



Department
for Business
Innovation & Skills

**Pubs Code and Pubs Code
Adjudicator**

A Government Consultation –
Part 2

DECEMBER 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, published on 29 October, focused 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 (PRA).

This Part 2 of the consultation covers:

- the Government's plans to ensure that its approach to the MRO option (set out in Part 1 of this consultation), along with the requirements to provide information in relation to a tied rent offer (set out in Part 2), fulfil the objectives of a PRA;
- the Government's position on the MRO option rent assessment trigger following the amendment laid in respect of these triggers in Lords Report on the Enterprise Bill on 30 November;
- 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, tenants who are renewing their agreements or where there is a proposed variation to the rent in a new or existing tied agreement other than during a rent assessment; tenants with extended code protection and those with investment 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, 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
- the period of extended code protection 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: 04 December 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. During passage of the Bill Parliament strengthened some of the protections for tied tenants.

Having now published Parts 1 and 2 of this consultation I would like your views on how we implement these measures. To ensure that you are able to do this I have extended the response deadline for Part 1 of this consultation so responses to both parts are invited by 18 January 2016.

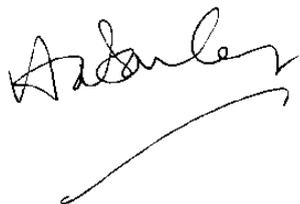
In Part 1 of this consultation we explained that the Government has decided not to proceed with a separate Parallel Rent Assessment process in addition to the Market Rent Only option. This raised genuine concerns from stakeholders as well as Peers during Lords Grand Committee discussions of the Enterprise Bill, as to whether the Market Rent Only option would enable tied tenants to consider a free of tie rent offer alongside a tied rent review proposal. In Chapter 6 of this Part 2 of the consultation we confirm that this in fact will be what tied tenants can receive.

As well as clarifying that our intention is for the MRO procedure to also deliver the effect of a PRA, we are openly asking for views as to whether it does indeed do that and whether it does so proportionately.

In addition we have heard concerns that the definition of the rent assessment trigger for the Market Rent Only option would mean that large numbers of tenants would not have the MRO option available to them because of current trends in the market. We have also heard from Parliament on the issue and the House of Lords has made changes to the Enterprise Bill which sets out the points at which the MRO option would be offered. The Government needs information and evidence to ensure it does not unintentionally undermine the protections intended through the Code. Therefore Chapter 7 sets out our position on this trigger and asks for views on the impact of the removal of the proposed definition.

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 will not be worse off than free-of-tie tenants and that there is fair and lawful dealing between pub-owning businesses and their tied tenants. Finally, we must ensure these principles are delivered without placing undue burdens on businesses. I trust that the clarifications of our proposals in this document and the extension of the deadline for responses will make sure that you can help make this happen.

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', with a long, sweeping underline stroke extending to the right.

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 requires secondary legislation, including the Pubs Code. 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.

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 new burdens being placed on businesses – both pub-owning businesses and tenants – and ensuring that tied tenants do not enjoy any less protection under the statutory Code than they currently have under the voluntary Industry Framework Code.

2.6 The consultation has been published in two parts. This second document, on which comments are invited by 18 January 2016, seeks your views on:

- the Government's plans to ensure that its approach to the Market Rent Only (MRO) option (set out in Part 1 of this consultation), along with the requirements to provide information in relation to a tied rent offer (set out here in Part 2), fulfil the objectives of a Parallel Rent Assessment (PRA);
- the impact of removing the rent increase condition on the rent assessment trigger for the MRO option. You should also note that there are already questions in Part 1 of this consultation on other MRO option triggers that seek your views on their definitions;
- 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, tenants who are renewing their agreements or where there is a proposed variation to the rent in a new or existing tied agreement other than during a rent assessment; tenants with extended code protection and those with investment 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, 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
- the period of extended Code protection when a pub is sold to a company outside of the Code.

2.7 The first document – published on 29 October 2015 and on which comments are now invited by 18 January 2016 – covered 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 detailed the proposed Code provisions on rent assessments and the option for tenants to request a MRO offer and set out the Government’s position on PRA. Specifically, it:

- described the circumstances in which a rent assessment under the terms of the Code will occur;
- set 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;
- explained 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
- explained the Government’s position on integrating PRA into the MRO procedure.

2.8 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 Part 2 of the consultation will begin on 04 December 2015 and will run until 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 E is available electronically on the consultation page: <https://www.gov.uk/government/consultations/pubs-code-and-adjudicator-fees-enforcement-and-other-parts-of-the-code> (until the consultation closes).

3.4 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

3.5 A list of organisations that we have notified about this consultation is in Annex D.

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 paragraph 3.3.

6. Market Rent Only option and Parallel Rent Assessments

Background

6.1 The legislation which establishes the Pubs Code and Adjudicator is in Part 4 of the Small Business, Enterprise and Employment (SBEE) Act 2015 which received Royal Assent on 26 March 2015. 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 SBEE Act stipulates that the 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 Following the addition of the Market Rent Only (MRO) option to the legislation in the House of Commons, Government made a number of further commitments during the remaining stages of the Bill in terms of what the Pubs Code would contain when it was set out in regulations.

6.3 These included commitments related to elements of the Parallel Rent Assessment (PRA) which Government had removed from the draft legislation following the inclusion of the MRO option in the House of Commons. At Lords Report stage, following debates in Grand Committee, Government amended the legislation to introduce a power to require PRAs as part of the Pubs Code. In subsequent debates Ministers in both Houses confirmed that, as well as incorporating the MRO option into the Pubs Code, PRA would be available to tenants so that they could judge if the tied deal they are being offered is fair.

6.4 Ministers in both Houses also confirmed that MRO and PRA would need to be streamlined. Baroness Neville-Rolfe, for example, said at Lords Report on 9 March:

... my noble friend will know that I am always keen to minimise bureaucracy, and as I said earlier it is our intention to streamline and integrate the two processes as far as possible, but we need to do the detailed work and process mapping to understand where and how the processes dovetail. This will benefit from further formal consultation, which will inform how we set this out in secondary legislation.¹

6.5 This intention to integrate the two processes was informed by representations made to Government by organisations from all sides of the argument. Pub company responses to our consultation in 2013 for example emphasised the difficulty in some aspects of the PRA calculation². Those in favour of inclusion of the Market Rent Only option gave their views on PRA. For example following publication of the Government response to the 2013 consultation the Save the Pub Group wrote to the then Secretary of State and said:

A parallel rent assessment has been proposed which I believe all parties to this dispute have agreed, for different reasons, is unworkable. The tenant organisations have highlighted that, whilst a useful informative tool in the right hands, the method is time consuming and complex and should only be used in conjunction with the

¹ Baroness Neville-Rolfe **Lords Report 9-3-2015 Hansard** (Col.464)

² <https://www.gov.uk/government/consultations/pub-companies-and-tenants-consultation>

*MRO option as a mechanism to calculate which agreement (tied or free of tie) would deliver the most likely sustainable/profitable future for the tenant.*³

6.6 In Part 1 of this consultation published on 29 October 2015 the Government confirmed it would not require pub-owning businesses to prepare a separate PRA for tied tenants. Of the relationship between PRA and MRO, Part 1 said:

*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.*⁴

6.7 Following publication of Part 1 of this consultation concerns were expressed by stakeholders and within the House of Lords during Lords Grand Committee on the Enterprise Bill⁵ related to the decision not to provide a separate Parallel Rent Assessment in the Pubs Code. The views expressed suggested that this decision may not have been consistent with commitments made in the last Parliament.

6.8 Intensive stakeholder engagement and further debate during Lord's Report on 30 November have clarified the concerns of stakeholders and Peers and also the position set out by Government in Part 1 of this consultation. Therefore in line with the commitment made by the Small Business Minister Anna Soubry in BIS Oral Questions on 10 November, this chapter of this Part 2 of the consultation clarifies the Government's position and will confirm how Government has integrated the key principles of PRA within the MRO procedure to ensure that it will deliver both the requirement of the legislation and the commitment from Government to integrate the operation of PRA and MRO processes.

6.9 With this clarification and the extension of the deadline of Part 1 of this consultation to the 18 January the Government intends that all stakeholders can consider both parts of the consultation together and review the complementary provisions related to the MRO option, rent assessments, information and transparency. In doing so they will be able to respond to the consultation with their views on whether the integration of PRA within the MRO option has been effective, ie, by making available in parallel a free of tie offer (the MRO option) with a tied rent offer.

The Government wants your views on the Market Rent Only option and Parallel Rent Assessment

6.10 Since publication of Part 1 of this consultation the Government has listened further to the strength of feeling around PRA and is seeking to ensure that its approach to the MRO option (set out in Part 1 of this consultation), along with the requirements to provide information in relation to a tied rent offer (set out in this Part 2), have integrated the Parallel Rent Assessment within the MRO procedure. This approach will provide tenants with the opportunity to compare in

³ <http://www.fairdealforourlocal.com/save-the-pub-group-accuses-vince-cable-of-falling-into-trap-on-pubco-reform-publicans-morning-advertiser/>

⁴ <https://www.gov.uk/government/news/fair-deal-for-tied-pub-tenants-under-new-government-proposals>

⁵ <http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/151104-gc0001.htm>

parallel two clear and transparent options, so they can have confidence they will be no worse off if they enter into a tied agreement. That principle lies at the heart of the Pubs Code.

6.11 We believe that the proposals set out in the two parts of this consultation do achieve a dovetailing of MRO and PRA, but it is important that we hear the detailed views from all sides of the industry so we can test whether the proposed Code does indeed provide proportionate and deliverable protections.

Clarifying the Government's position on Parallel Rent Assessment

6.12 Part 1 of this consultation stated that the draft Pubs Code regulations do not provide for a separate PRA as part of the Statutory Pubs Code. The reason they do not include a standalone PRA process that is separate from the MRO procedure, nor a process that is exactly the same as the PRA proposal in the Government's June 2014 response to the consultation of April 2013, is because of the way the objectives of PRA have been incorporated in the draft regulations.

6.13 The 2014 PRA proposal was intended as a transparency measure. It would have set out an actual tied offer and an illustrative free-of-tie comparison to help tenants negotiate a better deal on their tied rent. The Adjudicator could have reviewed the assessment and potentially mandated an adjustment of the tied rent if he or she found it was in breach of the Code. Under the 2014 PRA proposal, the tenant would have had no option to choose to pay a free of tie rent only.

6.14 The SBEE Act made it a statutory requirement under the Pubs Code that tenants must, in certain circumstances, have the option to choose to pay a free-of-tie rent; this is the Market Rent Only (MRO) option. This obviously strengthened the protections offered to tenants through the Code in comparison with the 2014 PRA proposal.

6.15 The draft regulations in this consultation (Parts 1 and 2 together) set out the proposals for how the principal objectives of both MRO and PRA can be met, namely that: 1) tenants must receive the information they need to negotiate a fair deal on their tied rent, 2) they have the right under the Code to choose a free-of-tie rent in certain circumstances and 3) they are no worse off under a tied deal than they would be under a free-of-tie deal.

6.16 The Government considers that a PRA as a separate remedy to the MRO option process is not required because the core intention of the PRA – comparison of a tied rent alongside a free-of-tie rent, in other words, in parallel – will now be provided for within the MRO option process itself. The MRO proposal will give tenants the opportunity to pursue a free-of-tie rent deal, if that is what they wish to do after a period of negotiation. As paragraph 8.18 of Part 1 of this consultation states:

By permitting a tenant to pursue both the (tied) 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.

How the Government's Proposals Work to Assist the Tenant

6.17 Importantly, the MRO procedure permits the tied tenant to use the MRO offer to make an informed choice between two options – a tied rent figure and a free-of-tie figure – that are both subject to independent third party scrutiny. These are available to the tenant 'in parallel' at the triggers points at which rent assessments and the MRO option are available.

6.18 The draft Code sets out the framework under which the tied offer must be prepared (as described in Chapter 6 of Part 1 of this consultation) and that it may be referred to the Adjudicator if the tenant believes there has been a breach of the Code⁶. Similarly, where the parties are unable to agree on a free-of-tie rent as part of the MRO option process, this will be subject to scrutiny by an independent assessor who is appointed by the parties and authorised by the Adjudicator.

Information supporting the MRO procedure

6.19 The Government has set out in Schedule 3 to the draft Pubs Code the list of documents that the independent assessor will require when assessing the free-of-tie rent under the MRO option – including, for example, information on: trading history, forecasts and comparative data with other local free-of-tie pubs.

6.20 In paragraph 10.23 and Question 14 in Part 1 of this consultation the Government is specifically seeking views on the comprehensiveness of the information these documents provide to enable proper assessment of the MRO offer. Regulation 30(3)(b) of the draft Pubs Code also allows the Adjudicator to issue guidance to the assessor on how to determine the free-of-tie market rent. We encourage consultees to revisit these provisions and let us have their views.

6.21 The Government is proposing that from the point of a tenant's initial request, they will have the right to pursue the MRO option through a period of negotiation with their pub-owning business and through to considering the final recommendation of an independent assessor with no obligation to accept any MRO offer that is on the table. The tenant will also have the right to refuse the offer at any time; to terminate the MRO option process; and to remain tied if they so choose.

6.22 When tied tenants evaluate the MRO option, the Government expects that they would want to source for themselves the prices they could secure for beer and other products if they choose to go free-of-tie. That information, along with the other information required by the Code, could help to strengthen their position when negotiating terms with the pub-owning business. If the pub-owning business is not able to improve its tied offer after negotiations, then a tenant with the right to choose MRO will be able to do just that.

6.23 We are already consulting on the proposed criteria that would enable a tenant to request an MRO option (in Chapter 8 of Part 1 of this consultation) and we would particularly welcome views on those in the light of the proposals set out in this Part 2 of the consultation about the information that must be provided to tenants.

Information to support the tied rent offer

6.24 Chapter 8 in this Part 2 describes the information that the Code will require pub-owning businesses to provide to tied tenants before rent negotiations start in relation to a new or existing tied agreement. This will include, for example:

- A summary of the methods which must be applied for calculating the rent, including the information used to support those calculations;
- A 12-month forecast of profit and loss statement;

⁶ For example, where a tied rent proposal is not in accordance with the requirements of the Code.

- Details of purchasing obligations, including price lists and discounts;
- Each party's repair and maintenance obligations and the processes involved;
- Whether the pub-owning business is aware of intentions to sell the pub;
- Relevant benchmarking reports.

6.25 These information requirements – and the others listed in the draft Pubs Code and referred to in Annex B – are intended to enable the tenant and any independent professional business advisor to have the data they need to assess whether the tied offer is fair and to compare it with any other available offer.

Other information provided to the tenant

6.26 Part 2 and Schedules 1 and 2 of the Pubs Code provide comprehensive information, which in addition to the information sourced by the tenant will assist in comparing the tied rent to the free of tie rent. This other information is summarised in Annex B.

6.27 We would therefore expect the MRO negotiations:

- to be conducted with reference to these information sources;
- to follow the detailed process for requesting, offering, negotiating and independently assessing an MRO option, as described and consulted upon in Chapter 10 of Part 1 of this consultation;
- to result in a free of tie figure that meets the requirements of Regulations 21 and 22 of the draft Pubs Code; and most importantly
- to provide tenants with a meaningful free of tie offer that they can compare with their tied offer.

Summary

6.28 Under the MRO procedure a tenant:

- can request a free-of-tie rent offer alongside a tied rent review proposal which must include information as laid out in Chapter 8;
- can refer the tied rent offer to the Pubs Code Adjudicator where they feel there is a breach of Code and refer the free-of-tie rent proposal to an independent assessor if agreement cannot be reached;
- has the real option to choose to pay a market rent only figure which would enable the tenant to source the products at free of tie prices; and
- will have the right to refuse the free of tie offer at any time; to terminate the MRO option process; and to remain tied if they so choose.

6.29 This process will allow the tenant to make an informed choice between the tied rent figure and a free-of-tie rent figure and ensure they are no worse off under a tied rent.

Prospective tenants

6.30 The arrangements above explain the options available to a tied tenant during the course of their tenancy agreement or when they are exercising a statutory or contractual right to renew their tenancy. The Government's approach to delivering no worse off for prospective tenants is different.

6.31 The MRO option will not be available at the time that a tenant takes on a new tenancy. Many of these prospective tenants will be new entrants to the pubs industry; some will be

looking to move to a new pub and some will have opted out of their right to renew their tenancy at their existing pub. In the latter cases, those tenants will, of course, have been covered by access to the MRO option throughout the duration of their previous tenancy.

6.32 The Government wants to ensure that tenants entering into a new tenancy have all of the information that they need to assess that the deal they are being offered is the right one for them. The draft Pubs Code will, therefore, require that these prospective tenants receive a rent proposal and the information in support of a tied offer described in paragraph 6.24 and set out in detail in Part 2 of the Pubs Code and in Schedules 1 and 2. Tenants taking on a new tenancy will also have access to the Adjudicator where the tied rent proposal is in breach of the Code, eg if its calculation does not follow the RICS guidance.

6.33 The Government believes that these arrangements provide proportionate protection for prospective tenants – who will also have the ability to consider and compare the deal on offer with other tied or free-of-tie deals available in the market; and therefore to establish that the deal being offered to them is both fair and leaves them no worse off than if they were to opt for a free-of-tie tenancy.

Q.1: We believe the stated MRO procedure, that will give tenants a free-of-tie rent offer alongside a tied rent review proposal, will enable tenants to make an informed judgment as to whether they will be no worse off by remaining tied and fulfils the objectives of a Parallel Rent Assessment. If you believe that this does not achieve the goal, please give your reasons why.

Q.2: We would welcome your comments on whether, in addition to the other information requirements of the draft Pubs Code, the documents provided for in Schedule 3 of the draft Code and described in paragraph 10.23 in Part 1 of this consultation are sufficient and appropriate for calculating a meaningful free-of-tie market rent that will allow tenants to make an informed judgment as to whether they will be no worse off by remaining tied.

Q.3: If you believe that the combination of current proposals will not adequately deliver the no worse off principle or does so in a disproportionate way, please give your reasons and, where relevant, provide evidence.

7. Availability of the Market Rent Only option at Rent Assessment

Impact of Regulation 15 on tenants' access to the MRO option

7.1 We have set out in Chapter 6 of this Part 2 of the consultation how the Government's proposals on the Market Rent Only (MRO) option, alongside the provisions on tied rent proposals, will deliver the objective of a system of parallel rent assessments.

7.2 We have done this by providing that the principal route to MRO is via a rent assessment (as described in Chapter 8 of Part 1 of this consultation and in Regulation 15 of the draft Pubs Code); and we have provided for regular rent assessments – either as provided for in the tenancy agreement, or at intervals of no more than five years under the Code (Chapter 6 of the first consultation and Regulation 8 of the draft Pubs Code).

7.3 We have heard the strength of feeling from stakeholders in response to our proposal in paragraph 8.12 of Part 1 of this consultation and draft Regulation 15(b) that the tenant would only have access to the MRO option if the rent review proposal is for an increase on the rent they are currently paying under the tenancy agreement.

7.4 Our proposal was based on an assumption that the amount payable could be expected to rise at each rent review scheduled in the tenancy. The Government therefore intended it to be a limited and proportionate intervention – there has never been any intention or indeed expectation on the part of the Government that this proposal should or could defeat the statutory duty to introduce the right to an MRO option at rent assessment.

7.5 Since the publication of Part 1 of this consultation we have been told that the effect of existing rent indexing arrangements and current trends in rent settlement figures – in combination with draft regulation 15(b) – would be to limit significantly the number of tied tenants who would on the basis proposed be able to exercise the MRO option at the time of their rent assessment.

7.6 This was not the Government's intention. We would be greatly concerned if it were to be the practical effect of our draft Pubs Code regulations.

7.7 This issue was debated at Report Stage of the Enterprise Bill on Monday 30 November and we recognised the strength of feeling on this issue. Following a vote an amendment was made to the Enterprise Bill which sets out the points at which the MRO option would be offered⁷. While the legal effect of the current drafting is uncertain we understand that the intended effect of the amendment is to disallow the Government's proposal in part one of the Pubs Code consultation to permit tied pub tenants to request an MRO option at a rent assessment only where the rent is increased.

7.8 The Government needs to ensure that the Pubs Code is clear to tied tenants and pub-owning businesses on this important issue. It will do this by taking proper consideration of the will of Parliament as expressed in Lords Report and by seeking views and evidence of

⁷ See amendment 70ZC here: <http://www.publications.parliament.uk/pa/bills/lbill/2015-2016/0071/amend/ml071-II.htm>

stakeholders regarding any unintended consequences that might result from the current drafting of the regulations. The Government is also taking the opportunity of this Part 2 of the consultation to ask for views on the removal from the draft Pubs Code of the condition that there must be a proposal for a rent increase at rent assessment before a tenant may exercise the MRO option; and for evidence of the extent to which the current drafting would restrict access to the MRO option at rent assessment.

7.9 The additional questions set out here complement questions in Part One of the consultation where the detail of the MRO Option procedure is set out. Therefore if you have views to share with regard to the points at which the MRO option is available then please consider questions 2 to 11 in Part 1 of this consultation and questions 4 and 5 below. You can do so in a single response and to the new deadline of 18 January. The Government will consider them together in preparing a response.

Q.4: What would be the effect of removing from the draft Pubs Code Regulations the condition that there must be a proposal for an increase in the rent at rent assessment before a tenant may exercise the MRO option?

Q.5: It would be particularly helpful to receive evidence of the percentage of rent reviews that have resulted in a freezing or reduction of the rent over the last three years; of the prevalence of annual indexation provisions and other inter-rent review arrangements in tenancy agreements; the typical increase in the amount payable by the tenant that they result in; and the way in which these are exercised by the pub-owning business under the terms of the tenancy.

8. The Pubs Code

8.1 The Small Business, Enterprise and Employment (SBEE) Act 2015 states that the Pubs 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."

Duty to provide a rent proposal

8.2 Part 3 of the draft Pubs Code sets out when and to whom a rent proposal needs to be provided. In circumstances where someone is considering becoming a tied tenant; when an existing tied tenant looks to take on a different or additional pub; or when there is a proposed variation to the rent payable under an existing or a new tied tenancy agreement other than during a rent assessment, it is proposed that pub-owning businesses will be under a duty to provide a rent proposal. This includes tied tenants who have the benefit of extended Code protection (see Chapter 10) and those who have entered into an investment agreement (see Chapter 12 of Part 1 of this consultation). A rent proposal is a proposal for the rent to be paid under a tenancy or licence.

8.3 Akin to rent review proposals required under the rent assessment process, rent proposals will need to be given along with the information contained at Schedule 2 of the draft Pubs Code and any other information required to understand or to negotiate the rent in an informed manner. This is explained in more detail at paragraphs 8.9 and paragraphs 8.19 to 8.22.

8.4 Again, as with rent review proposals under the rent assessment process, the rent proposal must be prepared in accordance with Royal Institution of Chartered Surveyors (RICS) guidance and signed off by a RICS registered valuer. Pub-owning businesses will be required to advise tenants to obtain independent professional advice in connection with the rent proposal before the tenant agrees to it.

Information requirements: when is information to be provided

Before entering into a new agreement

8.5 When someone is considering becoming a tied tenant; when an existing tied tenant looks to take on a different or additional pub; or when there is a proposed change to the rent payable under an existing or new tied tenancy agreement – ie the circumstances in paragraph 8.2 – it is important that the tenant receives all relevant information available to help them with their decision and to negotiate appropriate terms with the landlord.

At rent assessment and prior to other transactions

8.6 Similarly, for tied tenants coming up to a rent assessment, renewal or other transaction with their pub-owning business – eg a change in tied prices, paying an insurance premium, arranging for maintenance, repairs or improvements – it is important that they are aware of the processes involved, the cost implications and what they can do to influence them.

8.7 Under the voluntary Industry Framework Code much of this information had to be provided by the pub-owning business but often was not given to the tenant until very late in the process, when the main terms of the new agreement had already been settled. We received evidence of instances where information was not provided at all, and others where it had proved difficult or impractical to enforce the tenant's right to receive it. Moreover, the current provision of

necessary information to tenants and prospective tenants varies considerably in detail and timing from one pub-owning business to another.

8.8 During the passage of the SBEE Act, the Government committed to ensuring that the required information should be made available to prospective tied tenants much earlier in the application process.

8.9 We are proposing that the essential information should be made available to both prospective and existing tenants in good time to prepare their business plan and consider the tied rent being offered to them. The tenant and their independent advisors will then have the vital data they need to consider whether the offer is fair. They will be in a position to examine the costs and benefits of the constituent elements of that offer well before they begin detailed discussions towards an agreement with the pub-owning business. In particular, they should be able to come to an informed view as to whether the tied agreement will leave them better or worse off than the alternatives available.

8.10 We also propose that it should be made absolutely clear to incoming tenants whether they will have a right to renew their tenancy, ie, they are 'contracted in', under the Landlord and Tenant Act (LTA) 1954; and they will need to be informed what that process will involve. If they are contracted out, the LTA 1954 already specifies how the landlord needs to obtain their agreement to that in writing, Some of these contracted-out tenants may have an agreement that gives them a right or a limited right to renew. For those tenants the Pubs Code will require their pub-owning business to set out the renewal process, including the timeframe of any notification to renew.

8.11 Further information will be required to be provided in other circumstances, for example when the tenant or landlord changes; if a tenant wants to terminate the tenancy early or wants to assign the lease or if the pub-owning business (or superior landlord) intends to sell the pub.

8.12 The draft Pubs Code makes clear what information should be provided and when. If a pub-owning business does not provide the relevant information by the correct time, the tenant (or prospective tenant) will be able to refer the issue to the Adjudicator. A summary of the information to be provided is listed in Annex B.

Importance of the business plan

8.13 Whilst it would be disproportionate to require a pub-owning business to supply information to a purely casual enquirer, we want to ensure that those prospective tenants with a genuine interest and who meet the suitable and qualified person requirements (see Regulation 4) receive the information at the earliest opportunity.

8.14 We therefore propose making the supply of certain information conditional on two events having taken place. After that, a pub-owning business will still have normal commercial rights to reject an applicant at any point before signing an agreement but it will be a breach of the Pubs Code to continue to conduct discussions towards a tenancy agreement with a prospective tenant unless the pub-owning business provides them with the information required to inform their business plan. The two conditional events (see Regulation 5(6)(a) and (b) of the draft Pubs Code) are:

- 1) Firstly the prospective tenant must inspect the premises. This must be a physical viewing arranged with the pub-owning business or its agent, rather than a casual visit to the pub or viewing the property online.

- 2) Secondly, the prospective tenant must confirm his/her interest in the pub to the pub-owning business or its agent following the viewing.

Q.6: Do you agree that these are appropriate conditions to be met before it becomes mandatory to provide specified information to a prospective tenant?

Q.7: Do you agree that a pub-owning business may not require a prospective tenant to submit a business plan unless the tenant is a qualified person to whom it has provided the specified information?

Specified information

8.15 The bulk of the information requirements are found at Schedule 1 (Information specified for the purposes of a new agreement etc) and Schedule 2 (Information specified for the purposes of a rent proposal or a rent review proposal).

Information to be provided to a tenant before they agree a new tenancy

8.16 When a pub-owning business offers a new agreement to a prospective or existing tenant, the draft Pubs Code requires them to provide the tenant with all of the information listed in Schedule 1. Much of the information set out in Schedule 1 replicates requirements that are already covered in some way by the voluntary Industry Framework Code or by pub-owning businesses' own codes of practice. The requirements include details of fees, charges or financial penalties a pub-owning business may require its tenant to pay for whatever reason during the tenancy.

8.17 If a pub-owning business does not provide correct information by the correct time, its tenant (or prospective tenant) will be able to refer the issue to the Adjudicator. A summary of the information to be provided is listed in Annex B.

8.18 The draft Pubs Code also requires the offer of a new agreement to be accompanied by a formal Rent Proposal that includes all of the information specified in Schedule 2:

- a summary of the methods applied in calculating the rent;
- an outline of the procedure for the negotiating of the rent;
- a list of the matters to be considered relevant and irrelevant in those negotiations;
- an accurate, clear and detailed forecast profit and loss statement – including breakdowns for estimated purchases and sales of alcohol and other operating costs – expressed as a percentage of estimated turnover;
- a list of prices for tied products and services, and data on typical operating costs;
- updated information required under Schedule 1, where that information has changed or has not been provided previously; and
- a timetable for the provision of any further information.

Information relating to a variation of the tied rent

8.19 The draft Pubs Code makes specific provision for circumstances when the pub-owning business wants or agrees to negotiate changes to the tied rent during the course of the tenancy, but in circumstances where the extent of the change proposed does not satisfy the test in Regulation 8 of the draft Pubs Code requiring the pub-owning business to conduct a full rent assessment. Paragraph 6.14 of Part 1 of this consultation explains that certain contractual and formal or informal negotiations affecting the tied rent (and set out in Regulation 8(5)) will not require a rent assessment – including, but not restricted to:

- 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 the provision of a benefit in kind; and
- periodic general business reviews.

8.20 It is not the Government's intention that a tenant should be denied the detailed information that they require to negotiate with their pub-owning business if they request or are asked to agree to a change in their tied rent in circumstances where a rent assessment is not available by virtue of Regulation 8. Regulation 7 of the draft Pubs Code, therefore, requires that in these circumstances the tenant would have to be provided with a rent proposal, which must be provided at least 14 days before the change in the rent is proposed to take effect.

8.21 The Government is, however, interested in the views of stakeholders on whether the pub-owning business should be required to provide a full Schedule 2 rent proposal in these circumstances; or whether it would be sufficient only to require the provision of the elements that had changed; and also whether it is necessary to require all of the Schedule 1 information to be provided again in these circumstances.

8.22 The Government is also keen to hear views on whether there are any circumstances in which the tied rent may change – for example, in line with an annual indexation previously agreed when the tenancy was taken out; or where there is a temporary adjustment to the rent payable – where it might not be appropriate to provide for a new rent proposal.

Q.8: Do you agree that where a change in the tied rent is proposed during the course of the tenancy agreement, the tenant should be provided with a revised rent proposal? Should all of the Schedule 2 information be required; or only those elements that have been changed? Should all of the Schedule 1 information be provided at the same time?

Q.9: Should a rent proposal be required in all cases where there is a change in the rent during the tenancy? Would there be any merit in excluding changes that are automatic or agreed in advance (for example, annual indexation provisions); or that are of a temporary nature (such as rent 'holidays' to provide short-term relief to the tenant)?

Timing of information at rent assessments and renewals

8.23 We propose to retain the existing timescales in the Industry Framework Code for information required to be provided to tied tenants at a scheduled rent assessment or before a renewal (see Parts 3 and 4 of the draft Pubs Code). This information will have to be provided at least six months prior to the date the new rent is due to commence.

Information relating to assignment

8.24 We propose that prospective tenants must be made aware in writing if assignment of their tenancy is not permitted. If assignment is permitted, the pub-owning business must provide the prospective tenant with details of the procedure to be followed (see Schedule 1, paragraph 21 of the draft Pubs Code).

Repair provisions

8.25 The draft Pubs Code does not attempt to define the precise detail of repair and maintenance obligations in different circumstances. That will be for the contractual agreement between the pub-owning business and its tied pub tenant. The Code therefore provides that the pub-owning business should encourage the tenant to take professional advice before signing such an agreement.

8.26 Rather, the draft Pubs Code sets out that where the pub-owning business has repairing and maintenance obligations under the tenancy agreement, a breach of those obligations will be a breach of the Code that may be referred to the Pubs Code Adjudicator (see Regulation 50(11) of the draft Pubs Code). In addition (as described in the provisions on Information Requirements later in this chapter), the Code specifies what information regarding the respective obligations of pub-owning business and tied tenant has to be provided to a tenant or prospective tenant and when the pub-owning business needs to provide that information.

8.27 That information includes any obligation to obtain statutory safety certificates to allow trading to take place (see paragraph 19 of Schedule 1 of the draft Pubs Code).

8.28 In some cases, the pub-owning business may commit to undertake repairs and/or maintenance before or shortly after a new tenant moves in. A failure to honour this commitment would be a breach of the Code, as described in paragraph 8.26, and may be referred by the tenant to the Adjudicator for arbitration. An alleged persistent pattern of failing to honour such commitments could be investigated by the Adjudicator; and the Adjudicator would have the power to take enforcement measures.

8.29 A tied tenant may be awarded redress by the Adjudicator if the pub-owning business defaults on its contractual obligations regarding repairs and maintenance at any time during the duration of the contract. The Adjudicator could award redress both for the repairs/maintenance that had not been undertaken or that had not been undertaken to a reasonable standard within a reasonable time period and for any loss of trade suffered by the tenant as a consequence. This mirrors the existing ability of the Pubs Independent Conciliation and Arbitration Service to award redress in cases referred to it under the voluntary Industry Framework Code.

Access to premises

8.30 We propose that the draft Pubs Code states that, except in an emergency, access to the tied pub premises by the pub-owning business or its agents for the purposes of assessing, preparing for or conducting repairs, maintenance or a schedule of dilapidations – if permitted in the tenancy or licence agreement – must be by prior arrangement, giving reasonable notice to

the tenant. This provision would not in itself give the tenant the right to refuse permission for access, nor would it affect contractual rights to access for other purposes agreed between the pub-owning business and the tenant.

Q.10: Do you consider that these measures on repair obligations provide an appropriate balance between the rights and duties of pub-owning businesses and those of their tied tenants?

Arbitrable provisions

8.31 The SBEE Act 2015 allows the Pubs Code to contain provisions which are non-arbitrable. This means that an alleged breach of those provisions may not be referred to the Adjudicator for arbitration, except to the extent that they relate to another (arbitrable) breach of the Code.

8.32 However, breaches of a non-arbitrable provision could still be the subject of an investigation by the Adjudicator.

8.33 A provision might be designated non-arbitrable if a breach of it alone is unlikely to be a sufficient reason for any tenant to want to bring a case to the Adjudicator.

Q.11: In the draft Code are there any provisions that you consider should be specified as non-arbitrable? Please explain the advantages of doing so.

9. Contractual inconsistencies with the Code

9.1 The draft Pubs Code incorporates provisions giving effect to the power under section 47 of the Small Business, Enterprise and Employment (SBEE) Act 2015. This is designed to prevent the impact of the Pubs Code and the provisions of the Act in relation to arbitration being nullified by agreements between pub-owning businesses and their tied tenants that contain terms inconsistent with the Code.

9.2 Where the draft Pubs Code provides that a term in a **tenancy** agreement is void, that term will not bind the tenant. Where a term of an **arbitration** agreement between a pub-owning business and a tied tenant is unenforceable under the Code, it may remain part of the tenancy agreement but will not give the pub-owning business the right to take action as a consequence of any action or inaction by the tenant.

9.3 The provisions will apply both to new agreements and to agreements already in effect when the Code comes into force.

Terms in tenancy agreements which will be void

9.4 Under section 47 of the SBEE Act, terms in a tenancy agreement will be void if they have the effect of removing a tied tenant's right under the Code to refer a dispute to the Adjudicator for arbitration, or would penalise the tied tenant for making a referral. It is proposed that this same effect should extend to terms that seek to prevent or to penalise a tenant from relying on his or her protections under the Code and would constitute a fundamental breach of the Code.

9.5 The draft Pubs Code therefore regards as fundamental breaches of the Code any terms which:

- have the effect of preventing, inhibiting or penalising a tied tenant for relying on the Code's protections; or for asking its pub-owning business to comply with its Code obligations; or
- would allow only the pub-owning business and not the tenant to initiate a rent assessment; or
- restrict rent review proposals at rent assessments to being upwards only; or
- purport to penalise the tenant based on the reading of a flow monitoring device without any additional evidence.

9.6 Such terms would be void.

Terms in arbitration agreements which will be unenforceable

9.7 The same principle applies to any terms in agreements about arbitration between a tenant and a pub-owning business (section 47(5) of the SBEE Act). The draft Pubs Code makes such terms unenforceable if they have the effect described in paragraphs 9.4 and 9.5. It provides that any terms that seek to sidestep, shortcut or circumvent the statutory arbitration requirements and processes provided in the Code or other regulations made under Part 4 of the SBEE Act would be regarded as contrary to the proper working of the Code and therefore unenforceable against the tenant.

Q.12: Do you have any comments relating to the proposals for void and unenforceable terms?

10. Extension of Code protections

10.1 The purpose of section 69 of the Small Business, Enterprise and Employment (SBEE) Act 2015 is to ensure that a tied tenant who has the protection of the Pubs Code will not immediately lose that protection as a consequence of changes to either the ownership of their tied premises or the commercial arrangements of their pub-owning business that are beyond the tenant's control. Section 69 seeks to do this in a proportionate way that balances the expectations of the tenant in terms of rights and protections under the Code during the lifetime of the tied pub agreement with the commercial interests of a landlord that is not or is no longer a pub-owning business under the Act and is therefore not subject to the Code.

10.2 Specifically, section 69 extends the tenant's protection under the Code for a defined period – until the earlier of the end of the tenancy agreement or the conclusion of the next rent assessment following the change of landlord status – which is therefore unlikely to be for longer than five years. There are, however, two important exceptions to the extended protection which are provided in the Act. Firstly, the landlord cannot be subject to an investigation by the Adjudicator into alleged failures to comply with the Pubs Code. Secondly, the tenant has no right to request a Market Rent Only (MRO) option to occupy the premises – as this would have a long-term impact, beyond the limited duration of the extended protection, on the property interests of the landlord.

10.3 Regulations made under section 69(6) may provide definitions of the events that will terminate the extended protection; the end of a tenancy or licence; and the conclusion of a rent assessment.

End of the tenancy or licence

10.4 In relation to when a tenancy or licence ends, the Government proposes that this should be given its ordinary meaning – being either the date specified in the tenancy agreement as the end of the lease (or the date of expiry of the licence) or the date it may come to an end in accordance with the terms of the contract.

10.5 Where a tenant has a statutory right under the terms of Part II of the Landlord and Tenant Act 1954 or other contractual right to renew their lease, any such renewal would not be regarded as a continuation of the agreement to which extended protection applies, but as a wholly new agreement – even where the new agreement is made on identical terms to the old one. In these circumstances, the extended protection would end either on the date the lease expires or the date that the renewal commences, whichever is the earlier.

10.6 Assignment of the lease by the tenant would not bring the tenancy to an end and would not terminate the extended Code protection that attaches to the tenancy.

Conclusion of next rent assessment

10.7 The term 'rent assessment' is used consistently throughout the Code. Accordingly 'rent assessment' in the context of extended protection is a reference to the process explained in Chapter 6 of Part 1 of this consultation and set out in Regulations 8 to 11.

10.8 Regulation 11(3) sets out the point at which a rent assessment ends. It means that rent assessments carried out in relation to a contractual rent review end on the rent review date or the date when the new rent is agreed in writing, whichever is later. For rent assessments carried out at the request of the tenant:

- 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 beyond the tenant's control and that was not reasonably foreseeable has had a significant impact on the level of trade that could reasonably be expected to be achieved at the tenant's pub;

these assessments end six months after the rent review proposal is received by the tenant or the date the new rent is agreed in writing, again whichever is later.

Extent of the extended protection

10.9 In situations where the landlord changes to one who does not qualify as a 'pub-owning business' for the purposes of the Pubs Code, a tenant will continue to be entitled during the period of extended protection to:

- a) a rent assessment to be carried out in accordance with the Code;
- b) a rent proposal where a change to the rent that does not constitute a rent assessment is proposed;
- c) the information specified in connection with rent proposals and rent assessments;
- d) receive the benefit of the obligations on pub-owning businesses in respect of:
 - an assignment of the tenancy;
 - the enforceability of terms that are inconsistent with the requirements of the Pubs Code – including those that purport to give the pub-owning business and not the tenant the right to initiate the rent assessment; that restrict rent proposals at rent assessments to be upward only; and that purport to penalise the tenant on the evidence alone of a flow monitoring device;
 - the roles of Business Development Managers and Code Compliance Officers;
 - the liability of group undertakings as pub-owning businesses under the Code;
 - insurance arrangements for the pub;
 - the condition of the premises;
 - the prohibition of an enforced tie for gaming machines;
 - the required provision of a template profit and loss account;
 - the provision of information in relation to the sale of the freehold or a long lease over the premises; and
 - the obligation to resolve disputes as soon as reasonably practicable.
- e) refer all breaches of the Pubs Code to the Adjudicator for arbitration.

Disputes

10.10 Any dispute about whether a tenant has extended Code protection would be addressed by the Adjudicator in the course of an arbitration brought by a tied tenant trying to enforce his or her Code rights. Where the Adjudicator agrees that the tied tenant has extended protection, the arbitration would proceed.

Q.13: Do you have any views on the extent of the extended protection that is proposed?

11. Group undertakings

11.1 The Pubs Code applies to all “pub-owning businesses” which means landlords of 500 or more tied pubs (section 69(1) of the Small Business, Enterprise and Employment (SBEE) Act 2015). For the purpose of calculating whether a person is a landlord of 500 or more tied pubs, section 69(2) of the SBEE Act allows for tied pubs whose landlord is a group undertaking to be counted. The term “group undertakings” has the wide meaning given in section 1161 of the Companies Act 2006 and includes all parent and subsidiary businesses.

11.2 In addition, the SBEE Act allows further provisions to be made in the Pubs Code to specify circumstances in which a group undertaking is to be treated as a pub-owning business, or in which the Adjudicator can decide to treat it as one. This means group businesses, in addition to or instead of the immediate landlord of a tied pub can to be brought within the scope of parts of the Pubs Code. The anti-avoidance provisions of the SBEE Act aim to prevent pub-owning businesses from re-arranging their corporate structures in order to avoid the obligations imposed by the Pubs Code.

11.3 The structure of the group of companies to which a pub-owning business belongs can be very complex. All the current pub-owning businesses likely to come within scope of the Pubs Code are part of large groups containing various arrangements of parent businesses and subsidiaries.

11.4 The Government recognises that sometimes effective control or management of the decisions that may result in breaches of the Code may lie not with the immediate landlord but elsewhere in the pub-owning business’s group. We do not want to permit such undertakings to evade their responsibility where they are directly or indirectly contributing to breaches of the Code. Therefore the Government considers that there are three principal circumstances where it may be appropriate for a group undertaking to be treated as pub-owning business:

- In determining the reach of investigations into a breach of the Pubs Code;
- In relation to enforcement measures that may be imposed by the Adjudicator following an investigation, including the maximum financial penalty (see Chapter 13 for more on the maximum financial penalty); and
- In determining whom a tenant can bring into an arbitration of a Pubs Code breach before the Adjudicator and therefore which business(es) could be required to pay damages to and/or make other redress to a tied tenant.

Investigations

11.5 Section 53 of the SBEE Act gives the Adjudicator the power to investigate whether a pub-owning business (or businesses) has complied with the Pubs Code. It also gives the Adjudicator power to take various forms of enforcement action against pub-owning businesses found by the investigation to have breached the Code. The Government is proposes that in certain circumstances the Adjudicator should have discretion to widen an investigation to include group undertaking businesses as pub-owning businesses.

11.6 These circumstances would be where in the course of an investigation, information comes to the attention of the Adjudicator that group undertakings of a pub-owning business already under investigation have committed or directly contributed to breaches of the Code. The conditions, set out in Regulations 46(1)(b) and 47 of the draft Pubs Code, are that:

- Only group undertakings registered or operating in the UK may be brought into an investigation; and

- There is evidence which suggests that the group undertaking(s) has:
 - carried out or is responsible for carrying out functions of a landlord in relation to a tenant's tied pub or under the Pubs Code (for example, the business has arranged or paid for repairs, or provided information/support/services to a tenant under a tenancy agreement, or corresponded with tenants or made public statements about its activities as landlord, or as having the responsibilities of the landlord); or
 - has influenced or is responsible for the financial arrangements, charging policies or other administrative, managerial or executive decisions of the pub-owning business that impact on a tenant
 in a way that is relevant to the investigation.

11.7 It is envisaged that the Adjudicator would identify such information in the course of an investigation through documents or evidence which may come from a tied tenant, a third party organisation or from a publicly available source (such as Companies House or pub-owning businesses' websites or published corporate documents).

Enforcement measures following an investigation

11.8 Sections 54-59 of the SBEE Act provide enforcement measures which can be imposed by the Adjudicator following an investigation. Where the Adjudicator has concluded that a pub-owning business has failed to comply with the Pubs Code, he or she may recommend what a pub-owning business should do in order to comply, may require information to be published and/or may impose a financial penalty on the pub-owning business.

11.9 The Government proposes to apply those sections of the SBEE Act to any group undertaking which has been treated as a pub-owning business by the Adjudicator carrying out an investigation. This allows the Adjudicator a discretion to impose sanctions on those other businesses where breaches of the Pubs Code have been found. The SBEE Act also allows the Adjudicator to impose different enforcement measures on each separate pub-owning business. Therefore, any investigation where the Adjudicator has considered the actions of group undertakings of a particular pub-owning business may result in different sanctions being imposed upon the different businesses involved.

Arbitrations

11.10 Disputes referred to the Adjudicator for arbitration will concern alleged breaches of the Pubs Code by the pub-owning business. We propose that, where evidence suggests that they are involved in or responsible for the breach, group undertakings of a pub-owning business may be brought into an arbitration of a Pubs Code dispute (in addition to the immediate landlord).

11.11 We are proposing that the following conditions will apply when a tenant seeks to bring group undertaking businesses into an arbitration in addition to their contractual landlord pub-owning business:

- The group undertaking(s) must be registered or operate in the UK;
- There is evidence to suggest the group undertaking(s):
 - has carried out or is responsible for carrying out functions of a landlord in relation to that tenant's tied pub (for example, the business has arranged or paid for repairs, or provided information/support/services to the tenant under the tenancy agreement, or corresponded with the tenant or made public statements referring to itself as landlord, or as having the responsibilities of the landlord); or

- has influenced or is responsible for the financial arrangements, charging policies or other administrative, managerial or executive decisions of the pub-owning business that impact on the tenant

in a way that is relevant to the Pubs Code dispute brought to the Adjudicator by the tenant; and:

- Prior to making the request to the Adjudicator, the tenant has notified the group undertaking(s) in writing of the Pubs Code dispute, and has subsequently sent the undertaking(s) a copy of the request made to the Adjudicator.

11.12 The inclusion of any group undertaking in a Pubs Code dispute would then be at the discretion of the Adjudicator, who will make that decision based upon the evidence provided by the tenant. The Adjudicator may decide to take representations from the group undertaking(s) before making a decision.

11.13 The Government proposes that the Adjudicator should also have discretion to direct that a group undertaking business be made a party to arbitration proceedings even without a request from the tenant. This may arise where the evidence put before the Adjudicator by either party suggests that a group undertaking business fulfils the first two conditions set out above at 11.11.

Q.14: Are there any elements of these proposals regarding group undertakings that you think would not work as intended or that require amending?

12. Exemptions from the Pubs Code

Genuine pub franchise agreements

12.1 Tied pub agreements as defined in section 68 of the Small Business, Enterprise and Employment (SBEE) Act 2015 encompass a range of types of agreements that exist in the market. This includes agreements that are marketed as pub franchise agreements. Although this shorthand term is widely used, the characteristics of pub franchise agreements vary by company, for example in the nature of payments made by the tenant under the agreement. Perhaps the most common element in such agreements is that pub-owning businesses are seeking to improve the profitability of tied pubs by prescribing a business format which they (the franchisors) have developed and which the tied pub tenant (franchisee) is contractually required to follow.

12.2 Whether such pub franchise agreements should be in scope of all or part of the legislation to establish a Pubs Code and Adjudicator has been the topic of some debate throughout the process of developing and implementing the Government's proposals, particularly following the introduction of the Market Rent Only (MRO) option into the legislation. Much of the argument to exempt franchise agreements from the MRO option centred on agreements where a turnover based payment is made by the tied tenant, in lieu of a traditional tied rent, and the franchisee's profit is not affected by the prices paid for tied products.

12.3 During the passage of the legislation Ministers were persuaded that some pub franchise agreements may be able to ensure that the interests of the two parties are better aligned than in more traditional tied agreements and could result in a fairer share of risk and reward for the tied tenant. They agreed that these would merit an exemption from the MRO option provisions of the Pubs Code. At Lords Report stage the Government confirmed that it would exempt "genuine franchise agreements" from the MRO option by using the power to exempt in section 71 of the SBEE Act.

12.4 Reference to the concept of a 'genuine franchise' was made to distinguish agreements that simply have a pub franchise 'label' from those with characteristics that genuinely provide a fairer share of risk and reward and in particular address the potential 'mischiefs' related to rent and tied pub prices present in more traditional tied pub agreements.

12.5 As the Government commented during the passage of the Act:

There are other agreements in the industry which may be marketed as a pub franchise that display elements common to franchises in other sectors, such as common branding. But if they charge tenants a tied rent in the traditional way, they are not inherently fairer than a tied pub agreement. The consultation will allow us to set out the criteria for a genuine franchise.⁸

12.6 Ministers also confirmed that genuine pub franchise agreements would not be exempted from the whole of the Code. Genuine pub franchises would also continue to count towards the

⁸ <http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm150324/debtext/150324-0002.htm>

calculation of the number of tied pubs which determines the definition of a pub-owning business under section 69 of the Act.

12.7 The Government is honouring the commitment to exempt genuine franchises from the MRO option. It also intends to exempt these agreements from other provisions in the Code that regulate the setting and negotiation of rent. The rationale for this mirrors that for the MRO exemption; that is that genuine franchise agreements – with characteristics that avoid or significantly mitigate the inherent risks related to traditional tied rent agreements – are likely to lead to a fairer share of risk and reward for tied pub tenants. This is particularly relevant where they avoid the risks inherent in the setting of a tied rent in combination with prices charged for products supplied under the tie agreement.

12.8 The debates about pub franchises highlighted further key characteristics of a genuine franchise. One mentioned by both tenant and pub-owning business representatives is that a tied tenant taking on a genuine pub franchise is buying a business model that has been tested and proven to work.

12.9 Interventions in Parliament suggested other key characteristics. Lord Hodgson of Astley Abbotts summarised as follows:

How does it work? The franchisee receives the property, fixtures and fittings, capital investment, and repair and replacement of the fixtures and fittings of the building. All his bills are paid, including rates and utilities. The only bills not paid are council tax and staff wages. He also has services such as training, marketing and business support—the SCORFA arrangement we talked about earlier—and he has products to sell. For this, the franchisee—the operator of the pub—takes a share of the income at the cost of a business fee of about £5,000, compared to the £250,000 that you have to pay for a McDonald’s franchise, for example.

The cost of the products to the franchisee is irrelevant because they are paid a percentage of the revenue of the pub. The goods are delivered to the site and the franchisee holds them on behalf of the franchisor—the brewer. The products are held on the sale-or-return basis. At no time does any cash change hands in respect of payment for the products. The franchisee and franchisor take an agreed share of the total income. The franchisee has the ability to set the retail sales price for the beer in the pub being operated. The pub-owning business effectively supplies everything, with the franchisee then dictating the price to sell it at. The pub-owning business shares the income and, on top of this, the franchisee also receives a profit share. Under the agreement, the percentages and shares of the profit are set out in the contract and cannot be altered.⁹

12.10 In line with the commitment to consult on the definition of a genuine pub franchise for the purposes of the exemption, Table 1 summarises the key characteristics. It draws on evidence provided during the 2013 consultation and during the development of the legislation to establish a Pubs Code and Adjudicator. It also draws on practice in the wider franchise industry, in particular the European Code of Ethics for Franchises and the British Franchise Association

⁹ <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150128-gc0002.htm>

(BFA) Guide to its Code of Ethics.¹⁰ For an agreement to be considered a genuine pub franchise, all of these characteristics must apply.

Table 1 – Key characteristics of a genuine pub franchise with rationale

	Genuine franchise characteristic	Rationale
1.	The pub franchise agreement grants the franchisee (tied pub tenant) the licence to carry out a market-tested business model (or business format) which has been subject to a reasonable piloting programme (see paragraph 12.11 for a discussion of reasonable piloting). The business model includes certain ‘know-how’, business and technical methods, a procedural system, and other intellectual property rights that are the property of the pub-owning business.	<p>Characteristics 1 and 2 are important to the argument that a genuine franchise provides a fairer share of risk and reward. This is because the franchisor pub-owning business has created the concept behind the business model and has tested that it works BEFORE the franchisee signs an agreement to run the business.</p> <p>The franchisor pub-owning business then goes on to teach and provide ongoing support to help ensure the franchisee (tied pub tenant) is able to deliver the format for the length of the agreement.</p>
2.	The franchisor ‘teaches’ the business format, and the ‘know-how’ it has developed in creating the format, to the franchisee and sets out in a contract the training, marketing and other business support the tenant will receive in order for them to be able to continue to deliver the business concept.	<p>This is also important in the context of the duty on the Secretary of State under section 42(3)(a) of the SBEE Act which is that he/she must ensure that the Pubs Code is consistent with:</p> <p>(b) the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie.</p> <p>Tied pub tenants in traditional tied agreements do not have the benefit of a tested business format in the same way as in a genuine pub franchise. This is evidenced, for example, by the extra protection offered to franchise agreements by the block exemptions for vertical agreements provided for under EU competition law ¹¹.</p>

¹⁰ <http://www.thebfa.org/about-bfa/code-of-ethics>

¹¹ EU Competition Law under Article 101 of the Treaty on the Functioning of the European Union sets out block exemptions for vertical agreements. In doing so it makes **specific reference** to obligations on the treatment of intellectual property rights in relation to franchise agreements which differentiate them from other tied pub agreements covered by the block exemption. (see page 16 of the relevant guidance) http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

	Genuine franchise characteristic	Rationale
		Therefore the analysis of whether free-of-tie tenants are 'no worse off' is different in each case. In the case of 'franchisee' tied pub tenants, the benefit of the business format means it is unlikely they would be worse off than a free-of-tie tenant in the same pub.
3.	An agreement where the franchisee has the legal right to sell the business to a third party at its market value.	This is drawn from the British Franchise Association Code of Ethics. Having the right to sell the business as a going concern to a new franchisee means the tied tenant is able to realise the value that he or she adds to the business.
4.	There is no rent paid. Instead tenant and pub-owning business receive a percentage share of turnover. The share of turnover is fixed for the length of the agreement.	These two characteristics address the potential mischiefs set out in the June 2014 'Government Response to the Pub Companies and Tenants Consultation' and the accompanying impact assessment.
5.	There is no separate transaction for the products and services required to deliver the business model, and the profit of the tied tenant is not affected by the prices paid for tied products.	In particular this is important to the mischief that may be caused by the combination of dry rent and the cost of tied products. These characteristics also address concerns regarding abuse of the asymmetry in information and bargaining power that can lead tied pub tenants to have an unfair share of risk and reward under a traditional tied pub agreement.

Q.15: Please comment on the key characteristics of a genuine franchise agreement as set out in Table 1. Where you think a characteristic should be amended or removed please set out your evidence as to why.

Similarly if you think further characteristics should be added please set out your justification as to why as well as an explanation of what should be added.

Discussion of the definition of reasonable piloting

12.11 The BFA guide to the Franchise Code of Ethics says the following regarding the piloting required for a business format franchise:

Success must be demonstrated for a reasonable time. What is reasonable will inevitably depend upon the circumstances and the nature of the business. Factors to be considered will include the seasonality of the business, the period of time required to build up the type of business concerned and exceptional trading conditions such as extremes of weather, recession etc.

The concept should be operated in at least one pilot unit. The expression “at least” is very important since one unit in a unique location will not prove that the concept is capable of being franchised elsewhere. What is needed is such number of pilot units in locations typical of those in which franchisees will operate to be able to satisfy prospective franchisees that the business concept could be successful in the location where they propose to open for business. Franchisor company-owned units may provide the basis for a pilot operation but these should be run by a “manager” on an arm’s length basis to test the systems and the supporting infrastructure.

12.12 In line with this logic the Government proposes that a genuine pub franchise concept must have been piloted for at least one year to pick up Christmas and other seasonal peaks and to have been shown to work in more than one location.

Q.16: Do you agree with the Government’s proposals for ‘reasonable piloting’ of the pub franchise model. If not, please explain your answer.

The nature of the exemption

12.13 Where a tied pub tenant is party to a genuine pub franchise agreement they will not have the right to request an MRO option. Nor will they have the right to refer a dispute to the Adjudicator over a payment under a genuine pub franchise agreement. For example, they will not be able to request that the Adjudicator arbitrate the percentage turnover share that is offered by the pub-owning business under a genuine pub franchise agreement.

12.14 Information provisions under the Pubs Code (see Chapter 8) will still apply to genuine pub franchise agreements. Some of these may be relevant to the assessment of rent, eg information on where and how to access existing benchmarking reports. These provide important information about the trading potential of the pub and are important transparency measures that should be provided under any form of tied pub agreement.

12.15 In the case of genuine pub franchise agreements, the Government proposes that tied tenants (franchisees) would only be able to refer as a Code breach the failure to supply the required information; they would not be able to refer for arbitration how this information has or has not been used in determining the turnover share under such an agreement, because Parts 3 to 7 of the draft Pubs Code will not apply to these agreements.

Q.17: Do you agree that the Pubs Code information requirements that are indirectly related to rent such as the signposting to sources of benchmark information and the provision of historical trade information should apply to genuine pub franchise agreements?

If you disagree please clarify which requirement(s) is of concern, suggest any deletions and/or amendments and justify your arguments.

12.16 The Government intends to provide an exemption from the MRO option and other rent negotiation provisions in the Code only where all of the characteristics in Table 1 as set out in Part 11 of the draft Pubs Code are met. Agreements that do not meet these characteristics would not be classed as genuine franchise agreements. For example, where a genuine pub

franchise agreement requires the tenant to pay in part through a share in turnover and in part through a rent, the tenant in this scenario would be eligible for the MRO option and the pub-owning business would be subject to the rent provisions in the Code: it would be required to apply the Code principles to its calculation of the payments under the agreement, whether they are rent or in lieu of rent. Although it may be argued that a turnover share is more transparent and fairer than a traditional tied rent, that would not necessarily be the case in this scenario.

12.17 In order to comply with the Code, any assessments of payments in lieu of rent that form part of an agreement that did not meet all of the characteristics in Table 1 would have to be produced, prepared and conducted in accordance with the Royal Institution of Chartered Surveyors (RICS) guidance prevailing at that time. In addition, pub-owning businesses would have to ensure that any turnover fee assessments are signed by a qualified RICS valuer to this effect. Other relevant provisions would include the need to set out the assumptions underlying the turnover fee. This would be required because the risks to the tied tenant of an unfair share of risk and reward would still exist under this kind of hybrid arrangement where there is still a traditional tied rent element.

Tenancy at Will and short-term agreements

12.18 Tenancy at will agreements fall within the definition of “tenancy” in section 70(2) of the SBEE Act. This type of agreement is often used to allow immediate occupation until a lease is negotiated.

12.19 During the passage of the Act, the Government committed to exempt from scope of the Code tenancy at will and temporary agreements that were genuinely short-term, in that they did not extend beyond a certain limited period.

12.20 The Government accepted the argument from pub-owning businesses and some tenant groups that these agreements are valuable to pub-owning businesses because they are typically used to keep a pub open and trading while a longer-term tenant is being sought and due diligence is being carried out – for example, if the previous tenant has left at short notice or has died. They also enable potential tenants to experience running a pub, prior to committing themselves to a longer agreement.

12.21 Indeed, by their very nature, these agreements require more flexibility than longer-term agreements. They can be agreed very quickly, can be terminated at short notice and are not long-term contracts requiring investment from the tenant.

12.22 The Government accepted that requiring pub-owning businesses to comply with the transparency requirements of the Code in such circumstances would be too onerous. On the other hand, it was clear that a balance needed to be struck between retaining the valuable role that tenancy at will and short-term agreements play in the industry and ensuring that tenants have the protections of the Code if such agreements extend beyond a limited period.

Length of agreements to be granted exemption

12.23 The length of the tenancy at will and short-term agreements exempt from coverage by the Pubs Code will be specified in regulations. When the time period has expired, from that point onwards the tenant will have the protections of the Code.

12.24 Where a pub-owning business offers a tenant a number of tenancies at will or short-term agreements for the same premises, the length of these agreements will be taken as cumulative. Therefore, the tenant will be exempt from the protections of the Code only until the limited period

has expired on that/those agreement(s). It is not the Government's intention to limit the length of tenancy at will agreements. There will be circumstances where both pub-owning business and tenant are mutually content with such an agreement and it suits both their needs to continue the agreement. The regulations will not prevent this, but will ensure that the tenant benefits from the protections of the Code after the time period has expired.

12.25 During the passage of the SBEE Act, we heard various views on what the length of the exemption period should be, in order to allow for a variety of events such as recruitment, due diligence, to allow a tenant to get a feel for the industry before committing to a longer-term lease, or to allow for a specialist short-term tenant to come in at short notice to ensure the pub can stay open.

12.26 The Government has considered these views and concluded that 12 months seems a reasonable length for the limited exemption period. This is set out in Part 11 of the draft Pubs Code (Regulation 39). We would welcome views on whether you agree with this or, if not, how long you believe the limited exemption period should be.

Q.18: For how long should tenancy at will or other agreements be granted exemption from the Pubs Code?

Please explain the rationale for your answer and provide any evidence to support your case.

12.27 The Government may be minded to consider that Regulation 4 in the draft Pubs Code ('a suitable and qualified person') should apply to any tenant entering into a new agreement with a pub-owning business, so that the pub-owning business can be satisfied that the tenant is a suitable and qualified person, ie they have completed pre-entry awareness training. We would welcome views on whether you think Regulation 4 in the draft Pubs Code should apply to tenancy at will and short-term agreements during the limited exemption period, where the rest of the Code will not apply.

Q.19: Do you think it is appropriate that a tenant entering into a tenancy at will or short-term agreement with a pub-owning business should have completed pre-entry awareness training prior to being offered the agreement?

Please explain the rationale for your answer and provide any evidence to support your case.

12.28 The Adjudicator may be minded to advise pub-owning businesses in guidance to ensure that all tenants, under any type of agreement, whether it is in or out of scope of the Code, have the right information they need to help them make decisions.

12.29 We do not propose that we specify in legislation what information should be provided to tenants on entering into a tenancy at will or short-term agreement, but would welcome views on the sort of information that would be useful and desirable for these tenants to receive.

Q.20: What sort of information do you consider would be useful and desirable for a new tenant to receive from the pub-owning business when entering into a tenancy at will or short-term agreement?

13. Enforcing the Pubs Code

13.1 Tied tenants of pub-owning businesses will have the right to take disputes about the Pubs Code to a new independent Pubs Code Adjudicator. Recruitment of the Adjudicator, who will be appointed using standard public appointments rules and procedures, is underway. The intention is that the Adjudicator will be in post from April 2016.

13.2 The Act provides that the Adjudicator will have two key ways to enforce the Pubs Code to ensure that tied tenants are being treated fairly and are no worse off than free-of-tie tenants:

- Arbitrating individual disputes between tied tenants and their pub-owning businesses regarding alleged breaches of the Code; and
- Carrying out investigations into suspected systemic abuses of the Code.

Arbitration

13.3 The Adjudicator's *arbitration* function focuses on resolving Pubs Code disputes in individual relationships between tied tenants and their pub-owning businesses. The Adjudicator may award redress to the tenant if a breach of the Code is found. The Adjudicator will arbitrate on disputes relating to the Market Rent Only (MRO) option procedure in the same way as he or she will arbitrate disputes about other aspects of the Code. See Chapter 8 for details about arbitrable and non-arbitrable provisions of the Code.

Fee for arbitration

The proposed fee a tenant will be required to pay to refer a case to the Adjudicator will be subject to draft regulations to be published at a later date.

13.4 Section 51(2) of the Small Business, Enterprise and Employment (SBEE) Act 2015 provides that a tenant must pay a fee to refer a dispute to the Adjudicator to arbitrate. This is intended to encourage the tenant to satisfy themselves that they have a reasonable case before making the referral, as well as to deter frivolous requests.

13.5 The Government believes that the referral fee should be set at £200, as indicated in the Government Response to the 2013 consultation and during the passage of the Act. This is in line with the fee tenants currently pay to refer a case to the Pubs Independent Conciliation and Arbitration Service (PICAS), which is the industry voluntary arbitration scheme.

13.6 A tenant will be required to pay only one fee per referral, regardless of the number of alleged breaches of Code covered by the referral. If, however, the tenant makes another referral at a later date for a separate breach or breaches of the Code, then a further fee of £200 would be payable.

13.7 Section 51(3) of the Act provides that regulations may specify cases in which the tenant is not required to pay a referral fee. The Government has not identified any situation in which the tenant should not pay the fee, therefore we do not intend to specify in regulations any cases in which the tenant is not required to pay the referral fee.

13.8 Section 51(3) of the Act also provides that regulations may specify cases in which the referral fee should be refunded to the tenant. The Government does not intend to make any regulations under this power. Instead, the Adjudicator will have a discretion as part of any award

of costs following an arbitration, to include the refund of the referral fee to the tenant where the costs are payable by the pub-owning business.

13.9 As explained in Chapter 11 of Part 1 of this consultation, the Government proposes that the referral fee applicable to MRO disputes will be the same as that which will apply to other arbitrations by the Adjudicator, ie £200. The Government also proposed in Part 1 of this consultation 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 means that a pub-owning business would be required to pay a £200 fee when referring a dispute relating to the MRO procedure to the Adjudicator.

Q.21: If you do not agree with the proposed £200 fee please explain why and give the rationale and any evidence in support of an alternative amount.

Costs of arbitration

The costs of arbitration will be subject to draft regulations to be published at a later date.

13.10 All arbitrations of Pubs Code disputes will be conducted in accordance with the Arbitration Act 1996 and the Rules of the Chartered Institute of Arbitrators (by virtue of section 51(5) of the SBEE Act). The Rules provide as a general principle that costs of the arbitration are paid by the losing party, but subject to the discretion of the arbitrator, who can take all the circumstances of the arbitration and conduct of the parties into account when making any decision about costs. Therefore, where a case for arbitration is referred to the Adjudicator who finds in favour of the pub-owning business, it is likely that the tied tenant would be ordered to pay some or all of the pub-owning business's costs in addition to their own costs.

13.11 Section 51(7) of the SBEE Act provides for regulations to limit the arbitration costs faced by the tenant where the Adjudicator finds in favour of the pub-owning business. The Government does not believe it would necessarily be proportionate for a losing tenant to meet all the pub-owning business's costs.

13.12 The Government therefore proposes that where the Adjudicator decides to order the tenant to pay the pub-owning business's costs, this will be subject to a maximum of £2,000.

13.13 The £2,000 limit is the same as the maximum cost that tenants currently pay under industry self-regulation, for an independent rent review carried out through the Pubs Independent Rent Review Scheme (PIRRS).

13.14 Because the award of costs is at the discretion of the Adjudicator, who may consider all the circumstances of the arbitration and the conduct of the parties, there may be exceptions to the £2,000 cap, when the Adjudicator could require the tenant to pay costs above that limit. For example, where the pub-owning business's costs are over £2,000 and the Adjudicator finds that:

- a) the referral for arbitration made by the tenant was vexatious; or
- b) the tenant's actions unreasonably increased the costs of the arbitration.

13.15 In such circumstances and at the Adjudicator's discretion, the tenant could be ordered to pay costs up to the full amount of the pub-owning business's costs.

13.16 These proposals on costs apply to all arbitrations of Pubs Code disputes, including MRO disputes.

Q.22: Do you agree with the Government's proposal that the maximum costs that tied tenants could have to pay a pub-owning business following an arbitration should be set at £2,000?

If you do not agree, please suggest an alternative level of fee, explaining the rationale for the alternative and provide evidence to support your case.

Investigation

13.17 The Adjudicator's *investigation* function allows the Adjudicator to examine more widespread behaviour in the industry and to impose sanctions on pub-owning businesses which have breached the Code.

13.18 For example, the Adjudicator could receive evidence from a number of tenants and campaign groups that one or more pub-owning businesses are consistently failing to provide tenants with the necessary information at the beginning of a tenancy to enable them to make an informed decision. If the Adjudicator found, following an investigation, that one or more of the pub-owning businesses had breached the Code, he or she could take one or more of the following enforcement measures as stipulated in the SBEE Act:

- Make recommendations;
- Require the pub-owning business or businesses to publish information;
- Impose financial penalties.

Financial penalties

13.19 It will be for the Adjudicator to decide following an investigation whether to impose a financial penalty and what is the appropriate level of any penalty. The Adjudicator is obliged under the Act to publish guidance setting out the criteria he or she intends to adopt in deciding the amount of any financial penalty. The Adjudicator is likely to take into account factors such as the seriousness of the Code breach and the level of harm caused. However, the Adjudicator's financial penalty must not exceed a maximum level, which the Secretary of State is required to specify in regulations.

13.20 The focus of the Adjudicator's investigatory function is to identify behaviours in the industry and investigate whether these amount to wholesale or widespread breaches of the Code. A financial penalty imposed as a result of such investigation is intended as a punishment of a pub-owning business (or businesses) for not complying with the Code. It is not intended to provide redress to individual or groups of tenants (which can be provided in individual arbitrations).

13.21 Financial penalties will not contribute to the Adjudicator's funding, but will be paid into the Consolidated Fund¹².

Proposed maximum financial penalty

The proposed maximum financial penalty will be subject to draft regulations to be published at a later date.

13.22 The Government considers that the most proportionate and flexible approach would be to set the maximum financial penalty the Adjudicator can impose following an investigation at **1% of the annual UK turnover of all group undertakings of the pub-owning business**. This would provide the Adjudicator with the flexibility and scope to impose a range of financial penalties with a significant deterrent effect, and which would provide a reputational incentive to comply with the Code. This approach mirrors that agreed for the Groceries Code Adjudicator.

13.23 The Government proposes that the Adjudicator be given discretion to impose such a financial penalty on any of the group undertakings which were treated as pub-owning businesses within the investigation (and/or to impose a financial penalty on them jointly) so long as the combined penalties payable by businesses in a group do not exceed the maximum for that group. This allows the Adjudicator to take enforcement action against all businesses found to have breached the Code, and reduces any scope for pub-owning businesses to evade liability for such breaches by, for example, transferring resources within group companies or going into liquidation (see Chapter 11 for more on group undertakings).

13.24 The majority of pub-owning businesses are based in the UK only and all of them have a substantial presence in the UK. A maximum financial penalty based on UK turnover would therefore be proportionate to the relative size and market power of the pub-owning business which has breached the Code. This scalability – as opposed to a fixed figure maximum – is particularly relevant for this sector because the size and financial power of pub-owning businesses vary substantially. UK turnover figures for the pub-owning businesses that would be in scope of the Code currently range from around £70 million to more than £1300 million¹³.

13.25 We would welcome your views on the proposal of setting the maximum level of financial penalty at **1% of the annual UK turnover of all group undertakings of the pub-owning business**.

Alternatives considered

13.26 The Government considered a number of alternative approaches to setting the maximum financial penalty, such as using a percentage of worldwide turnover; using a percentage of the pub-owning business's tied pub revenue; setting a 'fixed figure' maximum; and using a combination of a fixed figure and percentage of turnover.

13.27 While worldwide turnover is used by competition regulators such as OFGEM, OFCOM and OFWAT as a measure for calculating the maximum penalty for breaches of competition law, we consider that this approach would not be appropriate for the Pubs Code Adjudicator as most

¹² The Consolidated Fund is the Government's general bank account at the Bank of England.

¹³ Based upon the latest turnover figures available.

pub-owning businesses are UK-based and the Pubs Code applies only to practices in England and Wales.

13.28 An approach which uses a percentage of the pub-owning business's revenue from tied pubs (rather than overall turnover) as the basis for the maximum financial penalty would be extremely complex to administer. Pub-owning businesses segment and categorise their revenue streams in a variety of ways, using different accounting methodologies, so it would be likely to require a disproportionate amount of time and resource from the Adjudicator to ascertain the elements of revenue which relate to tied pubs. Moreover, overall UK turnover figures for the company are a better indicator of the financial power of the business and should help ensure that any penalty has the desired deterrent effect.

13.29 The Government also considered setting a 'fixed figure' maximum financial penalty, which would be expressed as £X million (for example). However, as the pub-owning businesses vary in size and income, it is difficult to set a fixed figure maximum penalty that would be an effective deterrent for larger pub-owning businesses without being disproportionately excessive for the smallest of these businesses. Using a combination of a 'fixed figure' and a percentage of turnover would add complexity, could lead to confusion in the sector as to which maximum applies and would mean that the relevant legislation has to be updated more frequently.

13.30 On this basis, the Government considers that the simplest, most proportionate and flexible approach is to set the maximum financial penalty as a percentage of UK turnover; and the Government considers 1% to be the appropriate percentage to deliver the desired outcomes.

Q.23: If you do not agree that the maximum financial penalty the Adjudicator should be able to impose following an investigation should be set at 1% of the annual UK turnover of all group undertakings of the pub-owning business, please explain why and give the rationale and any evidence in support of an alternative amount.

14. Impact

14.1 This Part 2 of the consultation seeks your views on:

- the Government's plans to ensure that its approach to the Market Rent Only (MRO) option (set out in Part 1 of this consultation), along with the requirements to provide information in relation to a tied rent offer (set out here in Part 2) fulfil the objectives of a Parallel Rent Assessment (PRA);
- the Government's position on the MRO option rent assessment trigger following the amendment laid in respect of these triggers in Lords Report on the Enterprise Bill on 30 November;
- 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, tenants who are renewing their agreements or where there is a proposed variation to the rent in a new or existing tied agreement other than during a rent assessment; tenants with extended code protection and those with investment 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, 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
- the period of extended Code protection when a pub is sold to a company outside of the Code.

14.2 Much of this is designed to ensure the successful operation of the Pubs Code and does not change our assessment of the impact. Those parts of this consultation that do affect our assessment are covered in the impact assessment published alongside this part of the consultation. The exemptions from the Pubs Code discussed in Chapter 12 will reduce the burden of the Pubs Code where the interests of the two parties are better aligned or where more flexibility is required. The information requirements of the Code differ from the industry's self-regulation only in the timing of information provision and the addition of a few low cost provisions (eg informing tenants when their pub is offered for sale). Where the requirements do differ, they are not considered to result in a significant additional burden for business.

15. What happens next?

15.1 This Part 2 of the consultation will close on 18 January 2016.

15.2 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).

15.3 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.

15.4 The document will be published here:

<https://www.gov.uk/government/consultations/pubs-code-and-adjudicator-fees-enforcement-and-other-parts-of-the-code>

15.5 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: Information requirements in the Code

Provide copy of the Pubs Code and any company code of practice

Benchmarking reports

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Period of tenure

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Fees, charges and financial penalties the tenant may be required to pay

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Annex C: The Pubs Code (Draft Regulations)

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

STATUTORY INSTRUMENTS

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.

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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;
- “Business Development Manager” has the meaning given in regulation 42(6);
- “existing tenancy” has the meaning given in regulation 21(1);
- “full response” has the meaning given in regulation 20(7);
- “gaming machine” has the meaning given in regulation 51(2);
- “independent assessment period” has the meaning given in regulation 18(4);
- “initial or revised rent” has the meaning given in regulation 7(2);
- “insurance charge” has the meaning given in regulation 49(1);
- “investment agreement” has the meaning given in regulation 12(3);
- “investment period” has the meaning given in regulation 12(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);
- “new agreement” has the meaning given in regulation 4(6) and (7);
- “notification period” has the meaning given in regulation 18(2);
- “pre-entry awareness training” has the meaning given in regulation 4(5);
- “proposed MRO tenancy” has the meaning given in regulation 21(1);
- “short agreement” means—
- (a) a tenancy at will which entitles a tied pub tenant to occupy a tied pub; or

(b) any other contractual agreement entitling a tied pub tenant to occupy a tied pub for no more than [] months.

“the RICS” means the Royal Institution of Chartered Surveyors;

“the RICS guidance” means guidance issued by the RICS as amended from time to time;

“Schedule of Condition” means the provisions in a tenancy or licence which specify the condition of the premises to which the tenancy or licence relates.

(2) 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, only if (in addition to meeting the conditions in section 43(9)(a) to (c) of the Act)—

(a) the event does not affect any business other than that of the tied pub tenant;

(b) the event is not—

(i) connected to the personal circumstances of the tied pub tenant;

(ii) 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;

(iii) an event of a kind described at regulations 14 to 16;

(iv) an event which the tied pub tenant could have reasonably insured against;

(v) an event which the tied pub tenant could reasonably have prevented, or the effects of which it could reasonably have mitigated; or

(vi) an event which results in an increase in the level of trade which is forecast for a period of 12 months or more.

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’s 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.

PART 2

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

A suitable and qualified person

- 4.**—(1) A pub-owning business must not enter into a new agreement with a tied pub tenant unless the pub-owning business is satisfied that the tenant is a suitable and qualified person.
- (2) A tied pub tenant is a suitable and qualified person if the tenant has completed pre-entry awareness training.
- (3) The pub-owning business’s duty in paragraph (1) does not apply if the tied pub tenant—
- (a) agrees in writing that the duty should not apply; and
 - (b) meets at least one of the conditions in paragraph (4).
- (4) The conditions are—
- (a) that the tied pub tenant operates at least one other tied pub on the day on which the agreement under paragraph (3)(a) is entered into;
 - (b) that the tied pub tenant can demonstrate that the tenant has at least 3 years of relevant business management experience;
 - (c) that the pub-owning business has, at any time, granted the tenant a tenancy or licence in relation to a tied pub, other than a tenancy or licence in connection with a short agreement.
- (5) “Pre-entry awareness training” means training which—
- (a) is designed to raise awareness of the matters involved in operating a pub and entering into product ties and other agreements with landlords; and
 - (b) is accredited by the Office of Qualifications and Examinations Regulation or by Qualifications Wales.
- (6) A “new agreement” means a tenancy or licence to occupy premises which are, or are expected to be, a tied pub but does not include any short agreement, or agreements, which entitle a tied pub tenant to occupy a tied pub for a cumulative period of [12 months] or less.
- (7) References to entering into a new agreement—
- (a) include the renewal of a tenancy under Part 2 of the Landlord and Tenant Act 1954;
 - (b) do not include any other renewal of a tenancy or licence.

A sustainable business plan

- 5.**—(1) Before entering into a new agreement with a tied pub tenant, a pub-owning business must ensure that the tenant has a sustainable business plan.
- (2) A “sustainable business plan” is a business plan which—

- (a) has been prepared following the completion of the pre-entry training required under regulation 4(2) (where that requirement has not been waived under regulation 4(3));
 - (b) has been prepared following consideration of independent professional advice, including business, legal, property and rental valuation advice;
 - (c) includes financial forecasts for the duration of the tenancy or licence, including—
 - (i) estimates of income and expenditure,
 - (ii) a sensitivity analysis,
 - (iii) the impact of any indexation of rent or of other costs referred to in the new agreement.
- (3) If the conditions in paragraph (5) are met, the pub-owning business must, before the tied pub tenant prepares the business plan—
- (a) identify all reports which —
 - (i) are publicly available;
 - (ii) analyse the trading costs of tied pubs in the United Kingdom, or any area within it, and the costs of the tenancies and licences under which such pubs are occupied; and
 - (iii) provide relevant data against which the tenant can compare the performance of the tied pub for the purposes of preparing the business model;
 - (b) advise the tenant to consult those reports; and
 - (c) provide —
 - (i) copies of the reports identified under sub-paragraph (a) to the tied pub tenant; or
 - (ii) provide information to the tenant as to where, and how, the reports can be obtained.
- (4) The pub-owning business’s duty in paragraph (3)(b) and (c) does not apply in relation to a report which the tied pub tenant has confirmed to the pub-owning business the tenant has read.
- (5) The conditions mentioned in paragraph (3) are that—
- (a) the tenant has visited and inspected the tied pub to which the tenancy or licence relates for the purpose of considering whether to enter into a new agreement; and
 - (b) following that visit, the tenant has confirmed to the pub-owning business, or to a person acting on its behalf, an interest in entering into an agreement with the business.
- (6) A “sensitivity analysis” is an analysis of—
- (a) the potential business performance of the tied pub in the case of an increase or decrease in business income; and
 - (b) the effect of that increase or decrease on the tied pub’s costs and profitability.

The required information

- 6.—**(1) A pub-owning business must ensure that the tied pub tenant has received the information specified in Schedule 1 before the tenant considers the advice referred to in regulation 5(2)(b).
- (2) A pub-owning business is not required to comply with paragraph (1)—
- (a) where the circumstances in sub-paragraphs (a) and (b) of regulation 5(5) arise; or
 - (b) in respect of any information specified in Schedule 1 which—
 - (i) has already been provided to a tied pub tenant by the pub-owning business in connection with the current tenancy or licence; and
 - (ii) has not changed substantially since it was provided.
- (3) The “current tenancy or licence” means the tenancy or licence in force at the time the tenant prepares the sustainable business plan.

PART 3

Duty to provide a rent proposal

Duty to provide a rent proposal

- 7.—(1) A pub-owning business must provide a rent proposal to a tied pub tenant—
- (a) in the case of any change in the amount payable by a tied pub tenant under the tenancy or licence, at least 14 days before the change has effect;
 - (b) in the case of a tenancy which is renewed under Part 2 of the Landlord and Tenant Act 1954, before the tenancy is renewed;
 - (c) in the case of any other new agreement, before the tenant considers the advice referred to in regulation 5(2)(b), unless the circumstances in sub-paragraphs (a) and (b) of regulation 5(5) arise.
- (2) The rent proposal required to be provided under paragraph (1) must contain—
- (a) a proposal for, or information about the change in, the rent, or the money payable in lieu of rent, which is to be paid under the tenancy or licence (“the initial or revised rent”);
 - (b) the information specified in Schedule 2; and
 - (c) any other information which—
 - (i) the tenant requires to understand or negotiate the initial or revised rent in an informed manner; and
 - (ii) the pub-owning business would reasonably be expected to give to the tenant.
- (3) The pub-owning business must prepare the rent proposal in accordance with the RICS guidance and the rent proposal, when provided, must be accompanied by written confirmation, from a suitably qualified valuer registered with the RICS, that the proposal has been so prepared.
- (4) The pub-owning business must comply with any reasonable request for further information which—
- (a) is relevant to the negotiation of the initial or revised rent, or
 - (b) may allow the tied pub tenant to understand that rent,
- and which is made by the prospective tenant or a person acting on their behalf.
- (5) Where the pub-owning business does not comply with a request for further information under paragraph (4), the pub-owning business must provide to the tied pub tenant, within the period of 7 days beginning with day on which the request was received, a reasonable explanation why the information required is not provided.
- (6) The pub-owning business must advise the tied pub tenant to obtain independent professional advice in connection with the initial or revised rent before the tenant agrees that rent.
- (7) A pub-owning business is not required to comply with paragraphs (1) to (6) where the circumstances in sub-paragraphs (a) and (b) of regulation 5(5) arise.
- (8) A pub owning business is not required to comply with paragraph (1)(a) where regulation 8(1) (duty to conduct a rent assessment or an assessment of money payable in lieu of rent) applies in connection with the initial or revised rent.

PART 4

Rent assessments

Duty to conduct a rent assessment or an assessment of money payable in lieu of rent

- 8.—(1) A pub-owning business must conduct a rent assessment or an assessment of money payable in lieu of rent—
- (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; and
 - (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 or an assessment of money payable in lieu of rent if —
- (a) such an 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), 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 from the pub-owning business; and
 - (b) in the case of a request made under paragraph (2)(c), 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 or an assessment of money payable in lieu of rent is to review the rent or the money payable in lieu of rent which is payable by a tied pub tenant under the terms of the tenancy or licence.
- (5) The following 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;
 - (b) an increase in rent in connection with the receipt of a corresponding benefit from the pub-owning business;
 - (c) an increase in rent in connection with the freeing of the tied pub tenant from a product or service tie;
 - (d) 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 (2)(a) is subject to regulation 12(1).

The rent review proposal

9.—(1) Where a pub-owning business is required to conduct a rent assessment or an assessment of money payable in lieu of rent 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 or the money payable in lieu of rent which is to be paid under the tenancy or licence at the end of the 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 the rent review proposal, when provided, must be accompanied by confirmation from a suitably qualified valuer registered with the RICS that the rent review proposal has been so prepared.

Conduct of the rent assessment or the assessment of money payable in lieu of rent

10.—(1) A rent assessment or an assessment of money payable in lieu of rent 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 or an assessment of money payable in lieu of rent must be conducted in accordance with the RICS guidance.

(3) During the rent assessment, 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 does not comply with a request for further information under paragraph (3), the pub-owning business must provide to the tied pub tenant, [within the period of 7 days beginning with the day on which the request was received,] a reasonable explanation why the information required is not provided.

(5) Where a pub-owning business is required to conduct an 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 an assessment where—

- (a) the rent payable under the tenancy or licence is adjusted as a result of the assessment; and
- (b) the 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 or the assessment of money payable in lieu of rent 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 an assessment conducted under regulation 8(1)(a), with the rent review date,
 - (ii) in the case of an 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 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 or the assessment of money payable in lieu of rent

11.—(1) The tied pub tenant must continue to pay, until the end of the assessment, the amount of rent or money payable in lieu 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) An assessment ends—

- (a) in the case of an 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 an 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 or an assessment of money payable in lieu of rent

12.—(1) A tied pub tenant may not make a request under regulation 8(2)(a) where—

- (a) the pub-owning business has made a qualifying investment in the premises to which the tenancy or licence relates;

- (b) the pub-owning business and the tied pub tenant have entered into an investment agreement in relation to the qualifying investment; and
 - (c) the investment period has not ended.
- (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 or an assessment of money payable in lieu of rent 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.

PART 5

Market rent only option: requests

The tenant's request

13.—(1) Where any of the events specified in 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 events 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 event specified in this regulation is 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's 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 or an assessment of money payable in lieu of rent

15. The event specified in this regulation is 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, or money payable in lieu of rent, proposed by the pub-owning business to be payable by the tenant is higher than the rent payable by the tenant, or the money payable by the tenant in lieu of rent, at the time of that proposal.

A significant increase in the price of a product or service

16. The event specified in this regulation is 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 event specified in this regulation is 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 6

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 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 14(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 14 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 7

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 8

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, or an assessment of money payable in lieu of rent;
 - (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 9

Extended protection under these Regulations

Extended protection to last until the end of a tenancy

36.—(1) Where a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies is renewed under the provisions of that Part, the tenancy will be deemed to have ended, for the purposes of section 69(5)(a)—

- (a) on the date on which the tenancy is renewed under Part 2; or
- (b) if earlier, on the date on which the tenancy was due to expire before it was renewed.

(2) If the tied pub tenant or the pub-owning business disagree in respect of the date on which a tenancy or licence terminates under this regulation—

- (a) the matter may be referred to the Adjudicator; and
- (b) these Regulations continue to apply in relation to the tenancy or licence until the day on which the Adjudicator rules.

Extended protection to last until a rent assessment is concluded

37. For the purposes of section 69(5)(b) of the Act, a rent assessment or assessment of money payable in lieu of rent is concluded when the tenant and the landlord who is no longer a pub-owning business agree the new rent in writing under regulation 11(3).

PART 10

Assignment of tenancy

Duty of pub-owning business where tenant intends to assign the tenancy

38.—(1) This regulation applies where a tenancy in relation to a tied pub may be assigned under the terms of that tenancy.

(2) Where a tied pub tenant notifies the pub-owning business that the tenant intends to assign the tenancy, the pub-owning business must, as soon as reasonably practicable—

- (a) explain to the tenant and the assignee the implications of the assignment for both;
- (b) provide the tenant with information relating to—
 - (i) any fees payable by the tenant in respect of the assignment;
 - (ii) the arrangements for buying back the tenancy;
 - (iii) any dilapidations; and
 - (iv) any other relevant advice or support that is available for the tenant and for the assignee.

(3) Before agreeing to the assignment, the pub-owning business must be satisfied that the assignee has received the information specified in Schedule 1.

(4) If the tied pub tenant demonstrates to the pub-owning business that the assignee has received that information, the pub-owning business must not unreasonably withhold agreement to the assignment.

(5) But a pub-owning business is not required to agree to the assignment unless the assignee—

- (a) has completed pre-entry awareness training, or

- (b) meets at least one of the conditions in paragraph (6).
- (6) The conditions are—
 - (a) that the assignee operates at least one other tied pub on the day on which the notice mentioned in paragraph (2) is given;
 - (b) that the assignee can demonstrate that the assignee has at least 3 years of relevant business management experience;
 - (c) that the pub-owning business has, at any time, granted the assignee a tenancy or licence in relation to a tied pub, other than a tenancy or licence in connection with a short agreement.
- (7) Where the pub-owning business does not agree to the assignment, the pub-owning business must notify the tenant and the assignee as soon as reasonably practicable.
- (8) Paragraph (9) 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.
- (9) 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 the effect of that agreement on the assignee’s right to request a rent assessment or an offer of a market rent only option; and
 - (b) has received a copy of that agreement.

PART 11

Exemptions from these Regulations

Tenancies at will and short-term agreements

39.—(1) Where a pub-owning business and a tied pub tenant—

- (a) enter into one or more short agreements; and
- (b) the agreement or agreements entered into entitle the tenant to occupy the tied pub for a cumulative period of less than 12 months,

these Regulations do not apply to the dealings of the pub-owning business and the tenant in connection with those agreements whilst they are in force.

(2) Where a pub-owning business and a tied pub tenant—

- (a) enter into one or more short agreements; and
- (b) the agreement or agreements entered into entitle the tenant to occupy the tied pub for a cumulative period of 12 months or more,

these Regulations do not apply to the dealings of the pub-owning business and the tenant in connection with those agreements for a period of 12 months, beginning with the earliest day on which the tenant is entitled to occupy the tied pub.

Pub franchise agreements

40.—(1) Parts 3 to 7 of these Regulations do not apply to the dealings of a pub-owning business with a tied pub tenant under a pub franchise agreement.

(2) A “pub franchise agreement” means an agreement between a pub-owning business and a tied pub tenant for the tenant to occupy the tied pub which—

- (a) requires the tied pub tenant to pay to the pub-owning business a fixed share of turnover;
- (b) grants the tied pub tenant a right to use the relevant business model and may require the tenant to pay a fee in respect of the use of that model;
- (c) does not require the tied pub tenant to pay to the pub-owning business any other amount in respect of the tenant’s occupation of the tied pub;

- (d) does not require the tied pub tenant to make any other payments to the pub-owning business in connection with the supply of products to the tied pub tenant or the services offered to the tenant;
 - (e) includes details of marketing, training and other business support offered by the pub-owning business to the tied pub tenant; and
 - (f) grants the tied pub tenant a right to sell the business to a third party at market value.
- (3) “Fixed share of turnover” means a percentage of the tied pub’s turnover, being a percentage which is fixed for the duration of the franchise agreement.
- (4) “Relevant business model” means a model for doing business at a pub which—
- (a) the pub-owning business has piloted at two or more pubs for a period of 12 months or more;
 - (b) the pub-owning business can demonstrate has the potential to succeed when applied to the tied pub; and
 - (c) includes details of intellectual property rights held by the pub-owning business, and methods, procedures and other technical and industrial know-how required for its use.
- (5) For the purposes of paragraph (4)(b), a relevant business model has the potential to succeed if it has the potential to generate, from the tied pub, a reasonable profit for the tied pub tenant and the pub-owning business.

PART 12

Void or unenforceable terms

Void or unenforceable terms of a tenancy or licence

- 41.**—(1) A term of a tenancy or other agreement between a tied pub tenant and a pub-owning business is void if it purports to—
- (a) penalise the tenant for requiring the business to act, or not act, in accordance with a provision of these Regulations with which the business is bound to comply;
 - (b) provide that a rent assessment or assessment of money payable by the tenant in lieu of rent in relation to the tied pub—
 - (i) may be initiated only by the business; or
 - (ii) may only determine that the rent or money payable in lieu of rent is to be increased;
 - (c) penalise, or impose any liabilities on, the tenant as a result of any reading taken from a flow monitoring device, without additional evidence.
- (2) A dispute in relation to a term which is unenforceable, in that it purports to exclude, limit or otherwise modify the processes or the obligations of pub-owning businesses required under these Regulations, may be arbitrated in accordance with an arbitration agreement.
- (3) A “flow monitoring device” means a device which is owned and installed by the pub-owning business at the tied pub—
- (a) to measure the amount of alcohol being sold by the tied pub tenant; and
 - (b) for the purposes of verifying that the tenant does not sell alcohol at the tied pub in contravention of the terms of the tenancy or licence.

PART 13

Business Development Managers

Business Development Managers

- 42.**—(1) The pub-owning business must ensure that each of its Business Development Managers—
- (a) receives a copy of these Regulations before he or she liaises with tied pub tenants over any matters relating to the Regulations;

- (b) is provided with appropriate training in relation to the requirements of these Regulations at least once every 12 months; and
 - (c) deals with tied pub tenants in a manner that is consistent with the principle referred to in section 42(3)(a) of the Act.
- (2) A pub-owning business must provide to its tied pub tenants information about—
- (a) the role of the Business Development Manager; and
 - (b) the support and guidance which he or she will provide to the tenants.
- (3) A pub-owning business must ensure that the Business Development Manager—
- (a) is responsible for conducting rent assessments or assessments of money payable in lieu of rent; and
 - (b) receives appropriate training before they conduct any such assessment.
- (4) A pub-owning business must ensure that the Business Development Manager—
- (a) makes appropriate notes of any discussions with tied pub tenants in connection with—
 - (i) rent assessments or assessments of money payable in lieu of rent,
 - (ii) repairs to the tied pub premises,
 - (iii) matters relating to the tied pub tenants’ current or future business plans;
 - (b) provides tied pub tenants with a record of any such discussions within the period of 7 days beginning with the day on which the discussion occurred; and
 - (c) requests that the tenant respond to the Business Development Manager if the tenant does not agree with any aspect of the record within the period of 7 days beginning with the day on which the note was received.
- (5) A pub-owning business must specify, in a document published by the business—
- (a) its commitment towards the continuous professional development and improvement of its Business Development Managers; and
 - (b) how it proposes to fulfil such a commitment, referring where appropriate to relevant qualifications and training.
- (6) A “Business Development Manager” means—
- (a) a person who is employed as such by a pub-owning business; or
 - (b) any other person who represents the pub-owning business in its dealings with tied pub tenants in connection with the matters listed in paragraph (4)(a).

PART 14

Compliance Officer

Duty to appoint a Compliance Officer

43.—(1) A pub-owning business must appoint a suitably qualified employee to be the Compliance Officer, whose role is to verify the pub-owning business’s compliance with these Regulations.

- (2) The pub-owning business must ensure that the Compliance Officer—
- (a) is provided with the resources necessary to carry out his or her role, including information relating to the pub-owning business’s obligations under these Regulations;
 - (b) is entitled to contact the Business Development Managers to discuss matters relating to those obligations;
 - (c) makes himself or herself reasonably available to tied pub tenants and any other persons who may have a query relating to these Regulations;
 - (d) is independent of, and is not managed by, a Business Development Manager;
 - (e) is entitled to discuss with the tied pub tenant the reasons for any decisions made by the pub-owning business under these Regulations;
 - (f) is entitled to discuss with the Adjudicator matters relating to the pub-owning business’s compliance with these Regulations;

- (g) for the purposes of the annual compliance report, maintains records of the training received by the Business Development Managers.

Annual compliance report

44.—(1) A pub-owning business must ensure that the Compliance Officer submits an annual compliance report to the Adjudicator relating to each financial year.

(2) The annual compliance report must be submitted to the Adjudicator within the period of 4 months beginning with the day after the end of the financial year to which the report relates.

(3) Paragraph (4) applies in relation to a person who, immediately before these Regulations come into force, is the landlord of 500 or more tied pubs.

(4) The person must ensure that the first annual compliance report required under paragraph (1) relates to the period—

- (a) beginning with the day on which these Regulations come into force; and
- (b) ending on the last day of the first subsequent full financial year.

(5) Where the pub-owning business has an Audit Committee, the Chair of that committee must approve the annual compliance report before it is submitted to the Adjudicator.

(6) The annual compliance report must include a detailed and accurate account of —

- (a) the pub-owning business’s compliance with these Regulations in the period to which the report relates;
- (b) any instances where a breach or alleged breach of these Regulations has been identified by a tied pub tenant;
- (c) the steps taken in relation to any such breach, or alleged breach; and
- (d) the steps taken during the period to which the report relates to ensure compliance with these Regulations, including details of training and guidance offered to employees in connection with the Regulations.

(7) The pub-owning business must ensure that—

- (a) the Compliance Officer provides such other reports as are necessary to ensure that the pub-owning business’s Audit Committee has an understanding of the pub-owning business’s compliance with these Regulations; or
- (b) if the pub-owning business does not have an Audit Committee, the Compliance Officer reports directly to the non-executive director of the pub-owning business responsible for carrying out the functions normally associated with an Audit Committee, or, in the absence of such non-executive director, to the pub-owning business’s Chief Executive Officer, Managing Director or equivalent.

(8) A summary of the annual compliance report must be included in the pub-owning business’s annual report.

(9) If the pub-owning business does not produce an annual report, the summary of the annual compliance report must be published clearly and prominently on the pub-owning business website (if any) within the period of 4 months beginning with the day after the end of the financial year to which the report relates.

PART 15

Group undertakings

Adjudicator’s determination during referral of a dispute

45.—(1) This regulation applies where—

- (a) a tied pub tenant has referred a dispute between the tenant and a pub-owning business (“P”) to the Adjudicator under section 48 of the Act; and
- (b) there is evidence before the Adjudicator which suggests that a group undertaking (“U”) in relation to the pub-owning business—
 - (i) discharges, has discharged, exercises or has exercised, influence over any of P’s obligations under the tenancy or licence to which the dispute relates; or
 - (ii) is responsible for, or exercises influence over, the terms of that tenancy or licence, the financial arrangements, the charging policies or any other administrative, managerial or executive decisions of P, which affect the tied pub tenant,

in a way which is relevant to the dispute.

(2) Where this regulation applies, the Adjudicator may determine that U is to be treated as a pub-owning business, as well as or instead of P, for the purposes of the arbitration.

(3) Before the Adjudicator makes a determination under paragraph (2), he or she may consider representations from U.

(4) The Adjudicator may disregard a request from a tied pub tenant for U to be treated as a pub-owning business, where—

- (a) U is not identified by the tenant in such a way that the Adjudicator is able to establish U's name, business address and its relationship with P;
- (b) the tied pub tenant has not notified U in writing of the dispute; or
- (c) the tenant has not forwarded a copy of the request to U.

Investigations by the Adjudicator

46.—(1) This regulation applies where—

- (a) the Adjudicator is conducting an investigation of a pub-owning business (“P”) under section 53 of the Act; and
- (b) in the course of that investigation, evidence becomes available to the Adjudicator which suggests that a group undertaking in relation to P—
 - (i) discharges, has discharged, exercises, or has exercised, influence over any of P's obligations under the tenancy or licence to which the investigation relates; or
 - (ii) is responsible for, or exercises influence over, that tenancy or licence, the financial arrangements, the charging policies or any other administrative, managerial or executive decisions of P, which affect the tied pub tenant,

in a way which is relevant to the investigation.

(2) Where this regulation applies, the Adjudicator may determine that the group undertaking is to be treated as a pub-owning businesses, as well as, or instead of P, for the purposes of an investigation under sections 53 to 61 of the Act.

Adjudicator's determination in relation to UK businesses only

47.—(1) The Adjudicator may not determine that a person who is a group undertaking in relation to a pub-owning business is to be treated as a pub-owning business unless the person—

- (a) carries on a trade or business in the United Kingdom; or
- (b) is a UK-registered company within the meaning of section 1158 of the Companies Act 2006.

PART 16

Miscellaneous

Pub-owning business to notify Adjudicator and tied pub tenants of status under these Regulations

48.—(1) A person who, immediately before these Regulations come into force, is the landlord of 500 or more tied pubs, must notify that fact to—

- (a) the Adjudicator; and
- (b) its tied pub tenants,

as soon as reasonably practicable after these Regulations come into force.

(2) A person who—

- (a) gives notice under paragraph (1); and
- (b) subsequently ceases to be the landlord of 500 or more tied pubs,

must, as soon as reasonably practicable, notify the Adjudicator and its tied pub tenants, of that fact.

Insurance

- 49.**—(1) Paragraphs (2) to (4) apply where a pub-owning business—
- (a) insures, or intends to insure, the premises to which a tenancy or licence relates; and
 - (b) charges, or intends to charge, the tied pub tenant an amount in respect of that insurance (“the insurance charge”).
- (2) The pub-owning business must inform the tied pub tenant whether—
- (a) the insurance charge exceeds the amount payable by the pub-owning business in respect of the premises under the insurance policy and, if so, the amount of that excess; and
 - (b) the pub-owning business, or any group undertaking in relation to the pub-owning business, receives, or expects to receive, any commission or rebate in connection with that policy from the insurance company, insurance agent or insurance broker.
- (3) Before the pub-owning business purchases, or renews, an insurance policy in respect of the premises, the pub-owning business must—
- (a) provide to the tenant full details of that policy, including the cover which is provided, the charges payable and any contributions towards a claim which the policy holder is required to make;
 - (b) provide to the tenant any additional information required to allow the tenant to compare the policy with other suitable, comparable policies which may be available; and
 - (c) where the tied pub tenant notifies the pub-owning business that it has identified a suitable and comparable alternative policy (the “tenant’s alternative policy”), consider that policy.
- (4) Where the pub-owning business is required to provide information under paragraph (3), the pub-owning business must do so—
- (a) at least 21 days before the day on which the policy has effect; or
 - (b) at least 21 days before the day on which the pub-owning business enters into the insurance.
- (5) Paragraph (6) applies where the insurance charge is higher than the amount which would be payable by the tied pub tenant under the tenant’s alternative policy (the “alternative insurance charge”).
- (6) The pub-owning business must—
- (a) purchase the tenant’s alternative policy; or
 - (b) agree, in writing, that any difference between the insurance charge and the alternative insurance charge is not payable by the tenant.

Premises

- 50.**—(1) Before entering into a new agreement with a tied pub tenant, a pub-owning business must advise the tenant to—
- (a) conduct a thorough inspection of the premises to which the tenancy or licence relates; and
 - (b) obtain the advice of a qualified surveyor with professional experience relating to tied pubs.
- (2) Paragraph (3) applies where—
- (a) a tied pub tenant and a pub-owning business enter into a new agreement; and
 - (b) before entering into the agreement, the pub-owning business or the tied pub tenant agrees to carry out any maintenance, repair or improvement works to the premises.
- (3) As soon as reasonably practicable after the works are completed, the pub-owning business must update the Schedule of Condition, in the light of the works.
- (4) Where, under a tenancy or licence, a tied pub tenant is required to maintain or repair the premises, or any part of the premises, to which the tenancy or licence relates, paragraphs (5) and (6) apply.
- (5) The pub-owning business must take the Schedule of Condition into account—
- (a) before entering into a new agreement;
 - (b) during an assessment of any maintenance or repairs in respect of the premises; and
 - (c) before any obligations or liabilities in respect of the condition of the premises are agreed between the pub-owning business and the tied pub tenant.
- (6) The pub-owning business must ensure that the Schedule of Condition is reviewed—

- (a) in accordance with the terms of the tenancy or licence; or
- (b) where the tenancy or licence does not require such a review—
 - (i) following any significant alteration to the structure of the premises;
 - (ii) at least 6 months before the end of the tenancy or licence.

(7) A survey of the premises which is carried out by the pub-owning business for the purposes of determining the dilapidations to the premises must be carried out—

- (a) in accordance with the terms of the tenancy or licence; and
- (b) at least 6 months before the end of the tenancy or licence.

(8) Where—

- (a) dilapidations occur after a survey has been carried out under paragraph (7); and
- (b) there is evidence that those dilapidations could not have been foreseen during that survey,

the pub-owning business must confirm as soon as reasonably practicable to the tied pub tenant whether the tied pub tenant is to be responsible for those dilapidations.

(9) Paragraph (10) applies where a pub-owning business, or a person acting on its behalf, proposes to enter a tied pub for the purposes of —

- (a) assessing repairs or maintenance required under the tenancy or licence;
- (b) carrying out such repairs or maintenance; or
- (c) assessing dilapidations in respect of the premises.

(10) The pub-owning business, or the person acting on its behalf, must not, except in an emergency, enter the pub without giving the tied pub tenant reasonable notice.

(11) The tied pub tenant may refer to the Adjudicator a pub-owning business's failure to comply with any requirement to maintain or repair the premises under the terms of the tenancy or licence.

Gaming machines

51.—(1) Where a pub-owning business—

- (a) conducts a rent assessment; or
- (b) proposes to renew a tenancy or licence;

the pub-owning business must not require the tied pub tenant to purchase or rent gaming machines.

(2) A “gaming machine” has the meaning given by section 235 of the Gambling Act 2005.

Blank template for profit and loss account

52. Where the tied pub tenant so requests, the pub-owning business must provide to the tenant a blank template for completing the tied pub's profit and loss account.

Sale of freehold or long leasehold

53.—(1) Where the pub-owning business is aware that the holder of the freehold of, or the long leasehold in respect of, the premises to which the tenancy or licence relates—

- (a) is taking any steps to sell the freehold or the leasehold; or
- (b) has entered into an agreement to sell the freehold or the leasehold to those premises,

the pub-owning business must comply with the paragraph (2) as soon as reasonably practicable.

(2) The pub-owning business must provide to the tied pub tenant—

- (a) details of any such steps; and
- (b) the name and address of the buyers.

(3) The pub-owning business is not required to provide the information under paragraph (2)(a)—

- (a) if the offer to purchase the freehold or long leasehold is unsolicited;
- (b) if the sale is part of a sale and leaseback transaction; or

- (c) if—
 - (i) the holder of the freehold or the long leasehold is a listed company, and
 - (ii) a disclosure under that paragraph would breach any statutory obligation.

Dispute resolution

54.—(1) The pub owning business must ensure that any disputes that arise under these Regulations are resolved as soon as reasonably practicable.

(2) Information which may be used in any dispute resolution procedure must not be unreasonably withheld.

Tied pub tenant not to suffer detriment

55. A pub-owning business must not subject a tied pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under these Regulations.

	<i>Name</i>
	Parliamentary Under Secretary of State
Date	Department for Business, Innovation and Skills

SCHEDULE 1

Regulations 6 and 38

Information specified for the purposes of a new agreement etc.

Regulations and Code of Practice

1. The Pubs Code Regulations 2016.
2. Where the pub-owning business has a code of practice, a copy of that code.

The type of tenancy or licence

3. An overview of the different tenancies or licences offered to tied pub tenants by the pub-owning business.
4. Whether the tenancy offered by the pub-owning business is a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies and the process for the renewal of such a tenancy, or any other tenancy, including when notification to renew, or otherwise, must be given.
5. Whether there is a superior landlord and, if so, the name and address of the superior landlord.
6. The length of the tenancy, licence or relevant tie agreement offered to the tied pub tenant by the pub-owning business, including the date on which the tenancy, licence or relevant tie agreement is to begin and the date on which it is to end (“the end-date”).
7. Whether the tied pub tenant or the pub-owning business may terminate the tenancy, licence or relevant tie agreement before the end-date.
8. Details of the pub-owning business’s procedures for responding to any request by the tied pub tenant to terminate the tenancy, licence or relevant tie agreement before the end-date.
9. In paragraphs 6 to 8 a “relevant tie agreement” is an agreement of the kind described in section 43(8)(b) of the Act, where the terms of that agreement are not included in the tenancy or licence offered to the tenant.

The premises

10. A full and clear description of the premises to which the tenancy or licence relates, including—
 - (a) details of the premises licence, within the meaning of section 11 of the Licensing Act 2003 and any licence conditions;
 - (b) details of any enforcement action taken by any public authority in connection with the tied pub during the previous 2 years, where known;

- (c) details of any foreseeable material changes to the commercial conditions in the tied pub's local area and how these might influence the costs and trading environment of the tied pub tenant;
- (d) details of any restrictions on the use of the premises, such as planning constraints, restrictions on types of trading, restrictions on access to the premises (including details of any shared access) and hours of trading;
- (e) a Schedule of Condition which highlights any specific problems in the premises.

11. Whether the fixtures and fittings in the tied pub are required to be purchased by the tied pub tenant under the tenancy or licence and, if so, the arrangements for the payment for such fixtures and fittings.

Maintenance and repair

12. The respective obligations of the pub-owning business and the tied pub tenant under the tenancy or licence or pursuant to any other document, such as a code of practice, in relation to repairing and maintaining the premises to which the tenancy or licence relates.

13. The pub-owning business's procedures for discharging its obligations to repair and maintain the premises under the tenancy or licence, including the procedure by which a tied pub tenant can raise concerns about the discharge of those obligations.

14. Where the tenancy or licence requires the tied pub tenant to repair or maintain the premises to which the tenancy or licence relates, confirmation that, unless otherwise specified in the tenancy or licence, the requirement is to keep or maintain the premises in the condition set out in the Schedule of Condition.

15. The procedures to be followed in connection with the respective obligations of the pub-owning business and the tied pub tenant under the tenancy or licence in relation to assessing and making good dilapidations, including—

- (a) the time when the Schedule of Condition may be reviewed;
- (b) the process for agreeing the works which must be carried out in the light of a review of the Schedule of Condition;
- (c) where the tenant is responsible for remedying, or paying for, any dilapidations, the period before the end of the tenancy when a survey will be carried out to determine the extent of dilapidations;
- (d) the process for resolving a dispute in connection with any obligation under the tenancy or licence to maintain, repair and make good.

16. Where, before entering into a new agreement, the pub-owning business is aware of any maintenance, repair or improvement works ("initial works") which must be carried out to the premises to which the tenancy or licence relates—

- (a) a Schedule of Condition prepared in the light of the initial works required;
- (b) a list of the initial works which must be carried out;
- (c) the respective obligations of the tied pub tenant and the pub-owning business in relation to those works under the tenancy or licence;
- (d) details of any initial works which are required to be completed before the new agreement is in force including whether the pub-owning business or the tenant will be responsible for carrying them out;
- (e) where any of the initial works—
 - (i) are to be carried out to improve the premises significantly, or
 - (ii) require a significant investment of capital,
 a sketch or an artist's plan, if any, of those works; and
- (f) where any of the initial works are to be carried out after the new agreement has been entered into—
 - (i) whether the pub-owning business or the tenant will be responsible for carrying out the works;
 - (ii) the date on which the works must be completed; and
 - (iii) any penalty in respect of a failure to complete the works, or to complete them by a certain date.

17. Any requirements under the tenancy or licence in relation to the condition in which the premises to which the tenancy or licence relates are to be returned to the pub-owning business at the end of the tenancy or licence.

18.—(1) The pub-owning business's policy for investing in the premises to which the tenancy or licence relates by way of improvements and refurbishments to those premises, including any policy on joint investment with its tied pub tenants.

(2) Where, at the time the information under this Schedule is sent to the tenant, the pub-owning business is considering investing in the premises, the information required under sub-paragraph (1) includes details of the potential impact of any such investment on the rent or other payments which the tied pub tenant must pay under the tenancy or licence.

19. The respective obligations of the pub-owning business and the tied pub tenant under any enactments in relation to—

- (a) utilities at the tied pub, such as electrics, gas, water or sewerage; and
- (b) environmental impact, health and safety.

Obligations in relation to the purchase of tied products and services

20. Details of any obligations to purchase tied products or services under the tenancy or licence including—

- (a) the current price list for those products or services and notification of any imminent changes to that list;
- (b) any discounts which may be available to the tied pub tenant in connection with the purchase of those products or services;
- (c) whether the tenancy or licence authorises the tenant to purchase any food, drink or services which are not subject to a tie and, if so, the details of that authorisation;
- (d) if gaming machines are offered to the tied pub under the tenancy or licence, the terms on which they are supplied, including details of the arrangements for the distribution of income from the machines and an outline of the trading, payment and credit terms in relation to them.

Assignment

21. In the case of a tenancy—

- (a) whether the tenancy may be assigned and, if so, the procedures which the tied pub tenant must follow to assign the tenancy; and
- (b) the procedures which the pub-owning business must follow where the tied pub tenant makes a request to assign the tenancy.

Advice and support

22.—(1) The advice and support available to the tied pub tenant during the tenancy or licence, including advice and support in respect of—

- (a) the capabilities and training needs of the tied pub tenant and the tenant's employees;
- (b) licences and any relevant training requirements in relation to those licences;
- (c) brand promotion and merchandising;
- (d) provision and maintenance of dispensing equipment;
- (e) pub promotion and marketing;
- (f) other aspects of business management;
- (g) the benefits which the tied pub tenant may expect to enjoy as a consequence of the pub-owning business's ability to procure and supply products, services and expertise to the tied pub tenant;
- (h) business rates;
- (i) the exterior decoration of the premises, the signs, repairs to the building, car parks and gardens (where relevant).

(2) The information required under sub-paragraph (1) is not required to be provided to a tied pub tenant who is already subject to a tenancy or licence granted by the pub-owning business in relation to a tied pub unless that information has changed since the tied pub tenant received it in connection with that tenancy or licence.

23. The pub-owning business's policy for dealing with requests for assistance from the tied pub tenant in cases of difficulties in respect of the tenancy or licence which are beyond the tenant's control.

24. The circumstances in which the pub-owning business may be willing to consider amendments to its standard terms.

25. The events, the occurrence of which, entitle the tied pub tenant, under regulation 13, to give notice to the pub-owning business that the pub-owning business is required to offer the tenant a market rent only option.

Insurance

26. Whether, under the tenancy or licence—

- (a) the pub-owning business is responsible for insuring the premises and, if so, whether the pub-owning business requires an insurance charge; or
- (b) the tenant is responsible for insuring the premises.

27. Where the tied pub tenant is responsible for insuring the premises, any minimum requirements for insurance under the tenancy or licence.

Payment of rent and deposits

28.—(1) The arrangements for the payment of deposits, including—

- (a) the amount of any deposit (“the deposit”) payable by the tied pub tenant to the pub-owning business for the purposes of securing the tenancy or licence;
- (b) the period for which the deposit is likely to be retained by the pub-owning business;
- (c) the arrangements for paying to the tied pub tenant any interest accruing on the deposit;
- (d) the circumstances in which the deposit may be required to be increased under the tenancy or licence;
- (e) when and how the deposit will be repaid to the tied pub tenant;
- (f) how the deposit is to be treated if the pub-owning business becomes insolvent.

(2) The information required under sub-paragraph (1) is not required to be provided to a tied pub tenant in connection with a tenancy which is renewed under Part 2 of the Landlord and Tenant Act 1954 unless the pub-owning business proposes to change the arrangements for the payment of rent and other deposits on the renewal.

29. Where the tenancy or licence provides that the rent or money payable in lieu of rent is to be varied by reference to an index—

- (a) the index used;
- (b) when the indexation rate will be assessed and applied;
- (c) whether payments made by the tenant in respect of rent, or money payable in lieu of rent, will be adjusted upwards and downwards, according to the movement of the index; and
- (d) an illustration of the impact which the indexation rate will have on the rent, or the money payable in lieu of rent, during the tenancy or licence, using, by way of example, the indexation rate at the time the information under this Schedule is sent to the tenant.

30. In cases where damage to the premises to which the tenancy or licence relates impacts on the tied pub’s potential for trading, the pub-owning business’s policy in respect of the temporary suspension of—

- (a) rent or money payable in lieu of rent; and
- (b) minimum purchasing requirements under the tie.

31. Information in respect of other support available in cases where damage to the property impacts on the tied pub’s potential for trading.

32. Details of any other fees, charges or financial penalties which the tied pub tenant may be required to pay during the tenancy or licence.

Breaches

33. The pub-owning business’s procedures for establishing whether the tied pub tenant has breached the tenancy or licence.

34. Where a tied pub tenant is in breach of the tenancy or licence, the pub-owning business’s procedures for informing the tied pub tenant that the tenant is in breach and whether the tenant will have opportunities to remedy the breach before any enforcement action is taken.

35. Information about the procedures which may be followed by the tied pub tenant in cases where the tenant considers that the pub-owning business has failed to comply with the provisions of these Regulations.

SCHEDULE 2

Regulations 7 and 9

Information specified for the purposes of a rent proposal or a rent review proposal

1. A summary of the methods which must be used [under the tenancy or licence?] in calculating the initial rent or the new rent including—
 - (a) the information which will be used to support those calculations; and
 - (b) the rationale behind the use of such information.
2. An outline of the procedure to be followed during negotiations of the new rent between the pub-owning business and the tied pub tenant.
3. A list of the matters which will be considered to be relevant and irrelevant in such negotiations.
4. A forecast of a profit and loss statement for the tied pub for the 12 months following the rent assessment and the figures and other information which have been relied on to formulate that statement, including—
 - (a) information in respect of the volume of alcohol, including the number of barrels of alcohol, purchased during the last 3 years from the pub-owning business or its agents;
 - (b) a figure for the total estimated sales and gross profit margins of the tied pub during that year, with a breakdown showing separate figures for the estimated sales and gross profit margins for—
 - (i) draught ales;
 - (ii) lagers;
 - (iii) ciders;
 - (iv) wines;
 - (v) spirits;
 - (vi) flavoured alcoholic beverages; and
 - (vii) soft drinks;
 - (c) a figure for the volume of draught beer and cider not sold (a “waste figure”) where the waste figure has not been accounted for in the gross profit margin;
 - (d) the estimated operating costs likely to affect the tied pub tenant’s profit for that year including, where relevant, the estimated cost of a manager during that year, where the tied pub tenant is not the manager of the tied pub;
 - (e) an explanation of how estimated income from any gaming machine, in the tied pub has been accounted for in the statement;
 - (f) a breakdown of any costs which have not been accounted for separately but have been included in the estimated figures for other costs (for example, the cost of cellar gas).
5. The figures which are provided under paragraph 4 must—
 - (a) be expressed as a percentage of the tied pub tenant’s estimated turnover;
 - (b) be provided net of value added tax or machine games duty (within the meaning of Schedule 24 to the Finance Act 2012).
6. The profit and loss statement provided under paragraph 4 must—
 - (a) be accompanied by the pub-owning business’s list of prices for tied products and services;
 - (b) refer to relevant and current data available publicly in connection with the typical costs of operating a tied pub in the United Kingdom and explain any variance between the costs referred to and the pub-owning business’s costs estimate.
7. The statement, figures and other information which the pub-owning business provides to the tied pub tenant under paragraphs 4 to 6 must be sufficiently clear and detailed to allow the tenant to understand the basis on which the estimated figures in the statement have been calculated.
8. Any information which the pub-owing provides under paragraph 4, must be—

- (a) accurate, wherever it refers to historical data;
- (b) reasonable, wherever it refers to projected data.

9. Any information in Schedule 1 which—

- (a) the tied pub tenant has not already received; or
- (b) has changed materially since it was provided to the tenant.

10. A timetable specifying the dates on which any other information will be made available to the tied pub tenant before negotiations begin.

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 D: 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 Franchise 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
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
Punch Tenants Network
Royal Institution of Chartered Surveyors
Society of Independent Brewers

Annex E: The Pubs Code and Pubs Code Adjudicator: Part 2 - 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 2 - response form

Name:

Organisation (if applicable):

Address:

Email:

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

<input type="checkbox"/>	Pub-owning business with 500 or more tied pubs
<input type="checkbox"/>	Tied tenant
<input type="checkbox"/>	Interest group, trade body or other organisation
<input type="checkbox"/>	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 8 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

Market Rent Only option and Parallel Rent Assessments

Question 1

We believe the stated MRO procedure, that will give tenants a free-of-tie rent offer alongside a tied rent review proposal, will enable tenants to make an informed judgment as to whether they will be no worse off by remaining tied and fulfils the objectives of a Parallel Rent Assessment. If you believe that this does not achieve the goal, please give your reasons why.

Comments:

Question 2

We would welcome your comments on whether, in addition to the other information requirements of the draft Pubs Code, the documents provided for in Schedule 3 of the draft Code and described in paragraph 10.23 in Part 1 of this consultation are sufficient and appropriate for calculating a meaningful free-of-tie market rent that will allow tenants to make an informed judgment as to whether they will be no worse off by remaining tied.

Comments:

Question 3

If you believe that the combination of current proposals will not adequately deliver the no worse off principle or does so in a disproportionate way, please give your reasons and, where relevant, provide evidence.

Comments:

Availability of the Market Rent Only option at rent assessment

Question 4

What would be the effect of removing from the draft Pubs Code Regulations the condition that there must be a proposal for an increase in the rent at rent assessment before a tenant may exercise the MRO option?

Comments:

Question 5

It would be particularly helpful to receive evidence of the percentage of rent reviews that have resulted in a freezing or reduction of the rent over the last three years; of the prevalence of annual indexation provisions and other inter-rent review arrangements in tenancy agreements; the typical increase in the amount payable by the tenant that they result in; and the way in which these are exercised by the pub-owning business under the terms of the tenancy.

Comments:

The Pubs Code - Information requirements

Question 6

Do you agree that these are appropriate conditions to be met before it becomes mandatory to provide specified information to a prospective tenant?

Comments:

Question 7

Do you agree that a pub-owning business may not require a prospective tenant to submit a business plan unless the tenant is a qualified person to whom it has provided the specified information?

Comments:

Question 8

Do you agree that where a change in the tied rent is proposed during the course of the tenancy agreement, the tenant should be provided with a revised rent proposal? Should all of the Schedule 2 information be required; or only those elements that have been changed? Should all of the Schedule 1 information be provided at the same time?

Comments:

Question 9

Should a rent proposal be required in all cases where there is a change in the rent during the tenancy? Would there be any merit in excluding changes that are automatic or agreed in advance (for example, annual indexation provisions); or that are of a temporary nature (such as rent 'holidays' to provide short-term relief to the tenant)?

Comments:

The Pubs Code – repair provisions

Question 10

Do you consider that these measures on repair obligations provide an appropriate balance between the rights and duties of pub-owning businesses and those of their tied tenants?

Comments:

The Pubs Code – arbitrable provisions

Question 11

In the draft Code are there any provisions that you consider should be specified as non-arbitrable? Please explain the advantages of doing so.

Comments:

Contractual inconsistencies with the code

Question 12

Do you have any comments relating to the proposals for void and unenforceable terms?

Comments:

Extension of code protections

Question 13

Do you have any views on the extent of the extended protection that is proposed?

Comments:

Group undertakings

Question 14

Are there any elements of these proposals regarding group undertakings that you think would not work as intended or that require amending?

Comments:

Exemptions from the Pubs Code – genuine franchise agreements

Question 15

Please comment on the key characteristics of a genuine franchise agreement as set out in Table 1. Where you think a characteristic should be amended or removed please set out your evidence as to why.

Similarly if you think further characteristics should be added please set out your justification as to why as well as an explanation of what should be added.

Comments:

Question 16

Do you agree with the Government's proposals for 'reasonable piloting' of the pub franchise model. If not, please explain your answer.

Comments:

Question 17

Do you agree that the Pubs Code information requirements that are indirectly related to rent such as the signposting to sources of benchmark information and the provision of historical trade information should apply to genuine pub franchise agreements?

If you disagree please clarify which requirement(s) is of concern, suggest any deletions and/or amendments and justify your arguments.

Comments:

Exemptions from the Pubs Code – tenancy at will and short-term agreements

Question 18

For how long should tenancy at will or other agreements be granted exemption from the Pubs Code?

Please explain the rationale for your answer and provide any evidence to support your case.

Comments:

Question 19

Do you think it is appropriate that a tenant entering into a tenancy at will or short-term agreement with a pub-owning business should have completed pre-entry awareness training prior to being offered the agreement?

Please explain the rationale for your answer and provide any evidence to support your case.

Comments:

Question 20

What sort of information do you consider would be useful and desirable for a new tenant to receive from the pub-owning business when entering into a tenancy at will or short-term agreement?

Comments:

Enforcing the Pubs Code – fee for arbitration

Question 21

If you do not agree with the proposed £200 fee please explain why and give the rationale and any evidence in support of an alternative amount.

Comments:

Enforcing the Pubs Code – costs of arbitration

Question 22

Do you agree with the Government's proposal that the maximum costs that tied tenants could have to pay a pub-owning business following an arbitration should be set at £2,000?

If you do not agree, please suggest an alternative level of fee, explaining the rationale for the alternative and provide evidence to support your case.

Comments:

Enforcing the Pubs Code – proposed maximum financial penalty

Question 23

If you do not agree that the maximum financial penalty the Adjudicator should be able to impose following an investigation should be set at 1% of the annual UK turnover of all group undertakings of the pub-owning business, please explain why and give the rationale and any evidence in support of an alternative amount.

Comments:

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 F: Consultation questions

Market Rent Only option and Parallel Rent Assessments

Q.1: We believe the stated MRO procedure, that will give tenants a free-of-tie rent offer alongside a tied rent review proposal, will enable tenants to make an informed judgment as to whether they will be no worse off by remaining tied and fulfils the objectives of a Parallel Rent Assessment. If you believe that this does not achieve the goal, please give your reasons why.

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Availability of the Market Rent Only option at rent assessment

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The Pubs Code - Information requirements

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Q.9: Should a rent proposal be required in all cases where there is a change in the rent during the tenancy? Would there be any merit in excluding changes that are automatic or agreed in advance (for example, annual indexation provisions); or that are of a temporary nature (such as rent 'holidays' to provide short-term relief to the tenant)?

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