OUTER HOUSE, COURT OF SESSION

[2022] CSOH 89

P558/21

OPINION OF LORD HARROWER

In the petition of

(FIRST) GREENE KING LIMITED; (SECOND) HAWTHORN LEISURE LIMITED; (THIRD) PUNCH TAVERNS LIMITED

Petitioners

for Judicial Review of the Tied Pubs (Scotland) Act 2021

Petitioners: A O'Neill KC, Welsh; TLT LLP
Respondents: Crawford KC, Reid; Scottish Government Legal Directorate

9 December 2022

The issue

[1] Tied public houses are distinguished from free houses primarily by the presence of a contractual requirement on the tenant to purchase at least some of the alcohol for sale in the pub from the pub-owning business ("the landlord") or its nominee. According to the tied-pub business model, the increased price paid by the tenant for products and services ("wet rent") will be offset at least in part by a reduced rent in respect of the tenant's occupation of the pub ("dry rent"). In February 2020, concerns having been raised regarding both an imbalance in the relationship between landlords and their tied-pub tenants, as well as the effectiveness of the pub sector's voluntary code, Neil Bibby MSP introduced a Bill in the

Scottish Parliament, seeking to re-balance the contractual relationship between landlord and tied-pub tenant. Although different views were expressed in committee and at consultation on whether legislative intervention was necessary, the Bill as amended was eventually, and overwhelmingly, approved by the Scottish Parliament in plenary session. On 5 May 2021, the Tied Pubs (Scotland) Act 2021 ("TIPSA") received the royal assent.

[2] TIPSA makes provision, following similar legislation having been enacted in 2015 by the UK Parliament for England and Wales, for the Scottish Ministers to introduce a new code of regulations for tied pubs ("the code"), while also establishing the office of Scottish Tied Pubs Adjudicator ("the adjudicator"), with powers to investigate and enforce compliance with the code, and to adjudicate on disputes submitted to him by either the landlord or the tied-pub tenant. While the code has yet to be introduced by the Scottish Ministers, TIPSA, section 1, together with Schedule 1, provides that it must contain certain provisions. These include a requirement that the landlord make an offer to enter into a guest beer agreement with the tenant in certain circumstances ("the guest beer offer requirement"), and a requirement to offer to enter into a market rent only ("MRO") lease with a tenant who requests it ("the MRO lease offer requirement"). Otherwise, Schedule 1 places no limit on the requirements and restrictions that the code may contain (Sch 1, para 7), although in the main body of the Act, TIPSA does require the Scottish Ministers, when drawing up the code, and the adjudicator when carrying out his functions, to use their best endeavours to act consistently with certain overarching principles, such as the principle of "fair and lawful dealing" by landlords in relation to their tied-pub tenants ("the regulatory principles").

[3] The issue that arises in this petition for judicial review is whether the provisions of TIPSA lie outside the legislative competence of the Scottish Parliament, and are therefore, by

virtue of section 29(1) of the Scotland Act 1998 ("SA"), "not law". The petitioners, who are all landlords in terms of the Act, make two arguments. Firstly, they say that the provisions of TIPSA relate to the reserved matter of competition; and secondly, they say that the provisions of TIPSA are incompatible with their right to the peaceful enjoyment of their possessions under Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"). The petition came before me at a substantive hearing on the petitioners' motion that decrees of declarator and reduction of the provisions of the Act should be granted. That motion was opposed by the Lord Advocate ("the respondent").

The legislation

[4] The title to TIPSA narrates that it is an Act to establish a code "to govern the relationship between tenants and owners of tied pubs". It is convenient, before considering the parties' arguments in detail, to set out the key provisions of TIPSA, so far as relevant to the present dispute.

"Pub-owning business"

[5] TIPSA borrows the expression "pub-owning business" from similar legislation regulating tied pubs in England and Wales, namely, the Small Business, Enterprise and Employment Act 2015 ("the 2015 Act"). However, whereas south of the border, a "pub-owning business" is a landlord of 500 or more tied pubs (s69 of 2015 Act), TIPSA uses the same expression to refer simply to "the landlord" under the lease of a tied pub (s21(1)). In other words, and this was a point relied upon by the petitioners when underlining the breadth of the Scottish legislation, TIPSA applies to every landlord of a tied pub in Scotland, no matter how many tied pubs it owns. Since the phrase "pub-owning business" does no

conceptual work in TIPSA, and in order to avoid confusion with the same expression in English law, where it does, I have simply used the word "landlord" to refer to the landlord of a tied pub, including any "group undertaking in relation to the person who is the actual landlord" of the pub (s20(3)).

[6] A further point of distinction between TIPSA and the 2015 Act is that, whereas under the 2015 Act, in order to qualify as a pub-owning business, the landlord must have owned 500 tied pubs for a period of at least 6 months in the previous financial year (2015 Act, s69(1)(b)), for the purposes of TIPSA, a landlord of a tied pub includes anyone who has ever been a landlord of a tied pub, and a tied-pub tenant includes anyone who has ever been such a tenant (TIPSA, s21(2)).

"Tied pub"

[7] Tied pubs are defined in TIPSA, section 20 as meaning pubs which are being leased to a tenant who is subject to a contractual obligation, other than a stocking requirement, which requires that some or all of the alcohol to be sold in the pub be supplied by the landlord or a person nominated by him. A stocking requirement requires that some of the beer and/or cider sold in the pub be produced by the landlord, but does not require it to be procured from any particular supplier, and nor does it prevent the tenant from, nor penalise him for, selling beer or cider produced by someone else. Accordingly, a contractual requirement which merely restricts, without penalising or preventing, the sale of beer or cider produced by brewers other than the landlord will not in itself make the pub a tied pub (though it may become a tied pub by virtue of a separate supply tie).

Regulatory principles

[8] The regulatory principles are to be found in TIPSA, section 3(3). They are (a) the principle of fair and lawful dealing by tied-pub landlords in relation to their tenants, (b) the principle that tied-pub tenants should not be worse off than they would be if they were subject to neither a product tie nor a service tie, and (c) the principle that any agreement between a tied-pub landlord and his tenant should fairly share the risks and rewards "amongst" the parties. A product tie is a contractual obligation, other than a stocking requirement, that a product to be sold in the pub be supplied by the landlord or a person nominated by him. A service tie is a contractual obligation that the tenant receive a service, other than insurance, from the landlord or a person nominated by him.

[9] I note that while the 2015 Act expressly required the Secretary of State to ensure that the Pubs Code for England and Wales be consistent only with the first two of these principles (s42(3)), the explanatory notes made it clear that the objectives of the UK legislation included the principle that the agreement between the landlord and tied-pub tenant should offer a fair share of risks and rewards to both parties (para 58).

What the code must contain

[10] There are three particular requirements the code must contain that may be seen as necessary in order to prevent the code being rendered ineffective. Firstly, the code must require the landlord to comply with any directions given by the adjudicator who, following an investigation, is satisfied that the landlord has failed to comply with the code (s9; Sch 1, para 2). Secondly, TIPSA requires the code to prohibit the landlord from enforcing a term under which a tied-pub tenant is prevented from, or can be penalised for, taking action to enforce the code (Sch 1, para 3(2)). Thirdly, TIPSA provides that the code must contain a

prohibition on the landlord enforcing a term which provides that a rent assessment may be initiated only by the landlord, may only determine that the rent is to be increased, or may not determine that the rent is to be reduced (Sch 1, para 3(2)).

[11] A guest beer agreement is defined as an agreement that allows the tied-pub tenant, without incurring any penalty, to sell to his customers, at a price of his choosing, at least one beer of his choosing (regardless of who produces it), and to change the chosen beer as frequently as he wishes. The code may specify further criteria for what counts as a guest beer agreement, and it must specify the circumstances in which a guest beer offer is required to be made (Sch 1, para 4).

[12] Before setting out the MRO lease offer requirement, it is necessary to define a MRO lease (Sch 1, para 5(2)). A MRO lease is, firstly, one that sets the dry rent at an amount agreed between the landlord and tenant in accordance with a procedure to be described in the code, failing which, at the market rent. The procedure to be described in the code may specify a period for negotiation, and may require that any dispute be resolved by a rent assessor, to be agreed by the parties, failing which, one appointed by the adjudicator (Sch 1, para 6). "Market rent" is the estimated rent which it would be reasonable to pay in respect of the occupation of the pub as a pub under a hypothetical tenancy entered into on the date the estimate is being carried out, in an arm's length transaction, after proper marketing, between parties who are all acting knowledgeably, prudently and willingly (Sch 1, para 5(4)). In addition, a MRO lease must not impose either a product tie or a service tie in relation to the pub; it must contain such terms as the code may require in order to qualify as a MRO lease; and it must not contain any unreasonable terms, including any term corresponding to a description specified in the code of a term that is to be regarded as unreasonable (Sch 1, para 5(3)(a)).

[13] Schedule 1, paragraph 5(1) then provides that the code must require the landlord to offer to enter into such a MRO lease with a tied-pub tenant who requests that the offer be made. However, the code may specify the circumstances in which a landlord need not make such an offer (including, for example, where an agreement to invest in a tied pub has been entered into) (Sch 1, para 5(3)(b)). The offer must be made by offering to modify the terms of any existing agreement only to the extent that is necessary for the lease in relation to the pub to be a MRO lease. However, the code may specify circumstances in which the landlord may make the offer in another way (including by offering to modify the terms of an existing agreement in another way or by offering to enter into a new lease) (Sch 1, para 5(3)(c)). Finally, the code must require the landlord to use its best endeavours to enter into a MRO lease with the tenant as soon as possible following the tenant's request that the landlord offer to enter into such a lease.

What the code may contain

[14] While, as already noted, nothing in Schedule 1 is to be taken as limiting the generality of the requirements and restrictions that may be imposed on landlords by the code (Sch 1, para 7), TIPSA expressly provides that the code may contain certain provisions.

[15] Firstly, the code may contain requirements that the landlord produce information in a prescribed manner and form, including rent assessments, and provide it to actual and prospective tied-pub tenants, as well as to the adjudicator (Sch 1, para 1).

[16] Secondly, while I have already noted that the code must prohibit the landlord from enforcing certain types of term contained in the lease, TIPSA also provides that the code *may* prohibit a landlord from enforcing any other kind of term (Sch 1, para 3(1)(a)).

[17] Any term of a kind that the code prohibits the landlord from enforcing will be unenforceable by the landlord (s7).

Preliminary objections

[18] Each party objected to certain documents relied upon by the other.

[19] The petitioners objected to the admissibility of the notes on clauses to the Scotland Bill. The respondent referred to the following extract from the notes to the reservation headed "Competition", contained in C3 of Schedule 5, SA.

> "[…]
>
> General
>
> This reservation is designed to ensure the continuation of a common United Kingdom system for the regulation of competition matters.
>
> […]
>
> Details of Provisions
>
> Reservation
>
> What is reserved is the regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers. This will include all matters relating to that regulation, including
>
> a. the powers to investigate any body or person for the purposes of enforcing competition law;
>
> b. the administration of competition law through the respective powers of the Secretary of State for Trade and Industry, the Director General of Fair Trading and any other authority exercising competition functions.
>
> […]"

The respondent relied on *Imperial Tobacco* v *Lord Advocate* 2013 SC (UKSC) 153, paragraph 33, suggesting that notes on clauses, if circulated to Members of Parliament during the passage

of the Bill, might be a useful aid to construction. The petitioners referred to *R (Public and Commercial Services Union)* v *Minister for the Civil Service* [2010] EWHC 1027 (Admin) [2010] ICR 1198, paragraph 55, where it was observed that, since they would not be available to the public at large, notes on clauses, unless actually referred to in debate, were not a proper aid to interpretation, even if circulated to Members of Parliament. Ultimately, I did not find it necessary to rely upon the notes on clauses in arriving at my decision. Therefore, insofar as there may have been a conflict of authority, it was not one that required to be resolved in this case.

[20] The respondent objected to a report dated 23 July 2021, carried out by an economist, Dr Pau Salsas ("the Salsas report"), and relied upon by the petitioners as providing an "expert opinion on the economic effects that [TIPSA] will have on the [pub] sector" (petition, para 24). The respondent argued that the report was inadmissible, as usurping the function of the court, insofar as it attempted to assess whether or not TIPSA constituted a proportionate interference with the petitioners' A1P1 rights (*Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59). In a "speaking note", the petitioners argued that they were entitled to rely on his report as evidence of fact (paras 4.20, 4.21), and that insofar as Dr Salsas expressed an opinion on matters of proportionality, he was doing so merely for the assistance of the court (para 4.23). I was content to have regard to the contents of the report, while acknowledging that the proportionality assessment was ultimately a matter for the court.

Argument for the petitioners

[21] Competition, and in particular the regulation of anti-competitive agreements, was a reserved matter under SA, Schedule 5. Tied pub leases were, in principle, anti-competitive

agreements, being vertical agreements containing "non-compete" clauses, prohibited as a matter of competition law, unless exempt within the terms of the relevant block exemption regulation, Regulation 330/2010, which was a retained block exemption regulation incorporated into domestic law by virtue of the European Union (Withdrawal) Act 2018, section 3, and the Competition Act 1998, section 10(12) (and which was itself replaced as of 1 June 2022 by the similar block exemption contained in the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022): Case C-234/89 *Delimitis* v *Henninger Bräu AG* [1991] ECR I-935 [1992] 5 CMLR 210; Case C-453/99 *Courage Ltd* v *Crehan* [2002] QB 507; *Crehan* v *Inntrepreneur Pub Co* [2006] UKHL 38 [2007] 1 AC 333; and Case C-230/16 *Coty Germany GmbH* v *Parfümerie Akzente GmbH* [2018] Bus LR 1371. TIPSA purported "further" to regulate the terms and conditions of tied-pub leases beyond the terms of the relevant block exemption (petition, para 28). Therefore, TIPSA related to the reserved matter of competition and was not law.

[22] In any event, TIPSA interfered disproportionately with the petitioners' A1P1 rights. TIPSA was not evidence-based, and posed a danger to investment in the sector, which had already been partially suspended when the Bill was introduced to the Scottish Parliament. Tied-pub tenants had already prior to TIPSA enjoyed significant protection by virtue of the voluntary "Pub Sector – Scotland Code of Practice". This included access to an independent dispute resolution mechanism. Research published by the Scottish Government in 2016 had concluded that the case for legislative intervention in the tied-pub sector had not been made out. The lead parliamentary committee for the Bill - the Economy, Energy and Fair Work Committee ("the lead committee") – was not agreed that legislation was required, and did not support the Bill.

[23] TIPSA went further than the 2015 Act in the following respects. The regulatory principles required a fair sharing of risks and rewards between landlord and tenant. TIPSA applied to all landlords regardless of how many tied pubs they owned. It applied to anyone who had ever been a landlord or tied-pub tenant. TIPSA gave an "automatic right" to tied-pub tenants to exercise the MRO option "whenever they [chose]" (petition, para 18). There was no equivalent to the guest beer offer requirement in the 2015 Act. The combined result was to put Scottish tied pubs at a competitive disadvantage compared to their counterparts in England and Wales.

[24] The "automatic" right to exercise the MRO option, "effectively regulate[d] the tied pub option out of existence" (petition, para 23). It meant that landlords would no longer be able to offer a lower dry rent, by offsetting that with wet rent provisions such as a product tie "restricting the type of beers stocked and the price they are purchased for" (petition, para 19). The result would be to "remove the only low-cost entry point into owning and running a pub" (petition, para 23).

[25] The respondent had not demonstrated compliance with the Convention principle of proportionality. She had not shown that there existed a legitimate objective towards which TIPSA's provisions were aimed. She had not shown that there was a rational connection between the Act's provisions and whatever objective the Act did pursue. She had not shown that there was no alternative to the achievement of the Act's objective which was less disruptive of the petitioners A1P1 Convention right to run their businesses and trade, or that, looked at overall, landlords were not being required to shoulder a disproportionate and unfair burden: *Bank Mellat* v *HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700; *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016.

Argument for the respondent

[26] TIPSA did not relate to the reserved matter of competition. Head C3 of Schedule 5 to SA 1998 reserved the "regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers". The reservation was concerned with anti-competitive practices and agreements that adversely affected the competitive structure of the market. It did not reserve the regulation of unfair contractual terms in commercial contracts generally. TIPSA was not concerned with, and therefore did not relate to, the competitive structure of the market. It was concerned with, and related to, the terms of individual agreements between landlords and tied-pub tenants. The extent to which the petitioners might be able to rely on any block exemption regulation that was or may currently be in force was not affected by TIPSA.

[27] So far as the petitioners' A1P1 challenge was concerned, the Policy Memorandum, and indeed the Act itself, clearly identified as a legitimate objective the rebalancing of contractual relations between landlord and tied-pub tenant. In any event, the challenge was premature. Until the code had been drawn up, the proportionality of any interference could not be assessed. The challenge to TIPSA in its entirety was bound to fail, as many, if not most of its provisions – such as the requirement that there be a code, or the establishment of the office of adjudicator – could not conceivably be said to lie outside the competence of the Scottish Parliament. The contracting out prohibition and the prohibition relating to unfair rent assessment terms (Sch 1, para 3(2)) were designed to ensure that the provisions of the Act were not circumvented. TIPSA left it to the code to set out the circumstances in which the MRO offer requirement and the guest beer offer requirement could be invoked. Until then, it would be hopeless to attempt to assess the proportionality of these provisions or of the Act as a whole.

Decision

The reserved matters argument

[28] A provision of an Act of the Scottish Parliament that relates to a reserved matter is outside legislative competence and is not law (SA, s29(2)). The question whether a provision relates to a reserved matter is to be determined by reference to "the purpose of the provision, having regard (among other things) to its effect in all the circumstances" (SA, s29(3)). The phrase "relates to" indicates something more than a loose or consequential connection: *Martin* v *Most* 2010 SC (UKSC) 40, paragraph 49; *Imperial Tobacco Ltd* v *Lord Advocate*, 2013 SC (UKSC) 153, paragraph 16, and *In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2019] AC 1022, paragraph 27. The reserved matters are set out in SA, Schedule 5. "C3 Competition" is in the following terms: "Regulation of anti-competitive practices and agreements; abuse of dominant position; monopolies and mergers". C3 then creates an exception: "Regulation of particular practices in the legal profession for the purpose of regulating that profession or the provision of legal services."

[29] In Mr O'Neill's interpretation of C3, once an agreement was properly classified as an "anti-competitive agreement", then it followed that *any* regulation of that agreement would be reserved to the Westminster Parliament. Clearly, the reservation would not include, for example, general measures of taxation, or health and safety regulation, provided that these were targeted at individual employers, occupiers, and those acting in the course of a business, rather than specifically at the anti-competitive agreement as such. However, the petitioners' interpretation of the reservation would embrace any attempt to regulate the fairness of contracts, where the contracts in question fell to be classified as anti-competitive agreements. At any rate, this appeared to be the submission, even though the fairness of

private contracts would generally be considered to fall within the devolved competence of the Scottish Parliament. For example, it doesn't appear to have occurred to either of the Law Commissions in 2004, when reviewing the United Kingdom law on unfair contract terms in both consumer contracts and business-to-business contracts, that the legislation they were recommending would be covered by the reservation that is C3, although they did consider that some of its provisions might fall within the scope of the reservation for consumer contracts in C1, or the reservation for employment rights and duties in H1 (*Unfair Terms in Contracts,* Law Com No 292, Scot Law Com No 199, Cm 6464, paras 1.19-1.23). Why, it may be asked, should legislation that is concerned with unfair contract terms rather than specifically with competition be covered by the C3 reservation.

[30] The answer, or at least part of the answer, to this question can be found in the petitioners' pleadings. In paragraph 28 of the petition, they criticise TIPSA for "further" regulating tied-pub leases "beyond the terms of relevant block exemption Commission Regulation (EU) 330/2010". They then explain that compliance with that Regulation is necessary (presumably, putting the possibility of individual exemption to one side) in order to secure the exemption of tied-pub leases "from the prohibitions contained in Article 101(1) [of the Treaty on the Functioning of the European Union ('TFEU')] *such as to make them lawful"* (emphasis supplied). The argument was repeated in the petitioners' "speaking note", where it was asserted that the Court of Justice of the European Union had "examined and determined precisely the limits with which … beer supply arrangements in tied pub leases may be considered compatible or incompatible *(and hence lawful or unlawful)* with the Treaty's requirements of and for fair competition (3.15, emphasis supplied; see also 3.24). On the face of it, this is a spectacular *non sequitur,* since the block exemption contained in Regulation 330/2010 is simply an application of Article 101(3) TFEU, exempting an entire

category of agreements from the prohibition contained in Article 101(1) (the prohibition is said to be "inapplicable"). It might be thought that, just because such agreements are not prohibited by Article 101(1), it doesn't follow that they are "lawful", or that Article 101 exhausts the scope of the regulation to which they may be made subject. However, that would be to ignore the following passage taken from the petitioners' "speaking note":

> "It is a basic principle of EU competition law (which has been mirrored and reflect [*sic*] in a purely UK context by the provisions of the Competition Act 1998) that 'market failure' is a necessary condition for *any* State intervention in the marketplace to be justified. If the market is not failing there is *no* justification for State intervention. This is because in effect the EU Treaties embodied and protected the principles of the free market. State intervention in the market without market failure was *unlawful* because all that it is then doing is distorting an otherwise properly functioning market to the detriment of all and in contravention of the fundamental principles of free and fair competition on which the internal market is founded and which EU law protects as a fundamental principle" (4.27, emphasis supplied).

In other words, because, in the petitioners' view, tied-pub leases that comply with, or have gained exemption from, the provisions of competition law are "lawful", it follows that any further regulation of tied-pub leases is, as they say, "unlawful", not merely because regulation of these matters has been reserved for Westminster, but because it is in contravention of the fundamental principles of competition law as established by the EU. However, this argument seeks to convert an exemption from one regulation (the prohibition against anti-competitive agreements) into an immunity from any and all further regulation. None of the authorities relied upon by the petitioners supports that proposition. If it were correct, of course, it would undermine not just legislation of the devolved Scottish Parliament, but also legislation of the sovereign UK Parliament. Towards the end of their "speaking note", even the petitioners seemed to draw back from that extreme position (paras 3.39 and 3.40).

[31] So we should put to one side the petitioners' repeated complaint that TIPSA purports "further" to regulate already regulated anti-competitive agreements (petition, paras 27, 28). Their complaint is actually much simpler. It is about TIPSA's purporting to regulate anti-competitive agreements at all, in contravention of the reservation in C3. However, I would reject that argument, too, and for the following reasons.

[32] Firstly, it has been repeatedly held that a contracting party who has made a "bad bargain" will not be saved by Article 101 TFEU (or its forerunners). That is because Article 101 has to do with agreements which have the object or the effect of prevention, restriction or distortion of competition; it is not aimed at contractual terms which turn out to be adverse to the interests of either party (*Chemidus Wavin Ltd* v *Société pour la Transformation et l'Exploitation des Resines Industrielles SA* [1977] FSR 181, pp187-8). In the lead case in the Inntrepreneur litigation, the trial judge distinguished between unfair terms ("oppressively impos[ed] onerous terms"), on the one hand, and in relation to which the claimant, Mr Crehan, "may or may not have had other routes to legal redress available to him", and the question whether or not beer ties in Inntrepreneur leases were in breach of [the prohibition against anti-competitive agreements]" (*Crehan* v *Inntrepreneur Pub Co (CPC), Brewman Group Ltd* 2004 ECC 8, at para 143). I would infer from these cases that the new route to legal redress introduced by the Scottish Parliament, based on fairness in the contractual relationship between landlord and tied-pub tenant, is distinct from whatever remedies might be available to either party under competition law.

[33] Secondly, this is because the areas covered by C3 – the regulation of anti-competitive practices and agreements, abuse of a dominant position, and monopolies and mergers - are all directed at market failure and designed to ensure that competition is *free* in the interests primarily of consumers (see Richard Whish and David Bailey, *Competition Law*, 10th ed,

pp18-22; Simon Whittaker, "Unfair Terms in Commercial Contracts and the Two Laws of Competition", *Oxford Journal of Legal Studies*, 39(2), 2019, pp404-434). As such, the reservation does not necessarily include regulation designed to ensure contractual *fairness* in the interests primarily of traders.

[34] Thirdly, in this connection, it is worth noting that, although fairness is also a consideration in determining whether an anti-competitive agreement should be exempt in terms of Article 101(3) TFEU and its domestic analogue in the Competition Act 1998, in order to qualify for exemption, the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Such a consumer-oriented concern with fairness, however important from a competition law perspective, does not necessarily exhaust the regulator's concern with fairness.

[35] Fourthly, the focus in competition law specifically on consumers has implications for what is to be regarded as the relevant market in any particular case. For example, the distribution of beer in premises such as pubs and hotels has been held to be a distinct market from retail distribution, and both on-license and off-license channels of distribution to consumers must be kept accessible to market entrants (*Delimitis, op cit,* paras 17 and 27). However, Mr O'Neill's complaint was that TIPSA sought to impose conditions which ensured a "fairer competition for tied pub tenants within the marketplace for the on-sale consumption of beer" ("speaking note", para 3.35). This is to mistake the relevant market for the purposes of Article 101, which is not competition between tied pubs and free houses, but competition between, on the one hand, aspiring entrants into the market for distribution of beer to on-trade premises, and, on the other, incumbents already established in that market (*Crehan, op cit,* para 144).

[36] Fifthly, it is not the purpose of TIPSA to prohibit tied-pub leases, and neither the MRO offer requirement nor the guest beer offer requirement prohibits product or service ties. In this respect TIPSA is quite unlike the competition law prohibition of anti-competitive agreements under Article 101 TFEU and its domestic analogue. The prohibition of anti-competitive agreements means that, unless exemption can be secured, they are unenforceable, consistent with the primary focus of the competition legislation being the protection of third parties, specifically, consumers. Contrast the MRO offer requirement and the guest beer offer requirement, which leaves it to the tied-pub tenant to decide whether or not to opt out of the product and service ties. This is consistent with the primary focus of TIPSA being the protection of tied-pub tenants. Whether or not consumers are harmed by the tied-pub tenant's decision to request or not to request either an MRO offer or a guest beer offer is not something on which TIPSA has anything to say. Indeed, it is striking that there is no reference to consumers anywhere in the legislation.

[37] Sixthly, the express purpose of TIPSA is to govern the fairness of the relationship between landlords and tied-pub tenants. The first of the three regulatory principles is the principle of "fair and lawful dealing" by landlords in relation to their tied-pub tenants, and the third regulatory principle is that any tied-pub agreement should fairly share the risks and rewards between or amongst the parties. On the one hand, the petitioners appeared to accept that the purpose of the legislation was a "re-weighting of the balance of power in contracts between tied pub tenants and their landlords in favour of the tenants" ("speaking note", para 3.18). They referred to the Policy Memorandum which stated (at para 3) that the purpose of the Bill was "to improve the position of tied-pub tenants". They also referred to TIPSA, section 7, which would make a term of any agreement unenforceable by the landlord, if the code provides that the landlord is prohibited from enforcing a term of that

kind. This, they say, "makes plain" that the legislative intention is "to interfere in parties' freedom of contract". However, interference in parties' freedom of contract is part and parcel of any unfair contract terms legislation. It doesn't follow that such interference amounts to the regulation of competition.

[38] Seventhly, developing their argument, the petitioners complained that, although TIPSA may claim to regulate tied-pub leases "in the name" of fairness, the purpose of the legislation as a whole - what it is "really about", as it was put in *Imperial Tobacco*a (para 43) - is to change "the existing conditions of competition under which tied pub leases are currently negotiated, concluded and entered into in Scotland" ("speaking note", para 3.27). However, the focus of the complaint seems to have shifted here from changing the balance of contractual power to changing the conditions of competition. Indeed, what is most striking about the interpretation of C3 being contended for by the petitioners is its sheer breadth. At least in the field of commercial contracts, generally, the examples of unfair contract terms legislation must be few in number, in which there is not at least some potential for them to alter to some extent the "conditions of competition". I cannot think that C3 was intended to have such a broad scope. In my opinion, the petitioners have confused legislation whose purpose is to regulate competition with legislation which may have an impact on competition.

[39] This is not to suggest that TIPSA or the code may not have some impact on competition or the market for the supply of beer. However, in my opinion, these effects are incidental to its purpose, which is to regulate contractual fairness between landlord and tied-pub tenant. As such, and for the reasons already given, TIPSA does not fall within the reservation in C3, and is not, at least not on the basis of that reservation, outside the legislative competence of the Scottish Parliament.

[40] I have arrived at this view without taking into account the terms of any legislation other than TIPSA. I wish to make this clear since reference was made at various points in the substantive hearing, and in the productions, to the 2015 Act, including the fair and lawful dealing principle which it also includes. Counsel would not be drawn on whether that legislation raised any competition law issues, notwithstanding that its stated purpose was also to regulate fairness between landlord and tied-pub tenant (cf the view of the former Department for Business Innovation and Skills that it did not: consultation document, 22 April 2013, at paras 3.9, 3.10). For the avoidance of doubt, the advice notes of the Pubs Code Adjudicator ("PCA") make it clear that the PCA has no jurisdiction over competition law matters, including whether the terms of any tied-pub lease are anti-competitive (eg PCA Advice Note, "Stocking Requirements", March 2017). Similar principles have been introduced to other sectors of the economy. For example, the Groceries Supply Code of Practice, on which the 2015 Act was modelled, imposes on listed grocery retailers a general requirement of "fair and lawful dealing" with their suppliers. However, it is expressly provided that compliance with that principle does not exclude the retailer from, or restrict the application of, the Competition Act 1998 (The Groceries (Supply Chain Practices) Market Investigation Order 2009, art 2(2)). This is not to suggest that fair dealing requirements may not give rise to disputes similar to the issue in the present case. The inclusion in a UK statute of a "fair contractual dealing" requirement provoked controversy over whether C3 was engaged, and the matter reserved, or whether it was devolved, requiring, by convention, the legislative consent of the Scottish Parliament (Agriculture Act 2020, s29: see the Scottish Government's "Legislative Consent Memorandum", May 2020, para 12, reflecting on what was then clause 27 of the relevant Bill).

The Convention rights argument

[41] A provision of an Act of the Scottish Parliament which is incompatible with Convention rights is outside legislative competence and is not law (SA, s29(2)). The Convention rights include the right to respect for property as set out in A1P1:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

Any interference with A1P1 rights must be proportionate. Proportionality of interference with Convention rights is assessed in four stages: (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (2) whether the measure is rationally connected to the objective; (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (*Bank Mellat* v *HM Treasury* [2014] AC 700 at paras 20, 68-76, and 166). The intensity of review, that is, the degree of weight or respect to be given to the primary decision-maker, may vary according to the nature of the right at stake and the context in which the interference occurs (*Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016, Lord Mance, para 44; *Bank Mellat* v *HM Treasury (No 2)* [2014] AC 700, *per* Lord Reed, at paras 69-71).

[42] The respondent's fundamental argument was that, insofar as TIPSA or any of its provisions could be said to interfere with any of the landlords' A1P1 rights, it would be

premature, at least until such time as the code was established, to carry out a proportionality assessment. The petitioners' response was that the code's "DNA" was already set out in the legislation. TIPSA required the code to contain certain provisions, so there was no need to wait for the code to be drawn up before carrying out the proportionality assessment.

[43] I agree with the respondent. Firstly, while the focus of the complaint was on both the MRO offer requirement and the guest beer offer requirement, the remedies which the petitioners seek are directed at the legislation in its entirety. However, there are many provisions in the Act, such as the requirement that there should be a code, or the establishment of the office of adjudicator, where any interference that there may be with the petitioners' A1P1 rights is far from obvious. And yet no attempt was made before or during the substantive hearing to restrict the orders sought. Unless the Act as a whole can be shown to be incapable of being operated in a manner which is compatible with Convention rights, the petitioners' challenge must fail (*R (Bibi)* v *Secretary of State for the Home Department* [2015] 1 WLR 5055, paras 2, 60, and 69; *Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29, para 88).

[44] In any event, and focussing now specifically on the MRO offer requirement and the guest beer offer requirement, TIPSA left it to the drafters of the code to determine the precise circumstances in which each such offer may be required to be made by the landlord. So, for example, it is simply not the case that TIPSA requires the code to give the tied-pub tenant an "automatic" right to exercise the MRO option "whenever they choose" (as asserted in para 18 of the petition). Rather, it provides that the code may specify the circumstances in which a landlord need *not* make such an offer (Sch 1, para 5(3)(b)). The petitioners contrasted the "automatic" right under TIPSA with the 2015 Act, which included "certain conditions and trigger points that need to be met before the [MRO] option can be requested"

(petition, para 18). However, the "trigger events" referred to included anything that might correspond to a description specified in the Pubs Code for England and Wales (2015 Act, s43(6)(d) and 9)(d)). Therefore, the 2015 Act and TIPSA provided the drafters of the respective codes for the two jurisdictions with equal and opposite powers to define the circumstances in which a MRO offer may or may not require to be made.

[45] All that TIPSA says about the circumstances in which a MRO must be offered is that they may include the situation where an agreement to invest in a tied pub has been entered into, the clear intention being that the availability of the MRO option should not undermine investment by landlords in the tied-pub sector. While I acknowledge, therefore, the petitioners' complaint that the legislation had caused "investment blight" in the tied-pub sector, this too seemed to me a matter that could not properly be assessed until the code was introduced. (In any event, I should note that the case based on investment blight was not vouched by undisputed evidence at the substantive hearing.)

[46] Similarly, it is simply not the case that a MRO lease is one in which "the rent is set at the market rate for the property" (as asserted at para 19 of the petition). A MRO lease sets the rent at an amount to be agreed between the landlord and tenant in accordance with a procedure to be described in the code, and only if no such agreement can be reached, will it be the market rent (as that term is defined in the Act).

[47] Nor is it quite right to say (as does the petition, at para 19) that, under TIPSA, landlords would no longer be able to offer a lower dry rent, by offsetting that with wet rent provisions such as a product tie "restricting" the type of beers stocked. A mere stocking requirement, so long as it restricts, without penalising or preventing, the sale of beer or cider produced by brewers other than the landlord will not in itself make the pub a tied pub at all.

In other words, the petitioners' complaint seems to have been based, at least in part, on a misconception as to what TIPSA actually requires.

[48] So far as the guest beer offer requirement is concerned, as noted, TIPSA provides that the code may specify criteria for what counts as a guest beer agreement, and it must specify the circumstances in which a guest beer offer is required to be made. Although TIPSA applies to former tied-pub tenants, they will clearly not be able to take advantage of the MRO offer requirement or the guest beer offer requirement, so the advantages of the code from their point of view must presumably lie in provisions of the code that are yet to be determined. Similarly, the consequences of the fact that TIPSA applies to all landlords (hardly unusual in unfair contracts legislation, as distinct perhaps from competition law), cannot be assessed until the code has been drawn up.

[49] In short, properly analysed, TIPSA leaves it to the drafters of the code to set out the circumstances in which its key provisions will come into play. Until that is done, and subject to one possible exception to be discussed presently, it is impossible to carry out any proportionality assessment, or specifically to conclude, as the petitioners contend, that TIPSA will effectively regulate the tied pub option "out of existence" (petition, para 23).

[50] The exception is this. The petitioners argued that TIPSA was not aimed at any legitimate objective. This argument too is vulnerable to the prematurity objection, since the legitimacy of the objective must be measured at least in part by the extent of the interference. However, if it could be suggested that the respondent had failed to identify *any* sufficiently important objective that would justify *any* interference with landlords' A1P1 rights, then it might conceivably be argued that the legislation would fail the proportionality test at the first hurdle. In order to determine that matter, it is necessary to consider what information was before the Scottish Parliament when it approved the Bill.

[51] The Policy Memorandum identified the objectives of the Bill as improving the position of tied-pub tenants and redressing the balance of power between tied-pub tenants and their landlords (paras 3 and 60). The Bill aimed to provide Scottish tied-pub tenants with at least the same protection as had been provided by the 2015 Act to their counterparts in England and Wales. Research commissioned by the Scottish Government following the implementation of the 2015 Act had not identified a clear need for legislation, with the Scottish Government suggesting that it may have been difficult to persuade tenants and others to engage with the research. The lead committee commissioned its own research. A majority of the 98 tied-pub tenants who responded supported the Bill (see the lead committee's Stage 1 Report, para 17). The lead committee recognised that views on the Bill were "polarised" (*ibid*, para 22), and endeavoured to set out the competing arguments. It identified the limitations in the scope of the UK legislation, including the fact that it applied only to landlords owning 500 tied pubs or more. It explained that landlords held different views in relation to the scope of the Bill, with some consultees, including the largest pub-owning business in Scotland believing that, if legislation were to be introduced at all, it should apply to all landlords regardless of size (*ibid*, para 63). It identified weaknesses in the voluntary Code, including the fact that only 6 of the 10 pub-owning businesses in Scotland had signed up to it (*ibid*, paras 67-77). In addition, the Policy Memorandum included reference to the results of a consultation exercise that had been carried out in 2017 by the Bill's promoter, Neil Bibby MSP, in relation to a draft legislative proposal closely modelled on the 2015 Act. 275 responses had been received, the large majority of which was supportive of the draft proposal.

[52] Against that background, the petitioners' reliance on the Salsas report was misconceived. It is no criticism of Dr Salsas that he approached the question from the

perspective of an economist, and concluded that, in the absence of any evidence of market failure, the legislation had no legitimate objective. However, this is simply to ignore the Bill's stated objective to promote fairness in the contractual relationship between landlord and tied-pub tenant. Although the lead committee were not agreed on the need for legislation, it was entitled to place the Bill before the Scottish Parliament, identifying its objectives and setting out the arguments for and against the proposal. Ultimately, the Scottish Parliament decided to approve the Bill, by a vote of 197 votes to nil, with four abstentions. Applying whatever intensity of review it may be appropriate to adopt when carrying out the proportionality test, I am entirely persuaded that the stated objectives of the legislation were sufficiently important to justify the extent to which it can properly be said at this stage that TIPSA interferes with the petitioners' A1P1 rights. Accordingly, I reject this part of the petitioners' case.

[53] Although the petition contained averments that TIPSA also interfered with the petitioners' fundamental constitutional rights to respect for property at common law, this formed no part of the discussion at the hearing, and specifically, it was not suggested that the argument added anything of substance to the argument based on the petitioner's Convention rights. Accordingly, insofar as it is necessary to do so – and I note in passing that the argument was not the subject of any specific plea-in-law in the petition - I reject it too.

Disposal

[54] I shall sustain the third and fourth pleas-in-law for the respondent and refuse the petition. I shall reserve all question of expenses.