



Department for Business Innovation & Skills

Pubs Code and Pubs Code Adjudicator: Delivering ‘No Worse Off’

A Government Consultation –
Part 1

OCTOBER 2015

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The Pubs Code and Pubs Code Adjudicator

The Small Business, Enterprise and Employment (SBEE) Act 2015, which received Royal Assent in March 2015, requires the Secretary of State to introduce a statutory Pubs Code. The Code will govern the relationship between large pub-owning businesses (those that own 500 or more tied pubs) and their tied tenants. The Act also provides for a new independent Adjudicator to enforce the Code.

The Code and Adjudicator measures will be introduced through secondary legislation. A draft Pubs Code was published in June 2014 as part of the Government Response to the 2013 consultation on pub companies and tenants; and a revised version was published in November 2014 during Parliament's scrutiny of the SBEE Bill.

Further revisions have now been made to reflect changes made during the passage of the Act, and to take account of comments and information received. This consultation is in two parts. The first focuses on the Market Rent Only (MRO) option, including disputes arising in relation to the MRO procedure, and the waiver from MRO in return for significant investment; arrangements for rent assessments; and the Government's plans on parallel rent assessments.

The second part of the consultation, to be published next month, will cover:

- the type, timing and frequency of information to be provided to tenants by their pub-owning businesses – including the provision of rent proposals to prospective tenants and tenants who are renewing their agreements;
- repair and maintenance obligations under the Pubs Code;
- the types of agreement, such as genuine franchises and some short-term agreements and tenancies at will, that will be outside the scope of some or all of the Code;
- what happens to terms in agreements that are inconsistent with the provisions of the Code;
- enforcement of the Code – including the Government's proposals for the fee to take a case to the Adjudicator, how costs should be apportioned and which provisions of the Code will be arbitrable by the Adjudicator; and the maximum financial penalty that may be imposed following an investigation;
- the way that companies related to a landlord company (eg subsidiaries and parent companies) may be treated for the purposes of enforcement; and
- when a tenancy ends or when a rent assessment is concluded, how extended Code protection works when a pub is sold to a company outside of the Code.

Following consultation, both the Pubs Code and other regulations will be subject to the affirmative procedure, which means they will be subject to scrutiny and debate in both Houses of Parliament. The regulations apply to England and Wales.

The Government welcomes your views.

Issued: 29 October 2015

Respond by: 18 January 2016

Enquiries to: pubs.consultation@bis.gsi.gov.uk

This consultation is relevant to: tied pub tenants, pub-owning businesses, other businesses in the pub sector and trade bodies/associations in the sector.

1. Foreword from Anna Soubry



Pubs are an important part of life in this country. They are the hub of local communities in both rural and urban areas. They play a part in the positive experience of many visitors to this country. Beer and pubs contribute £22 billion to UK GDP. So it is important that pubs can operate in an environment that is fair and that allows them to thrive.

Over the last decade, tied tenants have raised concerns that the sector has become more difficult to operate in. The key issue for them has been the unfairness of the relationships they have with their large pub-owning businesses.

Some positive changes resulted from the introduction of industry self-regulation but the measures did not go far enough. The Government consulted on a statutory Pubs Code and an independent Adjudicator and enshrined these in the Small Business, Enterprise and Employment Act which received Royal Assent in March 2015.

I would now like your views on how we implement these measures.

We need to ensure the new Pubs Code is fair and proportionate and can be enforced effectively. We must ensure that tied tenants of the largest pub-owning businesses should not be worse off than free-of-tie tenants. Finally, we must ensure these principles are delivered *without* placing undue burdens on businesses.

I want you to tell us if we have got the balance right. I want to hear from tied pub tenants, pub-owning businesses and their representatives. I want your views so that we can achieve a fair outcome for all. Please respond to this consultation and help us put the right legislation in place.

A handwritten signature in black ink, appearing to read "Anna Soubry".

THE RT HON ANNA SOUBRY MP

Minister of State for Small Business, Industry and Enterprise

2. Executive Summary

2.1 The Government is committed to supporting a healthy and flourishing pub industry. We believe that a healthy pub industry is one which benefits all those who work hard to keep the Great British Pub at the heart of our communities. Yet there have been longstanding concerns in the industry about the unfairness in the relationship between large pub-owning businesses and their tied tenants. This is based on extensive evidence gathered by four BIS Select Committee enquiries over the course of a decade, a government call for evidence in 2012, continuing correspondence from tenants facing hardship and the 2013 Pub Companies and Tenants consultation.

2.2 The measures in Part 4 of the Small Business, Enterprise and Employment (SBEE) Act were introduced to address these concerns. The Act received Royal Assent in March 2015 and places a duty on the Secretary of State to introduce a statutory Pubs Code by 26 May 2016. The Code will govern the relationship between large pub-owning businesses (those that own 500 or more tied pubs) and their tied tenants in England and Wales. The Act also provides for a new independent Adjudicator to enforce the Code.

2.3 Implementation of some measures in the Act, including the Pubs Code requires secondary legislation. A draft Pubs Code was published in June 2014, as part of the Government Response to the 2013 consultation on Pub Companies and Tenants; and a revised draft Code was published in November 2014 during Parliament's scrutiny of the SBEE Bill.

2.4 This consultation seeks views on the statutory Pubs Code and some of the measures to enforce it. The draft regulations can be found in Annex B.

2.5 We have adopted a proportionate approach – fulfilling the requirements in the Act that the Pubs Code must deliver the principles of fair and lawful dealing and that a tied tenant should not be worse off than a free-of-tie tenant. We have done so in a way that minimises as far as possible the new burdens being placed on businesses – both pub-owning businesses and tenants – and ensures that tied tenants do not receive any lower level of protection under the statutory Code than they currently have under the voluntary Industry Framework Code.

2.6 The consultation is being published in two parts within a month of each other.

2.7 This first document – on which comments are invited by 18 January 2016 – covers the Government's proposals for delivering one of the two principles of these reforms – that a tied tenant should be no worse off than a free-of-tie tenant. It details the proposed Code provisions on rent assessments and the option for tenants to request a Market Rent Only (MRO) offer and sets out the Government's position on parallel rent assessments.

2.8 Specifically, it:

- describes the circumstances in which a rent assessment under the terms of the Code will occur;
- sets out the circumstances that will trigger the MRO option, how the MRO option will work and how disputes in relation to the procedure will be resolved;
- explains how the Government proposes to permit a tenant to waive (or postpone) their right to a rent assessment – and therefore the right to request an MRO offer – in return for a significant investment in their pub; and

- explains why the Government has decided not to introduce the right for a tenant to receive a parallel rent assessment.

2.9 This part of the consultation seeks your views on these issues.

2.10 The second part of this consultation – to be published next month – will cover the remaining elements of the Pubs Code. It will seek views on:

- the type, timing and frequency of information to be provided to tenants by their pub-owning businesses – including the provision of rent proposals to prospective tenants and tenants who are renewing their agreements;
- repair and maintenance obligations under the Pubs Code;
- the types of agreement, such as genuine franchises, tenancies at will and short-term agreements of a defined length that will be outside the scope of some or all of the Code;
- what happens to terms in agreements that are inconsistent with the provisions of the Code;
- enforcement of the Code – including the Government’s proposals for the fee to take a case to the Adjudicator, how costs should be apportioned and which provisions will be arbitrable by the Adjudicator; and the maximum financial penalty that may be imposed following an investigation;
- the way that companies related to a landlord company (eg subsidiaries and parent companies) may be treated for the purposes of enforcement; and
- when a tenancy ends or when the rent assessment is concluded, how extended Code protection works when a pub is sold to a company outside of the Code.

2.11 The Government will use the responses to the consultation to help inform the secondary legislation. All the secondary legislation covering the statutory Pubs Code and its supporting legislative framework is subject to the affirmative procedure, and will therefore be debated both by the House of Commons and by the House of Lords following this consultation.

3. How to respond

- 3.1 This first part of the consultation will begin on 29 October 2015 and will run for six weeks. The final date for responses is 18 January 2016.
- 3.2 When responding please state whether you are responding as an individual or representing the views of an organisation.
- 3.3 The consultation response form at Annex D is available electronically on the consultation page: <https://www.gov.uk/government/consultations/pubs-code-and-adjudicator-market-rent-only-option-and-rent-assessments> (until the consultation closes). The form can be submitted online/by email or by post to:

The Pubs Code and Adjudicator Team
Department for Business, Innovation and Skills
2nd floor, Orchard 2
1 Victoria Street
London SW1H 0ET

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

- 3.4 A list of organisations that we have notified about this consultation is in Annex C.

4. Confidentiality & Data Protection

- 4.1 The Government intends to publish all responses to this consultation.
- 4.2 Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information - including personal data that you provide - to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
- 4.3 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

5. Help with queries

- 5.1 Questions about the policy issues raised in the document can be addressed to the contact details set out in 3.3.

6. Rent Assessments

Provisions on the conduct of a rent assessment are set out in Regulations 8 to 11 in Part 3 of the Pubs Code (see Annex B).

6.1 The Pubs Code will provide around 13,000 tied tenants in England and Wales with increased transparency, fair treatment, and the right to request a rent assessment if they have not had one for five years. The Small Business, Enterprise and Employment (SBEE) Act 2015 stipulates that the Pubs Code must be consistent with the principles of (i) fair and lawful dealing by pub-owning businesses in relation to their tied tenants and (ii) that tied pub tenants should not be worse off than a free-of-tie tenant.

6.2 The Act states that the Code should be "about practices and procedures to be followed by pub-owning businesses in their dealings with their tied pub tenants" and that it may in particular "contain requirements as to the provision of information by pub-owning businesses to their tied pub tenants" and "impose other obligations on pub-owning businesses in relation to their tied pub tenants." Section 42(4)(b) provides that the Secretary of State may specify the circumstances in which pub-owning businesses – as part of their statutory obligations under the Pubs Code – will be required to provide a tied tenant with a rent assessment.

What is a rent assessment?

6.3 The concept of a 'rent assessment' is a central element of the statutory Pubs Code that needs to be defined so as to ensure the greatest possible clarity for tenants and pub-owning businesses.

6.4 Having a rent assessment will entitle an existing tenant to renegotiate their tied rent during the course of their agreement to reflect current trading. It will also entitle a tenant to request the offer of a Market Rent Only (MRO) agreement. The elements of the Pubs Code governing the circumstances in which a tenant may request an MRO offer; and for the negotiation and conclusion of MRO-compliant agreements are set out in Chapters 8 to 12 of this consultation document.

6.5 The timing of a rent assessment will determine how long a tenant whose pub-owning business has fallen outside the jurisdiction of the Code during the course of their agreement will continue to benefit from the extended Code protections under section 69 of the Act. The Pubs Code provisions on 'extended protection' for a tied pub tenant whose pub is sold by a 'Code company' to a 'non-Code company' will be discussed in detail in the second part of this consultation.

6.6 For all of these purposes, we intend the Pubs Code to describe a rent assessment in terms of a procedure, rather than a single fixed point in time.

6.7 This first consultation focuses only on the way a rent assessment should be defined.

6.8 The Government's proposals for the information that must be provided to the tenant as part of the rent review will be set out in the second part of the consultation.

Right to a rent assessment

6.9 Regulation 8 of the Pubs Code sets out the circumstances in which a pub-owning business must conduct a rent assessment. These are where the rent assessment is in

connection with a rent review that is required under the terms of the tenancy agreement or licence; or where an assessment has been requested by the tenant. Regulation 8 entitles a tenant to make a written request for a rent assessment in the following circumstances:

- a) where no rent assessment has been concluded under the tenancy agreement for at least five years; or
- b) where there has been a significant increase in the price at which tied products or services are supplied under the tied agreement; or
- c) where an event has had a significant impact on the tenant's expected trade.

6.10 In each of these circumstances, the tenant will also have the option to request the offer of an MRO agreement from their pub-owning business. A tenant's rights to pursue the MRO option and the procedure to be followed are explained in Chapters 8 and 10.

Conduct of a rent assessment

6.11 We propose that the Code should state that the rent assessment period will cover a period of at least six months. It will commence with a rent proposal being made by the pub-owning business:

- at least six months before the next rent review date provided for in the tenancy agreement; or
- in response to a request for a rent assessment from the tenant where it has been five years or more since the last rent assessment as provided for in the Pubs Code; or
- where there has been a significant increase in the price of tied products or services, or
- where there has been an event that has a significant impact on the expected trade of the pub.

6.12 Where a rent assessment has been requested by the tenant, the pub-owning business will be required to provide the tenant with a rent review proposal within 14 days of receipt of the request.

6.13 The rent assessment will end either on the rent review date or when a new agreement is concluded, whichever is the later. If later, the new rent will be backdated to the rent review date.

6.14 Other contractual terms and formal or informal negotiations that may affect the rent will not be prohibited by the provisions on rent assessments. These include annual indexation provisions; ad hoc arrangements in support of the tenant; rent changes connected to changes in the nature of the tie; changes related to a benefit in kind; and periodic general business reviews. These will not constitute a formal rent assessment under the Code.

Q.1: Do you have views on the proposed definition of a rent assessment?

7. Delivering the commitment on ‘No Worse Off’

7.1 Provisions on entitlement to a Market Rent Only (MRO) option were included by Parliament during the passage of the Small Business, Enterprise and Employment (SBEE) Act 2015 as a way of delivering the principle that a tied tenant should be no worse off than a free-of-tie tenant.

7.2 The SBEE Act makes the introduction of a statutory MRO procedure a compulsory element of the Pubs Code and of the Pubs Code Adjudicator arrangements.

7.3 Section 43 of the Act establishes the statutory framework within the Pubs Code for the offer of an MRO-compliant agreement to a tied tenant of a pub-owning business. Section 44 lays out the framework under the Code within which the tenant and pub-owning business will seek to negotiate and agree the terms of an MRO agreement; and also establishes the role of the Pubs Code Adjudicator within that procedure.

7.4 Section 45 of the Act provides for the making of regulations to govern the resolution by the Adjudicator of disputes between the parties in relation to the statutory terms or procedure for the requesting, provision, negotiation and concluding of an MRO agreement.

Parallel Rent Assessment

7.5 The SBEE Act includes a discretionary power to require pub-owning businesses to provide their tenants with a parallel rent assessment (PRA).

7.6 Proposals for PRAs were originally included in the SBEE Bill as the then Government’s preferred alternative to a market rent only means of delivering the principle that a tied tenant should be no worse off than a free-of-tie tenant. The Government had earlier proposed in its 2013 consultation that PRAs should be conducted in line with a proforma to be included in the Pubs Code.

7.7 Responses to the 2013 consultation showed that neither pub-owning businesses nor tenants’ groups supported the proposed PRA approach. A typical response from a pub-owning business described the imposition of a formula for the calculation of rent as an unwarranted intervention in the commercial process that would overturn the fundamental principle of free market negotiation. Representatives of tied tenants compared the PRA proposal unfavourably with a free-of-tie option as a way to deliver ‘no worse off’; they felt its inflexibility meant it failed to provide the necessary bespoke information to permit individual tenants to make an informed choice. The All Party Parliamentary Save the Pub Group warned that a parallel free-of-tie rent assessment procedure would overwhelm the Adjudicator with thousands of cases and would set the system up to fail.

7.8 The Government Response in June 2014 explicitly acknowledged that a ‘mandatory free of tie option’ – now known as Market Rent Only (MRO) – would be the quickest, simplest way of delivering the commitment to ensure that a tied tenant was no worse off; that this could be delivered through the usual process of contractual negotiation familiar to all within the industry; and crucially that it would not rely on an artificial construct as would be the case with any form of PRA. However, it feared the consequences of the commercial uncertainty for pub-owning businesses that an MRO option might bring.

7.9 The Government Response therefore attempted to chart a ‘third way’ between a mandatory free of tie option and the prescriptive form of PRA which many respondents had

argued would be unworkable. The compromise proposal was a form of PRA that would focus on the particular circumstances of an individual pub. To that end, the SBEE Act specifically leaves it to the Secretary of State to propose regulations defining what should constitute a PRA and makes PRA an optional element for inclusion in the Pubs Code.

7.10 Having considered the provisions of the Act and the options for implementation, the Government has now concluded that there is no need for PRA. PRA was always envisaged as a method of delivering transparency that provided an alternative to a compulsory right to go free of tie. Requiring pub-owning businesses to provide both PRA and MRO assessments would add complexity to the operation of the Code and would impose significant additional burdens. Nor would it be a simple task to merge the two procedures – as PRA works on a ‘bottom up’ basis, demonstrating the value of various tied benefits to the profitability of the pub; whereas MRO involves a straightforward ‘top down’ assessment of the commercial rentable value of the pub.

7.11 For these reasons of cost, complexity and proportionality, the Government has decided not to pursue the discretionary power to introduce a separate PRA procedure within the Pubs Code. The right to request MRO in the circumstances required by the Code will already deliver the principle of ensuring that the rent assessment procedure leaves an existing tied tenant no worse off than a free-of-tie tenant. The information and transparency requirements in the Pubs Code will ensure that prospective tenants have all the information they need in good time to make an informed decision on whether or not to enter into a tied agreement.

7.12 The Government’s detailed proposals on the information that the Code should require pub-owning businesses to provide to tenants and to prospective tenants will be set out in the second part of this consultation.

8. Market Rent Only option

The provisions on when a tenant may request an MRO offer are set out in Regulations 13 to 17 in Part 4 of the Pubs Code (see Annex B).

8.1 Through the Pubs Code, the Government seeks to establish a Market Rent Only (MRO) procedure that delivers high levels of both transparency and certainty; that both parties can plan for in advance; but that also provides important safeguards for tenants whose circumstances change radically through no fault of their own.

8.2 It was the intention of Parliament that tied tenants should have the opportunity when negotiating a renewal of their tenancy agreement or conducting a formal rent assessment to request an offer from their pub-owning business to occupy their pub on a market rent only basis. The Government expects that the vast majority of tenants seeking to move to an MRO agreement will do so at one or other of these times.

8.3 It was also Parliament's intention that tenants should be entitled to the option of an MRO agreement in other limited circumstances where the viability of their business has been adversely affected either by a significant increase in the cost of their tied products or services or by an external event that has had a significant impact on trade.

8.4 The Small Business, Enterprise and Employment (SBEE) Act 2015 reflects these requirements. In conjunction with Code provisions on the circumstances when a tenant may request a rent assessment (as described in paragraph 6.9), it will mean that most tied tenants will never be more than five years away from the right to request an MRO offer (unless they have waived their right – see Chapter 12).

8.5 Regulation 13 sets out the circumstances in which a tenant may request an MRO offer and defines the date on which the MRO procedure will commence.

Renewals

The provisions on the circumstances in which the renewal of an agreement will entitle a tenant to request an MRO offer are set out in Regulations 13 and 14.

8.6 Section 43(7) of the SBEE Act permits the Pubs Code to define a renewal for the purposes of triggering an MRO offer.

8.7 Regulation 14 sets out when a tenant's right to request an MRO offer in relation to the renewal of an agreement will come into effect. Where a tenancy is 'contracted in' under Part II of the Landlord and Tenant Act (LTA) 1954, a tenant will enjoy rights of renewal that are consistent with the provisions for the continuation and renewal of tenancies covered by Part II. This will be on either the day that the tenant receives the pub-owning business' notice under section 25(1) of the LTA; or the day on which the landlord receives the tenant's request under section 26 of the Act.

8.8 Our understanding is that tenants who are contracted-out under the LTA do not normally have any other contractual right to renew their existing tenancy. However, were they to do so, they would be able to request an MRO offer when exercising that contractual right.

8.9 We are not aware of licences containing entitlements to renewal, but if they did then there would be a right to MRO in those circumstances.

Q.2: Are there any other circumstances where a renewal would arise and which should trigger MRO beyond those we have set out?

Rent assessments

The provisions on the circumstances in which a rent assessment will entitle a tenant to request an MRO offer are set out in Regulations 13 and 15.

8.10 Chapter 6 discusses the circumstances in which a rent assessment must be conducted or may be requested by a tenant. Under Regulation 8, a rent assessment must be conducted where a rent review is provided for under the terms of the tenancy agreement or licence. A rent review proposal may also be requested by the tenant where a rent assessment has not been concluded for at least five years; where there has been a significant increase in the price of products or services supplied under the tie; or where an event has had a significant impact on the tenant's expected level of trade.

8.11 Where the rent assessment is in connection with a scheduled rent review, the rent assessment will commence on the date six months before the rent review date in the agreement. The pub-owning business will be required to provide the tenant with a rent review proposal on the date that the rent assessment commences.

8.12 Under Regulations 13 and 15, the tenant will gain the right to request an MRO offer following the receipt of this rent review proposal – so long as the rent proposed by the pub-owning business is higher than the existing rent that the tenant is paying. The tenant will have 14 days from the receipt of the rent review proposal in which to request an MRO offer.

8.13 A tenant may request a rent review proposal at any time after five years have elapsed since the conclusion of the last rent assessment. The pub-owning business will be required to provide the tenant with a rent review proposal within 14 days of the tenant's request; and the rent assessment will commence on the date that the rent review proposal is received by the tenant. If the rent review proposal represents an increase in the rent that the tenant is currently paying, the tenant will then gain the further right to request an MRO offer from the pub-owning business. The tenant will again have 14 days from the receipt of the rent review proposal in which to request an MRO offer.

A significant increase in price

8.14 The definition of a 'significant increase in price' is set out in Regulation 3 in Part 1 of the Pubs Code. The circumstances in which a significant increase in price may entitle a tenant to request a rent assessment are set out in Regulation 8 in Part 3 of the Pubs Code; and to request an MRO offer in Regulations 13 and 16 in Part 4 of the Code.

8.15 Section 43(6) of the SBEE Act requires the Pubs Code to provide tenants with the option of requesting an MRO offer from their pub-owning business where they have experienced a significant increase in the price of *any* tied product or service that was not reasonably foreseeable when the tenancy was granted or when the last rent assessment was concluded.

Tenant's options following a significant increase in price

- 8.16 The tenant's rights in respect of a significant increase in price will take effect from the date on which the tenant receives notification of the price increase from the pub-owning business.
- 8.17 A tenant will potentially have two routes through which to request an MRO offer – either under Regulations 13 and 16 in direct reliance on the price increase; or by first requesting a rent review proposal under Regulation 8 and commencing a rent assessment. In both cases, the same test of whether a significant increase in price has occurred – as set out in Regulation 3 and discussed in detail below – will apply.
- 8.18 Where the tenant wishes to pursue an MRO option under Regulations 13 and 16 from the outset, the procedure for requesting an MRO offer from the pub-owning business will be as set out in Chapter 10. A tenant who requests an MRO offer in reliance on the price increase will also have the option of requesting a rent review proposal and initiating a rent assessment at the same time. The procedure for commencing a rent assessment following a significant increase in price is set out in Chapter 6. By permitting a tenant to pursue both the rent assessment and MRO options at the same time the Pubs Code will ensure that the tenant has a meaningful comparison of the tied and free-of-tie terms that are on offer. If the tenant ultimately chooses not to pursue the MRO option to the end, the rent assessment procedure will continue to its conclusion.
- 8.19 However, a tenant will not need to make an immediate decision to request an MRO offer in relation to a significant increase in price. A tenant may initially rely on the provisions in Regulation 8 to request a rent review proposal and to commence a rent assessment. Under Regulations 13 and 15, the receipt of that (tied) rent review proposal will itself give the tenant a right to request an MRO offer from the pub-owning business, so long as the rent review proposal represents an increase in the rent that the tenant is currently paying. The tenant will have 14 days from the receipt of the rent review proposal in which to request an MRO offer. Again, if the tenant ultimately chooses not to pursue the MRO option to the end, the rent assessment procedure will continue to its conclusion. It is important to note that this two-stage right to request does not apply where the MRO offer is first sought in response to the significant increase in price, but a rent assessment is not requested within the same 14 day timeframe. If the tenant requests MRO only and the 14 day period to request a rent assessment expires, the tenant will have lost the right to request a rent assessment as a result of the significant increase in price.
- 8.20 The Government believes that this is a proportionate approach to balancing the rights to a rent assessment and to an MRO offer in response to a significant increase in price. It will not require a tenant to make an immediate decision to go down the MRO route; but will keep the option open until there has been the opportunity to weigh the merits of pursuing MRO in the light of a new tied offer from the pub-owning business.

Definition of a significant increase in price

- 8.21 Although the Government anticipates that a 'significant increase in price' will be used infrequently by tenants as a reason to commence the MRO procedure, it nonetheless represents an important protection for tenants against price increases that are not justified by wider regulatory environment or trading conditions.

8.22 As with other ways of initiating the MRO procedure, the Government believes that it is important for both tenants and pub-owning businesses to have certainty about what would and would not constitute a significant increase in price. We have taken into account that different products and services have different significance for different pubs, but that the price of beer is the most significant price for all pubs.

A significant increase in the price of beer

8.23 We propose that a significant increase in the price of beer should be determined by reference to the wholesale market price published by breweries. This provides a clear baseline. We propose that pub-owning businesses should be able to increase the price at which they supply beer to tied tenants by the same percentage as the wholesale price has increased, plus a small margin for tolerance. We propose that this margin should be 5 percentage points. Any increase beyond this would constitute a ‘significant increase in price’ and entitle the tenant to MRO. The regulations present this in the form of an equation – expressed as $(A - B) + (5\% \times B) + C$ – whose elements are the increase in the wholesale price from when the price was last fixed (from B to A), plus any external costs such as those attributable to tax, duty or regulatory costs (C), plus a margin of five percentage of the original wholesale price (5% of B).

Q.3: Is the wholesale market price for beer the appropriate baseline for determining a significant price increase?

Q.4: Is a five percentage point threshold above any increase in the wholesale price of beer (which will reflect any increases in inflation, taxation and other input costs), the appropriate measure?

A significant increase in the price of other tied products and services

8.24 Other products and services supplied under tied tenancy agreements vary considerably. They can include other alcoholic and non-alcoholic drinks, snacks, other foodstuffs and services such as cleaning. There is no obvious equivalent of the wholesale beer price lists to use as a baseline.

8.25 The Government therefore proposes that, for tied products and services other than beer, a straightforward percentage price increase should be used to determine whether a rise is ‘significant’. To reflect the fact that a price rise in products and services which are central to a pub’s business value has more impact on a tenant than an increase in more peripheral products and services, we propose a two tier approach. For tied products and services where the cost to the tenant is 20 percent or more as a proportion of the pub’s turnover, a significant price increase would be one in excess of 30 percent. For tied products and services where the cost to the tenant is less than 20 percent as a proportion of the pub’s turnover, a significant price increase would be one in excess of 40 percent.

8.26 As with beer prices, the Code would, however, reflect the Government’s judgment that it is proportionate and equitable to permit pub-owning businesses to pass on increases that are beyond their control without triggering the right for a tenant to request an MRO option. In the

case of beer, allowing the wholesale price increase to be passed on will account for this. For other tied products and services, costs that can be passed on would include those rises resulting from increases in taxes, duty or regulatory compliance costs; or inflation (RPI) in the wholesale prices at which the products or services are bought in by the pub-owning business. These would not count towards the price increase calculation.

Q.5: Do you agree that the calculation of a significant increase in price for tied products and services other than beer should exclude any increase in the wholesale price that results from rises in tax, duty, regulatory compliance costs or inflation (RPI)? Are there any other factors that should be excluded?

Q.6: Is this the appropriate way to measure a significant price increase for tied products and services other than beer? If not, please explain the alternative you would recommend.

Q.7: Is a two tier approach appropriate? If so, is the proposed threshold of contributing to 20 percent of the pub's turnover the right one?

Q.8: Are the proposed percentage increases in price (30 percent and 40 percent) appropriate? If not, please explain your reasoning and an alternative.

Timeframe

8.27 The simplest way of calculating price increases for other tied products and services would be by reference to the previous price paid by the tenant. However, our preferred approach is to calculate price increases by reference to the price paid by the tenant for the product or service in question at a previous point in time – for example six months previously. This would permit price fluctuations to be taken into account, and would mean that frequent small price increases that have the same cumulative effect on the tenant as a single significant price increase could not be used to avoid the MRO trigger.

Q.9: Do you agree that a significant price increase should be calculated by reference to the price paid by the tenant at a previous point in time? If so, should that be six months ago?

Significant impact

The circumstances in which a ‘significant impact on trade’ may entitle a tenant to request a rent assessment are set out in Regulation 4 in Part 1 of the Pubs Code; and to request an MRO offer in Regulations 13 and 17 in Part 4 of the Code.

8.28 Under section 43(9) of the SBEE Act the Pubs Code may provide for a tied tenant to have the right to request an MRO option where there has been an event which has a significant impact on the level of trade that – in the absence of that event - they could reasonably have expected; and where the impact is beyond their control; and where it could not have been foreseen.

Tenant’s options following a significant impact

8.29 The tenant’s rights in respect of a significant impact will take effect from the date on which the tenant provides the pub-owning business with a written analysis of the forecast impact on their business for at least the next 12 months.

8.30 As with a significant increase in price, a tenant will potentially have two routes through which to request an MRO offer – either under Regulations 13 and 17 in direct reliance on the significant impact; or by first requesting a rent review proposal under Regulation 8 and commencing a rent assessment. In both cases, the same test of whether a significant impact has occurred – as set out in Regulation 4 and discussed in detail below – will apply.

8.31 Where the tenant wishes to pursue an MRO option under Regulations 13 and 17 from the outset, the procedure for requesting an MRO offer from the pub-owning business will be as set out in Chapter 10. A tenant who requests an MRO offer in reliance on the significant impact will also have the option of requesting a rent review proposal and initiating a rent assessment at the same time. The procedure for commencing a rent assessment following a significant impact is set out in Chapter 6. By permitting a tenant to pursue both the rent assessment and MRO options at the same time the Pubs Code will ensure that the tenant has a meaningful comparison of the tied and free-of-tie terms that are on offer. If the tenant ultimately chooses not to pursue the MRO option to the end, the rent assessment procedure will continue to its conclusion.

8.32 However, a tenant will not need to make an immediate decision to request an MRO offer in relation to a significant impact. A tenant may initially rely on the provisions in Regulation 8 to request a rent review proposal and to commence a rent assessment. Under Regulations 13 and 15, the receipt of that rent review proposal will itself give the tenant a further right to request an MRO offer from the pub-owning business, so long as the rent review proposal represents an increase in the rent that the tenant is currently paying. The tenant will have 14 days from the receipt of the rent review proposal in which to request an MRO offer. Again, if the tenant ultimately chooses not to pursue the MRO option to the end, the rent assessment procedure will continue to its conclusion. As before, this two-stage right to request does not apply where the MRO offer is first sought in response to the trigger event, but a rent assessment is not requested within the same 14 day timeframe. If the tenant requests MRO only and the 14 day period to request a rent assessment expires, the tenant will have lost the right to request a rent assessment as a result of the trigger event.

8.33 The Government believes that this is a proportionate approach to balancing the rights to a rent assessment and to an MRO offer in response to a significant impact. It will not require a

tenant to make an immediate decision to go down the MRO route; but will keep the option open until there has been the opportunity to weigh the merits of pursuing MRO in the light of a new tied offer from the pub-owning business.

Definition of a significant impact

8.34 Because the exercising of the right to move to an MRO agreement could result in permanent changes to the commercial and property rights of a pub-owning business due to events outside its control, the Government intends that, in the interests of proportionality, this trigger should be capable of being invoked only rarely and in very exceptional circumstances.

8.35 Therefore, we propose that the Code should not specify trigger events or types of event – for example, the closure of a local business or the building of a bypass. Its focus should be on the impact itself, rather than the circumstances that cause it – other than that we rule out events caused by a change in the tenant’s personal circumstances or by changes in the regulatory environment. Specifically, we propose the Pubs Code stipulates that an event which has a significant impact is one in which all of the following conditions apply:

- i. brings about a permanent change to trading conditions, and not simply the result of normal variations in trading conditions. We propose that this would need to be evidenced by a year’s worth of trading forecasting to illustrate the significant impact on trade;
- ii. is not capable of prevention or remedy by any other means – for example, there will be no significant impact where the risk was an insurable one; where the pub-owning business is required or able to undertake physical repairs to the property; or where the pub-owning business is prepared to agree a reduction in the tied rent to alleviate the impact on trade;
- iii. specifically affects the tenant’s pub, and is not an impact that can be shown to affect other pubs too;
- iv. does not relate to the personal circumstances of the tenant;
- v. is not a result of an increase in tax, duty or regulatory compliance costs; or an increase in the wholesale price of goods supplied under the tie; and
- vi. does not result in an increase in the expected level of trade over the following 12 months.

Q.10: Do you have any comments on points i. to vi. above?

Q.11: Can you suggest any other circumstances that would be likely to have a ‘significant impact’ on the expected business of a pub; and that you believe would not be covered by the proposed definition in the Code?

9. MRO-compliant agreements

Provisions on the terms that will be required in an MRO-compliant agreement are set out in Regulation 21. Provisions on terms that will be reasonable and unreasonable are set out in Regulation 22 in Part 5 of the Pubs Code (see Annex B).

9.1 Section 43 of the Small Business, Enterprise and Employment (SBEE) Act 2015 sets down parameters for assessing whether an agreement is MRO-compliant. The purpose of this is to ensure that the Market Rent Only (MRO) procedure cannot be undermined by tenants being offered an MRO agreement on terms that they are unlikely to accept.

9.2 Section 43(4) provides that an agreement will not be MRO-compliant if it is in the form of a tenancy at will or contains a tie for any product or service other than for insurance.

9.3 Section 43(5) permits the Code to describe further terms and conditions that an agreement must contain if it is to be MRO-compliant; to specify terms that are unreasonable and that may not be included in an MRO-compliant agreement; and to advise on other terms that will be considered reasonable.

9.4 The Government does not propose to prescribe a model form of MRO-compliant agreement in the Code. Rather we expect MRO agreements to be modelled on the standard types of commercial agreements that are already common for free-of-tie tenants.

9.5 The Government is, however, proposing minimum requirements in certain circumstances. These are designed to ensure that a tenant enjoys no less – but also no more – protection or security of tenure under their new MRO agreement than they previously had under their old tied agreement.

MRO at renewal

9.6 Where a tenant whose tenancy is contracted in under Part II of the Landlord and Tenant (LTA) Act 1954 opts for MRO on renewal of the tenancy – to be MRO-compliant the new agreement must continue to apply the security of tenure safeguards in Part II of the LTA in the same way that they applied in the old tied tenancy agreement. In addition, a term will be unreasonable if it imposes a tie for any product or service other than for buildings insurance.

9.7 The Government's proposal that it should be unreasonable for an MRO-compliant agreement to include a tie for insurance other than buildings insurance (for example, for the contents of the pub or in respect of public liability) reflects common commercial practice, and protects the freehold property interests of the landlord. This is a clarification of the provision in section 43 of the Act.

9.8 Where a tenant whose tenancy is contracted out under Part II of the LTA opts for MRO on contractual renewal of the tenancy – we are not prescribing any terms that will be required to make the new agreement MRO-compliant. However, any term that imposes a tie for any product or service other than for buildings insurance will be unreasonable.

9.9 The rights of contracted in and contracted out tenants are different if they opt for MRO at renewal to ensure that, in each case, the tenant receives the offer of an MRO agreement that matches the rights, obligations and protections that they currently enjoy under their tied agreement. In the case of contracted out tenants, it will not be the role of the MRO procedure to grant them additional statutory rights under the LTA.

MRO during the tenancy

9.10 The requirements are different where MRO is offered in response to a request from a tenant other than at renewal – at the time of a scheduled rent assessment; when no rent assessment has been concluded for more than five years; in response to a significant increase in the price at which products or services are supplied under the tie; or in respect of an event that has had a significant impact on expected trade.

9.11 In these circumstances, to be MRO-compliant the new agreement must be for a minimum of five years or the remaining term of the existing tied tenancy, whichever is the shorter; for a maximum of 20 years; and must continue any protections under Part II of the LTA that were enjoyed under the tied agreement. In addition, terms will be unreasonable if they insert a break clause into the tenancy that is only exercisable by the pub-owning business; if they impose a tie for any product or service other than for buildings insurance; or if they are of a type that are not standard terms of business in free-of-tie tenancy agreements.

9.12 The Government is interested in hearing the views of respondents on the distinction that is drawn in the Regulations between terms that will be unreasonable in an MRO-compliant agreement that follows a request for MRO during the course of the tenancy and an MRO-compliant agreement that follows a request for MRO at renewal. In the former, the Regulations provide that terms will be unreasonable if they are not standard terms to be found in free-of-tie agreements. The Government regards this as a necessary protection to ensure that these tenants are offered an MRO agreement on comparable terms to existing free-of-tie tenants.

9.13 This provision is not required, however, where the request for MRO occurs at renewal – where the provisions of the LTA will instead apply. Where a tenant is contracted-in under Part II of the LTA, the tenant will already have the safeguard of applying to the courts to set the terms of the agreement under the terms of the LTA – at which time the tenant may argue that they should not be subject to terms that are not applied in other free-of-tie agreements. In those circumstances, it would not be appropriate to give the Adjudicator jurisdiction that cuts across that of the courts under the LTA.

Q.12: Do you agree with the distinction drawn between an MRO compliant agreement that arises from a request for MRO at renewal and an MRO compliant agreement that arises from a request for MRO during the course of the tenancy?

9.14 The Government is also seeking views on whether an MRO-compliant tenancy agreement should provide for an open market rent review every five years. If included, we would not propose to make any further provision for the terms of these reviews, but would expect the current industry approach in free-of-tie agreements to be adopted. We would welcome opinions on whether this would be a necessary, desirable or proportionate safeguard for tenants; or whether it would represent an unjustified intervention in the commercial dealings between the parties.

Q.13: Do you support the requirement that an MRO-compliant agreement should provide for an open market rent review every five years? Please explain the effect of such a requirement on the commercial relationship between the tenant and the pub owning business in an MRO agreement.

MRO and licences

9.15 In all circumstances where an MRO offer is sought by a person who holds a licence to occupy the pub premises – we are not prescribing any terms that will be required to make the new licence MRO-compliant. However, any terms that impose a tie for any product or service other than for buildings insurance will be unreasonable.

10. MRO procedure

The procedure to be followed in requesting and negotiating an MRO agreement is set out in Regulations 18 to 20 and 23 to 25 in Part 5 of the Pubs Code. The independent assessment of MRO is provided for in Regulation 25 in Part 5 of the Code; and the independent procedure itself is set out in Regulations 29 to 31 in Part 6 of the Code (see Annex B).

10.1 Details of the day-to-day operation of the Market Rent Only (MRO) procedure will be the responsibility of the Adjudicator, who will publish guidance on the detailed procedures to be followed.

10.2 The MRO procedure broadly divides into three phases: the notification period, during which the tenant may request an MRO agreement from the pub-owning business; the negotiation period, during which the parties should seek to agree MRO terms; and the independent assessment period – if required – for the market rent to be assessed.

10.3 The Government proposes an overall maximum timetable of approximately six months for conducting the MRO procedure (unless there is a dispute which is referred to the Adjudicator, which will proceed according to the timetable for the resolution of disputes described in Chapter 11). This mirrors the six-month rent assessment period which the Government has proposed in Chapter 6.

10.4 In the proposed arrangements set out below, all communications between the parties and with the Adjudicator and independent assessor are to be in writing – which may include electronic communication; and all deadlines are to be calculated from the date that the party receives the communication.

Effect of the MRO procedure on the existing tied terms

10.5 Regulation 19 provides that, where a tenant has requested an MRO offer in all circumstances other than in respect of the renewal of the agreement under Regulation 13 (as described in Chapter 8) the terms of the tenancy or licence under which they occupy the pub and any other associated contractual arrangements between the tenant and the pub-owning business will be ‘frozen’ as they applied at the point that the tenant’s request was made; and will continue unchanged until the MRO procedure has come to an end. There is no provision under Regulation 19 for the pub-owning business to recover any monies that would otherwise have been payable by the tenant under ‘frozen’ terms following the conclusion of the MRO procedure, where the tenant accepts the MRO offer.

10.6 The circumstances in which the MRO procedure will come to an end are set out in Part 7 of the Pubs Code and are discussed in detail in paragraphs 10.26 to 10.31.

10.7 Regulation 19 will have a particular effect where the tenant has requested an MRO offer in response to notification by the pub-owning business of a significant increase in price. In these circumstances, and where the tenant’s request is made before the price increase actually comes into effect, the pub-owning business may not introduce the proposed price increase – or any other changes to the tenant’s terms – while the MRO procedure is ongoing.

10.8 The effects on the existing tied agreement following a request by the tenant for a rent assessment only in reliance on the same triggers under Regulation 8 are described in Chapter 6. In these circumstances, the rent will remain the same until the end of the rent assessment (Regulation 11(1)) but other changes in the terms of the agreement – including any significant

increase in price that the tenant might have relied upon to request the rent assessment – will take effect as scheduled and continue in place throughout the rent assessment negotiations. This reflects the current practice for the review of tied rent under the voluntary Industry Framework Code.

10.9 The Government appreciates that the different approaches to the status of the existing tied terms under the rent assessment and MRO procedures will provide tenants with different levels of protection – and particularly where there has been a significant increase in price – depending on which option they take. This difference is deliberate.

10.10 Where the tenant seeks a rent assessment, they are pursuing a renegotiation of their existing tied terms. Any terms that change during the course of the rent assessment – for example, the price of tied products or services – will be ones that will be part of the new tied agreement; and a fair and transparent rent assessment conducted in accordance with the requirements of the Pubs Code will mean that these will be taken into account when setting the new tied rent.

10.11 However, where the tenant requests an MRO agreement, their intention is to move to a completely new form of contractual relationship with the pub-owning business. Changes to the old tied terms that occur during the MRO procedure will have no equivalent terms in the MRO agreement. It is therefore neither appropriate nor practical to alter the MRO offer to take account of the increased prices paid by the tenant during the MRO procedure.

The MRO Procedure

10.12 The MRO procedure is divided into three stages – the notification stage; the negotiation period; and - if required – the independent assessment stage. The Regulations set out a detailed timetable of the rights and obligations of the tenant and the pub-owning business, and of the role of the Adjudicator, under the MRO procedure. This is set out in Diagram 1.

Notification stage

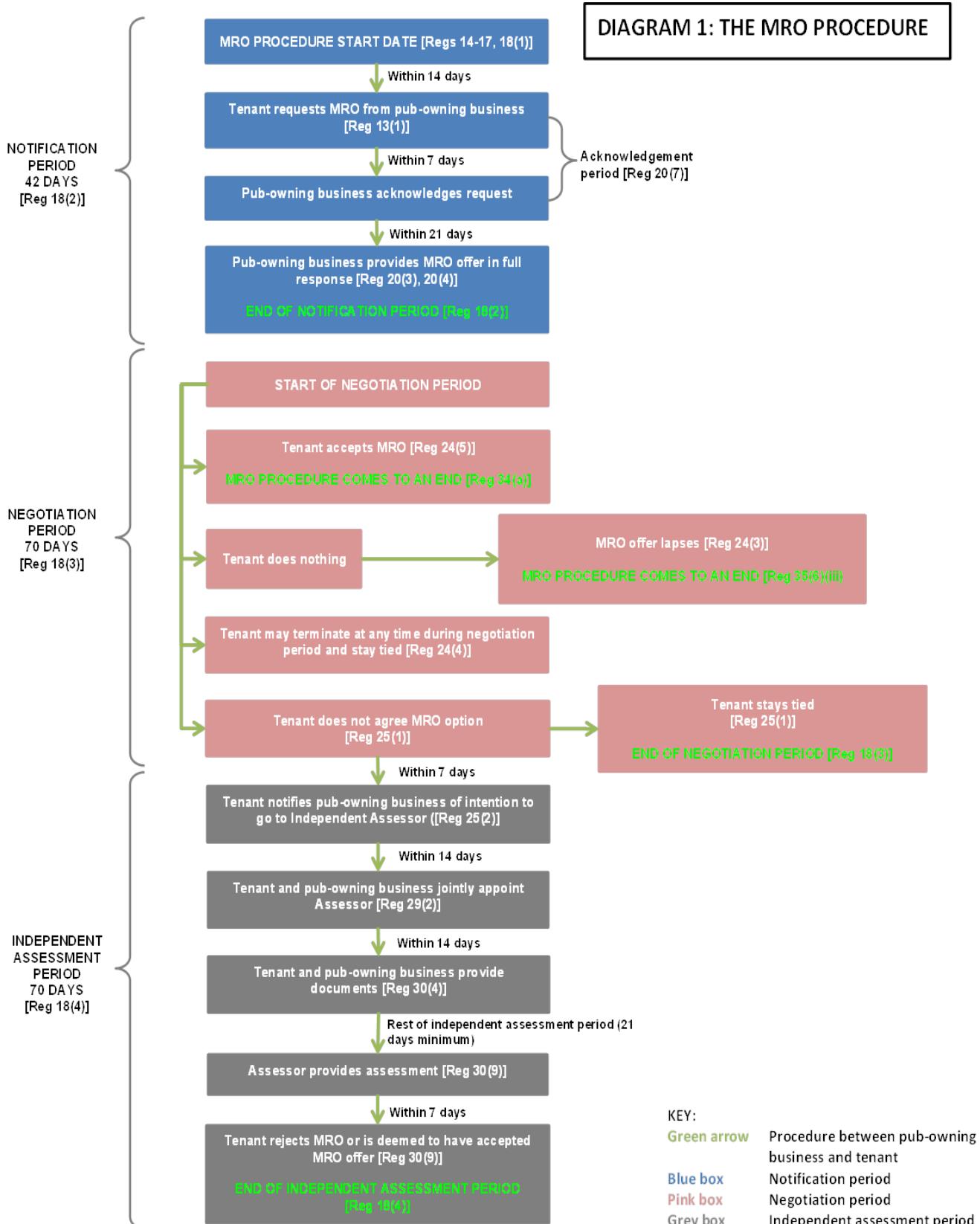
Provisions covering the notification stage of the MRO procedure are set out in Regulations 18 to 20 and 23.

10.13 The notification stage is defined in Regulation 18 as commencing on the MRO start date and running for a period of up to 42 days. The MRO start dates are set out in Regulations 14 to 17, and are explained in Chapter 8.

10.14 Regulation 13 sets out the arrangements under which the tenant may request an MRO offer; and Regulation 20 sets out the way in which the pub-owning business must acknowledge and respond to that request.

10.15 The tenant has 14 days in which to request an MRO offer; and the pub-owning business must acknowledge that request within a further seven days.

10.16 The pub-owning business then has a further 21 days in which to supply the tenant with a full response – either a proposed MRO-compliant agreement; or a statement of its reasons for disagreeing that an MRO offer is required. If the pub-owning business fails to acknowledge the tenant's request, or to provide a full response as required by Regulation 20; or where the tenant does not accept the pub-owning business' reasons for refusing to make an MRO offer – the



tenant may notify the pub-owning business within seven days of their intention to refer the matter to the Adjudicator for resolution.

10.17 Disputes on the conduct of the notification stage may be referred to the Adjudicator under Part 6 of the Regulations.

Negotiation period

Provisions covering the negotiation period for the MRO procedure are set out in Regulation 24.

10.18 Under Regulation 18, the negotiation period will run for a period of up to 70 days from the end of the notification stage. Under Regulation 24(4), the tenant may terminate the negotiation at any time during negotiations, bring the MRO procedure to a close, and remain on their existing tied terms.

10.19 Regulation 24 provides that, at the end of the 70 day negotiation period, the tenant may accept the negotiated MRO offer; or reject the MRO offer, end the MRO procedure and remain on their existing tied terms. If the tenant does nothing, the MRO procedure will terminate automatically under Regulation 24(3).

10.20 Under Regulation 25, having rejected the MRO offer at the end of the negotiation period, the tenant may, within 7 days, inform the pub-owning business of their intention to take the MRO procedure to the independent assessment stage.

Independent assessment stage

Provisions covering the procedure for the independent assessment of MRO agreements are set out in Regulations 29 to 31 of Part 6 of the Code.

10.21 Under Regulation 18, the Independent Assessment Stage will run for a period of 70 days commencing on the day that the pub-owning business receives notice of the tenant's intention to go to independent assessment.

10.22 Regulation 29 gives the parties 14 days from this date in which to jointly appoint an independent assessor; and a further seven days after that in which to inform the Adjudicator that they have failed to agree on an appointment – in which case the Adjudicator will have a further seven days in which to direct an appointment.

10.23 From the date of the appointment of the independent assessor, the parties will have 14 days under Regulation 30(4) in which to provide the assessor with relevant evidence. We propose that this should include documents providing evidence of:

- i. the trading history of the pub in question for the immediate preceding years;
- ii. trading forecasts for the immediate following years;
- iii. relevant comparisons with similar tied pubs in the local area;
- iv. the market value of any special commercial or financial advantage (SCORFA) currently being provided to the tenant under their tied agreement; and
- v. evidence relating to the wider local commercial property market.

10.24 The independent assessor will then have the remainder of the Independent Assessment Period in which to deliver the independent assessment of the MRO rent. Even if the Adjudicator has been required to make an appointment, and the full time in which to provide evidence has been taken, this will be at least 21 days.

10.25 Under Regulation 30(9), the tenant and the pub-owning business will be treated as having agreed to the determination of market rent in the independent assessment – unless:

- a) the tenant has relied on Regulation 30(9)(a) to reject the independent assessment in writing within seven days following its delivery – this will end the MRO procedure; and the tenant will stay on their existing tied terms;
- b) where the independent assessor has failed to provide a determination of market rent in accordance with the requirements of Regulations 30(2) and (3), and either of the parties refers the failure to the Adjudicator under Regulation 30(7) within seven days following the end of the Independent Assessment Period;
- c) where the independent assessor provides an assessment – but either of the parties believe that the determination of market rent has not been conducted in accordance with the requirements in Regulations 30(2) and (3), and they refer the matter to the Adjudicator under Regulation 30(8) within seven days of the delivery of the assessment.

End of the MRO procedure

The circumstances in which the MRO procedure will come to an end are set out in Regulations 34 and 35 in Part 7 of the Pubs Code.

10.26 Under Regulation 34(a), the MRO procedure will end when the parties sign an MRO-compliant agreement.

10.27 In the absence of agreement, the MRO procedure will come to an end:

- where the pub-owning business' offer lapses at the end of the negotiation period, where the tenant has failed to inform the pub-owning business that they either accept or reject the proposals by the pub-owning business (by virtue of Regulation 34(b)(ii));
- where the tenant informs the pub-owning business during the negotiation period that they are terminating the procedure;(Regulation 34(b)(iii));
- where the Adjudicator rules that the circumstances in which the pub-owning business is required to provide the tenant with an MRO offer have not been met (Regulation 28(3)(b));
- where the Adjudicator rules that any other aspect of the notification or negotiation periods that is required for the MRO procedure to be progressed has not occurred (Regulation 28(4)); or
- on the day that the tenant rejects in writing the assessment of the market rent produced by the independent assessor – which must be within 7 days of its receipt (Regulation 30(9)(a)).

10.28 Where either of the parties has referred the assessment of the market rent produced by the independent assessor to the Adjudicator on the grounds that the independent assessor has failed to comply with the statutory obligations under Regulation 30, the MRO procedure will end:

- on the day that the tenant rejects the assessment in writing – which must be within 7 days of receipt of a ruling by the Adjudicator that there has been no failure by the assessor;
- on the day that the tenant rejects the revised assessment in writing – which must be within 7 days of receipt of the revised assessment conducted following a ruling by the Adjudicator that there has been a failure by the independent assessor.

10.29 The MRO procedure will also end on the day that the tied tenancy or licence comes to an end – if no agreement has been concluded by that date. The Government does not believe that it would be proportionate in these circumstances to permit the MRO procedure to extend a tied agreement that would otherwise have come to an end.

10.30 Where the MRO procedure ends following the signing of an MRO-compliant agreement, Regulation 35(1) provides that the MRO-compliant tenancy will take effect on the following day; and that the MRO rent will be payable from that date.

10.31 Where the MRO procedure ends without the agreement of an MRO option, Regulation 35(3) permits either of the parties to refer to the Adjudicator the question of the recovery of any amounts that would have been payable – as a consequence of the renewal of any pub arrangement other than one covered by Part II of the LTA 1954, a rent assessment, a significant increase in price or a significant impact trigger – had there been no MRO procedure.

Q.14: Does the list of required documents set out in paragraph 10.23 provide the independent assessor with all the appropriate information to make an independent assessment of the MRO rental figure? Should any other documents be added?

Q.15: Do you have any comments on the timescales for the MRO procedure proposed for the Code?

Q.16: Do you have any views on the proposed circumstances in which the MRO procedure will come to an end?

11. MRO Disputes

Provisions governing the resolution of disputes relating to the Market Rent Only procedure are set out in Part 6 of the Pubs Code (see Annex B).

11.1 Section 45 of the Small Business, Enterprise and Employment (SBEE) Act 2015 provides for separate regulations to authorise the Adjudicator to resolve MRO disputes. It is proposed that the powers of the Adjudicator in respect of MRO disputes should be the same as for disputes under the Code as a whole (i.e. sections 48 to 52 of the SBEE Act). Accordingly, the Code provides that MRO disputes can be referred to the Adjudicator for arbitration (see Regulations 26 and 31). All arbitrations will be in accordance with the Arbitration Act 1996 and the Rules of the Chartered Institute of Arbitrators, which set out the powers of the arbitrator and some of the procedural requirements.

11.2 The Adjudicator will arbitrate disputes regarding the MRO requirements in the Act and the Pubs Code. In particular, the Adjudicator will deal with disputes about whether the eligibility criteria for MRO have been satisfied; whether an agreement is MRO-compliant; whether and how the independent assessment of market rent has been completed; and whether any other requirement of the MRO procedure has been complied with (for example, whether a pub-owning business has failed to provide a tied tenant with an MRO offer when required).

11.3 We propose that the fees and costs applicable to MRO disputes will be the same as those that will apply to other arbitrations by the Adjudicator. The second part of this consultation will deal with the fees and costs for arbitration under the Code.

11.4 We propose that both tenants and pub-owning businesses should be able to refer MRO disputes to the Adjudicator; and that the provisions of section 50 of the SBEE Act should apply to the MRO procedure. This will mean that, where the tenancy agreement already provides for arbitration of tenancy related disputes between the parties – and where the pub-owning business has commenced arbitration on a matter which the Pubs Code allows to be referred to the Adjudicator as an MRO dispute – the tenant will be entitled to refer that case to the Adjudicator for resolution under the statutory powers (see Regulation 32).

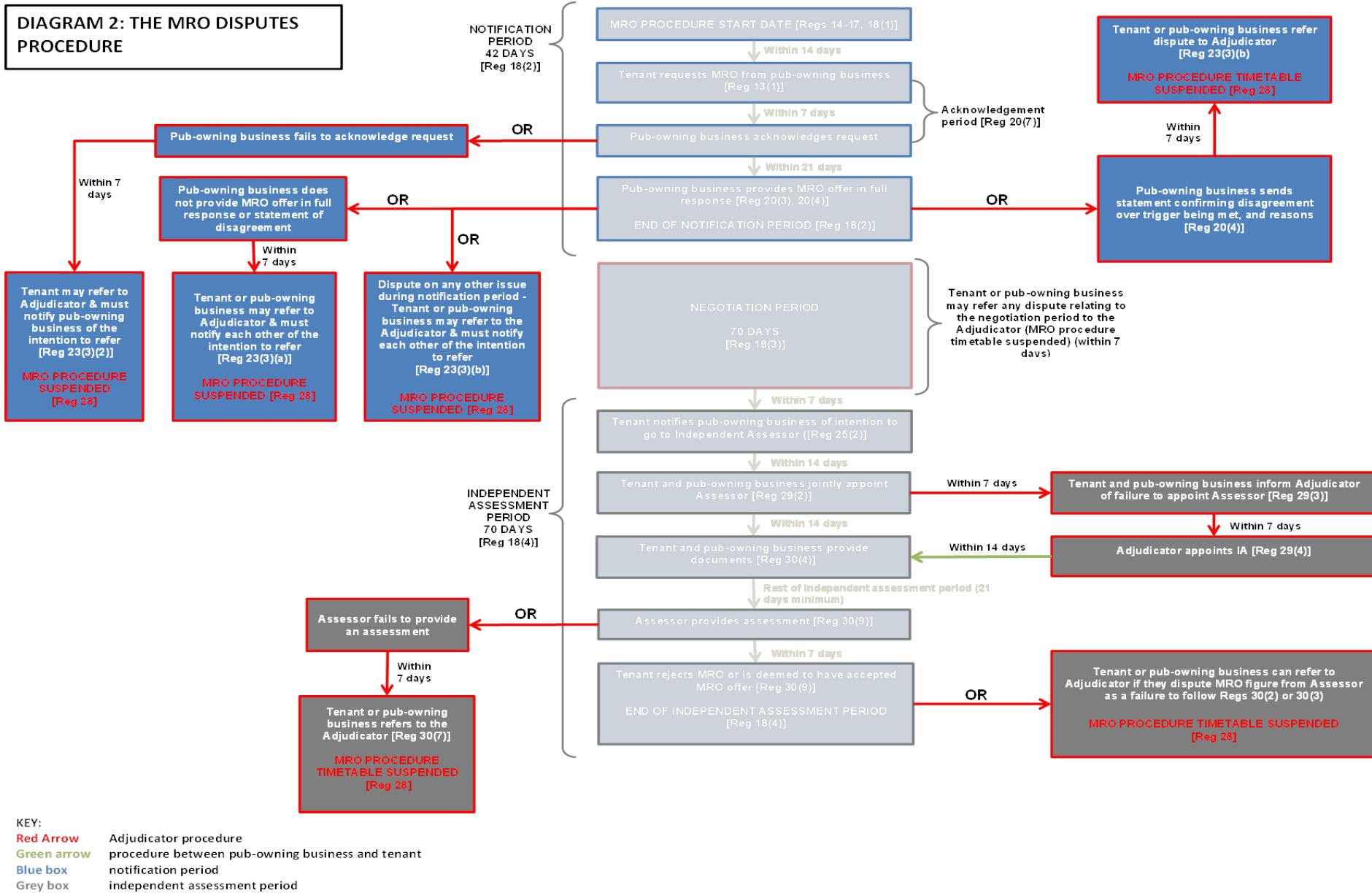
11.5 Where an MRO dispute is referred to the Adjudicator, we propose that the MRO timetable set out in the Code and described in Chapter 10 should be suspended until the conclusion of the arbitration; and should re-commence on the terms and at the stage in the MRO procedure set out in the Code or as directed by the Adjudicator.

11.6 In relation to the assessment of market rent to be provided by an independent assessor, the parties can refer to the Adjudicator where the independent assessor fails to provide an assessment, and/or where either the pub-owning business or tenant disagrees with the assessment of market rent provided. In the case of a failure to provide the assessment, the Adjudicator can direct further information be provided to the independent assessor, or appoint a new assessor (see Regulation 31(3)). Where the assessment of market rent provided by the independent assessor is disputed, the Adjudicator is required to consider whether the independent assessor has correctly followed the statutory procedure and applied the statutory assumptions. Where the Adjudicator finds that the independent assessor has failed to follow these requirements, Regulation 31(7) provides the Adjudicator with the discretion:

- a) to refer the case back to the independent assessor for further assessment – with an explanation of how the original assessment failed to meet the statutory requirements and / or to follow the Code; or
- b) to substitute the Adjudicator's own assessment of market rent where the Adjudicator judges that there are calculation errors in the rent assessment; or
- c) to consider, in exceptional circumstances, appointing another independent assessor or making any other order as the Adjudicator considers appropriate.

11.7 The proposed disputes procedure is set out in Diagram 2.

Q.17: Do you have any concerns about these proposals for the resolution by the Adjudicator of disputes related to the MRO procedure? If so, please explain your concerns.



12. Waiver from MRO in return for significant investment

Provisions governing the waiving of the right to the offer of a Market Rent Only (MRO) agreement are set out in Regulation 12 (“Exception from the duty to provide a rent assessment”) in Part 3 of the Pubs Code (see Annex B).

12.1 Regulation 8 sets out when a rent assessment has to be provided to a tenant. The provision of a rent assessment entitles a tenant to request the MRO option. Regulation 12 provides for a period of time during which a tenant is not entitled to seek MRO on rent assessment – in return for significant investment in the tied pub.

12.2 Pub-owning businesses have argued that the introduction of the MRO option into the Small Business, Enterprise and Employment (SBEE) Act 2015 has had and will have a chilling effect on the investment they make in their tied pub estates. They state that the lack of certainty at the start of an investment – not knowing whether a tenant would choose to go free of tie during the investment period and therefore whether the pub-owning business could recoup its investment – means fewer investments would be made. They have also said that their investments would be largely guided by how long a tenant has left before a rent assessment and not the needs of the pub at that time.

12.3 Based on views expressed during the passage of the Act through Parliament and subsequent engagement with stakeholders, the Government does not discern a consensus among pub-owning businesses on whether investments in their tied pubs generally see a return within five years or whether they expect larger investments to have a longer return on investment period.

Return on investment period of up to five years

12.4 The circumstances in which pub-owning businesses must provide a rent assessment are set out at Regulation 8. Under 8(1)(a), the pub-owning business is required to conduct a rent assessment in connection with a rent review under the terms of the tenancy or licence. Nothing in the SBEE Act or the draft Code prevents a pub-owning business from offering to invest in a tied pub at any time and in return asking the tenant to vary the terms of their existing agreement or enter into a new agreement with a higher rent to reflect the investment being made and new arrangements for rent reviews. Parties can agree to change or replace rent review provisions in their tenancy or licence agreements to avoid rent assessments under Regulation 8(1)(a), in return for investment.

12.5 The effect of such a deal is that the right to an MRO option would not then be available to the tenant until the next rent assessment, as provided for in their amended or new agreement, unless one of the other eligibility criteria for MRO is met (a significant increase in price, or an event beyond the tenant’s control which has a significant impact on the level of trade). The tenant’s next right to a rent assessment would be a maximum of five years away as Regulation 8(2)(a) of the Code provides for a tenant to be able to request a rent assessment if they have not had one for five years.

Return on investment period of more than five years

12.6 The Government wants to see pub-owning businesses investing in their tied pub estates. It is important for the success of the industry, both for pub-owning businesses and for tenants. That is why the Government considers the Pubs Code should allow the maximum period between a tied tenant’s entitlement to a rent assessment – at which point they are also entitled to an MRO offer – to be extended beyond five years, by agreement, if a significant investment is

made. This will provide a ‘waiver’ from the tenant’s time-linked entitlement to an MRO option for long enough to enable a pub-owning business to recoup significant investments. A clear commitment on this was given to Parliament during the passage of the Act. The waiver is achieved by providing at Regulation 12(1) for an exception from the duty to conduct a rent assessment under Regulation 8(2)(a).

12.7 The Government also wants to achieve a balance between providing some level of certainty of return on investment for pub-owning businesses and ensuring that tied tenants retain the protections of the Pubs Code – including the other eligibility criteria for the MRO option (a significant increase in price, and an event beyond the tenant’s control which has a significant impact on the level of trade). We propose to achieve this by providing qualifying criteria for the investment, imposing a limit on the length of the waiver period, and requiring other conditions to be met. Where an investment meets the qualifying criteria, and both parties agree in writing to the terms of the investment, then there would be no entitlement for the tenant to a time-linked rent assessment – as provided for in the Code at Regulation 8(2)(a) – until the waiver period ends, and therefore no right to be offered an MRO option until then (unless one of the other eligibility criteria were met – see Regulation 8(2)(b) and (c)).

12.8 Where there is a contractual term in the tenancy agreement that provides for a rent review within the investment period, Regulation 12(1) does not provide for a waiver of that contractual right to a rent assessment. Both parties would have to agree to vary the terms of the existing tenancy agreement so that any contractual rent review does not fall within the investment period and make this clear in the written “investment agreement”. Otherwise the duty to conduct a rent assessment in line with Regulation 8(1)(a) would remain.

12.9 We are seeking views on this framework to ensure that the Pubs Code does indeed provide an appropriate balance between the ability of pub-owning businesses to invest in their estate with confidence and giving tenants meaningful access to the right to pursue an MRO agreement.

Qualifying Investment

12.10 The waiver will be available only where a “qualifying investment” is made. The Government proposes defining “qualifying investment” according to two criteria: (i) the amount of investment and (ii) the type of investment. See Regulation 12(2).

(i) Amount

12.11 The Government has considered whether there is an individual amount that would be appropriate as a minimum investment threshold for the waiver. We have also considered a sliding scale based on value of investment and return on investment period. However initial stakeholder engagement indicates, and the Government agrees, that the question of whether an investment is significant is actually a relative concept which depends on a number of factors, including the size, location and turnover of the pub in question and the expected effect of the investment. We have therefore concluded that it is not appropriate to specify a fixed minimum sum for every qualifying investment and that the return on investment period is an unacceptably narrow measure of the extent of the investment.

12.12 The Government therefore proposes that the amount that qualifies as significant for the purposes of the waiver will be an amount relative to each individual pub. It must be an amount that can be defined in a reasonably simple and straightforward way, and would be known and

understandable to both parties, with minimal potential for dispute. Initial stakeholder views suggested that a figure which relates to the rent of the individual pub would be appropriate.

12.13 Considering the options around rent, there are two decisions to be made: first, which element(s) of the rent in the tied pub model are the appropriate measure (dry/wet rent), and second, what proportion of that measure (25%, 50%, 150%) should be the threshold for a significant investment. The Government seeks views in this consultation on two basic alternative ways of setting the minimum amount of investment.

12.14 One option is that the qualifying threshold for the waiver should be based on the total annual amount payable by the tenant to the pub-owning business under the tenancy or licence agreement. This will be the combined total of both the ‘wet’ and ‘dry’ rent payable by the tenant – in the full financial year or twelve months prior to the signing of the investment agreement. This is a measurable and known figure to both parties and would enable what is a significant investment to be determined in proportion to the characteristics of the pub and the size of the business being operated under the tied relationship. For the purpose of the draft regulations attached to this consultation, we have used this option (see Regulation 12(2)(b)). Other options would be to use the annual dry rent figure, or the rental value of the premises. We would welcome your views.

12.15 The second part of setting the minimum qualifying investment is to determine the proportion of the rent figure used. Regulation 12(2)(b) as currently drafted suggests 100% or 200%, however views are sought on whether either of these or some other percentage is appropriate.

12.16 Determining the threshold for a significant investment requires finding the right balance between the ‘type’ of rent and the percentage of that figure. For example, if the rent amount is based on “the total annual amount payable by the tenant to the pub-owning business”, then a lower proportion or percentage may be appropriate, because it would be based on a larger total amount. However, if based on just the annual dry rent paid, then a higher percentage would be more appropriate because it would be based on a smaller figure. The Government is seeking views on both the type of rent figure which should be used, and the appropriate percentage of that figure.

12.17 The Government does not intend to specify a fixed minimum sum for every qualifying investment but we have considered the latest Royal Institution of Chartered Surveyors quarterly pub benchmarking survey as potential ballpark figures. This survey covers rental figures for the majority of pub-owning businesses in scope of the Code and shows that the average ‘annual rent’ in England and Wales is around £27,000, with regional variations¹. The survey does not specify exactly what payment(s) constitute ‘annual rent’ (and the survey does cover non-tied pubs). However, taking an annual rent figure of £27,000, in this scenario a significant investment of 100% would be £27,000; 200% would be £54,000. These are ‘averages’ so a smaller or larger investment would qualify where the rent of any particular pub was lower/higher. These are ballpark figures which the Government has considered when setting out the options in this consultation and draft Regulations, and give an indication of the likely range of figures (as an average) which may be deemed suitable for the minimum threshold of a significant investment. However, we are seeking views on the options as set out above.

¹ <http://www.rics.org/uk/knowledge/market-analysis/pub-benchmarking-survey/>

(ii) Type

12.18 The Government considers that the Code should exclude from the definition of “qualifying investment” any investment in the tied pub which is a contractual obligation for the pub-owning business to provide (Regulation 12(2)(a)). This may vary from company to company and by type of tenancy or lease agreement. This exclusion should ensure that a qualifying investment is not used to pay for ongoing repairs or maintenance (which may include replacement/upgrade to décor, facilities, equipment etc) that the pub-owning business is obliged to carry out pursuant to the terms of the lease or tenancy agreement.

12.19 In addition, the Government wants to ensure that a qualifying investment does not capture purely cosmetic improvements to the pub. To achieve this, the Government proposes that to be a “qualifying investment”, the investment should meet one or more of the following conditions (Regulation 12(2)(c)):

- a) Relate to the infrastructure of the pub premises. For example, the building of a new extension or a kitchen refurbishment (rather than new furniture); or
- b) Be expected to increase trade/the trading capacity of the pub by an increase in the trading area or changes to the trading nature of the site. For example, an extension to the premises that provided a second bar area or expanded the dining area; or
- c) Relate to a project which requires official approval. For example, planning consent.

Q.18: How do you believe the “amount” of investment for the purposes of “qualifying investment” should be defined? Please explain your view by reference to the type of rent payment and percentage which should be used, with evidence to support your response.

Q.19 Do you agree with the proposed definition of “qualifying investment” in terms of the “type” of investment? If not, please explain why not, and suggest an alternative definition, with evidence to support your response.

Length of waiver period

12.20 The Government proposes that the waiver period should start on the date that both parties sign a written agreement containing the terms of the investment (whether they are set out in a new lease or tenancy agreement, a side agreement or an agreement specifically for the investment) rather than the date the investment has been completed. It would be unreasonable for a tied tenant to be able to request an MRO option between agreeing to an investment and the investment being delivered.

12.21 The Government proposes that the length of the waiver period should be flexible and agreed by both parties, subject to a maximum length. The tied tenant would not be entitled to a rent assessment during this period, unless one of the other MRO eligibility criteria is met. However, we consider it unreasonable for a tenant to have to wait longer than ten years before

regaining entitlement to a rent assessment, and therefore to the MRO option. Based on information gathered through some initial stakeholder engagement, the Government proposes that the minimum length should be more than five years and the maximum should be set in the range of seven to ten years. The maximum period will need to reflect the minimum value of investment to qualify. See Regulation 12(4).

Q.20: What do you consider should be the maximum length of the waiver period (a) 7 years; (b) 10 years; or (c) another option? Please provide an explanation for your answer and any evidence to support your case.

Other conditions

12.22 The Government considers that the Code should provide safeguards for tied tenants who choose to give up their right to a rent assessment for more than five years and, in effect, their right to an MRO option. The Government proposes that the following additional conditions should apply for an investment waiver to be valid:

- a) The pub-owning business must provide the tied tenant with information regarding the expected return on investment, and the expected impact on trade and/or profit (which may be in the form of a projected Profit and Loss account) such that the tenant can understand any change in payments by the tenant as a result of the proposed investment;
- b) Both parties must agree in writing the terms of the investment and the period of time before the next rent assessment must be provided, i.e. when the waiver period ends; and
- c) The tenant must have taken independent professional advice in respect of the written agreement outlining the terms of the investment.

12.23 It will be important that the tied tenant has a clear understanding of the proposed change in payments by the tenant as a result of the proposed investment and how they have been calculated. This is because a rent assessment as defined in the Code will not have been conducted at the time of agreeing a significant investment and the tenant will not then be entitled to a rent assessment for the period of the investment (except in the circumstances of a significant increase in price or an event beyond the tenant's control which has a significant impact on the level of trade).

12.24 Regulation 12(1) makes it a condition of the waiver that the parties enter into a written agreement relating to the investment. The Government is not proposing that the Code will specify exactly what that written investment agreement should contain beyond the provisions of Regulation 12(3): a description of the investment to make clear that it meets the criteria for a "qualifying investment"; a statement of the length of the 'waiver' being a period no greater than the maximum; clear explanation of any changes to the terms of the original tenancy or licence agreement; and confirmation that the tenant has had independent professional advice. In due course, the Adjudicator may want to provide guidance in the form of a checklist of recommended requirements for an agreement.

12.25 Ultimately, unless sufficient information has been provided regarding the change in payments by the tenant, and unless the tenant has taken independent professional advice on the terms of the investment, the waiver will have no effect (Regulation 12(5)).

Adjudicator's role in disputes

12.26 The Government intends that any breach of the MRO waiver provision in the Code will be arbitrable by the Adjudicator. As with other arbitrable elements of the Code, the tenant would be able to refer a dispute to the Adjudicator as an alternative to dealing with it through the dispute resolution provisions of their agreement.

12.27 The Adjudicator's role will be confined to disputes about whether the waiver/ investment agreement meets the conditions specified in the Code – that is, determining whether the investment is a “qualifying investment”, whether the waiver period does not exceed the maximum specified in the Code, and whether the transparency and advice requirements have been met.

12.28 Disputes concerning breaches of the investment agreement such as whether the investment has been made to the level agreed or delivered on time will be contractual disputes and outside the remit of the Adjudicator, not disputes relating to a breach of the Pubs Code.

Q.21: Do you agree with the safeguards proposed by the Government and the role proposed for the Adjudicator? Are there other safeguards that you consider should be provided? If so, what and why?

Assignment

12.29 The Government proposes that if a tied tenant assigns a lease agreement during the term of an MRO waiver, then the prospective assignee should be made aware of this. Therefore the Code provides that before the pub-owning business gives consent to an assignment, it must be satisfied that the prospective assignee has received information about any waiver, including a copy of the written agreement concerning the investment. This is to ensure that the individual taking on the lease is aware that they are bound by the waiver and are not entitled to be offered an MRO option until the next rent assessment which may be more than five years away. See Regulation 12(6) and (7).

Q.22: Do you believe that there are any unintended or undesirable consequences of the proposed definition of “qualifying investment” or of other conditions referred to in this chapter on the MRO investment waiver?

13. Impact

13.1 This first part of the consultation covers the Government's proposals for delivering one of the two principles of these reforms – that a tied tenant should be no worse off than a free-of-lease tenant. It details the proposed Pubs Code provisions on rent assessments and the option for tenants to request a Market Rent Only (MRO) offer and sets out the Government's position on parallel rent assessments.

13.2 Our assessment of the impact of delivering the 'no worse off' principle and the proposed provisions on rent assessments and MRO and parallel rent assessments has not changed since the primary legislation. The decision not to pursue the discretionary power to introduce a separate parallel rent assessment procedure removes this additional burden.

13.3 The Government wishes to deliver the principles of the Pubs Code without placing undue burdens on businesses. We do not expect the issues discussed in this part of the consultation to result in any additional burdens on business. The proposed waiver from MRO in return for significant investment has the potential to reduce the burden on business by allowing significant investments that benefit both businesses involved. We have not been able to quantify this impact.

13.4 The impact of the remaining elements of the Pubs Code will be considered alongside the second part of this consultation.

14. What happens next?

14.1 This consultation will close on 18 January 2016.

14.2 Following the close of the consultation period, the Government intends to publish all of the responses received, unless specifically notified otherwise (see Chapter 4 - Confidentiality & Data Protection – for full details).

14.3 The Government will publish its response to the consultation as soon as possible and within 12 weeks of both consultations closing, setting out the decisions made in light of the consultation, a summary of the views expressed and reasons for the decisions taken.

14.4 The document will be published on: <https://www.gov.uk/government/consultations/pubs-code-and-adjudicator-market-rent-only-option-and-rent-assessments>.

14.5 Following the consultation, the Pubs Code and other regulations under Part 4 of the Small Business, Enterprise and Employment Act 2015 will be laid in Parliament and will be subject to the affirmative resolution procedure. This means that the legislation will be subject to debate in both the House of Commons and House of Lords before being passed into statute.

Annex A: Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles:

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

Comments or complaints on the conduct of this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Angela Rabess
BIS Consultation Co-ordinator
1 Victoria Street
London
SW1H 0ET

Telephone Angela on 020 7215 1661 or e-mail to: angela.rabess@bis.gsi.gov.uk

However if you wish to comment on the specific policy proposals you should contact the policy team (see Chapter 3 – How to Respond).

Annex B: The (Draft) Pubs Code Regulations 2016

*Draft Order laid before Parliament under section *** of the *** Act ***, for approval by resolution of each House of Parliament.*

S T A T U T O R Y I N S T R U M E N T S

2016 No. 0000

TRADE, ENGLAND AND WALES

The Pubs Code Regulations 2016

Made - - - - ***

Coming into force - - 26th May 2016

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections [] of the Small Business, Enterprise and Employment Act 2015.

PART 1

General

Citation, commencement and extent

1. These Regulations—

- (a) may be cited as Pubs Code Regulations 2016;
- (b) come into force on 26th May 2016; and
- (c) extend to England and Wales.

General interpretation

2.—(1) In these Regulations—

“acknowledgement period” has the meaning given in regulation 20(6);

“the Act” means the Small Business, Enterprise and Employment Act 2015;

“existing tenancy” has the meaning given in regulation 21(1);

“full response” has the meaning given in regulation 20(7);

“independent assessment period” has the meaning given in regulation 18(4);

“MRO procedure” has the meaning given in section 44(1)(a) of the Act;

“MRO rent” means the rent to be payable in respect of the tied pub tenant’s occupation of the premises concerned under the proposed MRO-compliant tenancy or licence;

“MRO start date” has the meaning given in regulation 13(2);

“negotiation period” has the meaning given in regulation 18(3);
 “new rent” has the meaning given in regulation 9(1);
 “notification period” has the meaning given in regulation 18(2);
 “proposed MRO tenancy” has the meaning given in regulation 21(1);
 “the RICS” means the Royal Institution of Chartered Surveyors;
 “the RICS guidance” means guidance issued by the RICS as amended from time to time.

A “significant increase”

3.—(1) References in these Regulations to a “significant increase” in the price of a product or service supplied to a tied pub tenant are to be construed as follows.

(2) In relation to beer supplied to the tied pub tenant under a product tie, a significant increase is an increase which is (or is more than)—

$$(A - B) + (5\% \times B) + C$$

where —

A is the wholesale price of the beer at the time of the increase;

B is the wholesale price of the beer at the time the tied pub tenant and the pub-owning business last agreed the price to be payable by the tenant for the beer;

C is any extrinsic price increase to which the beer has been subject since the time the tied pub tenant and the pub-owning business last agreed the price to be payable by the tenant for the beer (disregarding any increase in the wholesale price of the beer).

(3) In relation to a product other than beer, or a service, supplied to the tied pub tenant under a product or service tie, a significant increase is an increase that raises the price to an amount which is (or is more than)—

$$(A \times B) + C$$

where —

A is the relevant percentage;

B is the price of the product or service supplied to the tied pub tenant at the beginning of the relevant period;

C is any extrinsic price increase to which the product or service has been subject since the beginning of the relevant period.

(4) In paragraph (3), “the relevant percentage” means—

- (a) where the cost to the tied pub tenant of purchasing the product or service during the relevant period is an amount that is 20% or more of the tied pub tenant’s turnover for that period, 120%; and
- (b) otherwise, 130%.

(5) In this regulation “the relevant period” means—

- (a) the period of 6 months preceding the time at which the tied pub tenant is notified of the increase in the price of the product or service; or
- (b) if shorter, the period—
 - (i) beginning with the time at which the tied pub tenant first agreed the price to be payable by tenant for the product or service, and
 - (ii) ending with the time at which the tied pub tenant is notified of the increase in the price of the product or service.

(6) In this regulation “extrinsic price increase” in relation to a product or service means an increase in the price of the product or service due to circumstances beyond the control of the pub-owning business such as—

- (a) an increase in the price at which the pub-owning business purchases the product or service;
- (b) an increase in any tax or duty payable by the pub-owning business which arises from the pub-owning business' purchase of the product or service; or
- (c) an increase in any other tax or regulatory cost payable by the pub-owning business which affects the costs of the pub-owning business.

A “trigger event”

4.—(1) For the purposes of Part 4 of the Act (and so of these Regulations) an event is a “trigger event” in relation to a tied pub tenant who has made a request under regulation 8(2)(c) or regulation 13(1), only if (in addition to meeting the conditions in section 43(9)(a) to (c) of the Act) it does not affect any business other than that of the tied pub tenant.

(2) But an event is not a “trigger event” for those purposes if it—

- (a) is connected to the personal circumstances of the tied pub tenant;
- (b) is an extrinsic price increase, within the meaning of regulation 3(6), in the price of a product or service supplied to the tied pub tenant;
- (c) is an event of a kind described at regulations 14 to 16;
- (d) is an event which the tied pub tenant could have reasonably insured against;
- (e) is an event which the tied pub tenant could reasonably have prevented, or the effects of which it could reasonably have mitigated; or
- (f) is an event which results in an increase in the level of trade which is forecast for a period of 12 months or more,

PART 2

Duties of pub-owning businesses before entering into a new agreement

Pre-agreement duties

5.—(1)

A suitable and qualified person

6.—(1)

The required information

7.

PART 3

Rent assessments

Duty to conduct a rent assessment

8.—(1) A pub-owning business must conduct a rent assessment—

- (a) in connection with a rent review which is required under the terms of a tenancy or licence of a tied pub of which it is the landlord; or
- (b) where a tied pub tenant of such a pub requests it under paragraph (2).

(2) A tied pub tenant may request a rent assessment if —

- (a) a rent assessment has not been concluded within 5 years prior to the date of the request;
- (b) there is a significant increase in the price at which a product or service which is subject to a product or service tie is supplied to the tied pub tenant; or

- (c) the tied pub tenant can demonstrate that a trigger event has occurred by means of a written analysis of the level of trading which is forecast for a period of 12 months or more beginning with the day on which the tenant makes the request.
- (3) A request under paragraph (2) must be made in writing and—
- (a) in the case of a request made under paragraph (2)(b), it must be received by the pub-owning business within the period of 14 days beginning with the day on which the tied pub tenant receives notification of the significant increase by the pub-owning business; and
 - (b) in the case of a request made under paragraph (2)(c), it must be received by the pub-owning business within the period of 14 days beginning with the day on which the tied pub tenant sends the written analysis referred to in that paragraph to the pub-owning business.
- (4) The purpose of a rent assessment is to review the rent which is payable by a tied pub tenant under the terms of the tenancy or licence.
- (5) The following, in particular, are not rent reviews for the purposes of paragraph (1)(a)—
- (a) an annual or other periodic indexation of rent in connection with the price of a tied product or service (whether or not that indexation is provided for in the terms of the tenancy or licence);
 - (b) an increase in rent in return for receiving a corresponding benefit from the pub-owning business;
 - (c) an increase in rent connected to the freeing of the tied pub tenant from a product or service tie;
 - (d) an increase in rent connected with an investment by the pub-owning business—
 - (i) which is not a qualifying investment of the kind described at regulation 12(2), and
 - (ii) whether or not the increase was agreed by the tied pub tenant or required under the tenancy or licence;
 - (e) any discussions in respect of rent increases which are carried out within a review of the business provided for under the terms of the tenancy or licence.
- (6) Paragraph (1) is subject to regulation 12(1).

The rent review proposal

9.—(1) Where a pub-owning business is required to conduct a rent assessment under regulation 8(1), the pub-owning business must send the tied pub tenant a document (“the rent review proposal”) containing—

- (i) a proposal for the rent which is to be paid under the tenancy or licence at the end of the rent assessment (the “new rent”);
- (ii) the information specified in Schedule 2;
- (iii) such other information as may be required to ensure that the tenant is able to negotiate, in an informed manner, the new rent.

(2) The rent review proposal must be sent to the tied pub tenant—

- (a) in the case of an assessment conducted under regulation 8(1)(a), at least 6 months before the date on which the rent review is required to begin;
- (b) in the case of an assessment conducted under regulation 8(1)(b), within the period of 14 days beginning with the day on which the tied pub tenant requests the assessment.

(3) The pub-owning business must prepare the rent review proposal in accordance with the RICS guidance and a suitably qualified valuer registered with the RICS must confirm that in writing.

Conduct of the rent assessment

10.—(1) A rent assessment begins on the day on which a pub-owning business provides a rent review proposal to the tied pub tenant in accordance with regulation 9.

(2) A rent assessment must be conducted in accordance with the RICS guidance.

(3) The pub-owning business must comply with any reasonable request for further information which is relevant for the negotiation of the new rent and which is made by the tied pub tenant or by a person acting on behalf of the tied pub tenant.

(4) Where the pub-owning business cannot comply with a request for further information under paragraph (3), the pub-owning business must provide to the tied pub tenant a reasonable explanation why the information required cannot be provided.

(5) Where a pub-owning business is required to conduct a rent assessment under regulation 8(1)(a), the pub-owning business must ensure that an appropriately qualified person who is involved in the preparation of the rent review proposal visits the tied pub within the period of 3 months beginning with the day on which the rent review proposal is provided to the tied pub tenant.

(6) The pub-owning business must advise the tied pub tenant to obtain independent professional advice in connection with the new rent before the tenant agrees that rent.

(7) Before the new rent is agreed by the tied pub tenant, the tied pub tenant and the pub-owning business must agree, in writing, how any recoverable rent is to be paid to the tied pub tenant or to the pub-owning business, as the case may be, at the end of a rent assessment where—

- (a) the rent payable under the tenancy or licence is adjusted as a result of the rent assessment; and
- (b) the rent assessment ends—
 - (i) after the rent review date, or
 - (ii) more than 6 months after the day on which the rent review proposal is received by the tied pub tenant.

(8) The tied pub tenant's agreement to the new rent must be given in writing.

(9) A suitably qualified valuer who is registered with the RICS must confirm that the rent assessment has been conducted in accordance with guidance issued by that institution.

(10) The “recoverable rent” is the amount of the difference between—

- (a) the rent which is payable under regulation 11(1) during the rent recovery period; and
- (b) the rent which is payable under regulation 11(2) for that period.

(11) The “rent recovery period” is the period which—

- (a) begins—
 - (i) in the case of a rent assessment conducted under regulation 8(1)(a), with the rent review date,
 - (ii) in the case of a rent assessment conducted under regulation 8(1)(b), with the day after the period of 6 months beginning with the day on which the rent review proposal was received by the tied pub tenant; and
- (b) ends with the day on which the rent assessment ends.

(12) In these Regulations, the “rent review date” is the date from which the terms of the tenancy or licence require the rent to be payable following a rent review.

Effect of the rent assessment

11.—(1) The tied pub tenant must continue to pay, until the end of the rent assessment, the amount of rent which is payable under the tenancy or licence at the beginning of the assessment.

(2) The new rent is payable with effect from the day after the end of that assessment.

(3) A rent assessment ends—

- (a) in the case of a rent assessment which is conducted under regulation 8(1)(a)—
 - (i) on the rent review date provided for in the terms of the tied pub tenant's tenancy or licence, or
 - (ii) if later, on the date on which the tied pub tenant and the pub-owning business agree the new rent in writing;
- (b) in the case of a rent assessment which is conducted at the tied pub tenant's request under regulation 8(1)(b)—
 - (i) at the end of the period of 6 months beginning with the day on which the rent review proposal was received by the tied pub tenant, or
 - (ii) if later, on the date on which the tied pub tenant and the pub-owning business agree the new rent in writing.

Exception from the duty to provide a rent assessment

12.—(1) A pub-owning business is not required to conduct a rent assessment in the circumstances described at regulation 8(2)(a) where—

- (a) the pub-owning business makes a qualifying investment in the premises to which the tenancy or licence relates; and
 - (b) the pub-owning business and the tied pub tenant enter into an investment agreement in relation to the qualifying investment.
- (2) A “qualifying investment” is an investment—
- (a) which is not made in pursuance of any duty under the terms of the tenancy or licence under which the tied pub is occupied;
 - (b) the value of which is equal to or greater than —
 - (i) [twice] the amount payable under the tenancy or licence by the tied pub tenant to the pub-owning business in respect of the last complete financial year preceding the date on which the investment was agreed;
 - (ii) where the tenant has not occupied the tied pub for the complete financial year described in paragraph (i), [twice] the amount payable by the tenant to the pub-owning business in respect of the period of 12 months preceding the date on which the investment was agreed; or
 - (iii) where the tenant has occupied the tied pub for less than 12 months, [twice] the amount payable under the tenancy or licence by the tenant to the pub-owning business during the months of the tenant’s occupation of the tied pub (disregarding any month for any part of which the tenant was not in occupation), divided by that number of months and multiplied by 12; and
 - (c) which meets at least one of the following conditions—
 - (i) it is made in connection with the infrastructure of the premises to which the tenancy or licence relates;
 - (ii) it is made in connection with a project which would be reasonably expected to change the trading environment, nature or capacity of those premises;
 - (iii) it is made in connection with a project related to those premises which requires planning permission or any other consent or permission required by or under any enactment.
- (3) An “investment agreement” is a written agreement between the tied pub tenant and the pub-owning business which includes—
- (a) a description of the proposed investment which demonstrates that it is a qualifying investment;
 - (b) a term specifying that a rent assessment will not be conducted during the investment period (and which includes the dates on which the investment period begins and ends);
 - (c) a term specifying any proposed change to the terms of the tenancy or licence;
 - (d) confirmation that the tied pub tenant has obtained independent professional advice in relation to the agreement.
- (4) The “investment period” is the period which—
- (a) begins with the day on which the investment agreement is signed by the pub-owning business and the tied pub tenant; and
 - (b) ends with a date agreed between the tenant and the pub-owning business, being a date—
 - (i) 5 years after the day on which the investment agreement is signed, and
 - (ii) no later than [7-10] years from that day.
- (5) The investment agreement is of no effect for the purposes of paragraph (1) unless—
- (a) the pub-owning business has provided the tied pub tenant with sufficient information to enable the tenant to understand—
 - (i) the expected return on the qualifying investment on the tied pub’s trade and profit;
 - (ii) the expected impact on the tied pub’s trade and profit;
 - (iii) any proposed change to the terms of the tenancy or licence; and
 - (b) the tied pub tenant has obtained appropriate independent advice in relation to the agreement.
- (6) Paragraph (7) applies where—
- (a) an investment agreement is entered into; and
 - (b) the tied pub tenant proposes to assign the tenancy to which the agreement relates during the investment period.
- (7) Before agreeing to the assignment, the pub-owning business must be satisfied that the assignee—
- (a) has been notified, in writing, of the investment agreement; and

- (b) has received a copy of that agreement.

PART 4

Market rent only option: requests

The tenant's request

13.—(1) Where the circumstances specified in any of regulations 14 to 17 occur, a tied pub tenant may give notice to the pub-owning business that—

- (a) in the view of the tenant, circumstances are such that the pub-owning business is required to offer the tenant a market rent only option; and
 - (b) the tenant wishes to receive such an offer.
- (2) The tied pub tenant's notice under paragraph (1) must be—
- (a) made in writing; and
 - (b) received by the pub-owning business within the period of 14 days beginning with the day on which the circumstances occurred (“the MRO start date”).
- (3) The tied pub tenant's notice must include—
- (a) the tenant's name, postal address, email address (if any) and telephone number;
 - (b) the date on which the notice is being sent;
 - (c) the premises in relation to which the request for an offer of a market rent only option is being made;
 - (d) the date of the MRO start date; and
 - (e) a description of the circumstances which have occurred and an assessment of why, in the tenant's opinion, the pub-owning business must offer the tenant a market rent only option.

The renewal of a pub arrangement

14.—(1) The circumstances specified in this regulation are that a pub arrangement is renewed.

(2) For the purposes of section 43(6) of the Act (and so of this regulation), a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies is renewed between the tied pub tenant and the pub-owning business—

- (a) on the day on which the tied pub tenant receives the pub-owning business' notice under section 25(1) of the Landlord and Tenant Act 1954; or
- (b) on the day on which the landlord receives the tied pub tenant's request under section 26 of the same Act.

(3) For the purposes of section 43(6) of the Act (and so of this regulation), a tenancy to which Part 2 of the Landlord and Tenant Act 1954 does not apply is renewed between the tied pub tenant and the pub-owning business on the day on which the tenancy may be renewed under the terms of the tenancy.

A rent assessment

15. The circumstances specified in this regulation are that—

- (a) the tied pub tenant receives a rent review proposal sent by the pub-owning business in respect of the tenancy in accordance with regulation 9; and
- (b) the rent proposed by the pub-owning business to be payable by the tenant is higher than the rent payable by the tenant at the time of that proposal.

A significant increase in the price of a product or service

16. The circumstances specified in this regulation are that the tied pub tenant receives notification of a significant increase in the price at which a product or service which is subject to a product or service tie is supplied to the tied pub tenant.

A trigger event

17.—(1) The circumstances specified in this regulation are that the tied pub tenant sends the pub-owning business a relevant analysis which demonstrates that a trigger event has occurred.

(2) In paragraph (1), a “relevant analysis” means a written analysis of the level of trading which is forecast for a period of 12 months or more.

PART 5

Market rent only option: procedure to be followed in connection with an offer

The notification period, the negotiation period and the independent assessment period

18.—(1) The MRO procedure begins with the MRO start date.

(2) The notification period—

- (a) begins with the MRO start date; and
- (b) ends—
 - (i) at the end of the period of 42 days, beginning with the MRO start date; or
 - (ii) if earlier, with the day on which the full response is required to be provided under regulation 20(3) or (4).

(3) The negotiation period is the period of 70 days beginning with the day after the notification period.

(4) The independent assessment period is the period of 70 days beginning with the day on which the pub-owning business receives the tied pub tenant’s notice under regulation 25(2).

(5) The MRO procedure ends in accordance with regulation 34.

Existing arrangements continue to have effect until the end of the MRO procedure

19.—(1) When a tied pub tenant gives notice under regulation 13(1)—

- (a) the tenancy or licence under which the tied pub is occupied; and
- (b) any other contractual agreement entered into between the tied pub tenant and the pub-owning business in connection with the tenancy or licence,

continue to have effect, as they have effect when the notice is given, until such time as the MRO procedure has come to an end under regulation 34.

(2) Paragraph (1) does not apply when the tied pub tenant of a tenancy to which Chapter 2 of the Landlord and Tenant Act 1954 applies gives notice under regulation 13(1) that the circumstances in regulation 14 have occurred.

Effect of tenant’s notice

20.—(1) This regulation applies where a pub-owning business has received a notice given under regulation 13(1).

(2) The pub-owning business must send a written acknowledgement to the tied pub tenant within the acknowledgement period.

(3) Where the pub-owning business agrees with the tied pub tenant’s assessment under regulation 13(3)(e), it must send the tenant—

- (a) a statement confirming its agreement;
- (b) where the assessment relates to a tenancy, a proposed MRO-compliant tenancy;
- (c) where the assessment relates to a licence, a proposed MRO-compliant licence; and
- (d) a proposed MRO rent.

(4) Where the pub-owning business disagrees with the tied pub tenant’s assessment under regulation 13(3)(e), it must send the tenant—

- (a) a statement confirming its disagreement; and

(b) its reasons for disagreeing.

(5) The pub-owning business must send a response under paragraph (3) or (4) within the period of 21 days beginning with the day after the end of the acknowledgement period.

(6) The “acknowledgement period” is the period of 7 days beginning with the day after the day on which the notice is received by the pub-owning business.

(7) A response sent under paragraph (3) or (4) is a “full response”.

Terms and conditions required in a tenancy or licence which is MRO-compliant

21.—(1) Where—

(a) a tied pub tenant is subject to a tenancy granted by the pub-owning business (the “existing tenancy”); and
 (b) the tenant gives notice under regulation 13(1) in any of the circumstances described in regulations 15 to 17,
 the tenancy which is sent by the pub-owning business under regulation 20(3) (the “proposed MRO tenancy”) is MRO-compliant only if it is of a description specified in paragraphs (2) and (3).

(2) The proposed MRO tenancy is for a period which is at least—

- (a) 5 years, or
- (b) where the remaining term of the existing tenancy is less than 5 years, that remaining term.

(3) In cases where Part 2 of the Landlord and Tenant Act 1954 applies to the existing tenancy, Part 2 of that Act applies to the MRO proposed tenancy as it applied at the time the notice was given under regulation 13(1).

(4) Where—

- (a) Part 2 of the Landlord and Tenant Act 1954 applies to the existing tenancy; and
- (b) the tenant gives notice under regulation 13(1) in the circumstances described in regulation 14,

the proposed MRO tenancy is MRO-compliant only if Part 2 of that Act applies to the proposed MRO tenancy as it applied at the time the notice was given under regulation 13(1).

Reasonable terms and conditions

22.—(1) Where a tied pub tenant—

(a) is subject to an existing tenancy; and
 (b) gives notice under regulation 13(1) in any of the circumstances described in regulations 15 to 17,
 the terms and conditions of the proposed MRO tenancy are to be regarded as unreasonable for the purposes of section 43(4) of the Act (tenancy or licence which is MRO-compliant) if they are of a description specified in paragraph (2).

(2) Terms and conditions which—

- (a) purport to insert into the tenancy a break clause which is exercisable only by the pub-owning business;
- (b) impose a service tie in respect of insurance other than buildings insurance in connection with the premises to which the tenancy relates;
- (c) are terms which are not standard terms of business between pubs which are not subject to product or service ties and their landlords.

(3) Where a tied pub tenant gives notice under regulation 13(1) in any of the circumstances described in regulation 14, the terms and conditions of the proposed MRO tenancy or the licence granted by the pub-owning business under regulation 20(3) are to be regarded as unreasonable for the purposes of section 43(4) of the Act if they impose a service tie in respect of insurance other than buildings insurance in connection with the premises to which the tenancy or licence relates.

Failure to acknowledge the tenant’s notice or provide a full response

23.—(1) This regulation applies where a pub-owning business has received a notice under regulation 13(1) and is required to send an acknowledgement under regulation 20(2) or a full response under regulation 20(3) or (4) to the tied pub tenant.

(2) Where the pub-owning business does not send an acknowledgement under regulation 20(2) within the acknowledgement period, the tenant may refer the matter to the Adjudicator within the period of 7 days beginning with the day after the acknowledgement period ends.

(3) Where—

- (a) the pub-owning business does not send a full response under regulation 20(3) or (4) within the period specified in regulation 20(5); or
- (b) there is a dispute between the tenant and the pub-owning business in connection with any other requirement of regulation 20,

the tenant or the pub-owning business may refer the matter to the Adjudicator within the period of 7 days beginning with the day after the notification period ends.

(4) Where the tied pub tenant or the pub-owning business intends to make a referral under paragraph (2) or (3), the tenant and the pub-owning business must notify each other, in writing, of their intention to do so, within the period specified in the paragraph under which the referral is being made.

The negotiation period

24.—(1) This regulation applies where—

- (a) the pub-owning business has given the tenant a full response under regulation 20(3); and
- (b) the tied pub tenant continues to wish to pursue a market rent only option.

(2) The tied pub tenant and the pub-owning business must seek to agree, within the negotiation period—

- (a) an MRO-compliant tenancy or licence; and
- (b) the rent payable under that tenancy or licence.

(3) If, by the end of the negotiation period, the tied pub tenant has not communicated to the pub-owning business, in writing, the decision to accept or decline the proposals referred to at paragraph (2)(a) and (b)—

- (a) the offer lapses; and
- (b) the tied pub tenant may not refer the matter to the independent assessor under regulation 25(1).

(4) A tied pub tenant may notify the pub-owning business, in writing, of the tenant's intention to terminate the negotiation at any time during the negotiation period.

(5) The tied pub tenant's agreement to the new rent must be given in writing.

(6) Where there is a dispute between the tied pub tenant and the pub-owning business in connection with any requirement of this regulation, the tenant or the pub-owning business may refer the matter to the Adjudicator within the period 7 days beginning with the day after the negotiation period ends.

Failure to agree a market rent only option

25.—(1) If the tied pub tenant has not agreed a market rent only option by the end of the negotiation period, the tenant may refer the matter to an independent assessor.

(2) Where the tied pub tenant intends to refer the matter to the independent assessor, the tenant must notify the pub-owning business, in writing, of the intention to do so within the period of 7 days beginning with the day after the end of the negotiation period.

PART 6

Market rent only option: disputes

Referrals to the Adjudicator in connection with the notification period and the negotiation period

26. Regulations 27 and 28 apply where a matter has been referred to the Adjudicator under—

- (a) regulation 23(2) (failure to provide an acknowledgement of notice);
- (b) regulation 23(3)(a) (failure to provide a full response);
- (c) regulation 23(3)(b) (any other dispute in connection with the notification period);

(d) regulation 24(7) (disputes in connection with the negotiation period).

Adjudicator to arbitrate the dispute unless another person is appointed

27. The Adjudicator must either—

- (a) arbitrate the dispute; or
- (b) appoint another person to arbitrate the dispute.

Effect of referral in connection with the notification period and the negotiation period

28.—(1) The periods described at regulation 18—

- (a) are suspended on the day on which the matter is referred to the Adjudicator; and
- (b) end or resume, as the case may be, in accordance with paragraphs (2) and (3).

(2) This paragraph applies where the dispute referred is in connection with—

- (a) the tied pub tenant's assessment under regulation 13(3)(e); or
- (b) the alleged failure of the pub-owning business to send a market rent only option to the tied pub tenant under regulation 23(3).

(3) Where paragraph (2) applies—

- (a) if the Adjudicator (or a person appointed by the Adjudicator under regulation 27(b)) considers that the circumstances are such that the pub-owning business must offer the tenant a market rent only option, the MRO procedure will resume at the point at which it was suspended under paragraph (1)(a);
- (b) if the Adjudicator (or a person appointed by the Adjudicator under regulation 27(b)) does not consider that the circumstances are such that the pub-owning business must offer the tenant a market rent only option the MRO procedure ends.

(4) Where the dispute referred is in connection with any other aspect of the MRO procedure during the notification period or the negotiation period, the MRO procedure will end or resume in accordance with the Adjudicator's ruling (or the ruling of any other person appointed by the Adjudicator under regulation 27(b)).

Referrals to an independent assessor

29.—(1) This regulation applies where a tied pub tenant has sent a notice to the pub-owning business under regulation 25(2).

(2) The tenant and the pub-owning business must, jointly, appoint an independent assessor within 14 days from the day on which the tenant sent the notice under that regulation.

(3) Where the tenant and the pub-owning business do not appoint, jointly, an independent assessor within the period specified paragraph (2), they must, within the period of 7 days following the end of that period, notify the Adjudicator in writing of their failure to make the appointment.

(4) Where the Adjudicator receives notification under paragraph (3), the Adjudicator must, within 7 days of the notification—

- (a) appoint an assessor; and
- (b) notify the tenant and the pub-owning business of the appointment.

Independent assessment procedure

30.—(1) The Adjudicator must specify the criteria which a person must satisfy in order to be appointed as an independent assessor.

(2) An independent assessor appointed under regulation 29 must, during the independent assessment period—

- (a) determine the market rent to be payable in respect of the tied pub tenant's tenancy or licence; and
- (b) communicate that determination to the tenant and the pub-owning business.

(3) The independent assessor's determination of the market rent must—

- (a) be made in accordance with the provisions of the documents (as amended from time to time) listed in Schedule 3; and

(b) have regard to any guidance issued by the Adjudicator.

(4) The tenant and the pub-owning business must provide to the independent assessor any information which they consider relevant to the assessment within 14 days beginning with the day after the day on which the assessor is appointed.

(5) The independent assessor may require the tenant and the pub-owning business to provide any other documents or information held by them which the assessor considers relevant for the assessment.

(6) The tenant and the pub-owning business must comply with any reasonable request made under paragraph (5) as soon as reasonably practicable.

(7) Where the independent assessor does not provide an assessment of the market rent in accordance with paragraphs (2) and (3) by the end of the independent assessment period, the tenant or the pub-owning business may refer the matter to the Adjudicator within the period of 7 days beginning with the day after the end of that period.

(8) Where the pub-owning business or the tied pub tenant consider that the independent assessor has failed to comply with any obligation under paragraph (2) or (3), they may refer the matter to the Adjudicator within the period of 7 days beginning with the day after the day on which the tied pub tenant or the pub-owning business, becomes aware of any alleged failure.

(9) Where the independent assessor provides an assessment of the market rent within the independent assessment period, the tied pub tenant and the pub-owning business are treated as having agreed that rent unless—

- (a) within the period of 7 days beginning with the day on which the assessment was provided, the tied pub tenant rejects that assessment in writing; or
- (b) the pub-owning business or the tied pub tenant make a referral to the Adjudicator under paragraph (7) or (8).

Referrals to the Adjudicator in connection with the independent assessment period

31.—(1) Where a matter is referred to the Adjudicator under regulation 30(7) or (8), the Adjudicator must—

- (a) arbitrate the dispute; or
- (b) appoint another person to arbitrate the dispute.

(2) Where a matter is referred to the Adjudicator under regulation 30(7) or (8), the MRO procedure is suspended on the day on which the referral is made.

(3) Where a matter is referred to the Adjudicator under regulation 30(7), the Adjudicator must—

- (a) determine whether the independent assessor requires additional information to complete the assessment of the market rent; or
- (b) appoint another independent assessor.

(4) Where the Adjudicator makes a determination under paragraph (3)(a), the Adjudicator must—

- (a) require the tied pub tenant or the pub-owning business to provide any additional information to the independent assessor; and
- (b) direct the independent assessor to complete the assessment of the market rent as soon as the assessor receives that information.

(5) When the Adjudicator appoints another independent assessor under paragraph (3)(b), the MRO procedure resumes as if an appointment had been made under regulation 29(4) 28 days after the end of the negotiation period.

(6) When a matter is referred to the Adjudicator under regulation 30(8), and the Adjudicator (or a person appointed by the Adjudicator under regulation 31(1)(b)) rules that the alleged failure has not occurred—

- (a) the MRO procedure resumes on the day of the ruling at the point at which it was suspended under paragraph (2); and
- (b) the tied pub tenant and the pub-owning business are treated as having agreed the independent assessor's assessment of the market rent under regulation 30, unless the tied pub tenant rejects that assessment, in writing, within the period of 7 days beginning with the day of the ruling.

(7) Where a matter is referred to the Adjudicator under regulation 30(8), and the Adjudicator (or a person appointed by the Adjudicator under regulation 31(1)(b)) rules that the alleged failure has occurred, the Adjudicator (or the person appointed under regulation 31(1)(b)) must—

- (a) give an explanation, in writing, to the assessor (and to the pub-owning business and the tied pub tenant) as to why the failure has occurred; and

- (b) having regard to the nature of the failure—
 - (i) direct the independent assessor to conduct a second assessment in the light of that explanation;
 - (ii) conduct an assessment of the market rent himself or herself; or
 - (iii) make any other determination, as the Adjudicator (or the person appointed by the Adjudicator under regulation 31(1)(b)) considers appropriate.

(8) When making a determination under paragraph (7)(b)(iii), the Adjudicator (or the person appointed by the Adjudicator under regulation 31(1)(b)) may, in exceptional circumstances, appoint another independent assessor to conduct an assessment of the market rent.

(9) An assessment conducted by the Adjudicator (or a person appointed by the Adjudicator under regulation 31(1)(b)) under paragraph (7)(b)(ii) is final and, as soon as it is communicated to the tied pub tenant and the pub-owning business—

- (a) the MRO procedure resumes at the point at which it was suspended under paragraph (2); and
- (b) the tied pub tenant and the pub-owning business are treated as having agreed that assessment unless the tied pub tenant rejects the assessment, in writing, within the period of 7 days beginning with the day on which the assessment was communicated to the tenant.

(10) Where the tied pub tenant and the pub-owning business agree with the assessment conducted—

- (a) under paragraph (7)(b)(i); or
- (b) by another independent assessor appointed under paragraph (7)(b)(iii),

the timing of the MRO procedure resumes at the point at which it was suspended under paragraph (2) on the day on which the agreement is given.

(11) Where an assessment which is conducted under paragraph (7)(b)(i) or by another independent assessor appointed under paragraph (7)(b)(iii) is not agreed by the tied pub tenant and the pub-owning business the Adjudicator (or a person appointed by the Adjudicator under regulation 31(1)(b)) must conduct a further assessment, which is final.

(12) As soon as the Adjudicator (or a person appointed by the Adjudicator under regulation 31(1)(b)) completes an assessment under paragraph (11) and communicates the results of that assessment to the tied pub tenant and the pub-owning business—

- (a) the MRO procedure resumes from the point at which it was suspended under paragraph (2); and
- (b) the tied pub tenant and the pub-owning business are treated as having agreed that assessment unless the tied pub tenant rejects the assessment, in writing, within the period of 7 days beginning with the day on which the assessment was communicated to the tenant.

Arbitration commenced by pub-owning business

32.—(1) This regulation applies where—

- (a) there is an arbitration agreement between a tied pub tenant and a pub-owning business;
- (b) the business commences arbitral proceedings about a matter which is, or which includes, an MRO dispute between the business and the tenant; and
- (c) the tenant would have been able to refer the MRO dispute to the Adjudicator in accordance with regulation 23 (were it not for the commencement of arbitral proceedings by the business).

(2) Paragraph (3) applies where—

- (a) in accordance with the arbitration agreement, the Adjudicator is appointed to arbitrate the MRO dispute; or
- (b) the tied pub tenant wishes the Adjudicator to be appointed to arbitrate that dispute, and has given notice to the effect in accordance with paragraphs (4) to (6).

(3) The Adjudicator must either—

- (a) arbitrate the MRO dispute; or
- (b) appoint another person to arbitrate that dispute.

(4) Notice under paragraph (2)(b) must be given in writing to—

- (a) the pub-owning business; and
- (b) the Adjudicator.

(5) In a case where the arbitration agreement provides for the arbitrator to be appointed by a person other than the pub-owning business or the tied pub tenant, notice under paragraph (2)(b) must be given within 21 days beginning with the day on which that person notifies the tenant of the person proposed to be appointed as arbitrator.

(6) In any other case, notice under paragraph (2)(b) must be given within 21 days beginning with the date on which arbitral proceedings commenced.

(7) Section 14 of the Arbitration Act 1996 makes provision about the commencement of arbitral proceedings.

Information required by the Adjudicator

33.—(1) If the Adjudicator appoints another person as arbitrator under regulation 27(3)(b), 31(1)(b) or 32(3)(b), the Adjudicator may require the arbitrator, or the pub-owning business and the tied pub tenant concerned, to provide information to assist the Adjudicator in carrying out functions under this Part.

(2) The Adjudicator may enforce any requirement to provide information under this Part by bringing civil proceedings to obtain an injunction.

PART 7

End of the MRO procedure

End of the MRO procedure

34. The MRO procedure ends—

- (a) where the tied pub tenant and the pub-owning business agree, in writing, the matters mentioned in regulation 24(2)(a) and (b), on the day on which that agreement is signed by both parties; or
- (b) in one of the following circumstances—
 - (i) on the day on which the tenancy or licence under which the tied pub is occupied at the time the request under regulation 13(1) is made, ends;
 - (ii) where the offer lapses in accordance with regulation 24(3), at the end of the negotiation period;
 - (iii) on the day on which the tied pub tenant terminates negotiations in accordance with regulation 24(4);
 - (iv) in accordance with regulation 28(3)(b) or (4);
 - (v) on the day on which the tied pub tenant rejects the assessment under regulation 30(9)(a), 31(6)(b) or 31(9);
 - (vi) on the day on which the tied pub tenant rejects an assessment under regulation 30(9), 31(6)(b), 31(9)(b) or 31(12)(b).

Effect of the end of the MRO procedure

35.—(1) Where the MRO procedure ends under regulation 34(a)—

- (a) the terms of the MRO-compliant tenancy have effect from the day after the end of the MRO procedure; and
- (b) the MRO rent is payable with effect from that day.

(2) This paragraph applies where—

- (a) a market rent only option has not been agreed between the tied pub tenant and the pub-owning business by the end of the MRO procedure; and
- (b) during the MRO procedure one of the following events has occurred (or would have occurred if the tenant had not given notice under regulation 13(1))—
 - (i) the renewal of a pub arrangement, other than a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies;
 - (ii) a rent assessment;
 - (iii) a significant increase;
 - (iv) a trigger event.

(3) Where—

- (a) paragraph (2) applies; and

(b) a tied pub tenant and a pub-owning business do not agree, in writing, how any MRO recoverable amount is to be paid to the tied pub tenant or to the pub-owning business, as the case may be, at the end of the MRO procedure, the tenant or the pub-owning business may refer the matter to the Adjudicator.

(4) The “MRO recoverable amount” is the amount of the difference between—

- (a) the amount which is payable under paragraph (1) during the MRO procedure; and
- (b) the amount which would have been payable during that period as a result of one [or more] of the events mentioned in paragraph (4)(b) if a notice under regulation 13(1) hadn’t been given.

PART 8

Exemptions from the provisions of these Regulations

SCHEDULE 1

SCHEDULE 2

Regulation 9

Information specified for the purposes of a rent review proposal

SCHEDULE 3

Regulation 30(3)

Documents specified for the purposes of an independent assessment

1. Documents which provide evidence of the tied pub’s level of trading in the last [] years.
2. Documents which present a forecast of the tied pub’s level of trading for the period of [] years.
3. Documents which provide a comparison between the tied pub’s level of trading and that of other pubs in the local area that are not subject to a tie.
4. Documents which analyse the market value of any special commercial or financial advantage provided to the tied pub tenant under the terms of the tenancy or licence.
5. Documents which provide evidence of the value of housing and commercial properties in the local area.

Annex C: List of Organisations to be consulted

Pub-owning businesses with 500 or more tied pubs

Admiral Taverns Ltd
Enterprise Inns Plc
Greene King Plc
Heineken UK and Star Pubs & Bars
Marston's Plc
Punch Taverns Plc

Interest groups, trade bodies and other organisations

Association of Licensed Multiple Retailers
Brighton and Hove Licensees Association
British Amusement Catering Trade Association
British Association of Pool Table Operators
British Beer and Pub Association
British Institute of Innkeepers
Campaign for Real Ale
Fair Deal for Your Local Campaign
Fair Pint Campaign
Federation of Licensed Victuallers Associations
Federation of Small Businesses
Forum of Private Business
GMB Union
Guild of Master Victuallers
Independent Family Brewers of Britain
Independent Pub Confederation
Justice for Licensees
Licensees Supporting Licensees
All Party Parliamentary Save the Pub Group
Pubs Advisory Service and MRO Advisory Service
Pub Governing Body
Royal Institution of Chartered Surveyors
Society of Independent Brewers

Annex D: The Pubs Code and Pubs Code Adjudicator: Part 1 - response form

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

Following the close of the consultation period, the Government intends to publish all of the responses received, unless specifically notified otherwise.

This closing date for this consultation is 18 January 2016.

Please return your completed form to:

The Pubs Code and Adjudicator Team
Department for Business, Innovation and Skills
2nd floor, Orchard 2
1 Victoria Street
London SW1H 0ET

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

The Pubs Code and Pubs Code Adjudicator: Part 1 - response form

Name:

Organisation (if applicable):

Address:

Email:

Please tick the box below which best describes you as a respondent to this consultation.

	Pub-owning business with 500 or more tied pubs
	Tied tenant
	Interest group, trade body or other organisation
	Other (please describe)

Please be aware that the Government intends to publish all responses to this consultation.

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see page 7 of the consultation document for further information.

If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

I want my response to be treated as confidential

Rent assessments

Question 1

Do you have views on the proposed definition of a rent assessment?

Comments:

Market Rent Only option

Question 2

Are there any other circumstances where a renewal would arise and which should trigger MRO beyond those we have set out?

Comments:

Question 3

Is the wholesale market price for beer the appropriate baseline for determining a significant price increase?

Comments:

Question 4

Is a five percentage point threshold above any increase in the wholesale price of beer (which will reflect any increases in inflation, taxation and other input costs), the appropriate measure?

Comments:

Question 5

Do you agree that the calculation of a significant increase in price for tied products and services other than beer should exclude any increase in the wholesale price that results from rises in tax, duty, regulatory compliance costs or inflation (RPI)? Are there any other factors that should be excluded?

Comments:

Question 6

Is this the appropriate way to measure a significant price increase for tied products and services other than beer? If not, please explain the alternative you would recommend.

Comments:

Question 7

Is a two tier approach appropriate? If so, is the proposed threshold of contributing to 20 percent of the pub's turnover the right one?

Comments:

Question 8

Are the proposed percentage increases in price (30 percent and 40 percent) appropriate? If not, please explain your reasoning and an alternative.

Comments:

Question 9

Do you agree that a significant price increase should be calculated by reference to the price paid by the tenant at a previous point in time? If so, should that be six months ago?

Comments:

Question 10

Do you have any comments on points i. to v. (significant impact trigger events) in Chapter 8?

Comments:

Question 11

Can you suggest any other circumstances that would be likely to have a ‘significant impact’ on the expected business of a pub; and that you believe would not be covered by the proposed definition in the Code?

Comments:

MRO-compliant agreements

Question 12

Do you agree with the distinction drawn between an MRO compliant agreement that arises from a request for MRO at renewal and an MRO compliant agreement that arises from a request for MRO during the course of the tenancy?

Comments:

Question 13

Do you support the requirement that an MRO-compliant agreement should provide for an open market rent review every five years? Please explain the effect of such a requirement on the commercial relationship between the tenant and the pub owning business in an MRO agreement.

Comments:

MRO procedure

Question 14

Does the list of required documents set out in paragraph 10.23 provide the independent assessor with all the appropriate information to make an independent assessment of the MRO rental figure? Should any other documents be added?

Comments:

Question 15

Do you have any comments on the timescales for the MRO procedure proposed for the Code?

Comments:

Question 16

Do you have any views on the proposed circumstances in which the MRO procedure will come to an end?

Comments:

MRO Disputes

Question 17

Do you have any concerns about these proposals for the resolution by the Adjudicator of disputes related to the MRO procedure? If so, please explain your concerns.

Comments:

Waiver from MRO in return for significant investment

Question 18

How do you believe the “amount” of investment for the purposes of “qualifying investment” should be defined? Please explain your view by reference to the type of rent payment and percentage which should be used, with evidence to support your response.

Comments:

Question 19

Do you agree with the proposed definition of “qualifying investment” in terms of the “type” of investment? If not, please explain why not, and suggest an alternative definition, with evidence to support your response.

Comments:

Question 20

What do you consider should be the maximum length of the waiver period (a) 7 years; (b) 10 years; or (c) another option? Please provide an explanation for your answer and any evidence to support your case.

Comments:

Question 21

Do you agree with the safeguards proposed by the Government and the role proposed for the Adjudicator? Are there other safeguards that you consider should be provided? If so, what and why?

Comments:

Question 22

Do you believe that there are any unintended or undesirable consequences of the proposed definition of “qualifying investment” or of other conditions referred to in this chapter on the MRO investment waiver?

Comments:

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have. Comments on the layout of this consultation would also be welcomed.

Comments:

Please use this space to explain why you consider the information you have provided to be confidential.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes

No

Annex E: Consultation questions

Rent assessments

Q.1 Do you have views on the proposed definition of a rent assessment?

Market Rent Only option

Q.2 Are there any other circumstances where a renewal would arise and which should trigger MRO beyond those we have set out?

Q.3 Is the wholesale market price for beer the appropriate baseline for determining a significant price increase?

Q.4 Is a five percentage point threshold above any increase in the wholesale price of beer (which will reflect any increases in inflation, taxation and other input costs), the appropriate measure?

Q.5 Do you agree that the calculation of a significant increase in price for tied products and services other than beer should exclude any increase in the wholesale price that results from rises in tax, duty, regulatory compliance costs or inflation (RPI)? Are there any other factors that should be excluded?

Q.6 Is this the appropriate way to measure a significant price increase for tied products and services other than beer? If not, please explain the alternative you would recommend.

Q.7 Is a two tier approach appropriate? If so, is the proposed threshold of contributing to 20 percent of the pub's turnover the right one?

Q.8 Are the proposed percentage increases in price (30 percent and 40 percent) appropriate? If not, please explain your reasoning and an alternative.

Q.9 Do you agree that a significant price increase should be calculated by reference to the price paid by the tenant at a previous point in time? If so, should that be six months ago?

Q.10 Do you have any comments on points i. to v. (significant impact trigger events) in Chapter 8?

Q.11 Can you suggest any other circumstances that would be likely to have a 'significant impact' on the expected business of a pub; and that you believe would not be covered by the proposed definition in the Code?

MRO-compliant agreements

Q.12 Do you agree with the distinction drawn between an MRO compliant agreement that arises from a request for MRO at renewal and an MRO compliant agreement that arises from a request for MRO during the course of the tenancy?

Q.13 Do you support the requirement that an MRO-compliant agreement should provide for an open market rent review every five years? Please explain the effect of such a requirement on the commercial relationship between the tenant and the pub owning business in an MRO agreement

MRO procedure

Q.14 Does the list of required documents set out in paragraph 10.23 provide the independent assessor with all the appropriate information to make an independent assessment of the MRO rental figure? Should any other documents be added?

Q.15 Do you have any comments on the timescales for the MRO procedure proposed for the Code?

Q.16 Do you have any views on the proposed circumstances in which the MRO procedure will come to an end?

MRO disputes

Q.17 Do you have any concerns about these proposals for the resolution by the Adjudicator of disputes related to the MRO procedure? If so, please explain your concerns.

Waiver from MRO in return for significant investment

Q.18 How do you believe the “amount” of investment for the purposes of “qualifying investment” should be defined? Please explain your view by reference to the type of rent payment and percentage which should be used, with evidence to support your response.

Q.19 Do you agree with the proposed definition of “qualifying investment” in terms of the “type” of investment? If not, please explain why not, and suggest an alternative definition, with evidence to support your response.

Q.20 What do you consider should be the maximum length of the waiver period (a) 7 years; (b) 10 years; or (c) another option? Please provide an explanation for your answer and any evidence to support your case.

Q.21 Do you agree with the safeguards proposed by the Government and the role proposed for the Adjudicator? Are there other safeguards that you consider should be provided? If so, what and why?

Q.22 Do you believe that there are any unintended or undesirable consequences of the proposed definition of “qualifying investment” or of other conditions referred to in this chapter on the MRO investment waiver?



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