

Pub companies and tenants - A government consultation

Response form

The consultation will begin on 22/04/2013 and will run for 8 weeks, closing on 14/06/2013

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.

This response form can be returned to:

Pubs Consultation
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
Westminster
SW1H 0ET

Email: pubs.consultation@bis.gsi.gov.uk

Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.
Representative Organisation
Trade Union
Interest Group
Small to Medium Enterprise X (Large Pub)
Large Enterprise
Local Government
Central Government
Legal
Academic
Other (please describe):

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

Submission from :

Technical Director

[REDACTED] is a city centre [REDACTED] and is operated under a fully tied FRI lease with Marstons. As a business we feel that the exploitation is damaging to our company and stifling growth in our company, and the sector as a whole. Without the tie being applied as it is, we are sure we would now have multiple venues and be employing many more staff than we currently are. I feel this is true for many other operators in the sector.

I also know from contact with other lessees, the tie is devastating to pubs turning over as much as £ 500k. This is clearly a bad situation. Pubs are socially essential to our way of life in this country. The cavalier way that the large brewers and pubcos treat the tenants and lessees needs to be urgently addressed, before our heritage is sold off to pay debt accrues from a massive property gamble.

I urge Mr Cable, BIS and the government to take immediate action to regulate the tie, with the implementation of a Statutory Code and Adjudicator, enshrining the principle that the Tied Tenant Should be No Worse Off than the Free-of-tie Tenant, and containing the offer of a free of tie option with open market rent review.

Please see below my responses to the questionnaire.

Yours sincerely

[REDACTED]

[REDACTED]

Consultation questions

Q1. Should there be a Statutory Code?

Absolutely . The pubcos and brewers with estates have repeatedly shown that they have no intention of any meaningful change . The voluntary codes are no different to codes that have been in place for many years and the pubcos , as a matter of course , use them as a excuse for serial poor behaviour. As long as what they are doing is not specifically prohibited in exact terms within in the code of practice , a publican is powerless to make a complaint or take legal action against the pubco . The codes fail to address any of the major problems , namely an imbalance in both risk/reward and power. If anything , new codes have been used to obligate tenants to a raft of new conditions not on the existing lease , merely by signing acceptance of delivery , or even by making a complaint to the pubco using the code as reference. They are meant to be pubco codes of practice and should not include additional terms over and above the tenants/lessees contractual obligations in their existing lease agreement.

Q2. 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.

There is an obvious danger that large brewers and pubcos would reduce the size of estates to fall below the proposed threshold of 500 pubs . Notwithstanding that , as I assume this has already been considered , I feel that all pubcos/ should fall under the statutory code regardless of estate size. Many of the smaller companies have mimicked the business model of the major brewers and large pubcos and as such , should be required to abide by the same statutory codes. One size fits all. If they do already treat their tenants and lessees fairly , then they have nothing to fear from any new code , voluntary or statutory.

Q3. 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?

Yes , all non-managed pubs should be covered . Again , one size fits all would negate the landlords from being creative with various types of lease , specifically designed to escape being covered by the statutory code , while operating the same underlying business model

Q4. How do you consider that franchises should be treated under the Code?

I feel franchises should be treated no differently to tied leases and tenancies . The countervailing benefits that a true franchise should offer are financially quantifiable and could be taken into account in any financial negotiations with regards to rent etc. Not including franchises in the code would open the door to abuse by simply branding a property and changing the lease terms in minor ways , with no discernible change in the underlying business model, thus escaping the application of the code and adjudicator.

Q5. What is your assessment of the likely costs and benefits of these proposals on pubs and the pubs sector? Please include supporting evidence.

Cost and benefits would be very difficult to quantify given the lack of knowledge of what the outcome of the consultation will be. At the moment, it seems there are several possible options. To a low turnover community pub, the changes to a free of tie option could mean the difference between failure and surviving to better times. For a medium £500k turnover pub it will mean a reasonable standard of living for the lessees and less dependence on government support. For a high turnover city site, the profit increase in profit would be very significant, attracting entrepreneurs into the sector, encouraging investment, growth and new job opportunities as a result.

To ourselves, a free of tie option will have a huge impact. New jobs, investment into the company and expansion to new sites. We would anticipate two new sites within 18 months of a free of tie option being offered. Potentially 30-40+ new jobs as a result.

The exchequer should also benefit as it is likely the rejuvenated tied pubs would produce more taxable revenue in the form of PAYE, VAT and Corporation tax. The tax credit burden should also be reduced. It would also tend to keep more money in circulation within the immediate communities, have a knock on benefit to other nearby businesses.

In contrast, the same revenue, currently in the hands of the pubco's and brewers, generates relatively little revenue for the exchequer, after corporate accountants have made sure the taxable profits are as low as possible. Not only does a large proportion of the profits leave the immediate communities, much of it probably finds its way out of UK PLC and into offshore tax havens.

There is obviously a significant cost implication to the pubco's, as, hopefully, there will be a transfer of profit from pubco to tenant as a result of the statutory code. Whilst this is likely to be a significant sum, it should not be seen as a barrier to implementing the code. The extra profits the pubco gain from exploitation of tied system, and stand to lose because of the code, should not be seen as a loss to the pubcos, but as rightly redressing the balance and being put back into the hands of the people that it has been extracted from.

Q6. What are your views on the future of self-regulation within the industry?

In my opinion, self regulation will never work. There is, in reality, no real desire for it to work, only the appearance that it does. It is currently used only to appease government and forestall the implementation of a statutory code. There has been no significant improvement in the lessee/landlord relationships, no redress of balance of power and no rebalancing in risk and reward. All the major complaints of lessees have not been addressed at all. All the other smaller issues tend to stem from these simple, primary problems. The bottom line for the pubco and brewers is just that, the bottom line! It is all about retaining income streams to service large debt burdens, regardless of the detrimental effects on the pubs themselves. These income streams per pubco/brewer are still being maintained, even though estate sizes have decreased significantly, leading to increased pressure on the remaining tenants and lessees.

Q7. Do you agree that the Code should be based on the following two core and overarching principles?

- i. Principle of Fair and Lawful Dealing*

ii. Principle that the Tied Tenant Should be No Worse Off than the Free-of-tie Tenant

I believe point one is a noble ideal , but “ fair “ is a very loose term and open to a wide variety of interpretations . I feel if it were to be enshrined , a more practical terminology should be used so it can be applied from a legal viewpoint. I think “ Lawful “ is absolutely a given.

The “ Principle that the Tied Tenant Should be No Worse Off than the Free-of-tie Tenant “ is vital . It needs to be quantified and put into a form that can be applied simply. From experience , the pubcos and brewers are past masters at manipulation of RICS guidelines . This manipulation and bizarre methodology of interpretation should be removed from the process . As it stands the rent review process is heavily weighted against the tenant/lessee. Let us not forget that RICS agreed some time ago , in front of BISC , that this principle should be applied to its own codes of practice. In reality , this still isn't the case.

It's also my understanding the the pubcos were granted block exemption from EU competition legislation based on the premise of the “Principle that the Tied Tenant Should be No Worse Off than the Free-of-tie Tenant “ I think the time has come for the pubcos and brewers to abide by the conditions of that exemption. At the very least , they should be obligated to identify , quantify and value the countervailing benefits they have relied on to attain the exemption.

Q8. Do you agree that the Government should include the following provisions in the Statutory Code?

- 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.**
- ii. Increase transparency, in particular by requiring the pub company to produce parallel 'tied' and 'free-of-tie' rent assessments so that a tenant can ensure that they are no worse off.**
- iii. Abolish the gaming machine tie and mandate that no products other than drinks may be tied.**
- iv. Provide a 'guest beer' option in all tied pubs.**
- v. 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.**

Point i. I think if a landlord wishes to make any significant changes to prices , or there is a change in circumstance for the pub , the lessee should have a right to request a rent review . However , given the fast moving nature of small businesses and their operational circumstance , five years is potentially a long time to wait before a request can be made. It could be too late by then and gives the landlord an opportunity to

introduce onerous burdens on the lessee immediately after a review , with the knowledge the lessee would have to wait five years before they could seek any redress .

Point ii. Increased transparency in rent setting is vital . It is very difficult to get figures from a landlord on how they reach certain figures , particularly when dealing with FMT. It is still an issue for my pub that FMT has risen since we took over the lease years ago . We have been told to expect another rise next year. In a shrinking market , during a recession , all FMT's should be lower . Costs and overheads are also significantly higher , so rents should surely be significantly lower . Our rent is almost double that of years ago , due to a 20% rent review increase and years of RPI increases.

Any requirements and processes should be made as simple as possible . Complex methodology and hidden figures are the friend of the powerful in any negotiation . Tenants and lessees are often pressured into accepting figures that have no bearing on reality . Many have no choice to accept what they are told , as they often have little experience or understanding of the process and no access to independent advice . They are outgunned. A simple formula that all can understand would be of great help in levelling the playing field.

Point iii . Personally , we removed the gaming machines from our pub . After the landlord takes their slice of the machine cake , there is often not enough left to even bother with the inconvenience of having them take up valuable space . Remove the machine tie .

Point iv. This would depend on whether an " across the board " free of tie option would be offered. That would be our preferred scenario. Any pub not taking up the free of tie option should be given guest beer and cider rights , as per the intention in the 1989 Beer Orders. My own view is that the tie should only exist for brewing companies . And even then , only on alcohol they produce in house. All other wet products should be sourced at FOT prices from any supplier . We have told our Brewer/landlord we have no problem buying the majority our stock from them , as long as their prices are realistic and competitive with open market prices.

Point v . Flow monitoring systems as they stand are worthless , inaccurate and even possibly affect the quality of the product. It seems absurd that our ales flow through a device that we are not allowed to take apart to clean , as we regularly do with all other equipment in the cellar . If the pubco/brewery tied prices were competitive , there would be no need for the spy in the cellar . Because of its inaccuracy , it has no commercial value to the lessee and is often just another avenue of abuse and opportunity for extra revenue for the landlord . Usually , this is via dubious stock fines based on manipulated flow data and threats of lease forfeiture.

Q9. Are there any areas where you consider the draft Statutory Code (at Annex A) should be altered?

I believe the draft Statutory Code to be a very good starting point. It attempts to address all the major problem areas. I feel the Adjudicator will be essential to plug holes that I feel will inevitably be exploited at a later date.

I also believe the code should be explicitly a Pubco/Brewery code , and not contain conditions , that apply to tenants or lessees , that are not already included in existing leases.

Q10. 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 two overarching principles?

Absolutely . I think it will be inevitable that the pubco's and brewers will attempt to exploit anything they feel they will get away with legally , to negate any financial and operational effects the Code may have on their businesses. I believe the Adjudicator should have the role of continually monitoring the ongoing situation , keeping an eye out for such abuses. Likewise , any loopholes that could unfairly benefit tenants and lessees should also be amended.

Q11. Should the Government include a mandatory free-of-tie option in the Statutory Code?

This is a very contentious issue. Personally , I think yes a mandatory free of tie option should be in the Code. It is the simplest and most elegant solution to the problems in the sector . It would , in one move , force pubcos to treat their customers fairly , charge fair prices for products and provide countervailing benefits they currently claim to provide , but don't. It would also remove the need for policing their customers and largely get rid of the adversarial nature of the current relationships. In effect , the model would have to operate under normal , competitive market conditions and would be allowed finally to grow and prosper.

A large part of the argument for this FOT option comes from the pubco's and brewers own standpoint with regards the tie. They insist that the majority of their tenants and lessees are happy with the tie , as it is beneficial to them . The extra costs of the tie are supposedly counterbalanced by its many benefits. If that is actually the case, as is claimed , then these happy tenants and lessees would no doubt stick with their current tied lease terms , and carry on as is. Several pubco heads have stated they believe complainants and the unhappy to be a small but noisey minority. If this minority chooses the free of tie option , and the pubco viewpoint is accurate , they would inevitably be worse off and wishing to rejoin the tied fold very quickly , or going out of business. So , if what they claim is true , the FOT option , would have little effect on their business , and may , in the medium term , benefit them.

The low entry cost is an absolute myth , and isn't even a point of discussion.

It would obviously have to be offered in conjunction with a rent review following the RISC guidelines , including the principle of being no worse off than a free off tie operator .

It's also my opinion that in the medium to long term , the pubco and brewers would actually benefit from offering a free of tie option. . Their own business would have reduced admin overheads , support costs , legal costs , bruline rentals , the list goes on. They would likely also benefit from a healthier sector with better quality lessees attracted in and much happier publicans investing in the up keep of the venues they own and increasing the value of the estates.

Q12. 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?.

It may be possible to "cap" the amount of benefit the pubco and brewer gets from the tie. Since the extra cost of the tie is usually justified by the claim of countervailing benefits, it should be quite easy for the pubco/brewer to quantify those benefits financially for each pub. This amount could then be converted into the extra profit in relation to a barrelage figure at the current tied pricing

Once the target barrelage sales figure is met, any further stock should be supplied at open market prices. Any stock price increases could be monitored to ensure that they would result in a lower barrelage figure.

Any increase in countervailing benefit value would have a proportional increase in barrelage figure. It is important that these countervailing benefits should be tangible, useful to the pub and have a definite, quantifiable financial upside to the lessee or tenant.

The lessee or tenant should also have the right to refuse the countervailing benefit, and its financial implication to the barrelage, if he/she feels it is inappropriate to their particular pub.

Q13. Should the Government appoint an independent Adjudicator to enforce the new Statutory Code?

Yes, it would have no teeth without it. There are several precedents in other sectors, most recently with supermarkets and suppliers.

Q14. Do you agree that the Adjudicator should be able to:

- i. Arbitrate individual disputes?**
- ii. Carry out investigations into widespread breaches of the Code?**

Yes, I strongly agree in both cases.

Q15. Do you agree that the Adjudicator should be able to impose a range of sanctions on pub companies that have breached the Code, including:

- I. Recommendations?**
- II. Requirements to publish information ('name and shame')**
- III. Financial penalties?**

Yes , again it is vital that the Code has teeth . Financial penalties should be severe , but also bear in mind that financial implications to the pubco/brewer are inevitably passed down the line to the pub owner , via prices increase in one area or another. It would be better to fine the CEO than the company !!

Q16.Do you consider the Government's proposals for reporting and review of the Adjudicator are satisfactory?

Yes.

Q17.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?

The main issue would be the direct transfer of these costs to the pubs themselves , so it's is important that the cost does not get too high. It is , however only a small amount per pub , even if that does happen.

It may be worth considering a proportion of the costs is raised from the fines levied on the worst offenders , thus making sure they shoulder the majority of the Adjudicator costs.