



Department for Business, Innovation & Skills

Pub companies and tenants - A government consultation

Response form

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

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

This response form can be returned to:

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

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

I submit this response as a lawyer/solicitor who has since at least the year 2000 advised and conducted litigation in courts up and down the country, mainly on the side of the licensees/publicans/tenants ("Licensees") as opposed to the major brewers/pub co's ("the Pub Co's") mainly in the tied pub industry ("the Industry").

... submitted to Parliament leading to its review of the Industry in 2004 and I have followed, and at times contributed to, the Parliamentary reviews of the Industry since.

our perception that from at least 2000 Licensees' margins were being squeezed.

My responses below reflect my sincere views drawn from that experience.

At parts of the responses below, I ask for the right to make more detailed response at a later date on the points of principle expressed, because matters which I am dealing with are proceeding through the courts. More detail may assist Parliament in arriving at a more informed conclusion/decision.

Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.

Representative Organisation
Trade Union
Interest Group
Small to Medium Enterprise
Large Enterprise
Local Government
Central Government
Legal x
Academic
Other (please describe):

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

Consultation questions

Q1. Should there be a statutory Code? YES

Q2. Do you agree that the Code should be binding on all companies that own more than 500 pubs? If you think this is not the correct threshold, please suggest an alternative, with any supporting evidence. NO, THE THRESHOLD SHOULD BE ALL BREWERS AND PUB CO'S.

TO HAVE RENTS CALCULATED PROPERLY, FAIRLY AND IN ACCORDANCE WITH THE STATUTORY CODE SHOULD SURELY NOT PLACE ANY UNFAIR OR DISPROPORTIONATE BURDEN ON SMALLER BREWERS AND PUB CO'S; AFTER ALL, THIS SHOULD BE A NATURAL BASIS FOR THEIR BUSINESS MODEL ANYWAY.

Q3. Do you agree that, for companies on which the Code is binding, all of that company's non-managed pubs should be covered by the Code? YES

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

Q5. What is your assessment of the likely costs and benefits of these proposals on pubs and the pubs sector? Please include supporting evidence. THE IMPACT ASSESSMENT INDICATES A BEST ESTIMATE THAT AN AVERAGE LICENSEES EARNINGS WOULD IMPROVE BY £4,000 ANNUALLY. ACCORDING TO CAMRA'S RECENT FIGURES THIS AMOUNTS TO AN INCREASE IN EARNINGS OF C40% FOR 60% OF TIED LICENSEES. THERE IS A VIEW THAT THIS WILL BE AN UNDER ESTIMATE AND IT IS MORE LIKELY TO BE AN IMPROVEMENT MORE IN LINE WITH THE HIGHER ESTIMATE OF £10,000 ON AVERAGE. THIS KIND OF IMPROVEMENT WILL ENCOURAGE ENTREPRENEURIAL FLAIR WHERE IT IS CURRENTLY LACKING, REINVESTMENT, TRAINING JOBS, AND MOST IMPORTANTLY PROFITABILITY WILL EASE THE CLOSURE OF PUBS AND BUSINESS FAILURE RATE OF TIED PUBLICANS.

Q6. What are your views on the future of self-regulation within the industry? SELF REGULATION HAS NOT DELIVERED, AND IS NOT ACCEPTED AS "INDEPENDENT" BY SOME LICENSEES. IN PARTICULAR I AM AWARE OF SEVERAL CASES WHERE RICS GUIDELINES HAVE BEEN MORE OR LESS IGNORED BY PUB CO'S WITHOUT THE RICS TAKING CORRECTIVE ACTION.

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

i. Principle of Fair and Lawful Dealing YES

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

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

- i. *Provide the tenant the right to request an open market rent review if they have not had one in five years, if the pub company significantly increases drink prices or if an event occurs outside the tenant's control. YES***
- ii. *Increase transparency, in particular by requiring the pub company to produce parallel 'tied' and 'free-of-tie' rent assessments so that a tenant can ensure that they are no worse off. YES***
- iii. *Abolish the gaming machine tie and mandate that no products other than drinks may be tied. YES***
- iv. *Provide a 'guest beer' option in all tied pubs. YES***
- v. *Provide that flow monitoring equipment may not be used to determine whether a tenant is complying with purchasing obligations, or as evidence in enforcing such obligations. YES* LICENSEES SHOULD BE TREATED IN ACCORDANCE WITH THE PRINCIPLES SET OUT IN Q.7 Q8 ABOVE. BUT IN ADDITION AND BY WAY OF CLARIFICATION, THE CODE SHOULD OPERATE SO AS TO CURE THE PROBLEM OF THE INDUSTRY AS FOLLOWS:- 1) THE SO-CALLED "DRY" RENT FOR THE PUB PROPERTY AND THE SO-CALLED "WET" RENT I.E. THE PRICES WHICH THE BREWER OR PUB CO COMMANDS UNDER ITS EXCLUSIVE "TIE" ARE THE MAJOR DETERMINANTS OF THE LICENSEE'S MARGIN/LIVING 2) AT THE HEART OF THE INDUSTRY'S PROBLEM IS THE INEXTRICABLE CONNECTION BETWEEN THEM; 3) TYPICALLY, UNDER THE PUB LEASE THE BREWER/PUB CO HAS POWER TO ALTER DRINKS PRICES AT ANY TIME, WHILE THE DRY RENT REMAINS FIXED FOR 5 YEARS, AND THERE IS NO CONTRACTUAL PROVISION GIVING LICENSEES THE RIGHT TO A DRY RENT REVIEW TO IMMEDIATELY COUNTERBALANCE ANY INCREASE IN BEER PRICES; 4) THIS GIVES POWER TO THE BREWER OR PUB CO TO SQUEEZE THE MARGIN OF THE LICENSEE; 5) THE BREWERS/PUB CO'S HAVE ADDED CRUCIALLY TO THAT POWER BY A SO-CALLED "ANTI-SET OFF CLAUSE" IN PUB LEASES; 6) THIS HAS THE EFFECT THAT, WHATEVER PRICE HIKE THAT MAY BE IMPOSED (I HAVE KNOWLEDGE OF CASES WHERE LICENSEES' WHOLESALE PURCHASE PRICES FROM PUB CO'S ARE ACTUALLY HIGHER THAN RETAIL PRICES THAT FREEHOUSE COMPETITORS ARE ABLE TO CHARGE NEARBY), AND WHATEVER BREACHES BY BREWERS/PUB CO'S OF THEIR OBLIGATIONS IN THE LEASE, NO MATTER HOW GREAT THE DAMAGE RESULTING TO THE LICENSEE'S BUSINESS, THE LICENSEE IS STILL IN MOST CASES IN CASH TERMS OBLIGED TO PAY HIGH RENTS**

THEREFORE, THE Code (AS RIGHTLY PROPOSED BY THE GOVERNMENT CONSULTATION PAPER) MUST PROVIDE FOR A) OPEN MARKET DRY RENT PROPERLY ASSESSED/RE-ASSESSED IN THE EVENT OF TIED DRINKS PRICES BEING INCREASED AND B) ON OPTION TO GO FREE OF TIE ON PROPERLY ASSESSED OPEN MARKET RENT. ONLY THIS COMBINATION WILL CURE THIS PROBLEM AT THE HEART OF THE INDUSTRY, BECAUSE IT

IS THE ONLY WAY TO TRULY CONNECT THE DRY AND WET RENT TO DELIVER EVEN A BASIC LIVING TO THE LICENSEE. THE COURTS, IT SEEMS, HAVE BEEN UNABLE TO DELIVER THIS SOLUTION (DESPITE THE COURT OF APPEAL BEING WELL AWARE OF THE INEXTRICABLE LINK BETWEEN WET AND DRY RENT AS LONG AGO AS THE CREHAN- V-INNTREPRENEUR CASE IN THE MID 90'S). NOW PARLIAMENT IS AT LAST PREPARING TO DO SO.

vi.

- Q9.** Are there any areas where you consider the draft Statutory Code (at Annex A) should be altered? YES – SEE RESPONSE TO Q8 ABOVE. THERE MUST BE A MANDATORY OPTION TO FREE OF TIE ON PROPERLY ASSESSED OPEN MARKET RENT
- Q10.** Do you agree that the Statutory Code should be periodically reviewed and, if appropriate amended, if there was evidence that showed that such amendments would deliver more effectively the two overarching principles? YES
- Q11.** Should the Government include a mandatory free-of-tie option in the Statutory Code? YES – SEE RESPONSE TO Q9 ABOVE
- Q12.** Other than (a) a mandatory free-of-tie option or (b) mandating that higher beer prices must be compensated for by lower rents, do you have any other suggestions as to how the Government could ensure that tied tenants were no worse off than free-of-tie tenants? SEE RESPONSE TO Q8 ABOVE
- Q13.** Should the Government appoint an independent Adjudicator to enforce the new Statutory Code? YES
- Q14.** Do you agree that the Adjudicator should be able to:
- i. Arbitrate individual disputes? YES*
 - ii. Carry out investigations into widespread breaches of the Code? YES*
- Q15.** Do you agree that the Adjudicator should be able to impose a range of sanctions on pub companies that have breached the Code, including:
- I. Recommendations? YES*
 - II. Requirements to publish information ('name and shame') YES*
 - III. Financial penalties? YES, BUT IN ADDITION ADJUDICATOR SHOULD BE ABLE TO IMPOSE REASSESSMENT OF RENT ON PUB CO'S I.E. ORDER PROPER RENT REVIEW POSITIVELY, NOT JUST IMPOSE SANCTIONS*
- Q16.** Do you consider the Government's proposals for reporting and review of the Adjudicator are satisfactory? YES
- Q17.** Do you agree that the Adjudicator should be funded by an industry levy, with companies who breach the Code more paying a proportionately greater share of the levy? What, in your view, would be the impact of the levy on pub companies, pub tenants, consumers and the overall industry? YES

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BIS/13/718RF