

RESPONSES TO BIS CONSULTATION

QUESTIONS

<p><u>Question 1</u></p> <p>Should there be a statutory Code?</p>	<p>Yes, this is vital.</p>
<p><u>Question 2</u></p> <p>Do you agree that the Code should be binding on all companies that own more than 500 pubs? If you think this is not the correct threshold, please suggest an alternative, with any supporting evidence.</p>	<p>Given that the statutory Code will essentially simply enshrine fair and lawful dealing etc., we are not sure why it should not apply to all landlords. We hope that those below any <i>de minimis</i> requirement will be required to abide by Codes of Practice enshrining the same principles.</p> <p>If a <i>de minimis</i> requirement is to operate we think it should be supplemented/bolstered by an additional provision e.g. a turnover provision similar to that utilised in relation to Article 85 of the EC Treaty. Otherwise, it would be far too easy for the Pubcos etc. to avoid regulation by selling or transferring their pubs into managed houses.</p>
<p><u>Question 3</u></p> <p>Do you agree that, for companies on which the Code is binding, all of that company's non-managed pubs should be covered by the Code?</p>	<p>Yes.</p>
<p><u>Question 4</u></p> <p>How do you consider that franchises should be treated under the Code?</p>	<p>Whatever the agreement, we believe it should still be fair, reasonable and comply with all legal requirements and that any relevant provisions should be applied. Otherwise there will be potential loop holes which can be exploited in order to circumvent the intended operation of regulation.</p>
<p><u>Question 5</u></p> <p>What is your assessment of the likely costs and benefits of these proposals on pubs and the pubs sector? Please include</p>	<p>Please see relevant analysis set out in the attached submission.</p>

supporting evidence.	
<p><u>Question 6</u></p> <p>What are your views on the future of self-regulation within the industry?</p>	<p>Self-regulation has been tried, tested and found seriously wanting. It appears entirely unrealistic to expect the Pubcos to regulate themselves. The change in ethos, culture and behaviour which would be required for this to be effective, is clearly more radical than they can reasonably be expected to manage.</p> <p>Statutory regulation is essential in order to curb the abuses and systemic issues outlined in the Impact Assessment. The pub sector plays a vital part in the UK economy and both it, and the tied tenants operating within it, need and deserve the protection that statutory regulation if properly implemented could afford.</p>
<p><u>Question 7</u></p> <p>Do you agree that the Code should be based on the following two core and overarching principles?</p> <p>(i) <i>Principle of Fair and Lawful Dealing</i></p> <p>(ii) <i>Principle that the Tied Tenant Should be No Worse Off than the Free-of-tie Tenant</i></p>	<p>Yes, provided that fair dealing also includes transparency and openness on the part of the Pubcos.</p>
<p><u>Question 8</u></p> <p>Do you agree that the Government should include the following provisions in the Statutory Code?</p> <p>i. <i>Provide the tenant the right to request an open market rent review if they have not had one in five years, if the pub company significantly increases drink prices or if an event occurs outside the tenant's control.</i></p> <p>ii. <i>Increase transparency, in particular by requiring the</i></p>	<p>Re (i) - Yes.</p> <p>Though, this provision should also be made available in other circumstances too e.g. in the first 5 years of a tenancy if it is discovered that an artificially high rent was imposed from the outset, or where a tenant discovers excessive levels of profit are being drawn off the business under the combination of 'wet' and 'dry' rent.</p> <p>Re (ii) – Yes.</p> <p>Though, in order for this to be effective, provision ensuring that these assessments are accurate and fair would need to be included, with sanctions being imposed</p>

<p><i>pub company to produce parallel 'tied' and 'free-of-tie' rent assessments so that a tenant can ensure that they are no worse off.</i></p> <p>iii. <i>Abolish the gaming machine tie and mandate that no products other than drinks may be tied.</i></p> <p>iv. <i>Provide a 'guest beer' option in all tied pubs.</i></p> <p>v. <i>Provide that flow monitoring equipment may not be used to determine whether a tenant is complying with purchasing obligations, or as evidence in enforcing such obligations.</i></p>	<p>where this was found out not to be the case.</p> <p>Re (iii) - Yes.</p> <p>Re (iv) - Yes.</p> <p>Re (v) – Yes. There are apparently problems with the accuracy of flow monitoring equipment which need to be investigated and resolved. Until they are resolved, there are doubts about the accuracy of such evidence.</p> <p>There are also wastage issues with flow monitoring, which need to be investigated and resolved, so that the tenant isn't penalised or underfilling as a result of them being fitted.</p>
<p><u>Question 9</u></p> <p>Are there any areas where you consider the draft Statutory Code (at Annex A) should be altered?</p>	<p>Please see discussions in attached submission.* We have made a number of additional suggestions.</p> <p>* [WITHHELD]</p>
<p><u>Question 10</u></p> <p>Do you agree that the Statutory Code should be periodically reviewed and, if appropriate amended, if there was evidence that showed that such amendments would deliver more effectively the three overarching principles?</p>	<p>Absolutely.</p>
<p><u>Question 11</u></p> <p>Should the Government include a mandatory free-of-tie option in the Statutory Code?</p>	<p>Yes. In our opinion, without that option being in place, it is infinitely less likely that the proposed changes will be fully effective and result in the changes hoped for.</p> <p>However, because it appears that the introduction of this option would be likely to operate in a way which really did safeguard the proposed principle that "the tied tenant should be no worse off than the free-of-tie tenant", it is presumably equally likely that the Pubcos will be lobbying against it tooth</p>

	<p>and nail.</p> <p>We suspect that they will bring all the economic might and political and corporate clout they have to bear in order to exert pressure on the Government and opposition. Including perhaps, warnings of wholesale disposal of their pubs, financial collapse (with the implications that might have for the economy and banks who they are presumably indebted to), and indications that they will find way to change their taxation structure and restrict the monies they currently supply to the Treasury.</p> <p>We wonder if Chancellor George Osborne's recent involvement in the regulatory reform debate isn't in some way related to such issues being raised behind closed doors.</p>
<p><u>Question 12</u></p> <p>Other than (a) a mandatory free-of-tie option or (b) mandating that higher beer prices must be compensated for by lower rents, do you have any other suggestions as to how the Government could ensure that tied tenants were no worse off than free-of-tie tenants?</p>	<p>Relevant points are made in the attached submission. <i>[WITHHELD]</i></p> <p>For example, it would be possible to stipulate an appropriate division of all the available profits generated by a tied pub. Or to specify the rent levels according to a maximum level of turnover.</p> <p>It would equally be possible to offer the free-of-tie option to tenants where it was shown that a Pubco was breaching its regulatory obligations to them and, for example, taking excessive profits from their pub.</p> <p>We believe that offering the FOT option in such circumstances would mean that it acted both as a carrot and stick in terms of regulatory reform. It might well operate as a factor which encouraged Pubcos to ensure that their operation of the tied model stayed within reasonable regulatory parameters because, where that wasn't the case, they would be compelled to institute a different and fairer model.</p> <p>Using the FOT option in this way would also have the advantage of potentially giving tied tenants a remedy for regulatory breaches that would not require them to effectively regulate Pubco's regulatory behaviour via third party determination etc.</p> <p>The problem with third party determination,</p>

	<p>as BIS is aware, is that tenants rarely have the time and resources needed to effectively access it. Historically, those that do have tended to lose their pubs and frequently been bankrupted in the process, even when they have won.</p> <p>One has to question whether a theoretical remedy which has such commercially catastrophic results can really be considered to be any remedy at all.</p>
<p><u>Question 13</u></p> <p>Should the Government appoint an independent Adjudicator to enforce the new Statutory Code?</p>	<p>Definitely, and it is imperative that the Adjudicator is truly independent and both fair and seen to be fair.</p>
<p><u>Question 14</u></p> <p>Do you agree that the Adjudicator should be able to:</p> <ul style="list-style-type: none"> <i>i. Arbitrate individual disputes?</i> <i>ii. Carry out investigations into widespread breaches of the Code?</i> 	<p>Yes.</p> <p>We also believe that the Adjudicator should also be able to carry out spot checks and investigate individual breaches of the Code.</p> <p>We also believe that it is important that there is a mechanism to review and correct any aspects of the regulatory system that are not working sufficiently well for the promised regulatory reform to be effectively delivered.</p> <p>It is important that the system put in place functions effectively and is flexible enough to address any vital shortfall or problems with what has been put in place: the efficacy of the proposed reforms of the pub sector will largely hang on this.</p> <p>As recent experience indicates, changing the current culture and behavioural approach of the Pubcos, is not something which it is likely to be easy to accomplish. The Adjudicator will need the tools, power and surrounding mechanisms necessary to do this.</p> <p>Failure to provide these would, at best, result in the same process of regulatory reform having to be done in future years. At worst, the majority of tied tenants would simply have gone to the wall taking a large of chunk of the pub sector, the communities they serve and a British institution and part of our cultural and social heritage with them.</p>

<p><u>Question 15</u></p> <p>Do you agree that the Adjudicator should be able to impose a range of sanctions on pub companies that have breached the Code, including:</p> <p><i>I. Recommendations?</i></p> <p><i>II. Requirements to publish information ('name and shame')</i></p> <p><i>III. Financial penalties?</i></p>	<p><u>Re (i) - Yes</u></p> <p><u>Re (ii) - Yes</u></p> <p><u>Re (iii) – Yes</u>, and other penalties and sanctions. Including the payment of compensation to tenants.</p> <p>All these powers are vital if the new system of regulation is to have "teeth" and any chance of being effective. What's more, these powers must be able to be exercised swiftly and effectively when necessary.</p>
<p><u>Question 16</u></p> <p>Do you consider the Government's proposals for reporting and review of the Adjudicator are satisfactory?</p>	<p>One of the failings of the Beer Orders was that there was no relatively easy method of review and amendment. That has hopefully been addressed by the review's proposals.</p>
<p><u>Question 17</u></p> <p>Do you agree that the Adjudicator should be funded by an industry levy, with companies who breach the Code more paying a proportionately greater share of the levy? What, in your view, would be the impact of the levy on pub companies, pub tenants, consumers and the overall industry?</p>	<p>In an ideal world, it would be better for the Adjudicator to be independently funded. Rightly or wrongly, it is widely believed that the Pubcos have historically used their economic power to obtain favour and influence and shape matters to their benefit and tied tenant's detriment. As a result, it is considered that it can be difficult to find individuals within the sector who are not in the Pubco's pay, debt or obligation to some extent and who are thereby capable of exercising independent and purely objective judgement.</p> <p>It is important, given what has gone before, that things going forward are clearly being run on a very different basis and that, for example, Pubcos funding of any scheme does not give them influence over it. It is important not only to be fair, in this context, but also be seen to be being fair. Given that, it does seem a rather strange thing to have poachers paying for a gamekeeper.</p> <p>However, in the current climate etc. it may be difficult to establish an adjudication system on any other basis. Which means that there should just be adequate safeguards to preserve the independence of all of those operating in a regulatory capacity or involved in work which has regulatory bearing (e.g. valuers).</p>

	<p>We believe that fines imposed under the new system should also go into funding and that these sanctions should be separate from having to offer tenants who have suffered compensation for costs and losses.</p>
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