

## 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](mailto: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 <b>member and pub representative - GMB</b>
Interest Group
Small to Medium Enterprise <b>- pub tenant - Punch lease - 13 years</b>
Large Enterprise
Local Government
Central Government
Legal <b>Consultant - &amp; paralegal/trainee solicitor with specialist litigation firm - in (I currently provide a large amount of voluntary and unpaid advice to struggling tenants)</b>
Academic
Other (please describe): <b>Independent Specialist (voluntary) adviser to tenants facing legal problems</b>

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

**Sirs,**

**Firstly, many thanks to the Business Innovation and Skills Department for commissioning this consultation process. It is, nevertheless, long overdue.**

**Until February 2013, I was the lessee of the (Punch Taverns) [redacted] near [redacted]. I entered this agreement in August 2000 in good faith and upon representations made by Punch Taverns representatives. It started to go wrong in 2004 and within 18 months, and as a result of that, I suffered a total mental collapse. The arrangement ended in four years of litigation and was settled out of Court in February this year. More details of this, and the details of the whole sorry affair later.**

**I am a member of the GMB union (though not particularly generally politically motivated) and am a spokesperson for their pub members.**

**I act in an unpaid consultancy capacity for a small specialist firm of Solicitors in [redacted]. This firm represents many pub tenants. The pub tenant litigation section of this firm is exceptionally busy, but is certainly not operated for profits. [redacted] and [redacted] were instrumental in bringing about, and giving evidence in, the 2004 TISC. I also act independently as a voluntary adviser to PubCo, AND Brewery tenants – I see very many, very distressed people who are on their last legs financially – facing bankruptcy and homelessness. Many do not speak up and end up 'disappearing' under the radar and feeling shame. (Statistics and case studies to follow – in confidence).**

**I, myself, in turn, have presented much written evidence to the last 3 Select Committees. Indeed, key questions were asked at the last hearing on 11 June this year based on information provided to the Committee by myself the day before. (Legal status of Company Codes of Practice – failure of self regulation).**

**During my time as a PubCo tenant, (by 2005) I found myself, penniless; in fact; heavily in debt. My marriage had not survived the strain and my mother (I was sole carer) became terminally ill with Dementia.**

**Notwithstanding severe personal and medical constraints, and a then prevalent lack of contractual capacity, Punch Taverns forced a cyclical rent review using an upwards only rent review clause in the lease (which the 2004 TISC had been given assurances that these would not be enforced in the PubCo estates after that hearing). In fact, the upwards review was carried out with my pub cleaner, and I was made to sign, or "it could get worse". I outlined that I was in no fit state to consider the figures and implications of events etc. but to no avail. At one stage the Punch area manager knocked my bedroom window when I was ill and poked his tongue out whilst 'singing' the words: "Nah nah ne nah nah – you say the words and I'll sing the tune".**

**The whole situation had been based on a pack of lies, (otherwise I would have been sensible enough not to go into it). The squeezing of higher rent (in bad faith), the terribly**



high and perpetually rising tied product prices, combined with the FRI obligations on a 17<sup>th</sup> century listed building, ensured an untenable business situation. In the event, I lost the equity (circa £300K) from three properties in this business debacle. This has been partly mitigated by the settlement reached earlier this year.

Financially, the bigger PubCo's are failing – if they go out of business then some revenue will be lost to the Treasury, and some jobs lost. Statistics (to follow) will show that the negative effects of this are outweighed by the effects of the current rate of pub closures and (inter alia) change of use into residential use etc. The effects of the loss of employment, benefits to the local (and wider) economy, drain on the welfare state are greater than PubCo personnel having to find other employment. At least they will not be immediately homeless and have lost everything as a result of their relationship with the PubCo's. All this is notwithstanding the many losses of the cultural benefits of community assets..., often the only business/pub left in a community.

The CGA statistics regarding this issue (collated a few years ago) pedalled by the BBPA are misrepresented to, particularly, Parliamentarians – I know this from my own personal, and colleagues' personal lobbying activities. It is NOT the case that more pub closures emanate from the free of tie/freehold sector. At the time of closure and/or change of use, the properties by that particular point in time are no longer registered as tied leases – very many of them have been pubco tied leases, - they are sold off for that purpose. The datum point for those statistics is/was wrongly timed. I am canvassing/lobbying colleagues, organisations and Parliamentarians to carry out a similar, but more balanced survey before a decision on the final format of a statutory code is reached.

So, very often, tenants are squeezed out of these properties to enable the pub companies in order simply to sell them to raise capital for their interest payments.

The provisions within a statutory code should ensure that these agreements will be rendered fair and reasonable, observe the principle that the tied tenant should be no worse off than the free of tie tenant, and moreover, that this free of tie tenant has a genuine, properly and transparently assessed market rent, where the balance of prices paid for product and rent paid for occupation of the premises enable the business to genuinely compete within its market. The system can only work if all the above (underlined) is enshrined in a legally enforceable, and/or properly adjudicated code.

Yours faithfully,

[Redacted signature block]

***My answers are highlighted in yellow. Also, I would request leave to submit further supplementary evidence in the near future as some information/evidence is still to come, and/or requires further research, and certain information is currently sub judice requiring clarification of status.***

## Consultation questions

### **Q1. Should there be a statutory Code?**

Yes, absolutely. Given that the Pub Companies and the BBPA have been given every chance to 'get their house in order' since 1993, and numerous Select Committee reports/investigations have taken place from 2004 - 2011 (TISC/BEC/BISC); and, given that the Pub Companies have failed to "get their house in order", then a statutory Code which provides and ensures a 'Market Rent' with a genuine and transparent free of tie provision with an open market rent assessment/review is the only way forward.

### **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.**

It should be binding on all companies owning more than 500 companies as a minimum, however there is a strong argument to apply the code to all pub owning companies.

I personally have seen tenant abuses by some family brewers and other organisations (eg, [redacted]) – [evidence of this to follow (in confidence)]

### **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, uniformity for all. Any anomalies could be ironed out as the code evolves under/by an Adjudicator. The statutory code should ensure that any agreements that contain tied provisions, whatever the terminology, should be fair, reasonable and comply with all legal requirements.

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

Yes, effectively some of the lease agreements, combined with tied purchasing obligations amount to/are in effect, if not in name, franchises; such are the constraints on tenants in some of the existing agreements. So, the same should apply to real franchises, particularly if the franchisor has abused the system previously as a pubco/brewery, and therefore may 'get round' the code in future.

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

Licensees will be able to negotiate lower rents as the current rents do not effectively contain very many of the much vaunted 'supposed' countervailing benefits (SCORFA) which are supposedly justified by the inflated tied product prices (and inflated rents). Lower rents equal higher net earnings to the licensee.

Licensees would be better remunerated, more incentivised, more motivated and would be able to invest in their properties. Pub offerings would therefore be more competitively priced with premises in better physical condition, thus more appealing to



the consumer. Revenues would rise, cutting out the large margins used by the PubCo's simply servicing interest payments. Evidence of the current situation can be obtained by simply looking around the UK at all the boarded up pubs, or miserable dilapidated places with disenchanted operators.

This is not solely due to supermarket pricing, cultural change and the smoking ban. Another survey along the lines of the CGA/BBPA and BISC surveys is being done. Evidence and results to follow.

The Impact Assessment indicates an estimate that an average licensee's earnings would improve by circa £4K annually. According to CAMRA's recent figures this amounts to an increase in earnings of around 40% for 60%+ of tied licensees.

There is a widely held view that this will be a very low figure and it is more likely to be an improvement more in line with the higher estimate of £10,000+ on average.

As stated, this kind of improvement will encourage entrepreneurial flair where it is currently lacking. Reinvestment, training jobs, and most importantly profitability will ease the closure of pubs and business failure rate of tied publicans. Moreover, the financial benefits resulting from this would seem not to have been estimated in the Impact Assessment and would constitute a further financial advantage for the industry and economy.

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

To date, self regulation has been a waste of time, prevarication to avoid statutory intervention over many years, at least from 2004.

#### **(1) RICS**

The industry, the pubcos, the BBPA and the BII have shown that they have never had any intention of ensuring or enforcing the 'prime principle' that the tied tenant should not be worse off than if they were free of tie. Enterprise in evidence to BISC totally refuted that it should be considered.

Although RICS has endorsed the principle in press statements, it is well known that they will not penalise their members for ignoring the prime principle and the RICS pub rent-setting guidelines.

The Courts, when rent reviews have come before them, have also been persuaded that the hitherto prime principle can be ignored. This is based on the evidence from the pubcos, valuers and RICS. Only a robust Statutory Code can prevent this from happening again.

#### **(2) PICAS**

Access to the self regulated PICAS system is difficult and confusing (said by all 3 of the already heard applicants to PICAS, and 3 more who have cases pending) i.e; the majority of PICAS cases. (precise evidence to follow in confidence)

Information within some of the above cases has not been treated confidentially or sensitively.

Information available to tenants about the PICAS system is confusing and little known. Tenants are both intimidated and suspicious that the proceedings are shrouded in so much confidentiality. It is also perceived/believed that the panel are not impartial, particularly when chaired by a surveyor who has represented Punch in legal cases (e.g; Punch v. Scott – where I was the defendant), and Punch v. Mountford).

### (3) Legal status of current IFC and company codes therein

Brigid Simmonds appeared on BBC Politics South East on Sunday 9 June 2013

Again Mrs Simmonds CEO of the BBPA, representing the PubCo's and Breweries stated that the Codes are 'absolutely legally binding' - In May this year, when I personally was in the Court Room - in front of a Circuit Judge at Clerkenwell and Shoreditch Court, in Enterprise v. Valentine - Enterprise's advocate when asked by Judge Cryan if "this code of conduct" is legally binding, Adam Rosthental said: "No it was not, but Enterprise are prepared to give it some effect in this case"

Mrs Simmonds has done this before;... in the Punch v. Scott case (late 2009) when David Green said on behalf of Punch that the code (their old code - 'retailer's charter') "has no legal effect, it is simply a user-friendly document.... outlining what the parties can expect of each other", her response to BISC was: "this was simply a barrister acting without instruction, and the company involved would not want its code viewed in this way"

I can talk with authority on both of the above, as I was instructing Counsel in the Valentine case and was the defendant in the Scott case, and was therefore obviously present.

The PubCo's, represented by the BBPA are telling the Government, BISC, tenants and the public that the Codes are legally binding, but acting as otherwise in Court. They use the existence of the self-regulated code divisively to their advantage...!

So, it is simply not the case that the major elements of self regulation, (especially PICAS and IFC/Company Codes) are currently working. The severest of the disputes between PubCos/Breweries and tenants end up in Court.

These are usually or often legal actions where the Landlord is suing for forfeiture of the business and residential accommodation, as, in very many cases, the tenant has found it impossible to earn enough revenue to cover the high rents and tied product prices demanded by the landlord. Therefore, there are various instances where tenants have

relied in Court on provisions represented to them in the Codes. Specifically, as in (3) above, these are usually where Codes offer a transparent and properly carried out rent review, or, some sort of financial assistance, to share the pain in uncontrollable and intervening negative circumstances affecting a particular business. When pushed by circumstances unfolding within the Court proceedings, PubCo legal representatives advocate (as exemplified above) that the Codes are not legally binding.

Indeed, in strict legal terms the codes are not currently legally binding in Court, so the only solution is to give them legal effect within a Statutory Code.

If the IFC, and the Company codes sitting within the IFC, were suitably legally arguable in Court, then it would be easier for tenants to defend their position, as many of the clauses and provisions in the code seem reasonable, and their businesses would have a better chance of surviving. The bottom line is that the PubCo's cannot financially afford to do this. These instances of the Codes being publicly represented as legally binding whilst PubCo lawyers are telling the Courts otherwise have been going on for some time as exemplified by the 2009 and 2013 Court cases cited above, and by BISC recently (and beforehand), utterly belie protestations as to the "absolutely legally binding" effect of the Codes by the BBPA and Co.

**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 am in absolute agreement with both principles – RICS guidelines should be tightened up and enforced/monitored (and much more effectively than to date) on principle (ii) ensuring any leased agreement is properly assessed, balanced and thus competitive in the open market. 'Fair dealing' requires a proper definition!

**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.***

Yes (also, many tenants, as things are now, universally mistrust RICS surveyors and believe that most 'are in the pockets' of their pubco clients, or at best professionally conflicted).

Quite simply, a properly assessed combination of wet and dry rent in an open and fully competitive market is the only combination which will cure the ills and problems at the heart of this industry. This 'connection' is the only solution which will deliver a reasonable living to the tenant. The Courts, even to the Court of Appeal, have not been able, or have chosen not to deliver this, so they must be given legislation to underpin and enable this to happen. Only then will the inextricable link between wet and dry rent will be properly recognised, which it has not been since Crehan v. Inntrepreneur in 1993.



- 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.***

**Yes**

- iii. ***Abolish the gaming machine tie and mandate that no products other than drinks may be tied.***

**Yes**

- iv. ***Provide a 'guest beer' option in all tied pubs.***

**Yes, if ensuring that a market rent only/genuine free of tie option actually and properly exists and operates transparently.**

- 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.***

**Yes, and subject flow monitoring to the appropriate Weights & Measures legislation, and ensure that all components within, and the system as an operating whole, comply with CE European Certification in all aspects of accuracy, safety, hygiene etc.**

**In a recent Brulines Court case Unique (Enterprise) v. Broad Green & Ors [2012] EWHC 2154 (Ch), the High Court Judge (Warren J), whilst not allowing the defendant to resist the installation of the Brulines equipment, because of the landlord's reservations in the lease, stated that the system, if used to 'fine' or 'penalise' (in other words assess damages) would require a definition of accuracy. To date, this has never been done, and absolutely should be done within the context of a quantum of damages in a buying out of contract allegation.**

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

**1. There needs to be a Market Rent Only option - where a licensee can choose to remain tied or simply pay a market rent and purchase beer (and any other formerly tied products from any source).**

**Without this the spirit and effect of the Code fails.**

**2. Like the Industry Framework Code (in which it is an empty promise as it cannot be enforced) there needs to be an enforceable clause in the Statutory Code that :**

**"All contracts will be fair reasonable and comply with all legal requirements."**

**3. It should be made clearer that ALL rent assessments (especially at rent review and lease renewal) need to be undertaken on the basis that RICS guidance should be interpreted on the prime principle that the tied licensee is no worse off than the free of tie licensee.**

**4. All the above (and referencing to and reinforcing point 2. just above), should be strengthened by the 'tightening up' of the effects of the anti set-off clauses present in most PubCo and Brewery leases. If all else fails, the matter will end up in Court. If the**

premises are entirely dysfunctional, and/or the business completely failing, then currently all ground rent, as a principle of English law, is still payable. The PubCo's and breweries hide behind and abuse these clauses, as a litigating tenant whose business is failing compounded/brought about by the contributory negligence of the supposed business partner with the consequential squeeze on financial, physical and mental resources effectively 'litigates' the defendant out of Court. As pubs invariably contain residential accommodation, the protection offered to domestic tenants, and the Unfair Contract Terms legislation afforded to consumers, should be extended in some measure to this particular unique (i.e; commercial and residential) tenants.

**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?**

**Yes**

The opportunity to review and amend was the main failing of the Beer Orders which led to the unintended consequences being uncontrolled. The statutory code and Adjudicator proposals seek to avoid such gaming of well meaning Government intentions.

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

**Yes**

It is essential, as it offers the opportunity for a licensee to sever unfair contract terms presented in tied agreements. Without Free of Tie option and an open market rent the code can be easily exploited. (See answer to question 9, above)

**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?**

(a) and (b) should both apply. All the provisions outlined in the proposed statutory code should apply to all relevant agreements. It is also essential that the provisions also encompass a mandatory free-of-tie option with an open market rent. If the rent cannot be agreed between the parties then it should be determined (in accordance with fair lease terms) by an independent third party in accordance with properly regulated RICS rent assessment guidance.

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

**Yes**



**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, to both**

**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?**

**Yes**

**II. Requirements to publish information ('name and shame')**

**Yes**

**III. Financial penalties?**

**Yes**

**The Adjudicator should have the following additional powers:**

**(1) The Adjudicator should have the ability to remove (or rule unfair/unenforceable) unfair terms within the contracts and substitute objective and fair terms, using OFT guidance as applicable to consumer tenancy agreements.**

**(2) The Adjudicator should not only impose financial penalties, but incorporate compensation and/or a re-assessment of rent within, or in addition to these penalties**

**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?**

**Yes**

**Pubcos and brewers are already paying for the self regulatory approach, the levy for the statutory code will reduce the funds for self regulation but the work load for the regime will be dramatically decreased (as most complaints emanate from the pub owning company tenants of the 6 biggest firms). The costs associated with the Adjudicator and statutory regulation will largely depend on the behaviour of the pub owning companies, worse behaviour = more complaints = more work = higher costs.**

**Therefore, the Adjudicator should be funded by the Pub Co's/pub owning companies, and perhaps also to some point by the BBPA. Their failure has contributed too many**

bankruptcies and business failures so they should bear the cost. Neither tenants nor consumers should bear any of the cost of the Adjudicator.