independent assessor for arbitration costs of £12,000 to £24,000 per year for all pubs.		

**Table 4: Summary of Costs and Benefits of Features of the Scottish Pubs Code (A – C) for Pub-owning Businesses**

Features of the Scottish Pubs Code:		MRO Lease (A)	Guest Beer Arrangement (B)	Rent Reviews (C)
<b>Option 1: Do nothing</b>	Benefits	Not applicable	Not applicable	No impact on pub-owning businesses, benefits remain the same as pre-code. Likely to be less costly than the other options.
	Costs	Not applicable	Not applicable	No impact on pub-owning businesses, costs remain the same as pre-code.
<b>Option 2: Minimal Code</b>	Benefits	Reduction in risks from market fluctuations due to higher dry rent under an MRO lease and savings made on SCORFA benefits provided under a tied lease.	When a lease is renewed, pub-owning businesses may seek to recover lost revenue by increasing dry-rent.	Potential better relationships between tenants and pub-owning businesses, as tenants have a better understanding of the decision processes with regards to rent.
	Costs	A net transfer of profits to tenants estimated at £0 to £16.7 million per year which may take a number of years to be fully realised.	Potential loss of revenue stream. Tenants can buy a guest beer from another supplier. This may result in a loss of 'wet-rent' (at least in the short-run). Estimates at paragraph 4.64.	Increases in legal costs and new costs in relation to the provision of additional information. Estimated at £1,500 to £2,500 per tied pub that requests a rent review.
Independent assessor for arbitration costs of between £12,000 to £24,000 per year for all pubs.		Increased uncertainty about rent levels and future revenues for the business.		

Features of the Scottish Pubs Code:		MRO Lease (A)	Guest Beer Arrangement (B)	Rent Reviews (C)
<b>Option 3: Limited Code</b>	Benefits	Reduction in risks from market fluctuations due to higher dry rent under an MRO lease and savings made on SCORFA benefits provided under a tied lease.	When a lease is renewed, pub-owning businesses may seek to recover lost revenue by increasing dry-rent.	Potential better relationships between tenants and pub-owning businesses, as tenants hold a better understanding of the decision processes with regards to rent.
	Costs	A net transfer of profits to tenants estimated at £0 to £16.7 million per year.	Potential loss of revenue stream. Tenants can buy a guest beer from another supplier. This may result in a loss of 'wet-rent' (at least in the short-run). Estimates at paragraph 4.65.	Increases in legal costs and new costs in relation to the provision of additional information. Estimated at £1,500 to £2,500 per tied pub that requests a rent review.
Independent assessor for arbitration costs of between £12,000 to £24,000 per year for all pubs.		Increased uncertainty about rent levels and future revenues for the business.		
<b>Option 4: Maximum Code</b>	Benefits	Reduction in risks from market fluctuations due to higher dry rent under an MRO lease and savings made on SCORFA benefits provided under a tied lease.	When a lease is renewed, pub-owning businesses may seek to recover lost revenue by increasing dry-rent. May be some savings from decisions not to invest in tied pubs.	Potential better relationships between tenants and pub-owning businesses, as tenants have a better understanding of the decision processes with regards to rent.
	Costs	Pub-owning businesses more likely to review their business model which could result in less viable pubs being sold or a general restructure of the business, with associated costs.	Potential loss of revenue stream as tenants can buy a guest beer from another supplier. This may result in a loss of 'wet-rent' (at least in the short-run). Estimates at paragraph 4.66.	Increases in legal costs and new costs in relation to the provision of additional information. Estimated at £1,500 to £2,500 per tied pub that requests a rent review.

Features of the Scottish Pubs Code:		MRO Lease (A)	Guest Beer Arrangement (B)	Rent Reviews (C)
		A net transfer of profits to tenants estimated at £0 to £16.7 million per year.	Pub-owning businesses more likely to review their business model which could result in less viable pubs being sold or a general restructure of the business, with associated costs.	
		Independent assessor for arbitration costs of between £12,000 to £24,000 per year for all pubs.		Increased uncertainty about rent levels and future revenues for the business.

### Financial penalties, fees and expenses

7.5. The table overleaf summarises the costs and benefits of the options outlined above for the Tied Pubs (Fees and Financial penalties) Regulations 2024. Given the analysis above and the summary, we recommend financial penalties and fees Option 3: define the maximum financial penalty using a methodology, set a fee for arbitration at £250. For expenses, we recommend Option 1, do nothing, and leave it to the Adjudicator's discretion when to require a tenant to make payment for the Adjudicator's expenses. On setting a fee at £250 we consider this best meets the need to make the arbitration system accessible, but also discourage vexatious disputes. On financial penalties, we recommend Option 3 as we believe this will ensure the Adjudicator has the discretion to set a penalty that is proportionate to the business size and supports the Adjudicator in enforcing the code. The Act already provides for the Adjudicator to be able to use their discretion to make the tenant liable for all or part of the arbitration fees and expenses when the pub-owning business requests this and the arbitrator finds in favour of the pub-owning business in the dispute.

**Table 5: Overview of Financial Penalties, Fees, Expenses and Arbitration Rules options considered in the BRIA**

Features of the Financial penalties, fees and expenses SSI		Financial Penalties (D)	Fees (E)	Expenses (F)
<b>Option 1: Do nothing</b>	Benefits	Not applicable	Not applicable	The Act already allows for the Adjudicator to relieve the business of liability for the Adjudicator's fees and expenses (at the request of the pub-owning business) and pass that onto the tenant, which benefits pub-owning businesses.
	Costs	Not applicable	Not applicable	No direct costs. Tenants could be made liable for some or all of Adjudicator's fees and expenses.
<b>Option 2</b>	Benefits	This option supports the Adjudicator in enforcing the code, ensuring that it rebalances the relationship between tenants and pub-owning businesses.	Ensures that tenants pay towards some of the costs of arbitration.	Small fee – could result in more cases being referred for arbitration and further costs on pub-owning businesses.
	Costs	Could result in a disproportionate impact for smaller pub-owning businesses.	This would allow for the Adjudicator to relieve the business of liability for the Adjudicator's fees and expenses (where the arbitration is in favour of the pub-owning	No direct costs. Tenants could be made liable for some or all of Adjudicator's fees and expenses.

Features of the Financial penalties, fees and expenses SSI		Financial Penalties (D)	Fees (E)	Expenses (F)
			business) and pass that onto the tenant, which benefits pub-owning businesses. However, the Act already provides for this.	
Option 3	Benefits	This option supports the Adjudicator in enforcing the code. Businesses are impacted proportionately by setting the maximum penalty in relation to turnover.	Ensures that tenants pay a proportionate and fair fee for arbitration. Could discourage tenants from referring minor or vexatious disputes, alleviating costs for pub-owning businesses directly.	N/A
	Costs	Costs are likely to be higher amongst pub-owning businesses that are part of a group undertaking. However, we anticipate that the maximum penalty would only apply where there is persistent non-compliance, as per England and Wales where only one penalty has been applied (which was substantially lower than the maximum amount set at £12,325,770.38).	Will create a cost for the tenant before bringing disputes forward for arbitration.	N/A



## Arbitration rules (G)

7.7. The table below summarises the costs and benefits of the options outlined above for the Tied Pubs (Scottish Arbitration Rules) Amendment Order 2024. Given the analysis above and the summary, we recommend Option 2: take action to enable Scottish Arbitration Rules (SARs) and processes set out in the Arbitration (Scotland) Act 2010 to apply to cases brought to the Adjudicator. The ability to choose the SARs would mean that the Adjudicator could select the SARs and apply these rules to arbitrations under the Tied Pubs (Scotland) Act 2021. The application of SARs, if selected, would ensure that the forum for the arbitration is in Scotland and that any appeal would be dealt with by the Scottish courts.

	<b>Benefits</b>	<b>Costs</b>
<b>Option 1</b> Do nothing	No change – no benefit.	No change – no costs.
<b>Option 2</b> Take action to enable Scottish Arbitration Rules and processes set out in the Arbitration (Scotland) Act 2010 to apply to cases brought to the Adjudicator.	Provides the Adjudicator with discretion about whether to use modern Scottish specific appeal provisions under the Scottish Arbitration Rules to all arbitrations.	No additional costs are anticipated for parties within the dispute.

## **8. Declaration and Publication**

8.1. I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed: Richard Lochhead**

**Date: 24 April 2024**

**Minister: Minister for Small Business, Innovation, Tourism and Trade**

**SG contact point: [tiedpubs@gov.scot](mailto:tiedpubs@gov.scot)**

## **Annex A**

# **Methodology Underpinning the Cost and Benefit Estimates in the Scottish Pub Code Regulations 2024 BRIA**

## **MRO Leases**

### **Background**

The Tied Pubs (Scotland) Act 2021 provides that the Scottish Pubs Code must require pub-owning businesses to offer a Market Rent Only (MRO) lease where a tied pub tenant requests it, except in specified circumstances.

An MRO lease is a lease where the rent is set at an amount agreed between the tenant and the pub-owning business or, failing agreement being reached, at the market rate for the property. It does not include any product or services ties.

An assessment of the costs and benefits of different options set out in this BRIA (see table 1) to deliver the MRO lease requirement of the Scottish Pubs Code is set out below. The assumptions, reasoning and methodological underpinning of this assessment is set out in this annex and is divided into the following parts:

- Transfers of profits from pub-owning businesses to tenants.
- Costs arising to tenants and pub-owning businesses due to a lack of an investment exemption.
- Costs to tenants and pub-owning businesses arising from independent assessments of MRO options.

The focus of the analysis has been on costs and benefits to tenants and pub-owning businesses. Further consideration of benefits and costs to other groups and other uncertainties are also considered.

### **Transfer of profits from a pub-owning business to a tenant**

In principle, we assume this policy has no impact on the profitability of pubs overall (at least in the short run). All else being equal, profits of tied pub tenants that exercise their right to request an MRO lease under the code will be transferred from pub-owning businesses to tied tenants. This is presented as a benefit for tenants and a cost for pub-owning businesses in this BRIA. There may be some longer-term net costs associated with some options assessed in the BRIA arising from impacts on investment that are examined separately below.

To reflect uncertainty in the level of transfer of profit from pub-owning businesses to tenants we establish an upper and lower bound for the level of the potential financial

transfer. An upper bound for the level of transfer is established by supposing a scenario in which all 700 tied pub tenants in Scotland are disadvantaged and will therefore gain the maximum transfer of profits when moved to an MRO lease. For the purposes of calculating the upper bound, in this scenario we assume the following:

- 'Dry rent'/Property rent unchanged: it is common practise in the sector that, as a part of a tenant's tied lease, the rent which tenants pay on the property – referred to as 'Dry rent' – is set at a discount, relative to that paid by an equivalent free-of-tie tenant. This discount is due to the tie obliging tenants to purchase tied products which are typically priced above the market rate. Within this upper bound scenario, however, it is presumed that the property rent paid by a tied pub tenant would not differ to that paid by a free-of-tie pub, as it's assumed no discounts in practice were given to the tenant in the form of reductions in 'Dry rent' by the pub-owning business. This would infer that there are no associated costs (or loss of benefits) from a tenant choosing an MRO lease in this scenario as there is no dry rent discount.
- Loss of Special Commercial or Financial Advantages (SCORFA) benefits: As part of research<sup>38</sup> commissioned by the Scottish Government in 2016, CGA produced estimated values of SCORFA benefits. Annex 7 of the report outlines the full BBPA list of definitions for the SCORFA benefits. A range was produced reflecting differences in views between pub-owning businesses, tied-tenants, and Independent Free Trade (IFT) pubs. These total estimates ranged from £3,700 to £18,600 per year per pub. As such it is assumed that, for an average tenant choosing to move to an MRO lease, they would lose out on benefits valued at around £4,600 (the average total, based on responses from full-tied pub tenants). Adjusting this figure, to account for changes in price since the source data was published, it is estimated that the same value in 2023 price is around **£5,700**. The deflator used in this instance is ONS' annual GDP Implied Deflator<sup>39</sup>, reflecting the average rate of inflation across the UK economy.
- Cost of tied products/'Wet rent': In switching to an MRO lease, tenants would not be required to pay 'Wet rent' to their pub-owning business. Estimates published as a part of the Office of Fair Trading (OFT) final decision<sup>40</sup> to the CAMRA super-complaint, indicated that the average price charged by pub-owning businesses to tenants for draught beer was around 40% to 45% higher than the price paid by free-of-tie lessees to the major UK brewers. This

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<sup>38</sup> [Research on the pub sector in Scotland phase 1: scoping study - gov.scot \(www.gov.scot\)](https://www.gov.scot/research/publications/scoping-study-2016-17/summary)

<sup>39</sup> [Gross domestic product at market prices:Implied deflator:SA - Office for National Statistics \(ons.gov.uk\)](https://ons.gov.uk/gross-domestic-product-at-market-prices/price-deflators/annual-gdp-implied-deflator)

<sup>40</sup> [OFT's response to CAMRA's super-complaint \(nationalarchives.gov.uk\)](https://www.nationalarchives.gov.uk/doc/default-report/opening/camra-complaint-2016-17) This report has been used as it is the most comprehensive data available.

equated to an average difference of around £19,000 to £21,000 per year per pub for beer. As such it is assumed, in this upper scenario, that this £21,000 would represent a benefit to the tenant when choosing an MRO lease. Adjusting this figure, to account for changes in price since the source data was published, it is estimated that the same value in 2023 price is around **£29,500**. The deflator used in this instance is ONS' annual GDP Implied Deflator, reflecting the average rate of inflation across the UK economy.

- **Deposits and repairing responsibilities:** It is assumed that there will be no substantial increases in deposits or repairing responsibilities.

In assuming the above, it would be thought that, under this upper bound scenario, the tenant in a tied pub lease is up to £23,800 worse off than those tenants free-of-tie<sup>41</sup>. Taking this figure and multiplying by the estimated 700 tied pub tenants within Scotland currently (and assuming no change in the near future), gives an upper estimate for the transfer of around £16.6 million.

Conversely, a *lower bound* for the level of transfer can be established by supposing a scenario in which no tenants are financially disadvantaged relative to those free-of-tie on MRO leases. In this scenario, the policy would have no effect on the profitability of a pub, as no tenant would opt for an MRO lease given the perceived loss of SCORFA benefits and perceived increase in rents that could potentially offset savings from reductions in wet rent. As such, there would be no transfer of profits under these conditions. Alternatively, tenants may value the flexibility of an MRO lease as important and valuable in and of itself, even if the potential profitability of such a lease compared to the status-quo was doubtful.

The above looks to demonstrate the perceived two extremes of scale for the level of transfer for a typical tied pub. The true level of transfers between pub-owning businesses and tenants will likely lie somewhere in-between these estimates on a case-by-case basis. However, due to a lack of evidence and the effect of individual circumstances, it is not possible to provide a more precise estimate.

### **Costs arising to Tenants and Pub-owning businesses from a lack of an investment exemption**

It is recognised that, particularly under Option 4 in this BRIA where an MRO lease request is available to tied pubs at any time (including material changes of circumstances), there is scope for the MRO lease request to disincentivise and reduce investments made by pub-owning businesses, as the MRO request could put at risk returns to the investment through lower revenue streams from wet-rent.

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<sup>41</sup> £23,800 is calculated by subtracting the value of lost SCORFA benefits (£5,700) from £29,500.

As a part of the consultation on the Scottish Pubs Code, proposals were included to specify circumstances where an MRO lease option need not be offered by the pub-owning businesses. These circumstances included circumstances in which the pub-owning business had invested significantly in the tenant's pub.

The determining feature of impact for such a policy decision, is the level at which such a threshold is set – both in terms of monetary value and the length by which such an exemption would be in place. As part of engagement and related consultations, three options were proposed by stakeholders and policy officials:

- Equivalent to 1.5 times the annual rent over 5 years.
- Equivalent to 2 times the annual rent over 7 years (to match that which is in place in England and Wales).
- Equivalent to 10 times the annual rent over 7 years.

The Scottish Government's preferred option is 5 years from the date an investment agreement was agreed, where the pub-owning business is investing in capital improvement works to the pub of to the sum of £35,000 or 1.5 times the annual rent of the pub or more, whichever is the greater.

In general, there is a lack of data available by which we can look to comprehensively understand the current level of investments made by pub-owning businesses, the drivers of such investments and the speed/ability for pub-owning businesses (and tenants) to realise their returns.

This is partly to be expected, given the varying nature and scale of any such investments within business. The impact of this policy, at an individual lease/pub level, will be dependent upon what circumstances otherwise would be. Noted in evidence given to the OFT<sup>42</sup>, pub-owning businesses will offer very different levels of support and investment, and the extent of support/investment that each pub-owning business offers will differ from pub to pub. Some pubs may receive no investment in years while others may receive a significant amount of investment. For instance, in Admiral Taverns public report, they invested £10 million into 138 pubs across their group (includes pubs across GB) in the first half of 2023, with several pubs seeing investments of several £100,000s<sup>43</sup>. Comments given by the SBPA<sup>44</sup> also highlighted that, of its members, one in six tied pubs had received annual capital investment of around £70,000. Conversely, in response to a Committee survey<sup>45</sup> in 2020, multiple tenants whose pub-owning businesses are not known stated that they'd received no investment in the pub they rented.

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<sup>42</sup> [OFT's response to CAMRA's super-complaint \(nationalarchives.gov.uk\)](https://nationalarchives.gov.uk)

<sup>43</sup> [ADMIRAL TAVERNS INVESTS OVER £10 MILLION INTO ITS COMMUNITY PUBS - Admiral Taverns](#)

<sup>44</sup> [Stage 1 Report on the Tied Pubs \(Scotland\) Bill \(azureedge.net\)](#)

<sup>45</sup> [Tied Pubs \(Scotland\) Bill Stage 1 consideration – Survey of tied tenants](#)

It is anticipated, however, that any regulatory thresholds – be the ones proposed or alternates – may result in unintended consequences, as the regulation directs (to varying degrees) investment decisions. For the following section, an illustrative example is used, assuming a threshold of £35,000 over 5 years is in place.

- Pub-owning businesses would likely be disincentivised from making investments which, combined, amounts to less than the set threshold – particularly as the amount tends towards it (£35,000 in this case). This is because it is assumed that the pub-owning business risks the possibility of not being able to realise adequate returns on investment of less than £35,000, prior to a tenant seeking an MRO lease option. Similarly, it might be expected that pub-owning businesses will reduce their level of investment which, otherwise, would have been only marginally over the exemption threshold.
- Conversely, it is possible that such a threshold will incentivise additional investment. If a pub-owning business deems that the cost of additional investment is less than or equal to the benefit – both monetary and non-monetary – that they would realise by guaranteeing a tenant maintains their tied-lease, they would be expected to invest further. Here it might be assumed that the pub-owning business had previously invested £30,000 per every 5 years. By then investing a further £5,000, they would qualify for the exemption criteria, would not be required to offer an MRO lease option and would not risk ‘losing’ their tied tenant to an MRO lease.
- Finally, we might expect that, with a single tier investment exemption, significantly larger investment might also be disincentivised. This being that, while both tenant and pub-owning business would realise benefits from the investment, the exemption period is deemed insufficient by the pub-owning business (in their decision-making process) to offset the risks associated with a tenant opting for an MRO lease option. Once again, it’s unclear as to what this upper limit might be or how applicable it is. For example, if it is deemed that investments in excess of £100,000 prove too risky but if this only occurs in one or two occasions, the overall effect is less substantial.

Conversely, it might be expected that, through the availability of an MRO lease, investment within pubs might increase, or reductions in pub-owning business funded investment could be partially offset, by tenants investing in the pub themselves. This is because tenants would benefit by retaining a greater share of any additional turnover and profit levels generated by the investment. The scope of this, however, is expected to be small as larger scale investments often depend on access to commercial finance and the cost may be prohibitive for many small pub-businesses.

Beyond the anticipated impact that an exemption threshold might have on the level of investment made by pub-owning businesses, what can also be expected is that such a policy has scope to increase the demand for independent adjudication, where pub-owning businesses and tenants disagree on the level of the investment made into the pub. Once again, the frequency of such occurrences and the scale of this cost is particularly challenging to predict.

### **Costs to Tenants and Pub-owning businesses arising from independent assessments of MRO options**

In instances, where the tenant and pub-owning business are unable to agree on the terms of an MRO lease, it is possible that it will be referred to the Adjudicator for Independent Assessment. In these instances, there will be an associated administrative cost, composed of the anticipated cost on an Independent Assessor being appointed and the frequency at which one will be needed.

As an indication, guidance shared on the Pubs Code Adjudicator in England and Wales suggest that the fees of an appointed Independent Assessor will range between £3,000 to £6,000<sup>46</sup> - subject to an agreed structure, which is banded - based on the annual rental value of the pub.

Whereas, as a part of the Tied Pubs (Scotland) Bill Financial Memorandum and based on the Pubs Code Adjudicator (PAC) for England and Wales Arbitration data<sup>47</sup>, it was estimated that there may be an average of 23 MRO requests in total<sup>48</sup>. A proportion of these would likely trigger an independent rent assessment. Based on research commissioned by the PCA in England and Wales in 2021<sup>49</sup>, we estimate around a third of cases (approx. eight per year) may seek an independent assessment as part of the MRO process. This gives a lower estimate of the expected cost of £24,000 and a higher estimate of £48,000 per year. The rent assessor's fees are to be split equally between the pub-owning business and the tenant.

It should be noted, however, unlike in England and Wales, the right of tied pub tenants to request an MRO option in Scotland will largely be automatic, although it is subject to some exemptions. This may mean that there are proportionally higher numbers of requests to exercise the right to request an MRO option in Scotland. This may in turn mean that the numbers of MRO related arbitration referrals, such as for independent assessment, to the Scottish PCA are higher than the figures estimated above.

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<sup>46</sup> [Independent Assessor fee structure - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

<sup>47</sup> [Tied Pubs Bill Financial Memorandum \(parliament.scot\)](https://parliament.scot)

<sup>48</sup> Assumes around 3% of tied pubs will seek an MRO lease.

<sup>49</sup> [The Pubs Code Adjudicator MRO research findings report.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)



## Limitations of analysis

**‘Dry rent’/Property rent** – Within the OFT's response to the CAMRA super-complaint, they set out that estimates (provided to them by certain large pub companies, and publicly available data regarding property rents), suggested that tied tenants benefit from rents that are approximately £10,000 to 12,000 per annum lower than rents for free-of-tie tenants.

Whilst intelligence gathered from the consultation and subsequent discussions does point towards the level of ‘Dry rent’ discount decreasing, it's less apparent that it has reduced to zero, as it is assumed within the upper bound scenario analysis above. The ‘Dry rent’ that a tenant pays their pub-owning business will be dependent upon several factors (i.e., location, business performance, etc.) and will vary on a case-by-case basis. Owing to this and other drivers, the discount which tenants are offered by the pub-owning businesses, if they are to enter into a tied-lease, will also vary.

**‘Wet rent’** - The ‘Wet rent’ will vary between the pub-owning businesses and between pubs within companies. The range provided, based on analysis completed by OFT in 2010, has limitations both in terms of the assumptions made within its calculation and coverage. Within the OFT's analysis, it is recognised that average prices estimated for individual free houses (the counterfactual) may understate the prices actually paid (thereby exaggerating the difference between the prices paid by tied pubs and free houses).

**SCORFA benefits** – Similar to ‘Wet rent’, the SCORFA benefits will vary between pub-owning businesses and between pubs within pub-owning businesses. Additionally, it is noted that the value of these benefits to tenants is highly subjective and there is no agreed consensus. Within the research conducted by CGA, it's apparent that the value placed on the SCORFA by agents varies significantly – both in terms of the overall value and individual components.

**Changes to pub profitability** – In the analysis we assume no change in the overall profitability of a tied pub under any option. During the consultation, however, it has been raised that by tenants choosing an MRO lease and to go free-of-tie, that a pub's profitability could either improve through greater autonomy of the tenant or worsen through the loss of economies of scale.

**Change in pub-owning businesses behaviour** – Based on responses to the consultation, it is apparent that pub-owning businesses will seek to change their business operation in response to some aspects of the code. Where a tenant moves to an MRO lease, there will be a subsequent impact on the pub-owning business's revenues and costs. On the one hand, they will no longer need to provide services to the tenant or arrange for distribution of tied goods. On the other, the pub-owning business will lose revenue through the loss of ‘Wet rent’ as the tenant sources their beer from the open market. The pub-owning business will also receive a different

‘Dry rent’ from the tenant. This then may result in the pub-owning business seeking to:

- Sell on pubs that have gone free-of-tie, which it no longer considers viable.
- Alter agreements with existing tied tenants to offset increased marginal costs.

Additionally, with the policy offering tenants the option to request an MRO lease at any point within the lifespan of a tied pub lease, it was argued within consultancy responses that this could disincentivise pub-owning businesses investing significantly in the associated pubs – arguing that they would be unable to realise the returns on such investment. These impacts may also be faced by tenants who do not wish to request an MRO lease, as pub-owning businesses may pre-emptively take action to reduce uncertainty and risk of tenants choosing to go MRO at some point in the longer-term.

**Change in tenants’ behaviour** – When a tenant chooses to request an MRO lease option, it does not necessarily mean that they will eventually accept the associated offer. Instead, the prospect of a tenant choosing an MRO lease option could result in some pub-owning business choosing to offer improved terms for the tenant to choose to remain tied. Likewise, there is scope that tenants will seek an MRO option as a means to assess the fairness of their existing lease.

This is borne out in figures on the adoption of MRO options in England and Wales, reported by BBPA<sup>50</sup>. Of the 1,381 MRO notices which have been received and where an outcome has been reached between 2016 and 2023, 26% resulted in a free-of-tie agreement, whilst 58% resulted in a new tied arrangement being agreed. It should however be noted that take-up of MRO leases in Scotland is expected to be higher than it has been in England and Wales.

Additionally, whilst it has been stressed that the tenant’s choice to move to an MRO lease would discourage pub-owning businesses from investing in the associated pub(s), it is likely that it would encourage tenants to invest in their businesses, as they would benefit by retaining a greater share of additional turnover and profit levels generated by any investment programme.

**Independent assessment and take-up of MRO leases** – In the above calculations, it has been assumed that the proportion of Scottish MRO negotiations that go into independent assessment closely mirrors the percentage of MROs that go into independent assessment in England and Wales. However, it is expected that the take-up of MRO leases will be higher in Scotland than in England and Wales, with less restrictions and an automatic right to the MRO option for tenants. Therefore, it may very well be that the incidence of independent assessments in Scotland will be

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<sup>50</sup> [Pub Partnerships | BBPA \(beerandpub.com\)](https://www.beerandpub.com/)

higher than in England and Wales. Nonetheless, with absence of further evidence, it is difficult to provide a better estimate.

**Age/Suitability of data** – Some of the data used within the above analysis can be considered out-of-date and that the associated figures fail to capture the current situation. However, without more current data available it is not possible to infer what more up-to-date figures would look like. To address this, additional insights from key stakeholders would be required, to provide new, more up-to-date estimates or context as to how the markets have developed over the recent past. The statutory review of the Scottish Pubs Code and the Adjudicator, expected in 2026 may provide a further opportunity to collect new information.

### **Costs and benefits which are not quantified in this BRIA**

**Costs to consumers** – Reported low profit margins for pubs would suggest that there is limited capacity to absorb new costs and, as such, new costs would be passed on to consumers. If the policy was to result in additional costs, there is scope that these will be passed on to consumers.

**Benefits to brewers** – As tenants choose an MRO lease and go-free-of-tie, they have the ability to source their beer free from the restrictions of a tie. Within this there are two possible responses with implications for brewers:

1. The tenant may choose to source some/all its supply of beer from their pub-owning business. Whilst this would not offset the loss in 'Wet rent' (given the aforementioned price differential) for the pub-owning business, it would offset some of the lost revenue.
2. The tenant may choose to source some/all its supply of beer from another brewer/wholesaler. Holding all else constant, this would represent an increase to the brewers' revenue streams.

The scale of these, however, whilst difficult to estimate, is also highly uncertain both in terms of how many tenants go free-of-tie and how their respective pub-owning businesses will behave as a consequence.

**Burden of risk** – The tie can be perceived to act as a risk-sharing mechanism, as total rent paid to the pub-owning is dependent upon the profitability of the pub. If a tenant has a 'good' year, they will pay more 'Wet rent'. Conversely, in 'bad' years they will pay less. By a tenant choosing an MRO lease, the tenant will retain more of their profits. However, they will be more exposed to market fluctuations than they would under a tied agreement. As such, it can be considered that the tenant will shoulder a greater share of these risks in such a case, whilst the opposite will be true for the pub-owning business.

**Improved certainty for market agents** – It has been noted in several discussions, by various stakeholders, that the prospect of a Scottish Pubs Code being introduced, with uncertainty of what the code would entail or how it would be enforced, have resulted in certain pre-emptive behaviours (particularly by pub-owning businesses) to manage associated and anticipated risks. These include the cessation of investment and short-term new leases. Regardless of which option is taken, it would provide the sector with greater certainty about the detail and likely impact of the code on business.



as well as the share of total volume of beer sold in 2022 from these brands. Under Option 2, although the vast majority of beer brands fall under the 5,000hL threshold, cumulatively these beers represent a very small share of overall beer sales, at less than 5%.

**Table 1B: Sales of Beer in the UK by Brand and Volume in 2022<sup>52</sup>**

Option and hectolitre (HL) threshold	Beer brands covered		Volume covered	
	%	Number	%	Hectolitres
Option 2: up to 5,000hL	95.90%	6,637	4.11%	1,511,000
Option 3: up to 100,000hL	99.36%	6,877	17.15%	6,304,000
Option 4: unrestricted	100.00%	6,921	100.00%	36,758,000

Source: CGA by NielsenIQ, rounded to nearest 1,000 hectolitre

There is a significant degree of uncertainty around what proportion of total beer sales in a typical tied pub would be substituted away from tied-beer towards a guest-beer under each option. In an analysis conducted by London Economics (2013) for the Department for Business, Innovation and Skills<sup>53</sup>, expert evidence gathered suggested that between 35% and 40% of wet-rent would come from a single lager brand for a typical wet-led tied pub and that it was likely (in an unrestricted guest beer scenario), that a tenant would seek to replace its most popular selling lager with a non-tied lager. This 40% figure is taken as the maximum level of substitution in the calculation of the potential profit transfer under Option 4 for a guest beer agreement, where there is no hectolitre restriction.

In consulting with businesses on the impact of a hectolitre restriction on guest beer, we were unable to obtain reliable or robust estimates of the likely impact of these restrictions on the degree of displacement of tied beer, although it was generally accepted the degree of displacement would be lower than in the unrestricted option. Based on insight from a single stakeholder, it was suggested that the extent to which guest beer sales would displace tied beer sales could be as low as 2% under a low hectolitre threshold, but that it would be entirely dependent on the market position of the guest beer. It was suggested that the most popular brands with larger market shares currently would be expected to displace a greater share of current tied beer sales.

<sup>52</sup> These estimates exclude sales from events of an occasional nature, such as outdoor festivals, that would include Music, Arts, Food & Drink. CGA and NIQ data shows sales whereas the Pubs Code regulation is on production.

<sup>53</sup> [Tied Pubs Final Report \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

For the purposes of calculating illustrative impacts for this BRIA, we have therefore assumed a range of guest beer substitutions associated with each option within the BRIA: 2-15% for Option 2 (5,000 hL), 10-30% for Option 3 (100,000 hL), and 30-40% for Option 4 (Unrestricted). These estimates should be treated with caution and are used for illustrative purposes only in this BRIA.

Secondly, for the purposes of the analysis, it is assumed that the sales price of a pint of beer is the same regardless of whether the beer is tied or a guest beer. Therefore, the sales revenue the tied pub makes remains the same, as the total volume and unit price of beer sold is constant. However, the level of profit will be influenced by the volume of guest beer vs tied-beer sales and the cost differential between guest beer and tied beer.

According to BBPA statistics the average sales price of a pint of beer in Scotland was £4.12 in 2022 (including VAT) or £3.43 (excluding VAT)<sup>54</sup>. The gross margin on a pint sold in a tied pub based on a survey of tenants by the SLTA (see annex E) was just over 50%. Therefore, we assume the cost to the tenant of a pint of tied beer is £1.62 per pint<sup>55</sup>. It is assumed that the tenant will retain more profit from the sale of guest beer than from tied beer. The OFT found that pub-owning businesses sold a tied-beer at a 40-45% mark-up<sup>56</sup>. Therefore, we assume the average tied pub tenant could acquire a pint of guest beer for £1.14 per pint from a wholesaler<sup>57</sup>. The gross margin on a guest beer is therefore around 67%. In the calculations of costs and benefits we assume that the average consumption of beer in a typical tied pub was around 77,400 pints per year per pub (based on BBPA statistics for on-trade beer consumption<sup>58</sup>).

Thirdly, we assume that not all tied pubs will choose to take up a guest beer agreement under the code as some may deem the option too risky. Although taking up a guest beer agreement may result in a transfer of income from the pub-owning businesses to the tenant, it will also result in a transfer of risk as well. Due to this increased risk to the tenants, it is expected that not all tenants will make use of the guest beer agreement provision of the code. It is expected that the take-up of the guest beer agreement provision across the 700 or so tied pubs in Scotland increases moving from Option 2 through to Option 4. This is because at the lower production level, it is expected that it will be riskier, more difficult and costly to acquire a guest beer and turn a profit. For Option 2, we assume 25% of tenants will adopt a guest beer agreement, for Option 3, 50% and for Option 4, 75%.

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<sup>54</sup> [Data & Statistics | BBPA \(beerandpub.com\)](#)

<sup>55</sup>  $(3.43 - 1.62) / 3.43 = 53\%$

<sup>56</sup> [Tied down: The beer tie and its impact on Britain's pubs | IPPR](#)

<sup>57</sup>  $(1.62 - 1.14) / 1.14 = 42\%$

<sup>58</sup> It is recognised that 2021 may not be representative of the on-trade sales in future years, due to the impact of the Covid-19 pandemic on the hospitality sector. For these purposes we took a 5-year average of beer sales from 2017-2021. The average on-licence beer consumption across the UK was 16.9hL using this method.

Fourthly, it is also assumed that 'Dry rent' will remain the same in the short run. The pub-owning business may wish to increase this to make up some of the losses in wet-rent incurred as a result of a tenant adopting a guest beer. However, the Scottish Pubs Code Regulations 2024 state that a guest beer agreement must not vary the existing lease except to include the guest beer agreement and to provide for a service equipment charge. As such, for the period remaining in the existing lease, dry rent is assumed to remain unchanged. It is important to note however that this situation is likely to change when a lease is renegotiated. A tied lease might also permit the pub-owning business to increase the price at which they sell tied beer to the tenant, which may be another avenue for the pub-owning business to protect their income – however the code requires that the tenant must not suffer detriment for taking up rights under the code. Moreover, we assume that the pub-owning business would not increase the price of the tied beer as doing so could potentially reduce demand further and encourage more switching by consumers to a guest beer.

Nevertheless, the gains to tenants outlined in this section of the BRIA would represent a short-term benefit for the time remaining on the existing lease which may not be expected to remain when the lease is up for renewal. Furthermore, such gains would be unlikely to accrue to new tenants as pub-owning business would be expected to factor in the potential impact of a guest beer agreement on wet-rent when setting the rate of dry rent in the lease.

Finally, it was raised by stakeholders that pub-owning businesses may incur some minor costs associated with drawing up a guest beer agreement and that tenants may incur some minor costs associated with maintenance of equipment used to dispense a guest beer. These are both assumed to be negligible (less than £100 per year for both the tenant and pub-owning business) and are not reflected in the illustrative costings.

## **Results**

Although the figures vary by scenario, in broad terms, it is expected that the implementation of a guest beer agreement will have:

- A relatively small net positive effect for tenants, as profits from guest beer sales are likely to exceed the combined losses expected from lost profits of an equivalent volume of tied beer.
- A net negative effect for pub-owning businesses, due to the loss of 'wet rent' associated with the reduction in tied-beer sales.
- A net positive effect for guest beer brewers, as they realise revenues from additional sales of guest-beer but set against an equally net negative effect for brewers supplying the pub-owning company.



As set out above, in the baseline scenario we assume a typical tied pub sells 81,500 pints per year at £3.43 per pint (excluding VAT), bringing in a turnover of £336,000 per year from beer sales. Approximately £147,800 is revenue for the tenant (or profit, excluding other non-beer related costs), around £131,900 of the revenue is for the pub-owning business (of which £92,600 is revenue for the brewer and £39,300 is profit for the pub-owning business or wet-rent).

Tables 2B, 3B, and 4B set out illustrative impacts on the revenues and profits of the brewers, the pub-owning business and the tenant under different guest beer agreement options set out in this BRIA. Under general perfectly competitive market assumptions, both the guest beer brewer and pub-owning business brewer will not be making a profit, therefore changes in revenue represents a transfer of production from one brewer in the economy to another brewer. In the illustrative scenarios we assume the guest beer is not provided by the pub-owning business/brewery.

However, it should be noted that currently, tenants that have a guest beer agreement can have their guest beer provided to them by their pub-owning business. Therefore, it may be the case that the pub-owning businesses will continue to provide the guest beer to their tenants. In such a case, there is no transfer of revenue to a guest beer brewer as shown in the analysis below. Regardless of this, under each illustrative scenario part of the profit or 'wet rent' achieved by the pub-owning business, is effectively transferred to the tenant under every option, with the amount of profit transfer increasing with the production threshold of the guest beer.

Under Option 2, the illustrative transfer of profits is estimated to be between £800 and £5,900 per year per pub. Under Option 3, the transfer of profits is estimated to be between £5,900 and £11,800 per year. Under Option 4, the transfer of profits is estimated to be between £11,800 and £15,700 per year. It should be stressed that the ranges presented are illustrative and the true values may well lie outside these ranges. The figures presented also show results for an average tied pub based on average sales and prices. In reality, most pubs will have characteristics that differ from the average and therefore one could expect an even wider range of outcomes.

**Table 2B: Illustrative change in revenue and profits under Guest Beer Arrangement Option 2 for an average tied pub (Option 2 - Low Production Threshold (5,000hL))**

Tied-beer displacement assumption	2% (low)	9% (mid-point)	15% (high)
Change in Guest Beer brewer revenue	£1,900	£7,900	£13,900
Change for Pub-owning business brewer revenue	-£1,900	-£7,900	-£13,900
Change for Pub-owning profit ('wet rent')	-£800	-£3,300	-£5,900

Change in Tenant profit	£800	£3,300	£5,900
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**Table 3B: Illustrative change in revenue and profits under Guest Beer Arrangement Option 3 for an average tied pub (Option 3 - Low Production Threshold (100,000hL))**

Tied-beer displacement assumption	15% (low)	23% (mid-point)	30% (high)
Change in Guest Beer brewer revenue	£13,900	£20,800	£27,800
Change for Pub-owning brewer revenue	-£13,900	-£20,800	-£27,800
Change for Pub-owning profit ('wet rent')	-£5,900	-£8,900	-£11,800
Change in Tenant profit	£5,900	£8,900	£11,800

**Table 4B: Illustrative change in revenue and profits under Guest Beer Arrangement Option 4 for an average tied pub (Option 4 - Low Production Threshold (100,000hL))**

Tied-beer displacement assumption	30% (low)	35% (mid-point)	40% (high)
Change in Guest Beer brewer revenue	£27,800	£32,400	£37,000
Change for Pub-owning brewer revenue	-£27,800	-£32,400	-£37,000
Change for Pub-owning profit ('wet rent')	-£11,800	-£13,800	-£15,700
Change in Tenant profit	£11,800	£13,800	£15,700

As set out in the assumptions above, it is not clear how many of the estimated 700 tied pubs in Scotland would take-up a guest beer agreement under each option. For Option 2, we assume 25% of pubs will adopt a guest beer agreement, for Option 3, 50% and for Option 4, 75%.

Therefore, under Option 2, with a 25% take-up of guest beer agreements, the total benefit to tenants, overall, ranges from £0.1 million to £1.0 million per year, which is offset by an equal cost to pub-owning businesses, as a whole, ranging from £0.1 million to £1.0 million per year. Under this option guest beer brewers/suppliers will benefit from increased annual turnover ranging from £0.3m to £2.4m. This is offset by an equal decline in turnover of tied beer brewers.

Under Option 3, with a 50% take-up, the total benefit to tenants, overall, ranges from £2.1 million to £4.1 million per year. This is offset by an equal cost to pub-owning businesses. Guest beer brewers/suppliers, as a whole, benefit from increased

turnover ranging from £4.9 million to £9.7 million, which is offset by an equal decline in turnover of tied beer brewers.

Finally, under Option 4, with a 75% take-up, the total benefit to tenants, overall, ranges from £6.2 million to £8.2 million per year. This is offset by an equal cost to pub-owning businesses, ranging from £6.2 million to £8.2 million per year. Guest beer brewers/suppliers as a whole, benefit from increased turnover ranging from £14.6m to £19.4m, which is offset by an equal decline in turnover of tied beer brewers.

### **Costs/benefits which cannot be quantified**

**Effect on consumers** – It is assumed that there will be benefits to consumers should tied pubs offer a greater variety of beers. Consumers will have an additional beer brand option to choose from in a tied pub.

**Increased autonomy** – It is expected that allowing the tied pub to choose a guest beer, the tenant will achieve a higher degree of autonomy in running the pub. In relaxing the assumption that the total volume of beer sold after a guest beer agreement remains the same, it is recognised that it is possible for the tenant to either increase sales by choosing a particular brand of guest beer and by advertising it successfully or reducing sales if the guest beer is unpopular.

**Standardised approach** – With the policy introducing an approach to guest beer agreements, it is expected that pub-owning businesses will benefit from having a standardised approach to guest beer agreements. This way pub-owning businesses know that they will be offering similar guest beer agreements as each other.

**Market access** – Under Option 2, small production guest beers are likely to have increased market access. This may allow guest beers to grow and compete with other more well-known brands.

**Undermining the tied pub model** – From stakeholder evidence, it is expected that an unrestricted guest beer agreement option (Option 4) would potentially undermine the tied pub model. This is because it is assumed that the tenants would choose a highly competitive brand of beer. 100% of responding pub-owning businesses to a SBPA survey said that if there were no exemptions for guest beer, they would turn tied pubs into other pub business models or sell as an ongoing business, and 43% said they would close tied pubs. This could reduce the opportunity for new entrants to the tied pub sector in Scotland if there are fewer pubs.

## **Annex C**

### **Rent Reviews**

#### **Background**

The rent review process is a mechanism by which the 'dry rent' paid by the tied pub tenant to the pub-owning business is re-evaluated and potentially adjusted. The purpose of the process is to ensure that the rent paid by the tied pub is fair and reflects market conditions. The rent review can be influenced by various factors such as changes in market conditions, the pub's performance, and any investment made by either party.

It is proposed that the tenant can request a rent review, in certain conditions, which then initiates the rent review process. The first step of the process is the rent assessment statement provided by the landlord to the tied pub tenant. The tenant and pub-owning business must mutually agree the new rent, after a rent assessment statement is provided, after a period of 6 months or failing which, the rent review process comes to an end.

Insights from stakeholder engagements show that there is a level of information asymmetry in the industry, with tenants calling for increased transparency around the process of determining rent. Obligating the pub-owning business to provide the tenant with a rent assessment statement is expected to close some of this information gap and support greater transparency around the process as the statement is to disclose all the matters that have been relied upon to determine the rent. This increased level of information is expected to increase a tenant's bargaining power in negotiating a mutually agreed rent.

#### **Estimating costs of rent reviews**

The cost of each rent review will depend on the amount of work involved and who is employed to complete it. Our understanding is that rent reviews can be conducted by the pub-owning business's staff. While tenants may face some time-related costs in preparing for a rent review, these are expected to be fairly nominal, and it is expected that the pub-owning business will bear most of the associated costs. Based on insights shared by the SBPA, the average cost of rent reviews carried out by responding members in 2022 was £1,750 – although responses varied, presenting a range of £1,500 to £2,500 per rent review. The costs calculated below will be 5-yearly costs.

For the purpose of an illustrative analysis of the possible costs of the rent review process arising from these regulations, we assume that 15-25% of tied pubs in Scotland could request a rent review under the code. This is an estimate but in engaging with stakeholders, we think it to be a realistic one. This is because, some

of the pub-owning businesses have tied pub leases that are shorter than 5 years and will therefore have a rent assessment as part of a new lease agreement at a frequency of less than 5 years. In this circumstance, tenants will not be in a position to request a rent review provision under the code. Another pub-owning business has stated that their tied pubs leases already have a rent review clause. Therefore, the proportion of tied pub tenants that could request a rent review under the code will be less than 50% but more than 0%. Furthermore, in engaging with stakeholders it appears that most tied pub tenancies in other pub-owning businesses in Scotland are 5 years or less and, therefore, the 15% to 25% range is likely to be a reasonable estimate of the proportion of tied pubs that could request a rent review under the code (although we recognise the numbers requesting a rent review could feasibly lie out with this range).

Taking the above assumptions, it is assumed that out of the estimated total 700 tied pubs in Scotland, 105 to 175 tied pubs will be eligible to seek a rent review, as described.

An upper bound for this cost can be established by supposing a scenario in which all eligible tied pubs request a rent review. In such a scenario, the estimated number of rent reviews to take place is between 105 and 175. A total cost of internal rent reviews faced by the pub-owning businesses can be estimated by taking the number of eligible pubs and multiplying this by the average cost of a rent review. This gives an estimated total cost of between £183,750 and £306,250. The costs are likely to be closer to the upper bound estimate for Option 4 as more tenants will be able to request a rent review.

These costs are expected to be realised over a 5 year period because not all tied pubs will be at the 5 year mark of their tenancy at the same time. To determine an annual cost, we can assume a scenario in which all tied pub tenancies are 5 years in length and that the distribution of tenancies at their 5-year mark is evenly distributed over the 5 years i.e., a 5th of all tied pub tenancies reach 5 years in the first year, a fifth in the second year and so on. Therefore, we can assume that out of the 105 to 175 eligible tenancies, 21 to 35 pubs would request a rent review each year. Thus, multiplying the average cost of a rent review with this number of tied pubs, an annual cost of between £36,750 and £61,250 is arrived at.

Conversely, a lower bound for the cost of internal assessments can be established by assuming a scenario in which, annually, only 1% of eligible tenants exercise their new right to request a rent review. In such a scenario, the 1% of eligible tied pubs (one to two tied pubs per year) is multiplied by the average cost of internal rent reviews which gives a total cost range of £1,750-£3,500.

The above looks to demonstrate the perceived two extremes of the cost of rent reviews. The true cost will likely be somewhere in between these estimates.

However, due to a lack of evidence and the effect of individual circumstances, it is not possible to be more specific.

### **Costs/benefits which cannot be quantified**

**Increased bargaining power for the tenants** – It is expected that a statutory right to a rent review will increase the bargaining power of the tied pub tenants and that this will result in them gaining more favourable terms in the leases, even in circumstances where a tenant chooses not to utilise this clause.

**Increased transparency** – It is proposed that the code will require pub-owning businesses to provide tenants with a rent assessment statement as part of the rent review process. The rent assessment statement is a statement which declares the rent to be paid by the tenant, and any information that was used to determine the rent. The rent assessment statement is expected to result in increased transparency in the market with tenants expected to receive better understanding of how their rents are determined. This may then result in better relationships between the businesses as tenants hold a better understanding of the pub-owning business decision processes.

**Costs and benefits of the rent review outcome** – Although there is a possibility that the outcome of the rent reviews is that the rent remains the same, the rent may also decrease or increase. In such a case that the rent decreases, we would expect that the tenant gets a benefit in terms of decreased rent mirrored by a cost to the pub-owning business in terms of decreased rent. And, in a case that the rent increases, the pub-owning business will receive a benefit in terms of increased revenue while the tenant sees a cost of increased rent. However, these outcomes have not been quantified as there is too much uncertainty around them.

### **Uncertainty/risk in the analysis**

**Change in material circumstances** – Understanding how many tenants may need to request a rent review as a result of a change in their material circumstances is a challenge. It is nonetheless expected that the inclusion of such a clause presents a particular risk that the cost of the rent review provision will be higher. This is because it provides additional grounds on which a rent review can be requested and additional grounds to challenge a rent assessment statement. However, it does not increase the eligibility of rent review requests as the condition of a minimum 5 year tenancy remains.

This added uncertainty in the tied pub industry might impact pub-owning businesses desire to invest as they are less certain on what the rent will be and how large their costs will be as a result of the rent reviews. This might incentivise pub-owning businesses to turn their pubs into management agreements as opposed to tied leases.

Having such a provision will, however, benefit tied tenants by giving them increased certainty if they feel that the rent is not representing the market conditions. Additionally, in relation to Option 4, if a tied pub is worse off as a result of a change in circumstances, it will be beneficial to both the tenant and the pub-owning business to review the rent.

**Increase in short term leases** – Stakeholders in the industry, especially tenants and their representative organisations have voiced concern over pub-owning businesses continually renewing only short-term tied agreements as a way of preventing tenants attaining the right to request a MRO lease. With the right to a rent review only being exercisable at the end of a 5-year period of a lease that has not had a rent review within that period, it is possible that pub-owning businesses would decrease the length of tied tenancies to under 5 years. However, the extent to which this may happen is uncertain.

**Cost of rent review** – The total cost of an internal rent review is uncertain. Although there are some figures suggesting the cost of a rent review, these are based on the current market circumstances. It is possible that the cost of rent reviews increase with the introduction of the code as pub-owning businesses are expected to provide additional information. However, it is also possible that the costs of rent reviews decrease as a result of the code in the long run. This may occur if pub-owning businesses look to establish rent reviews as a default part of tenancy agreements.

**The frequency of rent review requests** – There is uncertainty around the frequency of rent review requests by tenants. Although, we would expect them to rise as a result of the code, this will undoubtedly vary depending on circumstances. The state of the market can influence the frequency of requests. For example, if the code results in a decrease of tied pub tenancies, then we would ultimately expect the costs resulting from rent reviews to decrease as well.

## **Annex D**

### **List of questions to one pub-owning business as part of the Scottish Firms Impact Test**

#### **General information about your business in Scotland**

- How many tied pubs do you have in Scotland?
- What is your general lease length of tied pubs?
- How many free of tie leased pubs do you have in Scotland?
- What is the general lease length?
- How many employees to you have in Scotland and across the UK?

#### **Guest beer agreement**

- Do you currently offer guest beer agreements?
- What would be the time/cost to develop a guest beer agreement?
- What are the costs and benefits of various options – guest beer agreement is available for all types of beer, guest beer agreement is focused on brands of beers with a medium production value (e.g., under 30,000hL) or guest beer agreement is focused on brands of beers with a small production value (e.g., under 5,000hL)?
- Cost to maintain guest beer equipment?

#### **MRO leases**

- Does the cost/range of beer vary if it is a free of tie pub or a tied pub?
- What is the pub-owning companies share of profit in a free of tie pub compared to a tied pub?
- What would the impact be on wet/dry rent to a pub-owning business if a tenant took an MRO lease?
- What would be the impact on investment of MRO?
- What is the cost of using a rent assessor?
- How long would it take to prepare an MRO lease/deed of variation
- What would be the costs/benefits of the following options - MRO only for new leases, MRO but restricted to certain circumstances (with an investment exception) largely as per the consultation, or MRO available to all tenants in all circumstances – in terms of share of profits, opportunities for new entrants, changes in the types of pubs (changed to other models such as selling pubs)
- Who supplies stock required under a stocking requirement in an MRO lease (brewer or pub-owning company)?

#### **Rent reviews/rent assessment**



- Time and cost to run a rent assessment/rent review?
- Cost of using a rent assessor/independent advisor?
- Likelihood of rent changing as a result?
- Percentage of existing leases that have rent review clauses?
- What would be the costs/benefits of the following options – tenant being able to request a rent review/assessment only when the landlord is proposing a change, rent review/ assessment as per the consultation if a review hasn't taken place in the previous 5 years or when material circumstances change, rent review/assessment only if one hasn't taken place in the previous 5 years or on request at any time by the tenant?

### **Costs/benefits of compliance**

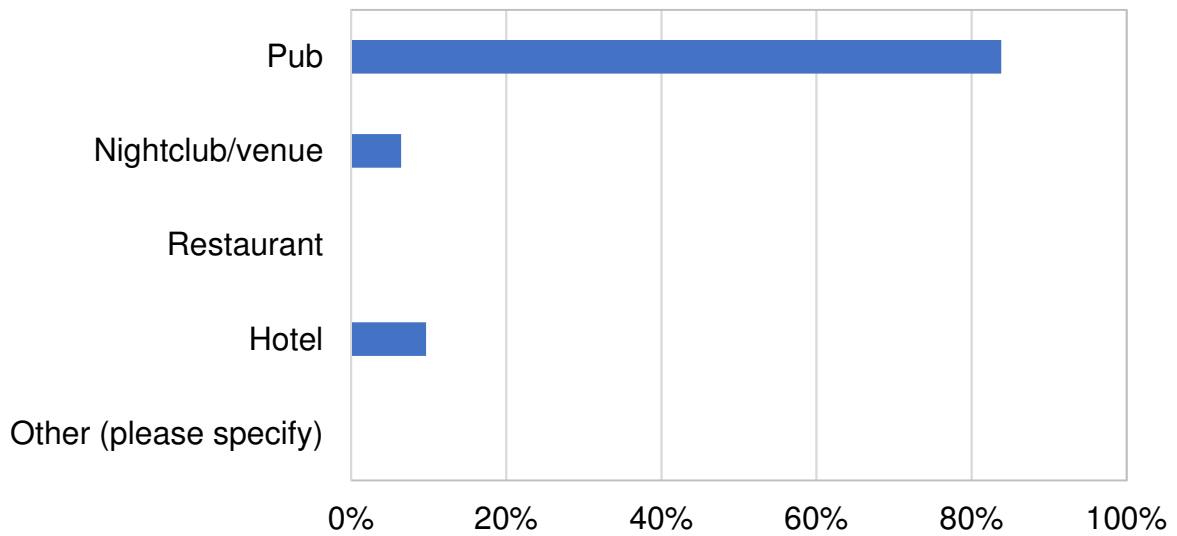
- What changes would be required for pub-owning businesses to comply with the code?
- How much does arbitration cost on average for the pub-owning business?
- If the maximum penalty for non-compliance was set at 1% of UK group turnover (see paragraph [45 for the definition](#)) – how much would that be? How much would that vary if it was only focused on turnover from your Scottish Leased and Tenanted business?

## **Annex E**

### **Scottish Licensed Trade Association survey**

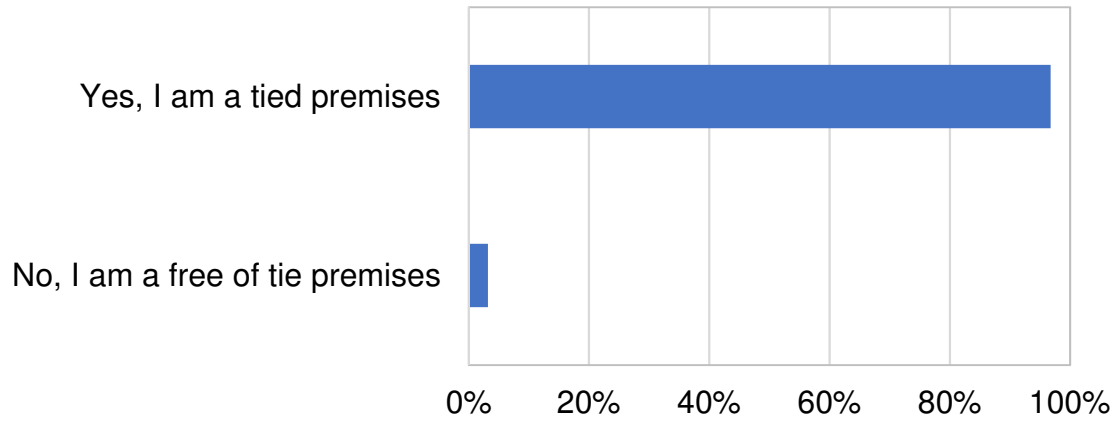
This survey with tied pub tenants was run by the Scottish Licensed Trade Association during June 2023. The Scottish Licensed Trade Association represents all sectors of the licensed trade in Scotland. This survey is not a Scottish Government survey but is referenced in this BRIA and it has therefore been published as an Annex.

### Q1: What type of premises do you operate?



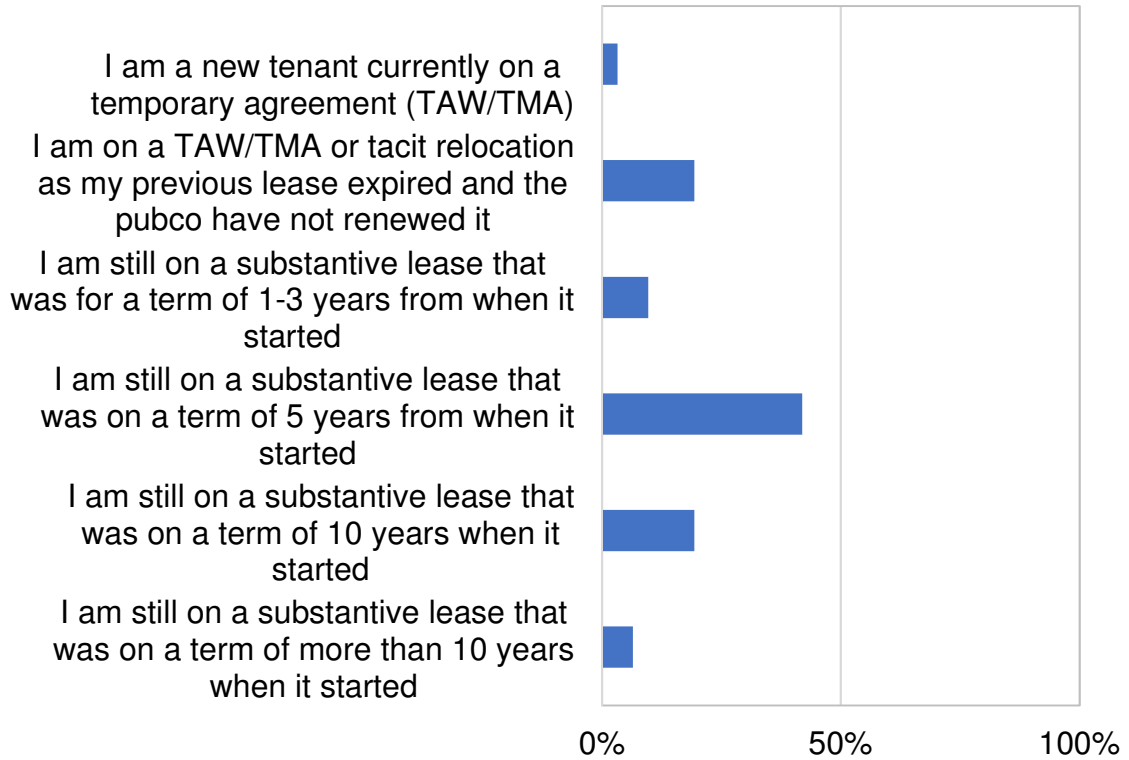
Answer choices	% Responses	Number of Responses
Pub	83.87%	26
Nightclub/venue	6.45%	2
Restaurant	0.00%	0
Hotel	9.68%	3
Other (please specify)	0.00%	0
<b>Total</b>	<b>100%</b>	<b>31</b>

**Q2: Are you tied to buy drinks from your commercial landlord, ie. Who you rent the building from?**



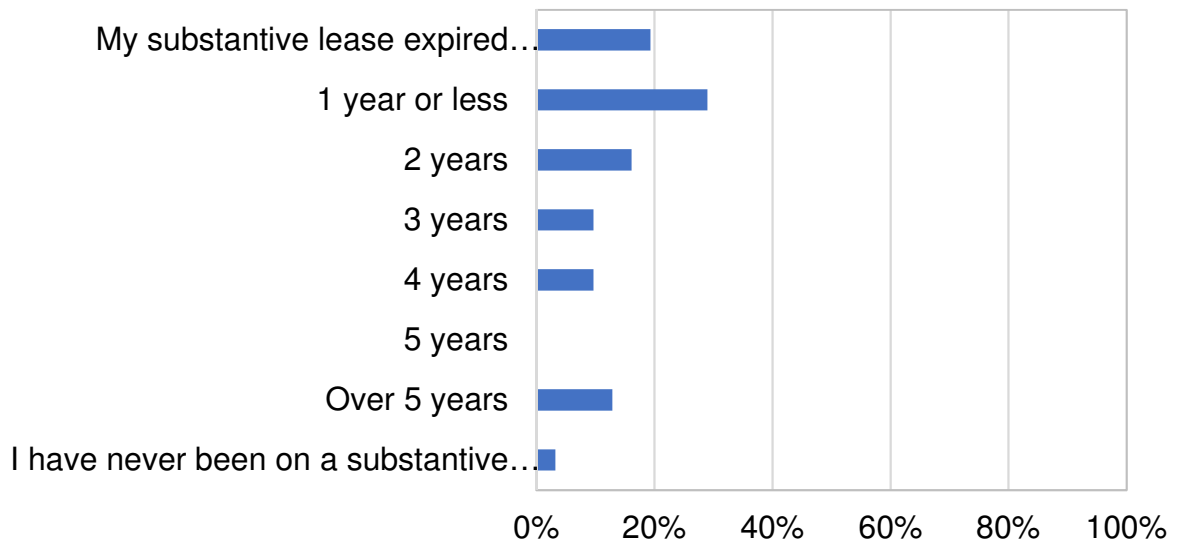
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes, I am a tied premises	96.77%	30
No, I am a free of tie premises	3.23%	1
<b>Total</b>	<b>100%</b>	<b>31</b>

### Q4: How long was the term on your current lease for?



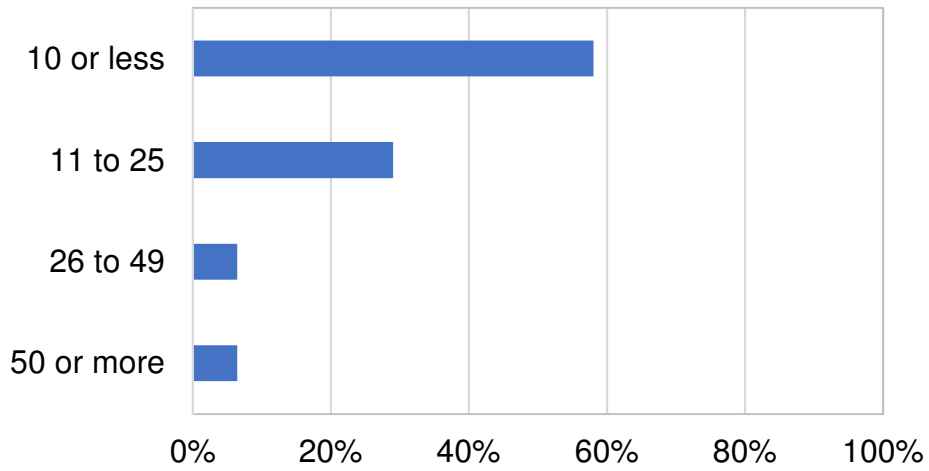
Answer choices	% Responses	Number of Responses
I am a new tenant currently on a temporary agreement (TAW/TMA)	3.23%	1
I am on a TAW/TMA or tacit relocation as my previous lease expired and the pubco have not renewed it	19.35%	6
I am still on a substantive lease that was for a term of 1-3 years from when it started	9.68%	3
I am still on a substantive lease that was on a term of 5 years from when it started	41.94%	13
I am still on a substantive lease that was on a term of 10 years when it started	19.35%	6
I am still on a substantive lease that was on a term of more than 10 years when it started	6.45%	2
<b>Total</b>	<b>100%</b>	<b>31</b>

### Q5: How long is left on your substantive lease?



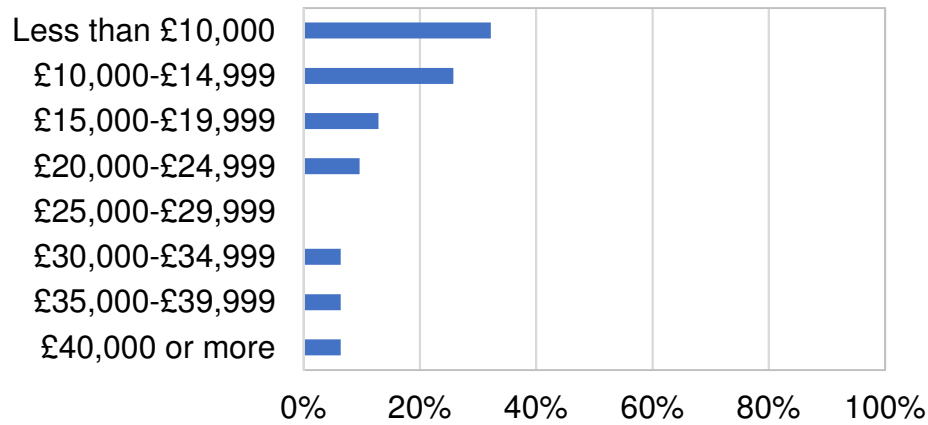
Answer choices	% Responses	Number of Responses
My substantive lease expired recently and the pubco refused to renew, I am on a temporary agreement (TAW, TMA, etc) to tacit relocation	19.35%	6
1 year or less	29.03%	9
2 years	16.13%	5
3 years	9.68%	3
4 years	9.68%	3
5 years	0.00%	0
Over 5 years	12.90%	4
I have never been on a substantive (long term) lease as I am new to the pub	3.23%	1
<b>Total</b>	<b>100%</b>	<b>31</b>

### Q6: How many employees do you have?



Answer choices	% Responses	Number of Responses
10 or less	58.06%	18
11-23	29.03%	9
26-49	6.45%	2
50 or more	6.45%	2
<b>Total</b>	<b>100%</b>	<b>31</b>

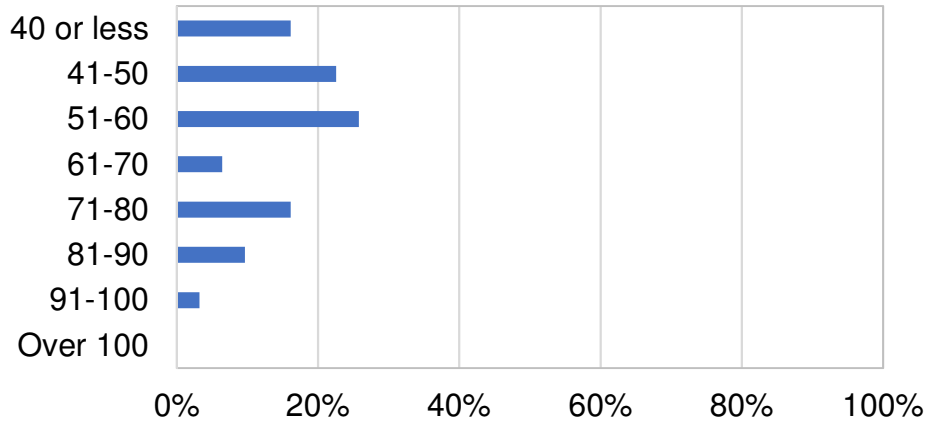
### Q7: What is your current net take home pay (after tax)?



Answer choices	% Responses	Number of Responses
Less than £10,000	32.26%	10
£10,000-£14,999	25.81%	8
£15,000-£19,999	12.90%	4
£20,000-£24,999	9.68%	3
£25,000-£29,999	0.00%	0
£30,000-£34,999	6.45%	2
£35,000-£39,999	6.45%	2
£40,000 or more	6.45%	2
<b>Total</b>	<b>100%</b>	<b>31</b>

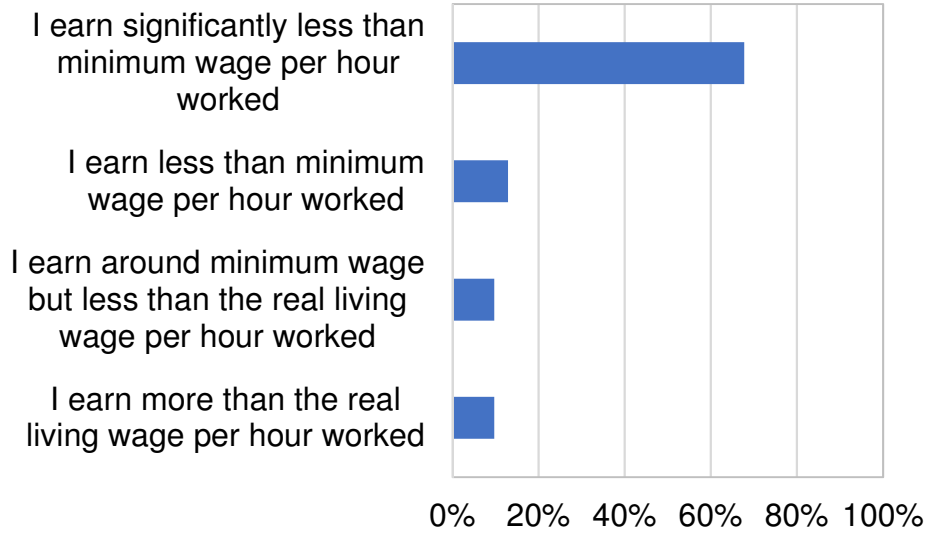


**Q8: How many hours a week do you work for your business?**



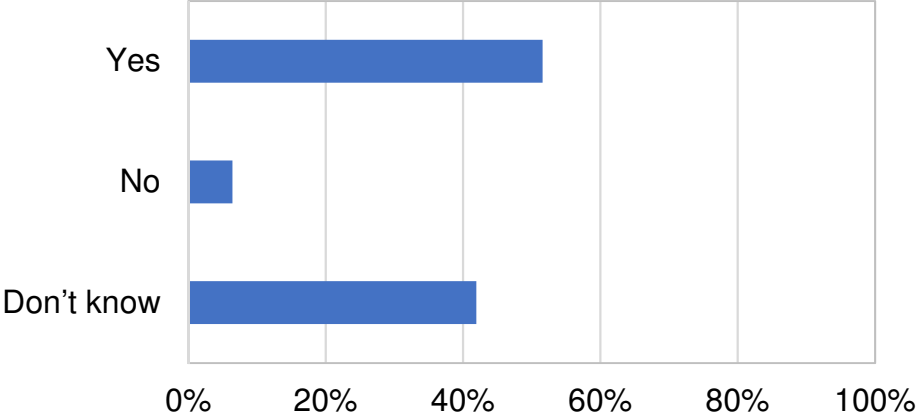
Answer choices	% Responses	Number of Responses
40 or less	16.13%	5
41-50	22.58%	7
51-60	25.81%	8
61-70	6.45%	2
71-80	16.13%	5
81-90	9.68%	3
91-100	3.23%	1
Over 100	0.00%	0
<b>Total</b>	<b>100%</b>	<b>31</b>

### Q9: Do you earn more or less than the Minimum Wage per hour worked?



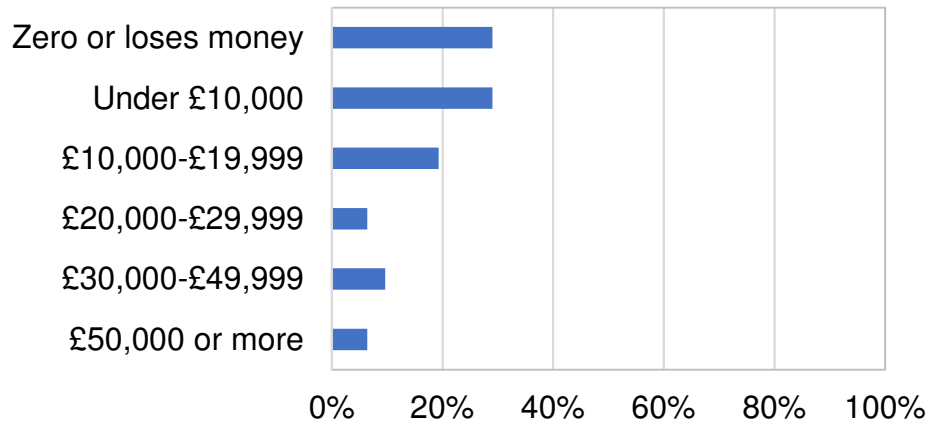
Answer choices	% Responses	Number of Responses
I earn significantly less than minimum wage per hour worked	67.74%	21
I earn less than minimum wage per hour worked	12.90%	4
I earn around minimum wage but less than the real living wage per hour worked	9.68%	3
I earn more than the real living wage per hour worked	9.68%	3
<b>Total</b>	<b>100%</b>	<b>31</b>

**Q10 Has your landlord signed up to the voluntary code of practice for tied pubs?**



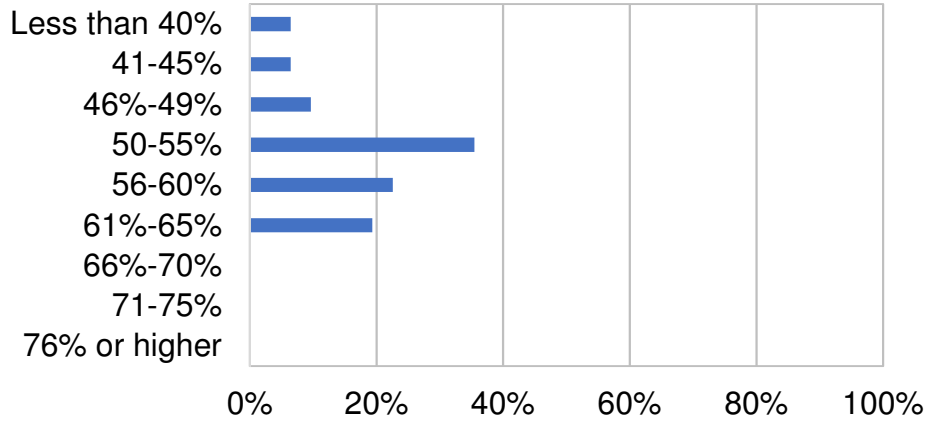
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes	51.61%	16
No	6.45%	2
Don't know	41.94%	13
<b>Total</b>	<b>100%</b>	<b>31</b>

### Q11 How much profit does your business make?



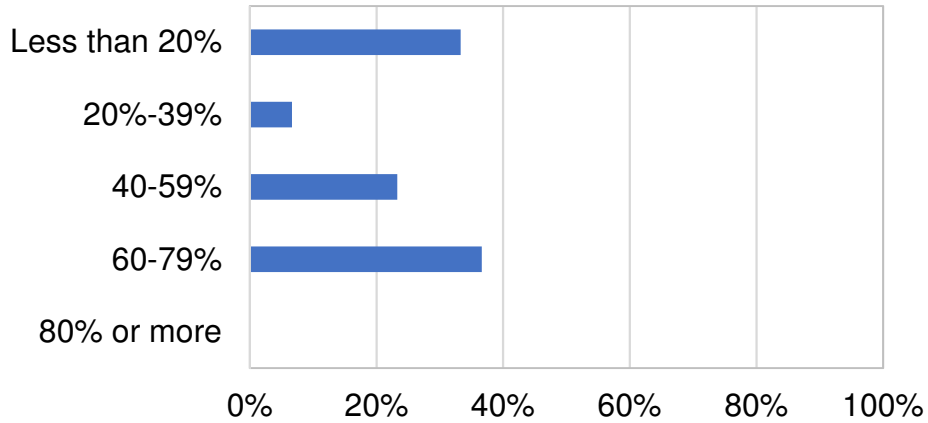
Answer choices	% Responses	Number of Responses
Zero or loses money	29.03%	9
Under £10,000	29.03%	9
£10,000-£19,999	19.35%	6
£20,000-£29,999	6.45%	2
£30,000-£49,999	9.68%	3
£50,000 or more	6.45%	2
<b>Total</b>		<b>31</b>

**Q12 What is your gross profit (GP or margin) from wet sales?**



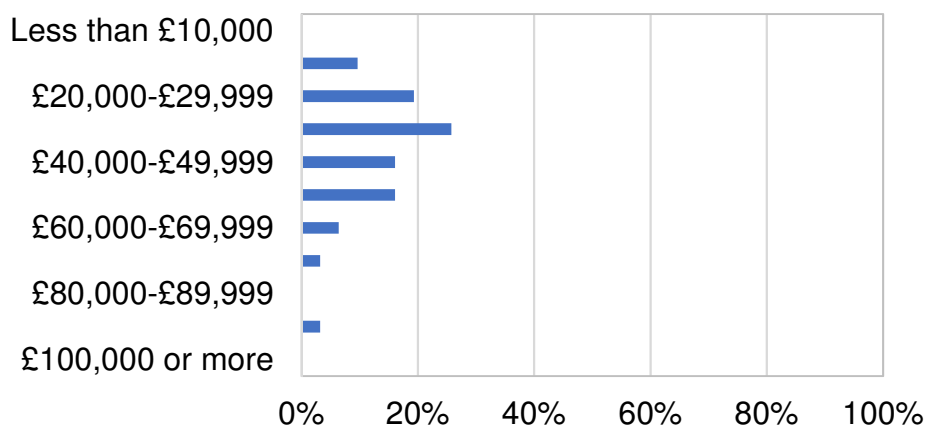
Answer choices	% Responses	Number of Responses
Less than 40%	6.45%	2
41-45%	6.45%	2
46%-49%	9.68%	3
50-55%	35.48%	11
56-60%	22.58%	7
61%-65%	19.35%	6
66%-70%	0.00%	0
71-75%	0.00%	0
76% or higher	0.00%	0
<b>Total</b>		<b>31</b>

**Q13 What is your gross profit (GP or margin) from dry sales?**



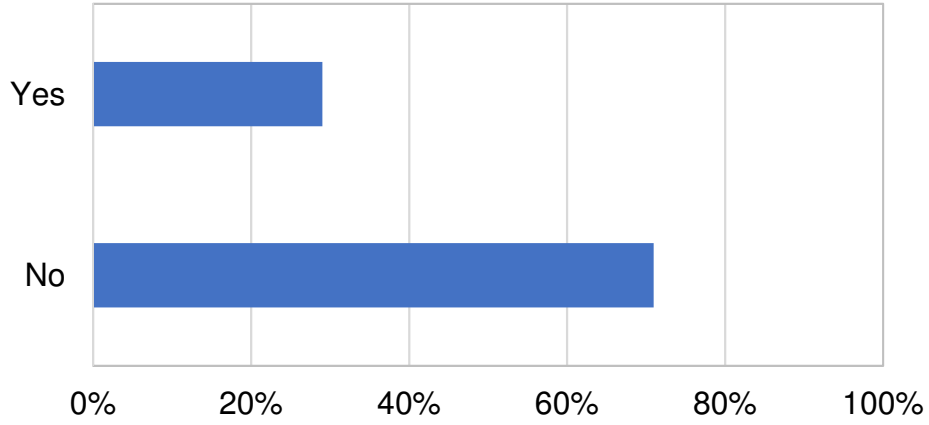
Answer choices	% Responses	Number of Responses
Less than 20%	33.33%	10
20%-39%	6.67%	2
40-59%	23.33%	7
60-79%	36.67%	11
80% or more	0.00%	0
<b>Total</b>	<b>100%</b>	<b>30</b>

### Q15 How much rent do you pay each year?



Answer choices	% Responses	Number of Responses
Less than £10,000	0.00%	0
£10,000-£19,999	9.68%	3
£20,000-£29,999	19.35%	6
£30,000-£39,999	25.81%	8
£40,000-£49,999	16.13%	5
£50,000-£59,999	16.13%	5
£60,000-£69,999	6.45%	2
£70,000-£79,999	3.23%	1
£80,000-£89,999	0.00%	0
£90,000-£99,999	3.23%	1
£100,000 or more	0.00%	0
<b>Total</b>		<b>31</b>

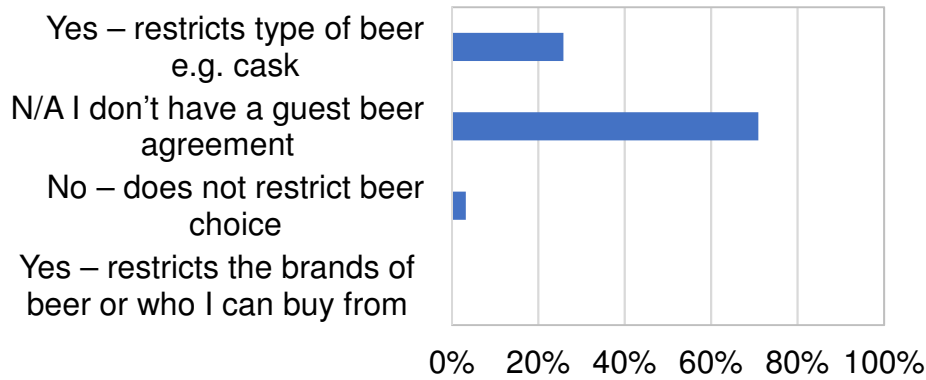
**Q16 Do you have a guest beer agreement currently?**



<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes	29.03%	9
No	70.97%	22
<b>Total</b>	<b>100%</b>	<b>31</b>

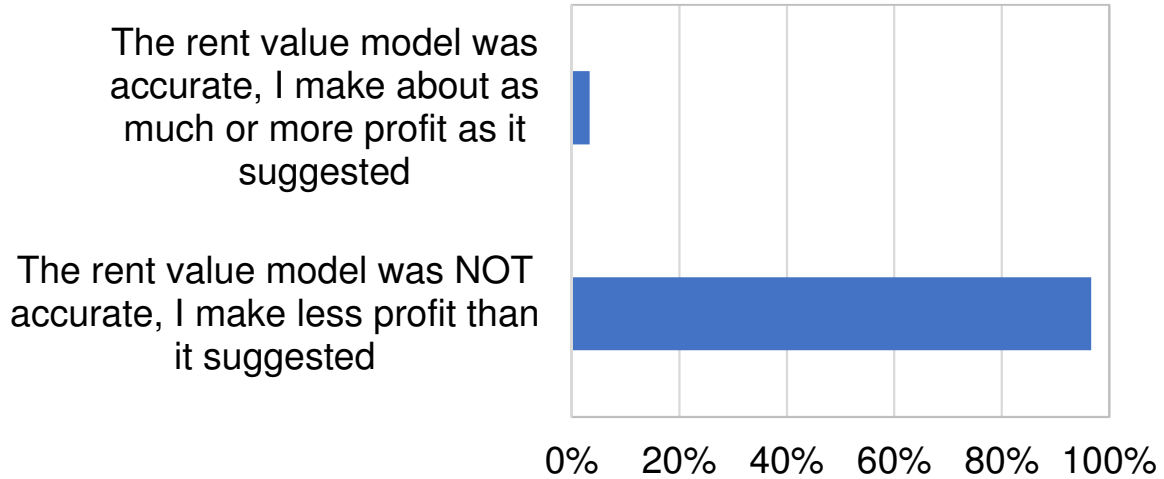


**Q17 Does your guest beer agreement restrict the guest beers you can sell (select all that apply)**



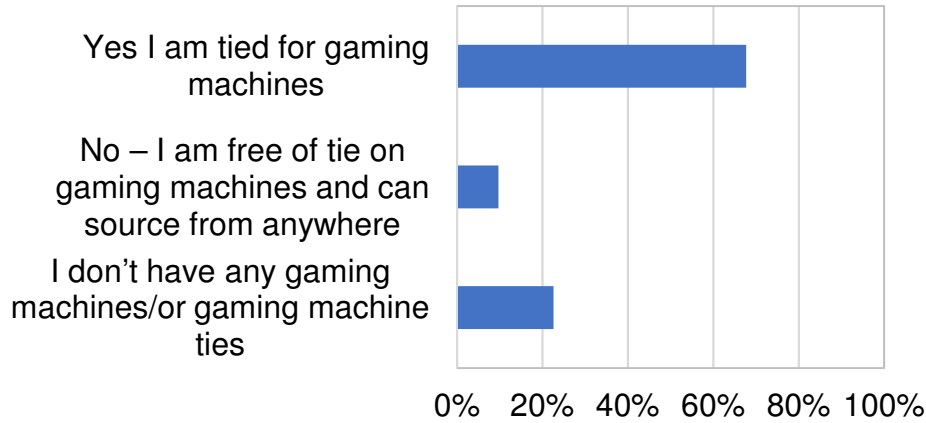
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes – restricts type of beer e.g. cask	25.81%	8
Yes – restricts the brands of beer or who I can buy from	0.00%	0
No – does not restrict beer choice	3.23%	1
N/A I don't have a guest beer agreement	70.97%	22
<b>Total</b>		<b>31</b>

**Q18 When you leased your pub, the pubco should have presented you with a rent valuation model. Since leasing your pub how accurate has this been?**



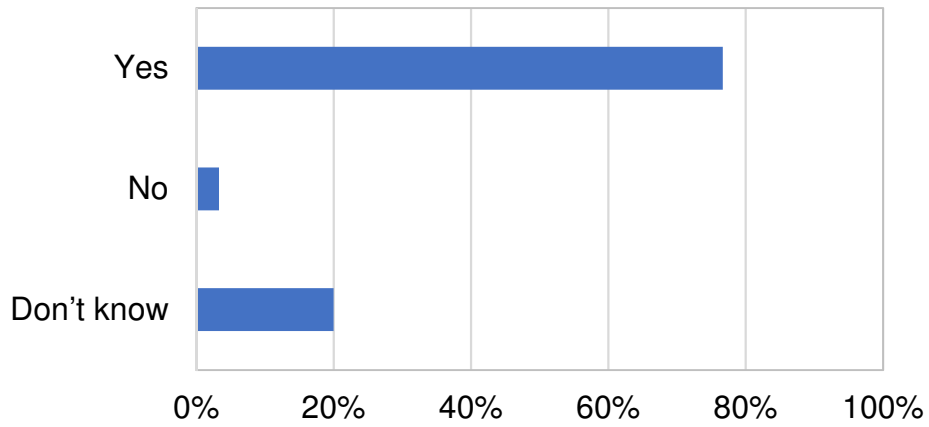
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
The rent value model was accurate, I make about as much or more profit as it suggested	3.33%	1
The rent value model was NOT accurate, I make less profit than it suggested	96.67%	29
<b>Total</b>	<b>100%</b>	<b>30</b>

**Q19 Do you have a gaming machine tie as part of your lease?**



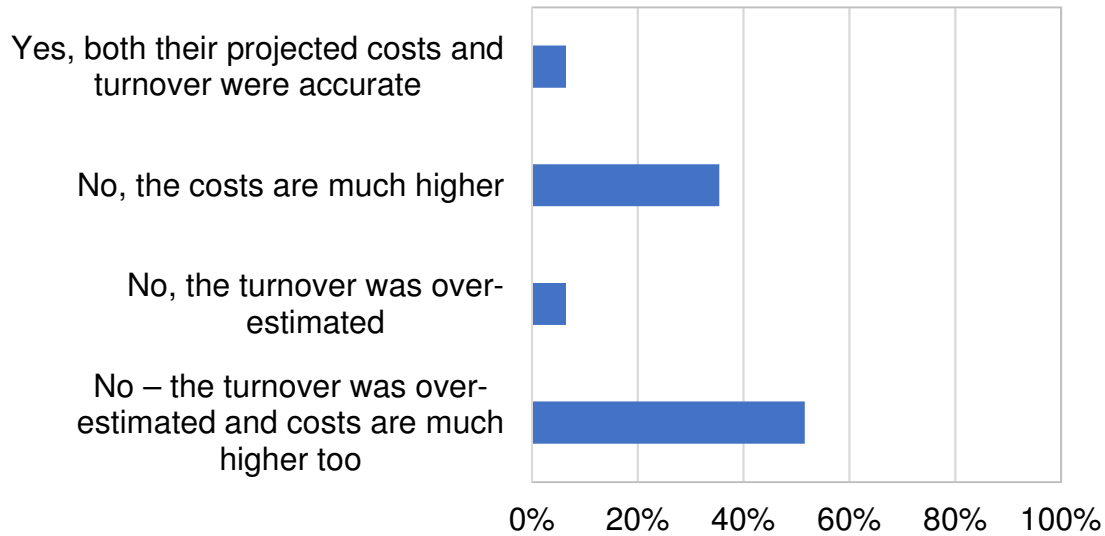
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes I am tied for gaming machines	67.74%	21
No – I am free of tie on gaming machines and can source from anywhere	9.68%	3
I don't have any gaming machines/or gaming machine ties	22.58%	7
<b>Total</b>	<b>100%</b>	<b>31</b>

**Q20 If you are tied on gaming machines, would being free of tie benefit you?**



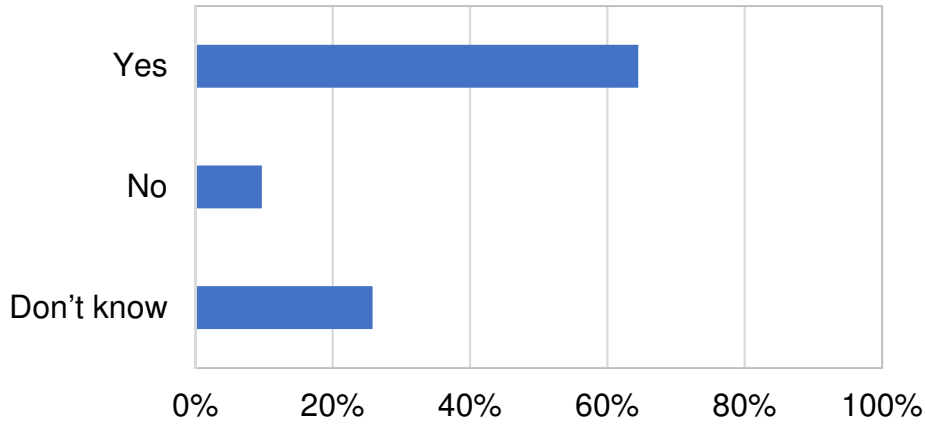
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes	76.67%	23
No	3.33%	1
Don't know	20.00%	6
<b>Total</b>	<b>100%</b>	<b>30</b>

**Q21 Did your pub-owning business provide enough information for you to accurately construct a business plan and enter into a lease?**



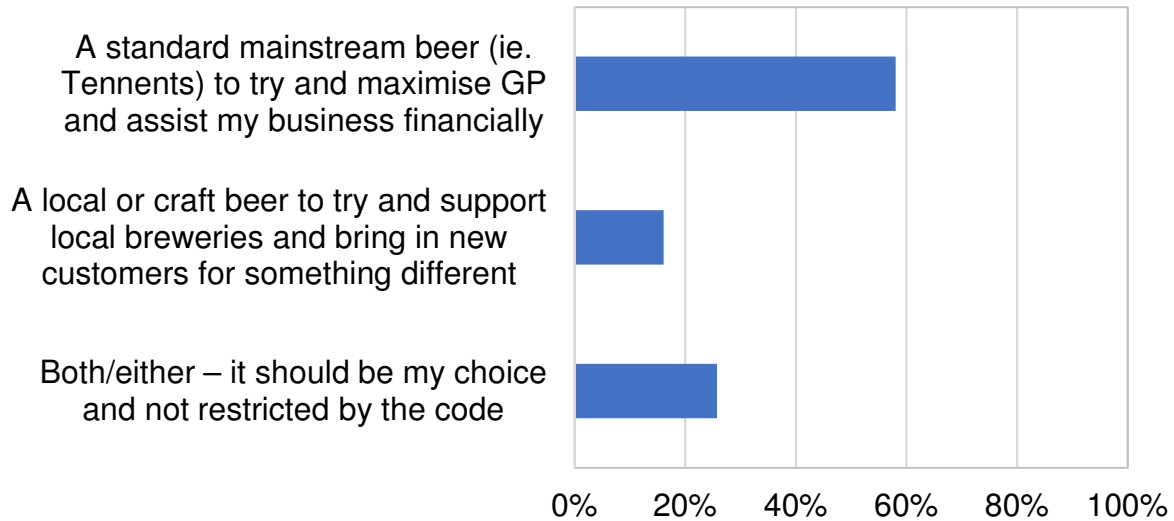
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes, both their projected costs and turnover were accurate	6.45%	2
No, the costs are much higher	35.45%	11
No, the turnover was over-estimated	6.45%	2
No – the turnover was over-estimated and costs are much higher too	51.61%	16
<b>Total</b>	<b>100%</b>	<b>31</b>

**Q22 Are you likely to request a guest beer agreement through the code?**



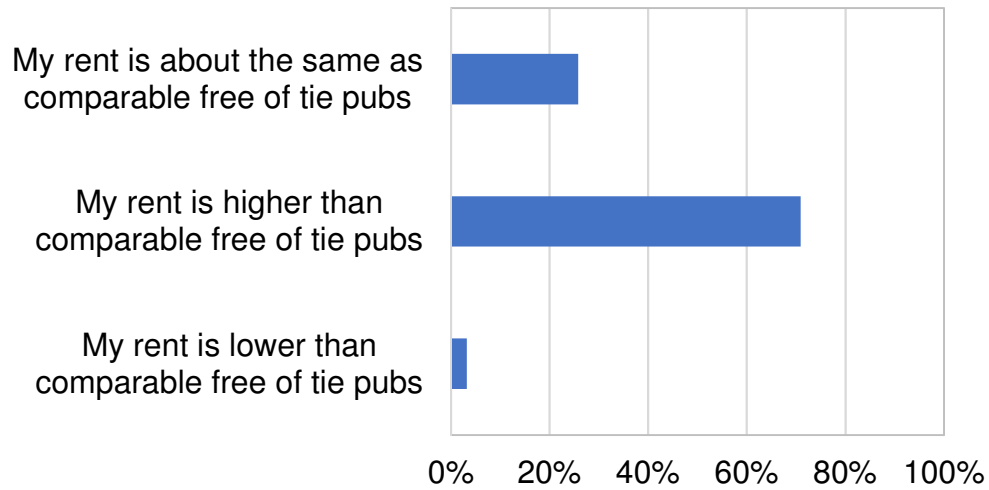
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes	64.52%	20
No	9.68%	3
Don't know	25.81%	8
<b>Total</b>		<b>31</b>

**Q23 If you were able to request a guest beer agreement for any type of beer - which type of beer would genuinely help you?**



<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
A standard mainstream beer (ie. Tennents) to try and maximise GP and assist my business financially	58.06%	18
A local or craft beer to try and support local breweries and bring in new customers for something different	16.13%	5
Both/either – it should be my choice and not restricted by the code	25.81%	8
<b>Total</b>	<b>100%</b>	<b>31</b>

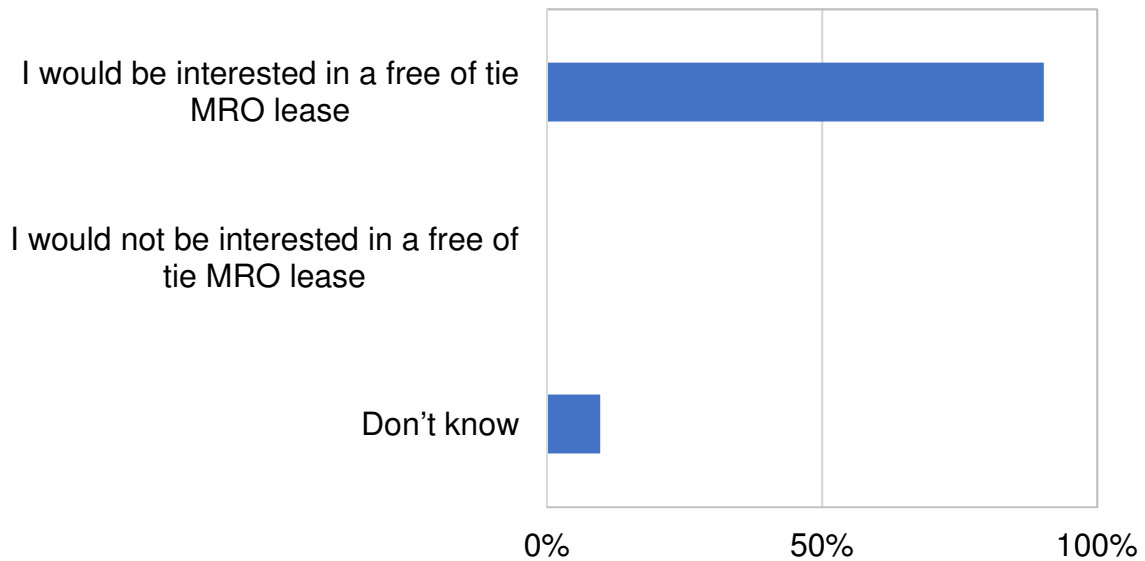
## Q24 How does your tied pub rent compare to free of tie pubs in your local area



Answer choices	% Responses	Number of Responses
My rent is about the same as comparable free of tie pubs	25.81%	8
My rent is higher than comparable free of tie pubs	70.97%	22
My rent is lower than comparable free of tie pubs	3.23%	1
<b>Total</b>	<b>100%</b>	<b>31</b>

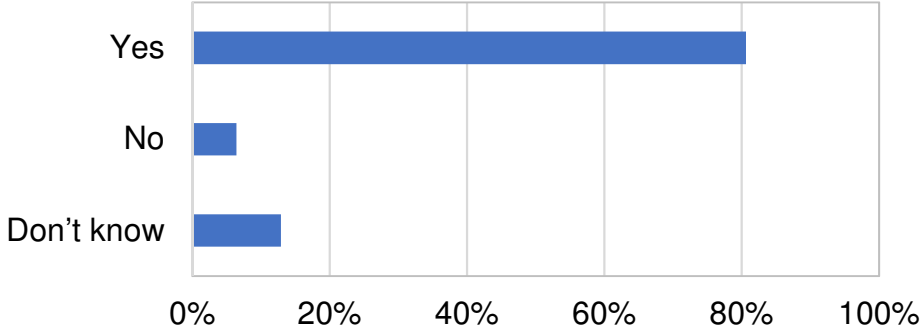


**Q25 An MRO lease is a Free of Tie lease where the rent is set at an amount agreed by the tenant and the landlord, or failing agreement between them, at the open market rate for the property. It does not include any product or service ties, complies with a**



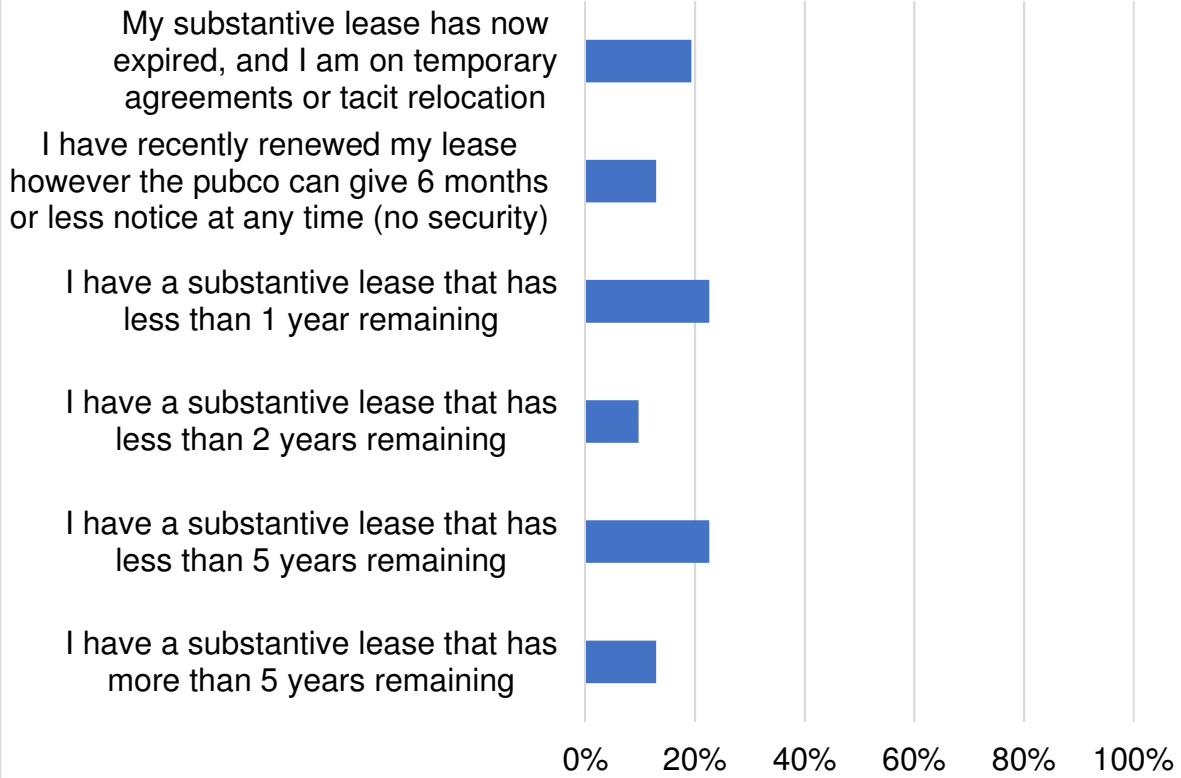
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
I would be interested in a free of tie MRO lease	90.32%	28
I would not be interested in a free of tie MRO lease	0.00%	0
Don't know	9.68%	3
<b>Total</b>	<b>100%</b>	<b>31</b>

**Q26 Are you likely to request a free of tie MRO lease, where the rent is an open market rent for a comparable free of tie pub?**



<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes	80.65%	25
No	6.45%	2
Don't know	12.90%	4
<b>Total</b>	<b>100%</b>	<b>31</b>

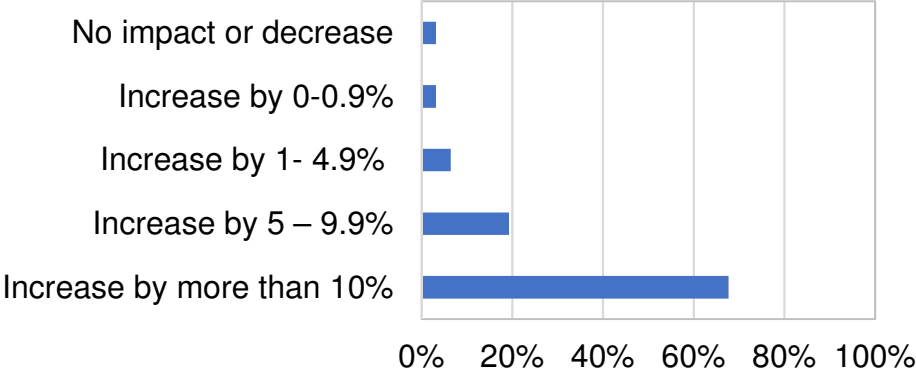
### Q27 In what year will your lease/tenancy agreement be up for renewal?



Please note the data table is overleaf.

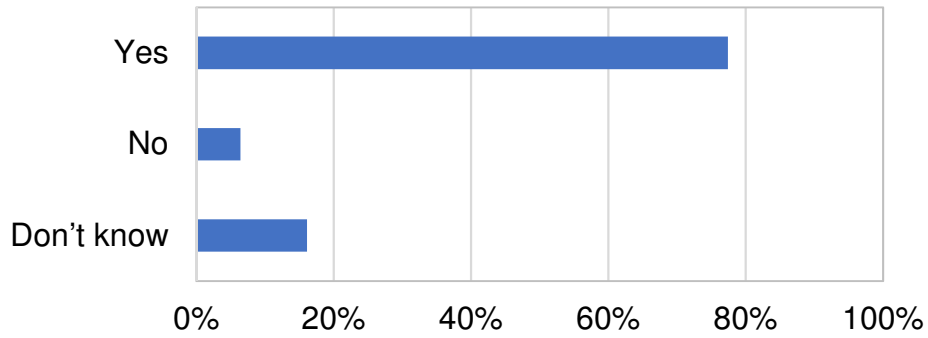
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
My substantive lease has now expired, and I am on temporary agreements or tacit relocation	19.35%	6
I have recently renewed my lease however the pubco can give 6 months or less notice at any time (no security)	12.90%	4
I have a substantive lease that has less than 1 year remaining	22.58%	7
I have a substantive lease that has less than 2 years remaining	9.68%	3
I have a substantive lease that has less than 5 years remaining	22.58%	7
I have a substantive lease that has more than 5 years remaining	12.90%	4
<b>Total</b>	<b>100%</b>	<b>31</b>

**Q28 What impact might a Free of Tie  
MRO lease have on your gross  
profit/margin from wet sales**



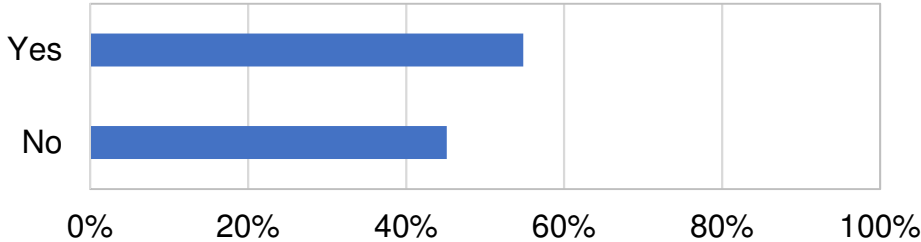
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
No impact or decrease	3.23%	1
Increase by 0-0.9%	3.23%	1
Increase by 1- 4.9%	6.45%	2
Increase by 5 – 9.9%	19.35%	6
Increase by more than 10%	67.74%	21
<b>Total</b>	<b>100%</b>	<b>31</b>

**Q29 If the code created a right to request a rent review would you use this? This would be on top of any arrangements set out in your lease?**



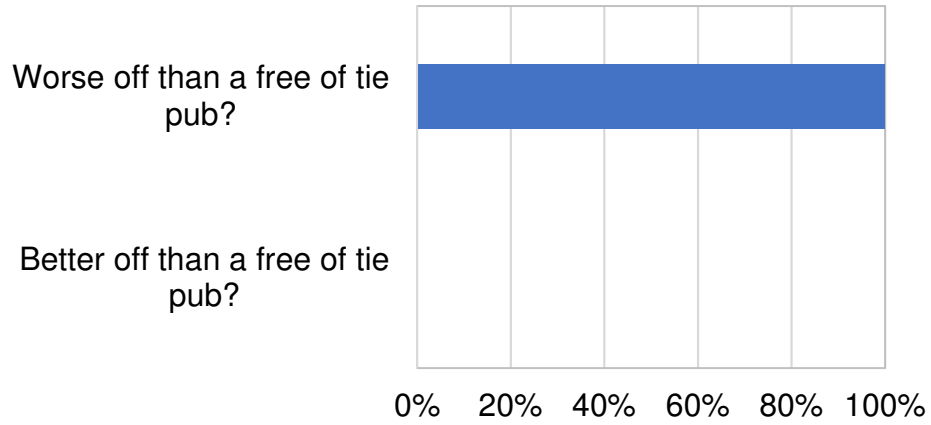
<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes	77.42%	24
No	6.45%	2
Don't know	16.13%	5
<b>Total</b>	<b>100%</b>	<b>31</b>

**Q30 Has your Pubco ever sent out any letters, emails or had any conversations with you in person suggesting or hinting that your future in the pub may be at risk as a result of the Tied Pubs Scotland Act (the Bibby Bill)?**



<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Yes	54.84%	17
No	45.16%	14
<b>Total</b>	<b>100%</b>	<b>31</b>

**Q31 As a result of being in a tied lease,  
are you financially:**



<b>Answer choices</b>	<b>% Responses</b>	<b>Number of Responses</b>
Worse off than a free of tie pub?	100%	30
Better off than a free of tie pub?	0	0
<b>Total</b>	<b>100%</b>	<b>30</b>