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**Illegalities and Potential illegalities - Scottish Short-Term Let (STL) Legislation**

**Background**

As the clock ticks down to 1 October 2023, the Scottish Government has made it plain that it intends to go ahead with no amendments and no delays. The ASSC and wider tourism industry remains alarmed by the extent of known unlawfulness and potential unlawfulness with the Scottish STL Licensing scheme.

Laws we believe are being contravened/breached include:-

* Common Law
* Provision of Services Act 2009
* Human Rights Act Article 1 Protocol 1
* The Town and Country Planning (Scotland) Act 1997
* Internal Market Act 2020
* Competition Law

**Red Flags and Solution July 2023 - rejected**

On 11th July 2023, the Scottish Government asked us to highlight **specific details** which are causing challenges for the sector. We outlined 14 red flags[[1]](#footnote-1) which, if addressed, would achieve the Scottish Government’s aim of delivering licensing, and reset relations with the sector whilst supporting rather than damaging tourism. We provided robust solutions to resolve the deficiencies associated with the scheme. All 14 red flags, and solutions, were rejected on 21st July 2023.

**Judicial Reviews**

**Following a Judicial Review in May 2023, Lord Braid found City of Edinburgh Council’s licensing policy to be unlawful at common law and in breach of The Provision of Services Regulations 2009.** This decision has identified material deficiencies in many other Local Authorities with policies which are also **irrational, oppressive and represent unnecessary duplication**. The ASSC has instructed further legal action on this basis as it is not clear that following Lord Braid’s judgement, other Local Authorities are amending their respective policies.

**A** **judicial review of City of Edinburgh Council’s planning policy** has now also been instructed on the basis that long-standing legitimate businesses are being forced to apply for, but not achieving, planning permission and livelihoods are being taken away from lawful operators.

**Operators Leaving the Sector**

**In the most recent ASSC survey 61% of 1225 respondents are contemplating leaving the sector.** Of those, 36% are actively considering leaving, while 25% remain undecided[[2]](#footnote-2).

Burdens associated with short-term let licensing include:

* Filling in complex, detailed forms (running to 42 pages). Some licensing authorities only accept online applications, with no save option, discriminating against those with limited internet access and the elderly
* Non-refundable licence application fees of up to £5962 for a one-year licence, with no presumption to grant licenses.
* Having to provide complicated scale floor plans to assist with maximum occupancy where this is not a legislative requirement. These are immensely difficult to procure in remote rural locations. (one member had to pay £2,300 for a floor plan)
* Waiting up to 12 months for an application to be considered by the licensing authority.
* New operators having to wait for a licence to be granted prior to be able to trade

which can take up to 9 months. This means that they cannot finance their investment as lenders in this sector will not lend with no license granted. This was raised in the Red Flags document.

* The uncertainty around the ability to gain a license has meant that securing lending has effectively stopped in Scotland[[3]](#footnote-3), discriminating against business here compared to the rest of the UK. This was raised in the Red Flags document.
* It is now impossible to sell a short term let property as a going concern because the licence is not transferable and therefore the going concern aspect stops when the seller stops trading. This is because provisional licenses are not available to resolve this business dilemma. It also precludes borrowing as lenders require a licence in place before they will grant a mortgage. This was raised in the Red Flags document.

Significant business closures will have large scale consequences, aside from loss of livelihoods. This puts Scotland at a disadvantage compared to its’ UK neighbours.

These include:

* increasing prices of accommodation, by reducing competition and increasing base costs, at a time of financial pressure on households
* reduced availability/choice for staycations for Scots and UK residents as well as international visitors
* discouraging investment due to the inability to secure finance
* harming local tourism reliant businesses and services (housekeepers, trades people, activity providers, visitor attractions, hospitality etc)
* impact on health and well-being of impacted people, loss of livlihoods, inability to fund retirement, inability to sell your business
* stifling entrepreneurship
* reduction in the ability to travel sustainably within your own country
* reputational damage as a welcoming country, giving competitor advantage to the rest of the UK

**UK Government Consultation into the Regulation of Short-Term Lets**

The UK Government is consulting on a ‘light touch registration scheme’[[4]](#footnote-4) for England. It is notable that *“Given the government’s priority is to deliver a proportionate regulatory response, the focus of the registration scheme in England will be on short-term lets only, and not other types of guest accommodation such as hotels, B&Bs and professional providers of self-catering accommodation. [This would] ensure that all providers of short-term lets can be obligated to provide safe, quality assured accommodation, as other providers of guest accommodation must currently do through existing regulation and quality assurance schemes.”* The government in Wales is taking a similar approach, albeit they are calling it ‘licensing’. It will be a **notification scheme rather than an authorisation scheme** in direct contrast to Scotland. This is a proportionate, justifiable, non-discriminatory and rational approach.

In Comparison, Scotland’s approach is disproportionate, unjustified, and discriminatory. It contravenes the Provision of Services Regulations 2009, and we contend Article 1, Protocol 1 of the Human Rights Act: Protection of Property. We believe it puts businesses in Scotland at a disadvantage under the Internal Market Act 2020.

**Internal Market Act 2020**

The Internal Market Act 2020[[5]](#footnote-5) is a piece of UK legislation designed to ensure that trade within the United Kingdom functions smoothly after leaving the European Union. The act aims to prevent new trade barriers from being created between different parts of the UK and to uphold the principles of the UK internal market, promoting competition and economic growth.

The act establishes the **"Principle of Mutual Recognition",** which means that goods and services lawfully sold in one part of the UK should be able to be sold in other parts of the UK without facing additional barriers or requirements. From 1/10/23 Scotland will be at a competitive disadvantage. Businesses (both independent and national / international) that operate across the UK, will face a disadvantage in Scotland from 1/10/23. Home owners that seek to supplement their income to meet mortgage increases by renting out their own home / a room are similarly disadvantaged north of the border.

Short-term let licensing potentially contravenes the Internal Market Act 2020 if specific licensing requirements create unjustified barriers to entry or operation within the UK internal market:

1. **Discriminatory Treatment:** If registration and licensing requirements differ significantly between different parts of the UK and impose more stringent conditions on goods or services originating from one part of the UK compared to another, it could lead to discrimination against businesses or individuals from certain regions. This discriminatory treatment would be contrary to the Principle of Mutual Recognition enshrined in the Internal Market Act, which aims to prevent such barriers to trade within the UK.
2. **Burden of Compliance:** If the licensing requirements imposed by one part of the UK are disproportionately burdensome or complex compared to other parts, it could discourage businesses or individuals from operating short-term lets in that specific region, leading to potential market distortions and non-compliance with the Principle of Mutual Recognition. This burden may also discourage businesses from expanding their operations across the internal market, thus hindering competition and the free movement of goods and services.
3. **Substantial Divergence in Licensing Rules:** If different parts of the UK introduce significantly different licensing rules and regulations for short-term lets, it may lead to confusion and administrative burdens for businesses trying to operate across different regions. This fragmentation could undermine the smooth functioning of the internal market.
4. **Divergent Standards:** If registration and licensing rules vary significantly between regions and lead to substantially different product or service standards, it could create confusion for consumers and hinder the ability of businesses to operate efficiently across the UK. The Internal Market Act seeks to ensure a level playing field and uniform standards within the internal market.
5. **Market Access Restrictions:** If the licensing requirements are so restrictive or costly that they effectively prevent short-term let providers from other parts of the UK from accessing certain regional markets, it would violate the Principle of Mutual Recognition and restrict fair competition.

We note that registration and licensing requirements are not automatically in violation of the Internal Market Act, however, under the circumstances, we believe that **the Scottish licensing scheme is indeed in contravention of this UK law**. The act acknowledges that there may be legitimate reasons for different regulations in different parts of the UK, as long as they are proportionate and not discriminatory. We fail to see how Scotland’s operators or indeed guests demand a more restrictive regulatory regime. We believe that Scottish short-term let regulations creates unjustified barriers to trade and undermines the functioning of the UK internal market. We therefore believe that they may be subject to legal challenge under the act.

**Competition Law**

Competition laws are designed to promote fair competition, prevent market distortions, and protect consumers. If a local authority enacts policies or regulations that explicitly favour hotels or serviced apartments over short-term lets, it could be viewed as discriminatory and anti-competitive, and potentially lead to legal challenge. This is evidently happening in Edinburgh where almost every planning permission application is being rejected for a secondary let, but serviced accommodation and hotel planning permissions are repeatedly successful.

**Additional Illegalities**

We have written to the Scottish Government highlighting other potential illegalities across Scotland’s licensing policies in light of the judicial review[[6]](#footnote-6).

We continue to question whether the Order is compliant with the European Convention on Human Rights (“ECHR”), although the judicial review found inconclusive evidence of this, mostly due to the timing of the JR being in advance of 1/10/23. We have repeatedly flagged this potential **Human Rights violation (protocol 1, article 1 and article 17 of the charter on fundamental rights – right to property).** The lack of data to support the Order further underlines it ought to be regarded as irrational and arbitrary, such as in the case of R (Kensall) v Secretary of State for Environment [2003] EWHC Admin 459, where measures were found to be in convention of ECHR rights. The short time duration of licenses, being three years, means that interference with peaceful enjoyment is extremely frequent and imposes an excessive burden, as in Sporrong and Lönnroth v Sweden [1983] 5 EHRR 35 where measures were found to be in contravention of the right to peaceful enjoyment of property. Article 17 of the Charter provides that everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions, and the use of property may be regulated by law only in so far as is necessary for the general interest.  For the reasons outlined above, we do not consider that objectively, a case has been made, backed up by evidence that the Order is either in the general interest or is only interfering in use of property so far as necessary.

We maintain that the Order creates a regulatory framework that is manifestly inconsistent with the Scottish Government’s **Better Regulation Agenda** and the principles of regulation being proportionate; consistent; accountable; transparent and targeted only where needed.

It is also inconsistent with the **Regulator’s Strategic Code of Practice:** **Clause 2,** and **Clause 3 of the Code**which requires Regulators to be enablers to help support businesses to grow sustainably.  The Order has been evidenced to fail to meet this objective as it very clearly stifles rather than supports small businesses in this sector.

**Conclusion**

**The Association of Scotland’s Self-Caterers has repeatedly advised on legally robust policy approaches which would fully meet the policy intentions of licensing but without the damaging consequences**. We have provided clear evidence that our proposals are **not** less robust than licensing, nor does our solution require primary legislation[[7]](#footnote-7). As an industry, we are not against regulation, but we are against poor legislation that is **unlawful, not fit for purpose, unjustified, disproportionate and discriminatory**.[[8]](#footnote-8)

A revised regulatory framework, such as we have proposed, can and must work for everyone: businesses, local and national government, and local communities. **This approach is supported by the tourism industry across the UK.**

1. <https://www.assc.co.uk/industry-news/short-term-let-licensing-red-flags-and-solutions-11th-july-2023> [↑](#footnote-ref-1)
2. <https://www.assc.co.uk/news-items/snap-survey-assessing-the-impact-of-short-term-let-licensing-in-the-self-catering-sector-2> [↑](#footnote-ref-2)
3. https://www.assc.co.uk/representation/short-term-let-licensing-creates-immediate-barrier-to-investment [↑](#footnote-ref-3)
4. [UK Government Consultation](https://www.gov.uk/government/consultations/consultation-on-a-registration-scheme-for-short-term-lets-in-england/consultation-on-a-registration-scheme-for-short-term-lets-in-england#:~:text=Consultation%20on%20a%20new%20use%20class%20for%20short%2Dterm%20lets&text=The%20consultation%20seeks%20views%20on,lets%20and%20support%20sustainable%20communities.) [↑](#footnote-ref-4)
5. https://www.legislation.gov.uk/ukpga/2020/27/contents/enacted [↑](#footnote-ref-5)
6. <https://www.assc.co.uk/representation/local-authority-short-term-let-licensing-policies-illegalities> [↑](#footnote-ref-6)
7. <https://www.assc.co.uk/legislation/reasons-for-not-utilising-the-anti-social-behaviour-etc-scotland-act-2004-the-2004-act-to-regulate-the-short-term-let-sector> [↑](#footnote-ref-7)
8. As the trade body representing the self-catering sector, we called for registration with mandatory health and safety conditions in October 2017. [↑](#footnote-ref-8)