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Pub companies and tenants: A government consultation

Response from the British Beer & Pub Association
June 2013



Executive summary

The BBPA and its members are hugely concerned about the real and unintended consequences of this Pub Company consultation. In essence our concerns are as follows:

- Self regulation is low cost, effective, legally binding and is working
- The Government has inadequate and insufficient evidence to make a statutory market intervention and the consultation process is flawed and biased.
- A market intervention is likely to reduce investment in the sector, reduce jobs and job creation, lead to future pub closures and may distort competition with unintended consequences.
- The tied house system is an excellent low cost, low risk business partnership that continues to evolve and respond to changing market conditions, which would be placed under threat by these proposals.

The majority of tenants and lessees are satisfied with their relationship with their pub company¹ and a thriving British pub sector demands that tenants and lessees should be fairly treated. We do not in any circumstances support abuse of this relationship.

To retain and attract effective licensees, pub owners do need to demonstrate the benefits of taking on a tied lease or tenancy and we support further transparency in this area. Individual pubs are however unique and the proposed quantifying of individual benefits (SCORFA) and linking to rent calculations is not practicable.

The tied pubs system offers a low cost entry to running your own business. A significant level of capital investment would be needed to purchase a freehold pub business. To obtain your own business as a tied leased/tenanted pub it can cost less than £30,000. It is a low risk, with what can be a high return on investment. In return, pub companies take the overall property risk and invest in their pub estates. It is simply not in their interest to see the business fail. Running a pub however, does require business skills. One of the key elements in self regulation in recent years is the new requirement for training and legal advice before a lessee takes on a pub. There are however, a small number of lessees who took on long leases some time ago, often from third parties, paying a significant premium. They did well in the favourable economic circumstances of their early years, but are now suffering in the

¹ '7 out of 10 tenants would sign up again with their pub owning company' CGA Strategy quoted in consultation document p.12

current economic climate and many will have negative equity. It is unfair to suggest that these tenants and lessees have been abused by pub companies.

Whilst putting the formal structures of improved self regulation in place has taken longer than anticipated (to the frustration of all parties) it is now working. The consultation fails to recognise the very significant progress made by pub companies over the past four years, not least with the launch of Version Six of the Industry Framework Code earlier this year. Unfortunately the consultation appears designed to present an inaccurate and contrary view, in places grossly over-exaggerating the evidence to support the proposals presented. There is a real danger that costly and unnecessary regulation is being proposed in response to calls from a very small proportion of licensees. Economic conditions are still very tough on the high street, as shown by the number of high street multiple retail stores falling by 2.7 per cent last year (down 1,800 stores in 2012) according to recent analysis by PWC². Tied tenants are already afforded significantly greater protection in difficult trading periods than is the case for other small businesses on the high street and elsewhere.

The Code as proposed would have real and unintended adverse consequences. It would distort competition for companies with 500 or more pubs, which would be subject to different terms and conditions than companies which own fewer. The BBPA welcomes the Government's intention to exclude smaller companies from a statutory code hence we support a 500 leased/tenanted pub threshold, however on the basis that it does not lead to a material distortion of competition. The proposals to force companies to offer a free of tie option, abolish the machine tie and offer a guest beer (which is likely to be a bestselling lager) would materially distort competition. If 500 pubs is to be the threshold, the calculation should only include tied tenanted and leased pubs. Managed pub companies that own no tied pubs should not be paying for an adjudicator. Similarly, smaller companies which wish to grow their managed estates should not find that they are suddenly caught by a statutory code.

Free-of-tie pubs should not be covered by a statutory code. These agreements are no different from any other commercial lease on shops, restaurants and other business premises. The pub owners in these circumstances are completely at arm's length from the pub operation and have little, if any involvement in the business, or information regarding the performance of the pub. The BBPA does not believe that franchises accredited by the British Franchise Association should be covered by a statutory code. If the agreement is for one year or less, it should not be covered by any code.

The consultation offers a clear understanding of the consequences of a mandatory free-of-tie option. As well as ongoing revenue support, brewers and pub companies invest well over £200 million per year in their pubs – enabled in large part by economies of scale generated. This ability and incentive to invest would be greatly reduced. Given the lack of lending by high street banks, it is difficult to comprehend how the Government believes this investment could be replaced. A lack of investment will lead to more pub closures and as the Government itself acknowledges, more free-of-tie pubs are closing than tied pubs. The latest CGA data

² <http://www.bbc.co.uk/news/business-21611772>

shows that 13 per cent of pubs operating as freehouses closed between January 2009 and March 2013 ~~September 2012~~ compared to 10 per cent of tenanted/leased pubs³. Indeed in the last 12 months alone the largest “free-of-tie” pub operator repossessed nine per cent of its total pub estate. Lower fixed costs for tenants/lessees mean the tied model also offers greater protection in challenging economic times.

The tie is vital to the viability of British breweries that rely on the pubs they own for the distribution of their beer. Without this distribution, breweries will close. Smaller breweries have unprecedented routes to market through SIBA’s Direct Distribution Scheme operated by Enterprise Inns and Finest Cask operated by Punch Taverns. Without doubt these two schemes have provided real choice in tied pubs not owned by brewers. Given the choice of beers offered by the largest pub companies which do not own breweries, it is completely illogical to require all tied pubs to offer a guest beer. For those who own breweries this change could block their route-to-market and make their brewing activities unviable.

Version Six of the Industry Framework Code made a fundamental commercial change to the relationship between pub companies and lessees, by establishing that gaming machine income must be shared only once. It requires real expertise to operate gaming machines successfully. The buying power of the pub companies provides good quality new machines, with vetted supplier accounts ensuring that they have adequate funds for capital investment and income targets set for suppliers to monitor performance. Free trade machine contracts are often onerous and can have high fixed rental costs. Given the real risks to a very important income source for pubs, breaking the gaming machine tie simply does not make sense. We would however, support a free-of-tie option on AWP (amusements with prizes) machines whereby tenants and lessees could choose whether to take up the offer of a machine supply agreement with a company, rather than closing off this option completely. Indeed this option is already available from most of the major pub companies.

Effective regulation must be proportionate. The consultation claims that there have been over 400 complaints to the Bill when in fact there have been 400 enquiries to a help-line in three years, covering every conceivable subject where a licensee might require help. Over the last four years 12 cases have been resolved through the rent review service PIRRS and another three have been considered through PICA-Service with five active cases. This equates to less than one per cent of an estimated 5,000 ‘rent events’ (reviews etc.) each year. This can hardly justify costly legislation or state intervention.

The online consultation questionnaire is particularly biased and this is reinforced by a Ministerial interview available on the DBIS website which uses emotive language and inaccurate data to lead respondents to a particular view and prejudge the outcome of the consultation. From independent advice from ComRes (attached), it is very clear that the questionnaire is in direct contradiction to the Market Research Society Code of Conduct and ultimately “...is not of sufficient quality in terms of survey design and structure to be able to support Government action in introducing a Statutory Code...”.

³ BBPA analysis of CGA Strategy data

Over the last ten years, pub companies have faced five inquiries and two OFT reports. In each and every case the basis for a tied system for public houses has been supported in the UK and in Europe through the 'Block Exemption'. One has to ask the question, what has changed since the end of 2011, when the Government's response to the BIS Select Committee said:

"Government should not intervene in setting the terms of the commercial, contractual relationship, where these are fully justified by law and have been found by the OFT to be raising no competition issues that significantly affect consumers. Fundamentally, whether or not a lease or tenancy includes a tie is a commercial decision on the part of both parties".⁴

The consultation makes clear that its objectives are not about competition, but a transfer of value. In reality, there is likely to be little, if any, transfer of value if proper consideration is given to the Special Commercial or Financial Advantages (SCORFA) over the lifetime of an agreement, when taking into account the risk and reward. These SCORFA benefits, calculated at between £6,000-£10,000 per pub per year, constitute the support offered by the pub company alongside lower fixed rents, in return for higher charges for beer, and the benefits provided by the economies scale and purchasing provided by pub companies. In addition over £200 million is invested in capital support each year. Bank lending to pubs is almost non-existent, so it is difficult to understand how Government thinks this investment will be replaced.

The pub industry offers a wide range of agreements within the tied model – giving flexibility and choice for tenants who wish to take up different options with pub companies, family brewers and property companies (such as fully tied, partially tied and free of tie). By imposing a rent setting formula, which in effect this consultation is proposing, this choice of model and the future evolution of the pub industry will be under threat. Free of tie options already exist in the sector, but overriding the market through legislation will have real unintended consequences.

The pub industry now offers comprehensive arbitration services as part of its self-regulation reforms. The Pub Independent Rent Review Scheme (PIRRS) has been in operation since 2009. Independent chartered surveyors chosen from a panel by the lessee, offer arbitration on rents. A more recently established Pub Independent Conciliation and Arbitration Service (PICA-Service) offers arbitration on any matter other than rent contained in the Industry Framework Code, or individual company codes at a very low cost of £200.

In conclusion, BBPA and its members believe that the adverse consequences of these proposals would be huge and would only lead to the loss of many more pubs. The partnership approach, expertise and above all investment of breweries and pub companies in their estates is vital to support community pubs. The Chancellor's decision to cut beer duty this year has been hugely welcomed and creates both confidence and a platform for increased investment. These proposals threaten that

⁴ <http://www.official-documents.gov.uk/document/cm82/8222/8222.pdf>

investment and create uncertainty at a time when the beer and pub sector is ready to build on the first cut in beer duty for 40 years through the creation of new jobs. The current proposals will undo all of the positives of this duty reduction and damage the fragile recovery of this important British industry.

Introduction

- i. The BBPA welcomes the opportunity to respond to this consultation on behalf of its members who produce 95% of beer sold in the UK and operate around half of the UK's pubs, including almost 90% of leased or tenanted pubs. Member companies are totally committed to fair, transparent and lawful dealing with tenants and lessees and all other business partners and against any abuse of the tied pub model. They are committed to self-regulation and have established independent complaints panels for rents and for any other aspect of the Industry Framework or individual company codes. However, the Association, as supported by the recent OFT inquiry⁵ and recognised by a continued EU Block Exemption, is convinced that the tied pub model provides a material and significant net benefit to tenants/lessees, with low cost entry to running your own business, alongside commitment and investment from companies and a wide range of support services. This is supporting a vibrant pub sector through an unprecedented and difficult economic climate, and also benefits both pubgoers and beer drinkers.
- ii. The model ensures both the pub company and the licensee have a mutual interest in the ongoing success of the business via beer sales, rather than a straight commercial rent arrangement that does not take into account the performance of the business. The range of beers now available in the UK is wider than ever before and the access to market provided through the largest pub companies for small brewers is unique. The consultation recognises that the beer tie has no detrimental impact on competition and consumer choice.
- iii. The BBPA believes that self-regulation remains the appropriate way to ensure that all parties are protected from any potential abuse of the tied model. Self-regulation ensures that the business potential, level of support and respective obligations are fully transparent and offer a fair deal for all parties. Whilst progress has taken time, Version Six of the Industry Framework Code, worked through with representatives of multiple retailers which are themselves tenants and lessees, provides transparency and cultural change. The BBPA and its members are also committed to continuing to evolve self-regulation to meet the demands of even greater transparency as required and being judged by this system in the coming years.

⁵ The OFT's 2011 review that was consistent with no transfer of value occurring in moving to a free of tie model

- iv. We are committed to working with our members, partner organisations and Government to ensure greater awareness and visibility of the work of PIRRS and PICA-Service, and the provisions of IFC Version Six.
- v. The BBPA does not believe that a statutory code, underpinned by a newly formed regulator, is a necessary or appropriate way forward. There is a real danger that the consultation proposals, which makes clear that objectives are not driven by concerns of competition, would create an uncompetitive market. The evidence offered of unfair behaviour is weak and at no stage have pub companies been given the opportunity to provide evidence to counter individual accusations. The impact assessment is wholly unsatisfactory, for reasons detailed below. The additional regulatory burden adds very significant costs to the pub sector and potentially has hugely damaging consequences in terms of additional pub closures, business failure and reduced consumer choice. These issues are barely acknowledged. We are also unclear as to the legal basis for proposals aimed simply at transferring value/property from one part of an industry to another on the basis of 'fairness' with no material benefit to wider society (and potentially the opposite, as changes will lead to pubs closing). As drafted, the Code could constitute unjustified interference by Government over BBPA members' possessions, in breach of Article 1, Protocol 1 of the European Convention of Human Rights.
- vi. The BBPA is also unclear as to what has changed from the Government response to the BIS inquiry in 2011 which clearly stated:

Whilst the Government recognises that pubs face a wide range of challenges in the current economic climate, it sees little evidence to indicate that tied pubs are more likely to close, as has been suggested. In addition, particularly in the case of the traditional tenancy model, the tie may actually play an important role in safeguarding the future of Britain's smaller breweries. Data produced by CGA Strategy clearly shows that between December 2008 and June 2011 more free-of-tie pubs closed than tied pubs, both in absolute figures and as a percentage of the total number of pubs in that category.

Much has been written, in the Committee's report and elsewhere, about the beer tie. In the evidence given to the Committee, parties on every side put forward strong views on the merits or otherwise of the tie; its role, purpose and effects; and what was meant by a 'free of tie' model. It should be noted that the beer tie is considered lawful practice due to the Block Exemption.

Government should not intervene in setting the terms of commercial, contractual relationships, where these are fully justified by law and have been found by the OFT to be raising no competition issues that significantly affect consumers. Fundamentally, whether or not a lease or tenancy includes a tie is a commercial decision on the part of both parties.

In terms of framing a solution, the Government therefore considers the debate over 'tied' or 'free-of-tie' to be largely a distraction. There is nothing in itself that causes the tie to be fundamentally wrong – and, in fact, in some instances, the tied model

Compared with the above Government response and preceding OFT report, the evidence base that informed the current decision to consult on a statutory code is severely lacking. The evidence received following Vince Cable's call for evidence in November 2013 consisted of 12 submissions from organisations and individuals, where no strong evidence was presented that a major statutory intervention such as the one proposed was required.⁶

- vii. This consultation and many of the questions asked seek to do precisely what the Government said it should not do in the quote above. Pub closures are due to much wider social and economic trends as well as the increasing tax and regulatory burden faced by pubs in recent years. The current rate of pub closures stands at 26 per week. Historically the trend shows that free-of-tie pubs are more likely to close than tied pubs. This is recognised in the impact assessment which highlights a 5% closure rate for free-of-tie pubs between 2010 and 2012, compared to a 3.4% rate for tied pubs. Since the start of 2009, 13% of free-trade pubs have closed compared to 10% of tenanted/leased pubs. Recent reports from the only major free-of-tie leased operator show that this company repossessed 9% of its entire estate from lessees over the course of 2012.
- viii. The recent duty reduction on beer was a hugely welcome step for which the Chancellor was rightly applauded. However, failure to recognise the resilience and advantages of the tied pub model in difficult economic times such as these and the likely consequences of many of the proposals in relation to the statutory code is in danger of undermining this boost and is clearly counter to the Government's own deregulatory and growth agenda.

Before answering the individual questions there are a number of key points, inaccuracies and assertions from the evidence-base and impact assessment we would like to highlight:

- ix. The number of 'complaints' to BII highlighted in the consultation (400 in three years) were in fact calls to a helpline. Other complaints noted are anecdotal. Stripping out non-complaints and based over a three year period, this is too small a sample on which to base new legislation and a statutory regulatory body costing over £1 million per annum; particularly bearing in mind many complaints may well have been easily resolved.
- x. The reference in the impact assessment to three out of ten licensees who would not continue to sign up with their current pub company being indicative of '5,000-10,000 unhappy publicans' is disingenuous. There are many other reasons why licensees may not wish to stay in their current pub aside from

⁶ [BIS website – Evidence](#)

problems with rent or the conduct of the pub company. As reported to BIS earlier in the year, in one major company only 9% of their tenants were unlikely or very unlikely to take another pub with this company, and applications to take on a pub are up 25%. For another company, there was a real increase in positive acknowledgement of the performance of BDMS, most of whom have now completed the BII training course. For a third, partners engagement with the company concluded with record attendance at road shows this year - 56% of the estate attended a road show, and 3,300 pubs out of 4,200 have voluntarily registered for the company's buying club.

- xi. Over the last four years 12 cases have been resolved through the rent review service PIRRS and another three have been considered by PIRRS with five active cases. This equates to less than one per cent of the estimated 5,000 'rent events' each year. This can hardly justify costly legislation or state intervention.
- xii. We would disagree with the assertion that there has been no culture change. The industry has moved a long way in the last two years in terms of self-regulation and the latest Code was supported by ALMR, which represents multiple licensee interests.
- xiii. "The tie gives an additional route of abuse" and being "tougher for tenants to know if they are getting a good deal" are simply assertions with no foundation as is "tied tenants are more likely to face serious hardship". This is simply not true as the tied model protects tenants/lessees when trade falls and this is reflected by a greater proportion of free-trade pub closures compared with tied pubs. The same section states "The fair working of the beer tie is particularly important because of the hardship many publicans face including the possibility of losing their home". This does not acknowledge that this is no different from the rest of the pub trade.
- xiv. The language of Section 3 of the consultation is emotive, with little if any substance to justify the Government action proposed. None of the above suggests the "proportionate regulation" which is the stated intention.
- xv. The main (and only) proposed benefit of the proposals, is to transfer between zero and £200 million from pub companies with a mid-point estimate of £102 million and at a cost of £2 million per year to the industry.
- xvi. This transfer value is based on the difference between an estimate of wet rents, the value of SCORFA⁷ benefits and the number of tied pubs covered by the adjudicator (24,000 quoted – although we believe this is a high estimate). In reality there is likely to be little if any transfer of value if proper consideration is given to the SCORFA benefits over the lifetime of an agreement and taking account of risk and reward. In this case there would be absolutely no justification at all for these proposals. Where and if transfer may occur, it would likely go to the larger, more profitable higher volume pubs (e.g. often operated by multiple operators).

⁷ Special Commercial or Financial Advantages – see paragraph 5.6

- xvii. If there were some transfer of value and/or pub companies had to change their business models or offer free-of-tie options, guest beer and no machine tie, this would almost certainly lead to huge job losses, brewery and pub closures and reduced investment in the sector.
- xviii. As drafted, the proposals would apply to short term tenancy agreements and tenancy-at-will agreements (TAW). Such agreements are often used by companies to allow tenants to 'try out' running a pub before signing a longer contract. By being brought into the scope of a statutory code, this would prevent companies from offering such agreements to the detriment of prospective tenants and lessees.
- xix. There is no estimate of what would be a significant increase in costs of self-regulation for those companies below the 500 pub threshold proposed, if larger companies are no longer covered by this. Since 2010, self-regulation has been funded by BBPA members at a cost of £4 million (the majority of which comes from the larger pub companies).
- xx. The consultation also proposes that this transfer of value would lead to *increased* investment in the sector. This would appear contrary to the reality where asset owners (the pub companies) commit very significant amounts of CAPEX to their estates each year (£8-£10,000 per pub) alongside £6,000 – £10,000 of SCORFA benefits. For example, a large amount of capital investment is needed to upgrade a pub. This is currently carried out by the pub company (c.£50,000 for a new kitchen) This in turn drives trade but would be unaffordable to many tenants on their own and is significantly higher than the £5,000 transfer of value proposed. It is very unlikely that banks would step in to replace the pub company's investment. The more likely scenario is increased pub closures.
- xxi. Whilst no figures are quoted in the consultation document, there is a presumption that tenants/lessees are being squeezed by unjustified rent increases. However, average rents in tied pubs fell by 5% in 2012, again reflecting the interest pub companies have in sustainable and profitable businesses.
- xxii. There is also no consideration of the balance between risk and reward between the different parties. A pub company generally bears a much higher risk with the return on the asset achieved over a much longer period. A new tenant/lessee can generally achieve a significant return for a very modest investment.
- xxiii. There is no assessment of the impact on pub companies of the proposed guest beer provision, or loss of the machine tie. This would have a very material impact on companies and create a significant distortion of competition above and below the proposed 500 pub threshold.
- xxiv. Option 3 in the impact assessment proposes a mandatory free-of-tie option. It recognises the many risks associated with this and the only benefit above and

beyond option 2 (a statutory code without a free-of-tie option) that is presented, would be to benefit high volume pubs often leased by multiple operators. This seems completely contrary to assisting pubs which are in need of help, with potentially disastrous consequences for pub companies and the wider industry.

- xxv. The online survey accompanying the consultation is deeply flawed. In a report for the BBPA, leading market research firm ComRes found that flaws in the survey “call into question the validity of any findings drawn from the results and therefore any conclusions drawn”⁸. The BBPA has written to the Head of the Civil Service, questioning the validity of any results, and requesting that that they be disregarded, with an objective way of assessing licensees’ views found.
- xxvi. ComRes states that the survey “*could appear to provide evidence of support for certain action where no such support exists.*” ComRes cites the use of “*leading introductory statements and questions in direct contradiction to rule B14_3 of the Market Research Society Code of Conduct which explicitly states that reasonable steps should be taken to ensure that ‘respondents are not led towards a particular point of view’.*” In one consultation question, for example, the assertion that self-regulation has not worked is presented as a fact, with no evidence, or an alternative point of view, provided. Several other examples are given in the full report. Problems were identified with the ‘routing’ of the survey, with respondents who were not licensees able to answer several of the questions. ComRes also discovered serious concerns with the survey’s security. It found that respondents can easily fill in the survey multiple times simply by setting their Chrome browser to ‘incognito mode’.
- xxvii. The BBPA has also raised the presence on the BIS website of a Youtube style film featuring the responsible Minister, Jo Swinson, and the Chief Executive of CAMRA discussing the need for Government intervention in the sector. This is wholly inappropriate for a Government website and biased towards one particular point of view.

⁸ See Annex C for full report

This could be a completely unwarranted and disastrous statutory intervention into a market which the OFT has repeatedly concluded works well for consumers

The responses to the questions below are predicated on the basis that we do not believe that the evidence supports the need for a Statutory Code and adjudicator.

1. Should there be a Statutory Code?

- 1.1. The BBPA does not accept there is a need for a Statutory Code.
- 1.2. BBPA firmly believes that self-regulation is working. The low-cost arbitration services of PIRRS (rent) and PICA-Service (breaches of the IFC) is in place to ensure any claims relating to abuse of the tied model are properly and swiftly dealt with. Self regulation also now ensures that potential licensees have to undertake suitable pre-entry training, as well as financial and legal advice before taking on a pub. Many of the current problems for licensees are historic with long leases taken on at a time of economic prosperity. Such businesses are now, as in many other sectors, suffering as a consequence of the downturn, and historic assignment of leases by licensees at a premium. Their pub company has little control over who buys the lease but still provides assistance and SCORFA benefits. This is a key point, as it reflects the changing and developing pub market. Leases taken on (i.e. bought directly from the previous lessee) often, as mentioned above, included a significant premium payment. In good economic times, such premiums were acceptable as the lease could be sold on for a higher premium to another lessee. However, the leased market changed and many lessees found themselves unable to sell on pub leases which they had acquired at significant premiums. Even though the pub company did not directly sell the lease to the lessee the relationship of support and additional SCORFA benefits remains in place. Many long-term leased pubs are currently in this situation.
- 1.3. No other industry to our knowledge provides such a comprehensive low cost mechanism for complaints. Longer established has been the PIRRS scheme for disputes surrounding rent where a panel of independent assessors consider rent adjustment proposals and are empowered to set rent as a result. The more recent PICA-Service scheme allows lessees and tenants to complain about anything else in individual company codes. Three or four cases have been heard, and many more have been resolved before they reach the PICA-Service panel. The low level of cases taken forward demonstrates the significant strides made by the industry in fair and transparent dealings between parties.
- 1.4. Version Six of the Industry Framework Code is now in place. BBPA spent almost a year in discussion with representatives of multiple lessees agreeing commercially sensitive changes to the Code. Version Six will be incorporated into all company codes throughout this year. Further evolution of the Code will be taken forward by the new regulatory board where both landlord and tenant interests are fully represented (with the majority of Board places going to tenant representatives) and behaviours judged by a voluntary system already in place which tied pub companies (large and small) have funded at a cost of £4 million since 2010, and £1 million per annum ongoing.

- 1.5. A statutory code would also result in a two-tier resolution system with significant cost implications for all companies. This would put an inevitable strain on the voluntary system.

2. 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 supporting evidence.

2.1. Do not agree.

2.2. The BBPA supports* a 500 leased/tenanted pub threshold, but on the basis that this **does not** lead to a material distortion in competition above and below this threshold. The current proposals to abolish the machine tie and offer a guest beer (which could be the pub's best selling lager) would materially distort competition.

2.3. We believe that property companies operating free-of-tie pubs (e.g. Wellington, Grosvenor Estates, National Trust) should not be covered by such a Code, as these agreements are no different from any other commercial lease on shops, restaurants, and other business premises. The pub owners in these circumstances are completely at arm's-length to the pub operation and have little, if any, involvement in the business or information regarding the performance of the pub. These pub owners also have minimal interest in whether the property is operated as a licensed premises, and therefore adding more onerous obligations via a Code could lead to companies switching the use of sites from pubs. Consideration should also be given to free-of-tie leases operated by companies which are caught by the code and the implications of this. Following the same principle these should also be excluded from any statutory code.

2.4. It would seem that the decision to include non-tied pubs in the 500 calculation stems from a concern that pub companies would just transfer some or all their pubs to be managed or free-of-tie pubs. This has to be a commercial decision for the company and they should be free to operate their estates in a way which works, and indeed stems from an incorrect view that landlords can switch pub operating type at will – tenants are under the protection of the Landlord and Tenant Act.

2.5. A threshold of 500 total pubs would have other unintended consequences. Companies such as J D Wetherspoon or Mitchells &

* Majority view

Butlers would be liable to pay for the Adjudicator under this proposal, despite the fact that they have none, or very few leased pubs. Pub companies with fewer than 500 pubs would be burdened if they were successful in growing their businesses to more than 500 pubs. In the current economic climate it is surely wrong to penalise businesses that are investing in their estates and growing.

2.6. We do however welcome the intention of Government to ensure smaller operators and brewers are not covered by such a statutory code, were it to be introduced.

3. 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?

3.1. As stated above the BBPA supports a leased/tenanted pub threshold (subject to the caveats surrounding distortion of competition above). The Code should only be binding on tied leased/tenanted pubs owned by the company.

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

4.1. Business models termed as franchises do exist within the pub sector, and a number of companies have had these accredited by the British Franchise Association. If franchises are regulated under the British Franchise Association they should not be covered by any Statutory Code. Companies operate the franchise agreement under the British Franchise Association Code of Ethics and have undertaken to comply with the BFA's Disciplinary, Complaints and Appeals Procedures, which provide systems and procedures for dealing with any disputes between the parties.

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

5.1. We do not agree with the costs and benefits stated in the consultation document regarding the impact the proposals would have on the pub sector. As outlined in the introduction to this consultation response, we have a number of concerns with the evidence base for the proposals, and the assumptions made by the Government in the Impact Assessment.

Benefits

- 5.2. The primary 'benefit' to the pub sector of the proposals is the transfer of (best estimate) £102 million from the pub owning companies covered by a Code to their licensees, working out at around £4,000 per pub. This transfer value is based on the difference between an estimate of wet rents, the value of SCORFA benefits (see below) and the number of tied pubs covered by the adjudicator (24,000). The impact assessment recognises this is very much a 'finger-in-the-air' exercise.
- 5.3. The number of tied pubs quoted to be covered by the Code – 24,000 – seems to us to be a high estimate. We would estimate that the figure would be nearer 18,000 which would in turn lower the estimate of the transfer of value from companies to pubs (by 25%).
- 5.4. In reality there may be little, if any transfer of value if SCORFA benefits are greater than the difference in wet rent and indeed other considerations are properly taken into account. In which case there would be absolutely no justification at all for these proposals. There are other important factors to consider such as risk to pub viability (see answer to Q7), consideration of value over the lifetime of agreements, risk to investment, balance of risk and reward, the reality of the rent assessment process at individual pub level, and unquantifiable benefits such as ease of surrender. There is also no such thing as a free-of-tie traditional brewery tenancy. Indeed, there are only c.1,500 free-of-tie leased pubs in the UK with which to compare.
- 5.5. Therefore we do not believe the proposed calculation of "no worse off" under a Statutory Code and consequent transfer of value is an acceptable or indeed practicable proposition.

SCORFA

- 5.6. SCORFA – Special Commercial or Financial Advantages – was introduced in 1984 by the European Union in Regulation 1984/83, as part of the Block Exemption regulations. In essence, SCORFA represents the commercial, financial or other advantages that the tenant or lessee receives when taking on a tied agreement. SCORFA as a legal concept was repealed in successive Block Exemption regulations. However, it still remains integral to how the tied model operates and has become an accepted concept. There is no one fixed definition of what constitutes SCORFA as different company operating models and different pub agreements will vary, and is a feature of competition between pub operating companies – attempting to mandate this could lead to legal issues. Features of SCORFA benefits include:

- 5.6.1. Commercial benefits offered by pub operating companies rather than the licensee having to source and pay for these themselves – these could include licensing training, BII membership, cellar training, Business Development Manager contact and assistance, marketing, advice on websites/social media, internal sales tools, commercial services, insurance. Pub companies provide SCORFA from their wholesaling/product margins reflecting economies of scale.
- 5.6.2. Rental benefit – tied pub leases and tenancies offer lower fixed rents than commercial property transactions, where the rent is set according to the value of the property, its location and square meterage of the building, compared to pub rents calculated usually via barrelage and Fair Maintainable Trade (FMT). The variable or 'wet' rent paid to the company for drinks products also benefits the licensee, as this will vary in level according to the volume of trading at the pub rather than being a fixed cost with no account taken of the success of the business.
- 5.7. As mentioned above, there cannot be a mandated definition of all SCORFA elements, as the Government is proposing to do in this consultation, as each pub rent is decided on the basis of the amount of SCORFA benefits available, or that the tenant wishes to take up, and the type of agreement signed. Evolving competition between pub companies to attract the best tenants and lessees has resulted in a range of SCORFA benefits being developed and offered. It would be a retrograde step to attempt to codify such benefits and in some cases it would not be possible to make this public due to commercial confidentiality.
- 5.8. Even if this were possible there is a judgement to be made as to both the financial value of any benefit, which may well be different to a pub operator and a licensee and indeed the value of a particular benefit to a party with a short term outlook and tenure and a party with a long term outlook. As mentioned some more intangible benefits such as ease-of-surrender are also hugely difficult to quantify as is putting a value on risk and reward.
- 5.9. However to demonstrate the significance of SCORFA benefits offered, IFBB members, which primarily offer traditional brewery tenancies, undertook an exercise with an independent third party to produce broad estimates of current key SCORFA benefits. BBPA separately asked member companies with over 500 pubs (and with a wide mix of tied leases and tenancies) to provide this information.
- 5.10. As expected there were a vast range of benefits listed which could be broadly classified around consultancy/business support, legal and compliance, property, membership and subscriptions, marketing /PR and training but with many sub-categories/elements listed within these. Benefits also include a mixture of capital and revenue support.

The results were as follows:

	Average level of support per pub*
Business/legal/property/marketing /training etc**	£6,000 - £10,000 p.a
CAPEX support funding	£8,000 - £10,000 p.a
Additional direct financial/cash support	£1,000 - £5,000 p.a.

**Average data provided so there is will be wider variation at individual pub level.*

*** It should also be noted that levels of support are calculated on a net cost to pub company basis.*

The free-market equivalent of sourcing these benefits elsewhere (which would be a truer reflection of the value of benefits could add a further premium of up to 50%).

5.11. The other suggested benefit of the proposals set out in the impact assessment include increasing the incentive for licensees to invest in their pub, while decreasing the incentive for the pub operating company to invest. The Government concedes that this benefit is not likely to be large. Our view is that in reality, licensees would not be able to invest in their pubs to a level comparable with the significant amount of investment by pub companies in their estate each year as shown above. The Government has acknowledged in other sectors that bank lending is hugely difficult to obtain. Bank lending to pubs is almost non-existent. It is difficult to understand how the Government thinks pub company investment is to be replaced.

5.12. The cost of the adjudicator is estimated at £900,000 per year (best estimate). The current assumption made in the document that the code will cover seven companies is incorrect, and will impact on the calculations regarding the cost to each company, currently estimated at £168,000 per pub company. We would also point out that as currently proposed, managed and free-of-tie companies would be liable for adjudicator costs (such as compliance officers etc.) despite not having any pubs that would be covered by the Code itself. This will therefore increase the costs to pub operating companies. There will be costs to those companies with under 500 pubs operating under the self-regulatory system, as the larger companies will no longer be part of this system and costs will inevitably be higher.

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

6.1. The BBPA fully supports self-regulation within the industry, and believes great progress has been made in recent years with strong evidence that the system is working well. We and our members are committed to ensuring that, despite Government intervention, the self-regulatory system will continue for companies below the threshold.

Inaccuracies regarding self regulation in the Government proposals

6.2. To emphasise the current extensive self-regulation already in place within the industry, we would like to point out that the impact assessment (section 33) contains out-of-date information. The pub sector published in February 2013 Version Six of the Industry Framework Code (IFC) - not Version Five as stated in the IA. Version Six of the Code is a major step forward from Version Five as it provides greater transparency for tenants and lessees and seeks to tackle a range of more commercially sensitive issues. In summary, the new reforms include:

- Companies which operate more than 100 leases will be required to publish an annual statement of Code compliance which will be externally audited
- Greater clarity is provided around insurance and a commitment to price-match on like-for-like policies
- A clear commitment that income from AWP machines can only be shared once and will not also be included in the rent assessment
- A schedule of conditions which clarifies obligations on any remedial work required
- Common formats for shadow profit & loss accounts and rent assessments
- An improved protocol on flow monitoring equipment

We are committed to working with our members, partner organisations and Government to ensure greater awareness and visibility of the work of PIRRS and PICA-Service, and the provisions of IFC version six.

6.3. The Code also reflects a commitment to establish a new Regulatory Board to oversee the corporate governance of BIIBAS, which accredits all company codes, and the PIRRS and PICA-Service panels, which have already been successfully established and provide independent, low-cost arbitration services for rent and other disputes. This commitment has been advanced recently, with the Regulatory Board set to be in place with both tenant and pub company representation.

6.4. There are a number of unfounded assertions regarding the self-regulatory system within the impact assessment and consultation document which we would question, particularly as the view that self-regulation has 'failed' is part of the Government's rationale for proposing such a Statutory Code. The assertions include:

- *'Some in the industry are not convinced the code is legally binding'* – it is not clear to whom this refers. The legal status of the IFC is made clear in Version Six and has been tested by the Government's own lawyers before the Government's response to the last Select Committee was published.
- *'Even positive developments like PICAS are divisive with its independence being questioned'* – this again is an assertion, with subjective evidence being presented to back this statement up. There is a large amount of support for PICA-Service within the industry and recognition of its fair and positive operation for both companies and tenants. The Panel for PICA-Service comprises experts who are tenants and lessees and represent these organisations.

6.5. The Government states that self-regulation is *'likely to continue to deliver small improvements in the treatment of licensees, however continued widespread complaints of abuse...mean improvements will be limited'*. We disagree with this view, and see self-regulation as delivering important and far-reaching changes in terms of improvements made in landlord-tenant relations and transparency around lease and tenancy agreements.

The future of self-regulation

6.6. We have set out our views above on the real progress made with regard to self-regulation in the pub sector in recent years. However, the BBPA and its members are prepared to do more to ensure that self-regulation is as effective and transparent as possible and is delivering measurable results. This has already begun with the establishment of the Regulatory Board, with tenant representation, to oversee all of the self-regulatory structures in place and ensure they are operating effectively. In addition to this, we propose:

- To review the self regulatory system regularly – a suggested timeframe is every three years – by an independent body or person;
- Promote PIRRS, PICA-Service and the provisions of the Code across the entire leased and tenanted sector and raise awareness;
- Promote greater transparency around the results of self-regulatory cases, and their resolution and resultant action
- Greater transparency around all the benefits offered by SCORFA.

The BBPA is committed to the Industry Framework Code and self-regulation, and will aim to improve it where possible.

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

i. Principle of Fair and Lawful Dealing

7.1. Member companies are totally committed to fair, transparent and lawful dealing with tenants and lessees and all other business partners and to stamping out any abuse of the tied pub model, as has been proven by their implementation of the self-regulatory system.

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

7.2. To retain and attract effective licensees, pub owners do need demonstrate the benefits of taking on a tied lease or tenancy and we support further transparency in this area. Individual pubs are however unique and the proposed quantifying of individual benefits (SCORFA) and linking to rent calculations is not practicable, as discussed more fully in the answer to Question 5.

7.3. There are also relatively few companies operating free-of-tie long leases (and no company operates free-of-tie short term tenancies), and probably less than 1,500 in total (3% of all pubs) with one company (Wellington) operating over half of these. Therefore it would be very difficult to establish a basis for comparison with a tied tenancy or lease agreement on a comparable local level.

7.4. Rents of free-of-tie outlets are often set with a lack of knowledge regarding outlet performance and limited information due to the arms-length relationship between the lessee and the pub company. Free-of-tie rents will also be affected by the economic climate, as well as the availability and cost of finance to purchase freehold premises.

7.5. We support greater transparency around SCORFA (and what constitutes SCORFA) and where possible these should be quantified and set out. However this cannot be in a formula directly linked to rent assessments, for the reasons outlined above. As RICS makes very clear – rent assessments are an art and not a precise science.

8. 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

8.1. A number of pub operating companies already have this provision in place within their own company codes.

- if the pub company significantly increases drink prices or if an event occurs outside the tenant's control.

8.2. Many members of the BBPA set out in their individual company codes when and how they can increase prices and the Industry Framework Code requires them to provide notification of any imminent changes. There is no evidence that pub companies do make 'significant increases' in drinks prices – indeed the OFT response to the CAMRA super-complaint on this issue concluded that:

8.3. *We consider that in the context of this sector, where an individual pub company generally faces significant competition from other pub operators in the downstream retail market and where the characteristics of the market do not offer conditions in which coordination between the large pub companies is likely to be sustainable, pub companies will not be in a position to sustainably inflate prices charged to lessees above a competitive level.*

8.4. *'If pub companies do not ensure that their lessees are well placed to provide a competitive offer to customers, those pubs risk losing custom to other tied, free house and managed pubs in their locality. For these reasons, we do not consider that it would be sustainable for pub companies to set prices and rents at a level that would compromise the competitive position of pubs within their estate...to that extent, pub companies' commercial interests would appear to be aligned with the interests of their lessees', and it would not appear to be profitable for pub companies to inflate the beer prices and rents charged to their lessees to a level that would undermine their lessees' ability to compete effectively.'*⁹

We would welcome further definition around what constitutes an event outside of the tenant's control.

⁹ CAMRA Super-Complaint –OFT Final Decision (October 2010) p.125-126

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.

8.5. We support greater transparency of SCORFA benefits. This would highlight the key benefits of the tied model to prospective tenants and lessees at rent assessment time.

8.6. However we do not believe it is possible to lock these into rent assessments on an individual pub basis where every pub is unique and rent is part of a commercial negotiation. This would have to be illustrative over the life of the agreement, and over the entire company estate. There is also the issue that in relation to 'traditional' brewery tenancies in particular, there is no equivalent free-of-tie model with which to compare rent assessments.

8.7. SCORFA differs between each pub operating company as it uses commercially sensitive information and is a point of competition to attract the best tenants. Therefore, mandating it removes this element of competition and reduces competitiveness within the sector.

8.8. SCORFA benefits are secured via economies of scale enjoyed by pub operating companies. Mandating SCORFA will impact on the ability to provide such scale benefits.

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

8.9. Do not agree. Restricting what may or may not be tied in this way for companies over 500 pubs would lead to a market distortion between these operators and smaller companies.

8.10. We would support a free-of-tie option on AWP machines, whereby tenants and lessees could choose whether to take up the offer of a machine supply agreement with a company rather than closing this option off completely. Indeed, this is the case already with most major pub companies where tenants do not have to tie for machines, but are given the option of doing so. As noted above, lessees of companies with less than 500 pubs would still be able to take up a tied machine offer if they so wish leading to distortion of competition in the pub machine sector.

8.11. An issue that could arise with the removal of the machine tie could be a lack of access for tenants to vetted and managed suppliers, and the key principles of the Gambling Act may not be upheld (keeping gambling crime free etc.).

8.12. Benefits of the machine tie include:

Operational benefits

- Members report that the average age of an AWP in free trade houses is two and a half years, whilst in tied estates this is nearer one year – the pub company is able to source good quality new machines for their estate which in turn means higher net cashbox as players prefer these machines
- Supplier accounts are vetted to ensure that they have adequate funds for capital investment
- Suppliers can be denominated, or be penalised through loss of business for poor standards or performance
- Pub companies set income target objectives for suppliers and monitor performance
- Licensees are advised of the best performing Suppliers should they wish to change
- Pub companies monitor fraud on note and coin acceptors
- Pub companies monitor machine break-in and robbery patterns

Contracts

- Tied licensees do not have to enter into supply agreement with a supplier for a given term.
- They have the freedom to select a supplier from a professionally vetted nominated list
- Some free trade machine supply contracts are onerous either due to the length of term or the fixed rental cost
- In the free trade older machines can be supplied on rents which are commercially unreasonable due to the lack of licensees specialist knowledge

Legal compliance

- Suppliers approved by the pub company will ensure that machines aren't installed without the correct licenses and permits - this is not always the case with all machine suppliers
- No illegal machines will be supplied by approved suppliers. Again this is not always the case with other suppliers and there are regular instances of illegal machines being offered to tied pubs. This risk can only be policed by approved suppliers and the pub companies because the licensees don't have the expert knowledge to be aware of current machine legislation
- Tied suppliers will apply for the necessary permits on behalf of licensees if requested
- Tied collection service removes an accounting burden for licensees ensuring that MGD and VAT are calculated and declared accurately

Maintenance of product quality

- Companies ensure by contracted arrangements that a minimum number of new machines are purchased for tied estates each month
- Product test data is gathered from a range of sources weekly and consolidated to ensure that the best machines are purchased for use in tied estates

- All machines supplied into tied estates comply with Gambling Commission regulations for both AWP and Skill with Prize machines.
- Legislative machine changes are monitored and flagged to suppliers to maintain licensee income
- Rent/net income ratios are managed to ensure that over-renting doesn't happen

Managing the supply chain

- The UK's only remaining volume AWP manufacturer was purchased by an Austrian company which then tried to increase the price of machines by 60%. This would have been a substantial additional cost to publicans, but the buying power of the pub companies enabled them to resist this and encouraged and supported new entrants to the market thus ensuring a competitive market and suppressing price increases for licensees.
- The constant demand for new products driven by pub companies stimulates manufacturing and supports jobs.

8.13. The above benefits would be lost if the proposals went ahead as drafted. A further point to note is that if the tenant went free-of-tie on machines then the income from the machine would be included as part of the divisible balance and therefore taken into account when rent levels were assessed – whereas under the current tied model income from machines (IFC v.6) cannot be included in the divisible balance. This could result in licensees being no better off under free-of-tie proposals as the cashbox would be rentalised.

8.14. Mandating that only drinks products may be tied has serious competition issues and would restrict opportunities for licensees to take advantage of benefits provided by pub company economies. For example, some tenants choose to buy their food through their company which offers benefits such as quality of supply, lower cost of food goods, marketing and waste management. Removing the tie for anything other than drinks would impede the ability of the sector to evolve and lessen opportunities for pub operators that wish to take up machine or food supply agreements with their company.

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

8.15. Do not agree. The 'guest beer' option is defined as 'the tenant should be allowed to purchase and sell one draught beer from any source'. The consultation document justifies the inclusion of such an option by claiming 'it may be of benefit to both the tenant, consumer and independent breweries'. There is no evidence to support this assumption and it would lead to competition issues where pub companies brew their own beer. Pub companies already offer a wide variety of choice for tenants within their existing supply agreements.

8.16. There could also be unintended consequences for local breweries. With the guest beer provision as currently drafted, there would be

nothing to prevent licensees from sourcing their most popular beer (in most cases standard lager) from larger brewers or wholesalers....

8.17. The Society of Independent Brewers (SIBA) operates a Direct Delivery Scheme (DDS) with the largest pub companies. Independent breweries receive orders and distribute them immediately to the pub via the pub company – Enterprise Inns alone offers 1,350 cask ales from 380 small and microbreweries via this scheme. Punch Taverns operates its own similar scheme allowing a wide range of guest beers.

8.18. For members of the BBPA which own breweries, this proposal will lead to brewery closures. On average, breweries make a profit of 1p or 2p per pint. Their success and viability depends on distribution. If a guest beer is mandatory for companies owning over 500 pubs, there is little doubt that breweries will close as a result.

8.19. The guest beer option will also favour operators doing well with higher beer volumes.

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

8.20. Do not agree. There is no evidence presented in the consultation as to why flow monitoring equipment should not be used as part of the process to determine if a tenant is not complying with purchasing obligations.

8.21. The argument made in the consultation document, that the 'model of the tied public house has been part of the British pub industry since at least the 18th century...it is therefore completely possible to operate a tied estate and to enforce the tie without the use of flow monitoring equipment' is flawed. It is disingenuous to compare the technology available in the 21st century with that available 300 years ago as a reason not to use flow monitoring equipment as a tool in determining whether purchasing obligations are being breached.

8.22. The current Industry Framework Code has a flow monitoring protocol which must be included in individual company codes stating that flow monitoring equipment cannot solely be used as evidence that a breach of contract has occurred. We would support this as a fair and reasonable position to take in any statutory code.

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

9.1. We have dealt with a number of the issues raised by the proposed Code in answer to the questions above. Looking at the draft Code itself at

Annex A of the consultation, we would make the following observations in comparison to the current IFC:

9.2. In general there is no distinction made between leases and tenancies in the Statutory Code as compared to the IFC Version Six. Operators of both leases and tenancies covered by the Statutory Code will be subject to the same obligations, which is currently not the case.

9.3. Definitions in the introduction to the Code:

9.3.1. 'Tenant' – explained here as meaning the person to whom the pub is assigned as either a lease or a tenancy (irrespective of which type of agreement) yet the Code itself (notably Part 6 – Miscellaneous Provisions) refers to separate 'lease' and 'tenancy' agreements which is inconsistent and confusing;

9.3.2. 'Pub' – attempting to define a 'pub' is always a difficult task, and defining it within legislation such as this could lead to unintended consequences. The definition set out in the Code could exempt food-led non-managed pubs, or indeed include premises which otherwise could be classed as 'restaurants' if they have a high level of food turnover and have no specific licensing conditions relating to consuming food at the premises;

9.4. The majority of Part 2 of the Code 'Pre-contractual Negotiations' is taken from the current IFC. However, as noted above, it is taken primarily from the leased section of the IFC and as such will introduce onerous obligations on tenants and tenanted operators;

9.5. Part 2 also simplifies a number of the obligations set out in the IFC, potentially making it less onerous on pub companies subject to the Code compared with companies subject to the voluntary IFC;

9.6. Part 3 – rent assessment statements: It is not clear throughout this section as to the difference between an initial rent assessment provided to a tenant going into a new pub and existing tenant rent reviews which will lead to confusion;

9.7. Section 20 makes it illegal to enforce an UORR clause – this is already in the IFC but will apply to companies currently outside this scope. This would place pubs at a commercial disadvantage from other uses such as shops, offices, restaurants and factories retain UORR clauses;

9.8. Part 4 of the Code contains the majority of the new obligations on companies, we comment on these in answer to Question 8 above.

9.9. Part 5 – BDMs contains a number of obligations not included in the IFC regarding BDM training etc.

9.10. Part 6 – Miscellaneous provisions

- 9.11. Section 33: New obligations here include incorporation of Code by next rent review (inconsistency here again regarding the definition of 'rent assessment' to cover both reviews and initial assessments for new tenants);
- 9.12. Section 37: More onerous obligations for tenants/tenanted companies regarding 'keeping' or 'putting' the pub in good order as these are different requirements for leases and tenancies and will cause problems if they have to be adopted by traditional tenancies;
- 9.13. Part 7 - pub company codes of practice: does not require those subject to the Code to produce a separate IFC compliant code;
- 9.14. Parts 8 and 9 deal with the statutory adjudicator and related dispute resolution and so are above and beyond anything within IFC version six;
- 9.15. Annex A – rent assessment statements – this differs from that within the IFC as it includes hypothetical free-of-tie option as comparator.

10. 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?

- 10.1. As proposed above, we have committed to reviewing the self regulatory system regularly (suggested every three years) and we would expect the Statutory Code to be reviewed (transparently and independently) on the same timescale.

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

- 11.1. The BBPA does not agree that a mandatory free of tie (FOT) option should be included in the Statutory Code. A mandatory FOT option would have serious unintended consequences for the entire pub sector, a number of which are identified in the consultation:

- 'In the short term there will be higher costs as a result of lost economies of scale...these are likely to fall disproportionately on lower volume pubs...this may also lead to some pubs becoming unviable and closing'
- 'Choice is likely to suffer' as market could be foreclosed by large international brewers offering exclusive brands

- 'Removing the surety of the tie would reduce pub owning companies' incentive to invest'
- 'The impacts could include higher costs for consumers, the exit of one of the major pub owning companies and/or dominance of the market by large international brewers'

11.2. Even a significant minority of tenants taking up a mandatory free-of-tie option could be enough to render a pub company's infrastructure unviable, as the free-of-tie tenants would not be contributing to its support. Companies are unlikely to be able to operate a hybrid free-of-tie and tied estate on a large scale, and would have to move towards a fully free-of-tie estate (along the Wellington model) with a purely rent-based commercial property relationship.

11.3. BBPA instructed Compass Lexecon to undertake an independent study into the potential consequences of the current BIS proposals and particularly the impact of the mandatory free-of-tie option.

11.4. Compass Lexecon is one of the world's leading economic consulting firms. It provides expert economic advice on competition policy, economic and financial regulation, public policy and the assessment of damages in complex disputes.

11.5. Compass Lexecon modelled the impact of the BIS proposals using data about 13,000 pubs provided by BBPA members who would be impacted by the proposals (i.e. those which operate over 500 pubs). The results were then scaled to assess the impact on all 16,000 pubs covered by the BIS proposals. The full report has been provided to BIS.

11.6. The key findings are as follows:

- If all licensees exercised the mandatory free-of-tie option, this would lead to a further 2,300 pub closures with the loss of 18,400 direct jobs. Almost half of these jobs would be among 18-24 year olds
- A further 10,000 indirect jobs in the pub supply chain would also be lost
- The overall annual reduction in the economic value generated by the sector caused by the pub closures would be £600m
- Pub companies invest an average £8-10,000 per pub per annum across the sector. Their incentive and ability to continue with this programme is greatly reduced. Under a commercial lease, fixtures and fittings are paid up front and rent is paid quarterly in advance. These changes would contribute to an increase in licensee up-front costs from just £12,500 on average to almost £47,000
- The net effect of these latter two points is almost certainly to be further acceleration of pub closures and job losses, as many licensees are

likely to be unable to generate the additional borrowing and investment required from banks and elsewhere.

11.7. Tenanted/leased pubs stock more cask ales than independent free houses and therefore there is likely be a reduction in cask ales available to consumers. CGA data shows tenanted/leased pubs are more likely to stock cask ale pubs than independent pubs and stock a greater range – 81% of leased/tenanted pubs stock cask ale compared to 60% of free trade pubs. Leased/tenanted pubs that do stock cask ale have an average of five ale brands on offer, compared to three brands in independent pubs.

11.8. Compass Lexecon did not model the impact on UK brewing but closures of breweries and/or brewers divesting their pub estates would be a real threat under a mandatory free-of-tie regime and many small brewers would be denied an effective and efficient route to market. Third parties benefiting from any transfer of value from pub operators would also have less incentive to invest in the sector.

11.9. There are a large number of free-of-tie pubs in the current market, therefore presenting a licensee who wishes to take on such a business with a range of choices. Offering such a model should not be forced upon a pub company or brewery that has decided that this model does not offer a sufficient return or allows for sufficient business support.

11.10. Free of Tie will mean a loss of SCORFA benefits for lessees and tenants. As covered in earlier paragraphs a free of tie option would remove these benefits and leave tenants and lessees looking for funding which will prove difficult to find in this economic climate. For almost all pub companies, the vast majority of prospective tenants are looking for the pub company to take more of the risk as their access to finance is so limited.

11.11. We recognise that a rational tenant would not exercise the option to go free-of-tie if they anticipated that this would make them worse off. He/she could be worse off either because the lower cost of beer did not compensate for the loss of SCORFA benefits in the short term, or because the company would close the pub in the longer term.

11.12. However, tenants may elect to go free-of-tie, even if it would lead to the closure of the pub, for a variety of reasons including:

- The tenant may perceive short term benefits from going free of tie and be less concerned about the long-term (e.g. because of short-term financial pressure or because the tenancy is near the end);

- The tenant may not consider the pub company's' concerns credible that the pub would not be viable from its perspective under a free-of-tie model;
- The tenant might assume that mandatory FOT, as a regulatory option, is likely to be in their interest.

In addition to the above, the pub industry offers a wide range of agreements within the tied model – giving flexibility and choice for tenants who wish to take up different options with pub companies, family brewers and property companies (such as fully tied, partially tied and free of tie). By imposing a rent setting formula, which in effect this consultation is proposing, this choice of model and the future evolution of the pub industry will be under threat. Free of tie options already exist in the sector, but overriding the market through legislation will have real unintended consequences.

12. 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?

12.1. The BBPA believes that the self-regulatory system and SCORFA already delivers this (see response to Q11).

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

13.1. Under the IFC, PICA-Service already provides an independent conciliation and arbitration service for complaints around company conduct, and PIRRS for rent reviews.

13.2. The Groceries Code Adjudicator was introduced after a specific OFT complaint. There was no such complaint against the pub sector, indeed the OFT concluded there were no competition breaches in the industry and that it was working well. Furthermore, the Grocery Adjudicator has no rights to interfere or arbitrate commercial decisions, simply to punish abuse. The comparisons with the Grocery Code are flawed and misleading.

13.3. Any adjudication system should be as cost effective as possible and impose the minimum of red tape on the industry. We believe the cost estimates for the Adjudicator as stated in the Impact Assessment are low, and in reality are likely to be higher – especially taking into account the arbitration function outlined in the answer to Question 14. This should not be underestimated – the consultation likens a lack of

adjudicator to 'a sports match with rules but no referee' which we would argue is simplistic in the extreme. The adjudicator would have to arbitrate on 'issues (such as rent) that will be specific to each pub' which leads to the conclusion that this hypothetical sports match would have thousands of players on the field where one referee would have to deal with each disputed tackle on an individual basis. For example, it is estimated that there are around 5000 'rent events' (reviews, renewals, new agreements) across the leased/tenanted sector each year.

13.4. The consultation document also uses the Groceries Code Adjudicator as the prime template for how this process will work. The fact that the supermarket sector and the leased/tenanted pub sector are very different business models means that a straight assumption that both Adjudicator functions will be similar should be treated with caution. The Groceries Adjudicator has no power to arbitrate or influence commercial decisions (such as rent), simply to punish abuse – a major difference with the proposed pub sector Adjudicator.

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

(i) Arbitrate individual disputes?

14.1. There are already a number of services that are available to tenants to arbitrate disputes:

- PICA-Service (disputes relating to breaches of the IFC)
- PIRRS (disputes relating to rent reviews)
- Via the court system over contractual disputes
- Other established arbitration bodies (ACAS)
- RICS also operate a resolution service

14.2. The consultation states that 'it is our assessment that no pubs should become unviable as a result of this policy, as profit is only moved from one party to another. If a pub had been viable prior to the policy, it is our view that the tenant and pub owning company could reach a commercial negotiation that maintained the pub's viability'.

14.3. In essence, this means that where the proposals make the pub unviable from a pub company point of view, then the company and tenant will negotiate to ensure viability. This means that if equivalence were to cost, for example, £5,000 and that made the pub unviable from a company perspective then the actual transfer amount would be less.

14.4. Subsequent discussions with DBIS on the above point suggest that it is the intention of the Government that the Adjudicator should step in to

arbitrate and determine the actual transfer amount in such a situation. This is not made clear in the consultation document and the costs of such arbitrations are not set out in the impact assessment. This would increase the costs of the Adjudicator exponentially as there would be potentially hundreds, if not thousands, of rent reviews each year on which the Adjudicator would have to arbitrate.

(ii) Carry out investigations into widespread breaches of the code?

14.5. Investigations into breaches of the Code would have to be based on sound evidence, and specify where exactly the Code has been breached. Systems should be in place to prevent vexatious and speculative complaints being escalated, with the resultant time and financial cost of unnecessary investigations.

14.6. Under the Groceries Code Adjudicator, a draft report is issued to the retailer identified as having breached this Code with the opportunity to comment. This provision should be reflected in the pub company code.

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

(i) Recommendations

(ii) Requirement to publish information ('name and shame')

(iii) Financial penalties

15.1. The consultation contains no detail of appeals process for companies. Recourse to such a system should be in place to prevent unfair decisions being reached.

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

16.1. We do not accept the need for a costly and bureaucratic Adjudicator. Under the self-regulatory system, company codes are re-accredited every three years. A simpler and more effective system would be to have the IFC itself reviewed independently every three years.

16.2. If it decided to create the regulatory Adjudicator function, a regular review of whether the Adjudication system is effective, and more importantly, actually required is vital. If for example the number of

complaints to the Adjudicator were extremely low (or indeed non-existent) a judgement would have to be made as to whether it was required at all.

17. Do you agree that the Adjudicator should be funded by an industry levy, with companies who breach the Code paying a proportionally 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?

17.1. The impact on the industry and consumers of setting up such an Adjudicator should be as limited as possible. As stated above, we believe the cost estimates of such a regulator are too low. There is the danger of regulatory creep by such a body, and suggest a cap on the budget of the Adjudicator to minimise the impact on the pub sector.

17.2. The Levy as proposed will be paid by pub companies covered by the Code, in proportion to number of pubs owned. In second and subsequent years of the levy, it is suggested that those who breach the Code pay more. However, this still does not address managed companies and FOT companies having, as proposed, to pay into the Adjudicator system despite having no pubs that are actually covered by the provisions.

**BBPA
14.06.2013**

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GLOSSARY OF TERMS

ALMR	Association of Licensed Multiple Retailers
AWP	Amusement With Prize (Category C Gaming Machine)
BBPA	British Beer & Pub Association
BRM/BDM	Business Relationship Manager/Business Development Manager
BII	British Institute of Innkeeping
CAMRA	Campaign for Real Ale
CAPEX	Capital Expenditure
DDS	Direct Delivery Scheme
FOT	Free-of-tie
IFBB	Independent Family Brewers of Britain
IFC	Industry Framework Code
MGD	Machine Games Duty
OFT	Office of Fair Trading
PICA-Service	Pubs Independent Conciliation and Arbitration Service
PIRRS	Pubs Independent Rent Review Scheme
RICS	Royal Institute of Chartered Surveyors
RPI/CPI	Retail Price Index/Consumer Price Index
SCORFA	Special Commercial or Financial Advantages
SIBA	Society of Independent Brewers
TAW	Tenancy at Will
UORR	Upward Only Rent Review

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 ANNEX A – List of BBPA members as at 14 June 2013

AB Inbev Admiral Taverns Ltd Adnams plc Arkell's Brakspear Pub Company Budweiser Budvar UK Ltd C & C Group plc Carlsberg UK Camerons Brewing Company Charles Wells Ltd Daleside Brewery Ltd Daniel Batham & Son Ltd Daniel Thwaites plc Diageo plc Elgood & Sons Ltd Enterprise Inns plc Everards Brewery Ltd Frederic Robinson Ltd Fuller Smith & Turner plc George Bateman & Son Ltd Gray & Sons (Chelmsford) Ltd Hall & Woodhouse Ltd Harvey & Son (Lewes) Ltd Heavitree Brewery plc Heineken UK Ltd Heron and Brearley Ltd Holden's Brewery Ltd Hook Norton Brewery Co Ltd Hydes Brewery Ltd iNTERTAIN Ltd JC & RC Palmer Ltd J D Wetherspoon plc J W Lees & Co (Brewers) Ltd Joseph Holt Ltd Kurnia Group Liberation Group Maclay Group Ltd	Marston's plc McMullen & Sons Ltd Miller Brands (UK) Ltd Mitchell's of Lancaster (Brewers) Ltd Molson Coors Brewing Company (UK) Ltd Punch Taverns plc R W Randall Ltd Robert Cain & Co Ltd Route Organisation Ltd S A Brain & Co Ltd Shepherd Neame Ltd St Austell Brewery Co Ltd T & R Theakston Ltd The Black Sheep Brewery plc The Felinfoel Brewery Co Ltd Thomas Hardy Brewery/Packaging Ltd Timothy Taylor & Co Ltd Titanic Brewing Co Ltd Wadworth & Co Ltd Weston Castle Ltd Young & Co's Brewery plc
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ANNEX B – Legislation, reports and inquiries affecting the public house sector since 1969

- 1969 "Beer - A Report on the Supply of Beer" - The Monopolies Commission No.216.
- 1969 "Beer Prices" - National Board for Prices and Incomes Report No. 136 Cmnd 4227.
- 1977 "Beer Prices and Margins" - Price Commission Report No. 31.
- 1979 "Bass Ltd. - Wholesale prices of beer and prices in managed houses" - report by Price Commission. HC 109.
- 1979 "Whitbread & Co. Ltd. - Wholesale prices and prices in managed houses of beer, wines, spirits, soft drinks and ciders" - report by Price Commission. HC 110.
- 1981 Report by the Monopolies and Mergers Commission (MMC) on "Full-line forcing and tie-in sales". HC 212.
- 1983 Issue by European Commission of Regulation 1984/83 (adapting the "Block Exemption" Regulation 67/67 under the Treaty of Rome) applying to exclusive purchasing agreements with subsequent guidelines. There had been a detailed investigation of the tied pub industry prior to the Regulation being issued.
- 1987 Investigation by Office of Fair Trading (OFT) which led to their recommendation that an industry review should be undertaken by the MMC.
- 1989 Report by the Monopolies and Mergers Commission entitled "The Supply of Beer" (Cm 651).
- 1989 Statutory instrument entitled "The Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices)" (SI 2258).
- 1989 Statutory instrument entitled "The Supply of Beer (Tied Estate)" (SI 2390).
- 1989 Review by Agriculture Committee of House of Commons into the Supply of Beer.
- 1992 (November 1st) Deadline for compliance with DTI Orders regarding disposal of pubs.

- 1993 Inquiry by the Agriculture Committee into the Effects of the Beer Orders. HC 402.
- 1995 Inquiry by the OFT into the wholesale price of beer charged by brewers to tied customers and to the free trade.
- 1995 Inquiry by Trade and Industry Committee of the House of Commons into competition policy included a review of the 1989 MMC inquiry into the supply of beer.
- 1996 Commencement of review on vertical agreements by European Commission
- 1997 European Commission issued green paper on vertical agreements and requested comments by 31st July.
- 1997 (June) Supply of Beer (Tied Estate) (Amendment) Order 1997 (Guest Beer) extended to include bottle conditioned beer.
- 1997 European Commission announces that the block exemption will be extended from 31st December 1997 to 31st December 1999.
- 1998 (May) European Commission issued policy follow up paper on vertical restraints.
- 2000 (January) OFT launches a review of the Supply of Beer Orders
- 2000 (1st June) New block exemption on vertical restraints comes into effect covering the generality of distribution arrangements, including public house property ties and trade loans. Limited to companies with a market share not exceeding 30%
- 2000 (Dec) Report of the Office of Fair Trading's review of the beer orders published, recommending revocation of the Tied Estate order and most of the Loan Ties, Licensed Premises and Wholesale Prices Order.
- 2000 (Dec) Response by the Department of Trade and Industry to the Office of Fair Trading's review announcing the decision to revoke the cap on the size of brewers' tied estates and the requirement of large brewers not to tie alcoholic drinks other than beer. The guest beer provision and restrictive covenants on sale were to be retained. The Beer Orders would next be reviewed in 2005
- 2002 (Feb) It is announced by the Secretary of State that the Beer Orders enacted in 1989 will be revoked in their entirety.
- 2004 (May) Trade and Industry Select Committee announces inquiry into the relationship between pub companies and their tenants. (Mar'05) Recommendation that the Practice Framework for the granting of

tenancies and leases. BBPA review its Code of Practice

- 2009 (May) The Business & Enterprise Committee recommends the supply tie operated by pub companies and brewers be referred to the Competition Commission. Other changes to operating practices also recommended.
- 2009 (July) CAMRA submit a super-complaint to the OFT regarding UK pub industry.
- 2009 (October) OFT report concludes no action is required with regard to the beer tie.
- 2009 (December) BIS (formerly BEC) Committee holds second evidence session regarding pub companies.
- 2009 (December) CAMRA applies to the Competition Appeals Tribunal regarding OFT decision.
- 2010 (February) OFT opens consultation on its response to CAMRA super-complaint.
- 2010 (May) European Commission renews block exemption, allowing beer supply tie to continue in UK.
- 2010 (October) OFT upholds original October 2009 decision regarding beer tie.
- 2011 (June/July) BIS Committee holds third evidence session regarding pub companies.
- 2011 (August) Government consults on the use of restrictive covenants in the pub sector
- 2011 (September) BIS Select Committee recommends the Government introduce statutory regulation governing the relationship between tied tenants and pub operating companies
- 2011 (November) Government response to the BIS Select Committee endorses a self-regulatory framework system governing tied tenancies and leases, including a strengthened industry code and advisory/arbitration services
- 2012 (January) Industry Framework Code Version 5 for tied tenanted and leased public houses published
- 2012 (October) BIS Minister Jo Swinson announces industry self-regulation objectives have 'now been achieved'.

2012 (October) Government announces review of industry self-regulation to date

2013 (January) Government announces its intention to consult on a statutory code of practice for pub companies

ANNEX C – ComRes Report into BIS Consultation Questionnaire (see attached document)

BBPA also supplied the independent study referred to under paragraphs 11.3 to 11.8. This has been withheld at the request of the BBPA owing to its commercial confidentiality.



BBPA Pub Consultation Review

*A comprehensive review of the Pub Consultation survey
run by the Department for Business Innovation and Skills*



31st May 2013



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Objectives

ComRes have been commissioned by the British Beer and Pub Association to conduct an in-depth audit of the online survey used as part of the Government consultation conducted by the Department for Business Innovation and Skills entitled '*Pub companies and tenants - A government consultation*'. The core objectives of this research are as follows:

- To review the suitability of the survey for individual tenants and consumers;
- To audit question design and survey structure against the MRS Code of Conduct and industry best practice;
- To advise on the suitability of Survey Monkey and use of 'cookies' for a Government consultation of this type;
- To advise on the robustness of any findings stemming from the consultation.

Methodology

Senior researchers at ComRes conducted an in-depth review of the survey between 20th May and 31st May 2013. The survey was assessed for quality and compliance with the MRS Code of Conduct with a view to assessing its suitability for use in a public consultation.

EXECUTIVE SUMMARY

Following an in-depth review of the online survey used as part of the Government's consultation on the relationship between large pub companies and their tenants, ComRes have several concerns over the suitability of the survey for such work and the subsequent validity of any findings drawn from the results. It is our view that the survey in its current form is not of sufficient quality in terms of survey design and structure to be able to support Government action in introducing a Statutory Code and Independent Adjudicator to oversee the problems between large pub companies and their tenants.

The key concerns are as follows:

- The survey uses leading introductory statements and questions in direct contradiction to rule B14_3 of the Market Research Society Code of Conduct which explicitly states that reasonable steps should be taken to ensure that 'respondents are not led towards a particular point of view'. It is our view that the survey in its current form leads respondents to give survey answers that are supportive of the Government's position because of the way the questions are asked.
- In many cases, the survey presents a positive case for a course of action and then asks the respondent whether or not they support such action without presenting the alternative view. This means the consultation could appear to provide evidence of support for certain action where no such support exists.
- In the majority of cases, the survey does not present the respondent with a clear option to indicate that they 'don't know' or have 'no preference' for a course of action, contradicting rule B14_2 that efforts should be made to ensure that 'respondents are able to provide information in a way that reflects the view they want to express, including don't know/prefer not to say where appropriate'. This could lead to respondents giving answers to questions they are not qualified to comment on, creating issues over the validity of findings drawn from the results.
- Survey routing is often misleading or inadequate meaning respondents do not answer questions relevant to them and are led to answer a certain way. This is crucial to the validity of the consultation's findings as it means that results could be based on survey responses from those that do not possess an informed view on the subject matter at hand or even those who have a vested interest in certain results being achieved.
- There are significant concerns about the use of Survey Monkey as a survey vehicle and the security of the survey which call into question the validity of results gathered and therefore the credibility of any findings drawn from the consultation.

INTRODUCTION TO MRS GUIDELINES AND BEST PRACTICE

Market Research Society guidelines

The Market Research Society has put in place specific rules and guidelines for the design and implementation of online research. A full breakdown of the Market Research Society Code of Conduct can be found below [http://www.mrs.org.uk/pdf/Code%20of%20Conduct%20\(2012%20rebrand\).pdf](http://www.mrs.org.uk/pdf/Code%20of%20Conduct%20(2012%20rebrand).pdf)

MRS Guidelines for Online Research

Rule B.14 of the MRS Code of Conduct (listed below) is of critical importance regarding this consultation, clearly stating that respondents should be given the opportunity to provide information in a way that reflects their views, that respondents are not led towards a particular view and that responses are capable of being interpreted in an unambiguous way.

MRS: Code of Conduct: Designing the Data Collection Process

B.14 Members must take reasonable steps to ensure all of the following:

- That the Data Collection Process is fit for purpose and Clients have been advised accordingly; that the design and content of the Data Collection Process or instrument is appropriate for the audience being researched;
- That Respondents are able to provide information in a way that reflects the view they want to express, including don't know/prefer not to say where appropriate;
- That Respondents are not led towards a particular point of view;
- That responses are capable of being interpreted in an unambiguous way;
- That personal data collected are relevant and not excessive.

The following section of this report aims to provide a detailed assessment of the survey structure and content in terms of its suitability for use in a Government consultation of this type.

Note on survey set up

The survey was scripted using Survey Monkey as the online provider of the software. The survey is accessed via an open link on the Consultation website. While there are restrictions preventing multiple completions by browser, there is a loophole in this approach. Any respondents wishing to subvert the answers by completing the survey multiple times can do so by using the 'incognito' setting on a Google Chrome browser. This is relatively simple to set up and therefore the survey is open to multiple submissions by one person.

Introductory statement

The initial introductory statement that sets out the purpose of the survey is extremely leading and invites respondents to answer subsequent questions in a particular way, contrary to rule B14_3 of the Market Research Society Code of Conduct.

Fig.1 Introductory statement

Statutory Regulation of the Pubs Industry

Over the last decade, significant concerns have been raised about the relationship between large pub companies and their tenants. By 'tenant', the Government is referring to any publican who rents their pub from a larger company, whether they are referred to as a tenant, a lessee or any other term. There are concerns suggested that in too many cases, tenants are treated badly and exploited, including by being asked to pay unfairly high rents or beer tie prices. Particular concern has been raised about so-called 'tied' arrangements, where the pub company requires the tenant to buy beer from them rather than on the open market: a recent survey found that 47% of tied tenants earn less than £15,000 a year, compared to only 22% of free of tie tenants.

The Government's aim is to ensure fairness for tenants, to ensure that tied tenants are treated no less favourably than free-of-tie tenants and to support the continuation of pubs as valuable community assets. We also want to safeguard the long term stability and sustainability of the industry, through proportionate and targeted interventions where needed.

The Government is therefore consulting on establishing a statutory Code and Independent Adjudicator to oversee the problems between large pub companies and their tenants (publicans). The purpose of this consultation is to seek the views of various individuals who are affected by or have an interest in the pubs industry.

The introductory statement is leading in a number of ways:

- The above statement (fig.1) introduces that 'significant' concerns have been raised about the relationship between large pub companies and tenants without presenting the alternative view.
- It highlights that there are unspecified 'concerns' that tenants are being 'treated badly and exploited' without providing evidence for this.
- There is no definition of what a 'larger' company consists of.
- It presents the fact that tenants that are 'tied' to a particular pub company earn less than those who are not, presenting an emotive case for any action in support of that group.
- It then moves on to present the position of the Department of Business, Innovation and Skills in flattering terms, arguing that any Government action in this area is designed to 'ensure fairness for tenants' and to safeguard the 'long term stability and sustainability of the industry, through proportionate and targeted interventions where needed'. This is a one-sided view supporting tenants only.

The opening paragraph then concludes by saying that:

'The Government is therefore consulting on establishing a Statutory Code and Independent Adjudicator to oversee the problems between large pub companies and their tenants (publicans). The purpose of this consultation is to seek the views of various individuals who are affected by or have an interest in the pubs industry'.

In short, the opening paragraph of the survey presents a clear and one sided argument that the status quo is unsatisfactory and unsustainable and that the Government's intentions in introducing a statutory Code and Independent Adjudicator are positive. This can only lead the respondent, who has at this stage yet to read a question, to have a positive view of any such Code and Adjudicator.

Use of leading questions

There are several examples within the survey of the presence of leading questions that invite the respondent to answer in a particular way. In many instances, the case for a certain course of action is made forcibly and then the respondent is asked whether or not they support that course of action. In other cases, respondents are asked to indicate whether or not they agree with a particular course of action that is implied is perfectly reasonable to support (and not necessarily linked to the subject matter) with the inference that Government action introducing a Statutory Code and Independent Adjudicator is a positive step in this direction. Finally, in the majority of cases, respondents do not have the option to indicate that they 'don't know' or have 'no preference' either way for a particular course of action. This contradicts rule B14_2 of the MRS Code of Conduct that 'respondents are able to provide information in a way that reflects the view they want to express, including don't know/prefer not to say where appropriate'. This means that should the respondent answer the question, they could potentially

pick an answer at random rather than select the answer most relevant to them. Below are some examples of such practice highlighted above.

Fig.2 Examining self-regulation and the principles of the code

2. Self regulation has been tried since 2004 but has not worked – too many tenants are still being badly treated and facing hardship. The Government therefore considers that it needs to introduce statutory legislation to regulate the relationship between pub companies and tenants.

Do you agree that the Government should regulate the relationship between pub companies and tenants?

- ☐ Yes
☐ No

3. The Government believes the best way of achieving this would be to introduce a Statutory Code, to set down the rules which pub companies would have to obey, and an Independent Adjudicator to enforce and referee the Code.

Do you agree that a statutory Code and Independent Adjudicator would be an appropriate way of tackling this problem?

- ☐ Yes
☐ No

4. The Government considers that the two most important principles that should be fundamental to the proposed Statutory Code should be that tenants must be treated fairly and lawfully and that tied tenants should be no worse off than free of tie tenants.

Do you agree that these two principles should be at the heart of the Code? (Select each one that you agree with).

- ☐ Tenants must be treated fairly and lawfully
☐ Tied tenants should be no worse off than free of tie tenants

- In the above Question 2, the assertion that self regulation 'has not worked' has been presented as a fact, followed by the further assertion that 'too many tenants are still being treated badly and facing hardship'. Neither of these points are supported by evidence nor is an alternative view provided. The survey then presents the Government's policy as the solution, '*The Government therefore considers that it needs to introduce statutory legislation to regulate the relationship between pub companies and tenants*'. It is in this context that the question is asked '*Do you agree that the Government should regulate the relationship between pub companies and tenants?*'. The only logical answer the respondent can give, if they take the introductory text at face value, is 'Yes'. This is a wholly inadequate means of measuring public support for this measure and calls into question the validity of the results from this consultation.
- The following question, Question 3, which reads '*Do you agree that a Statutory Code and Independent Adjudicator would be an appropriate way of tackling this problem?*', is asked once it has been established that it is Government policy that this is the best course of action. Before the question is asked, an introductory statement is included reading, '*The Government believes the best way of achieving this would be to introduce a Statutory Code, to set down the rules which pub companies would have to obey, and an Independent Adjudicator to enforce and referee the Code*'. The flow of Questions 2 and 3 make it very difficult for a respondent to say they agree action should be taken but disagree with a Statutory Code and Independent Adjudicator. In addition, the use of the phrase, 'The Government believes the best way of achieving this' infers that respondents agree the Government should regulate the relationship between pub companies and tenants.
- In Question 4, the survey presents two extremely leading statements and asks respondents whether they agree with them. It does so without asking for strength of agreement with these



principles and without giving respondents a clear option to select 'I do not agree with either of these statements' or to say that they 'don't know'.

Fig.3 A better example

5. The Government recognises that the tie can be used responsibly and that some pub companies treat their tenants fairly. On the other hand, some companies abuse the tie and it is the abuse of the tie that the Government wishes to stop.

Some people have suggested that the simplest means of ensuring that tied tenants are no worse off than free of tie tenants would be if the Code forced pub companies to offer a free of tie option to tenants. By a free of tie option it is meant that the tenant could buy beer from whoever they wished and would only have to pay a fair market rent to the pub company. Others have suggested that this would be unfair to responsible companies who use the tie well, and that it would place less of a burden on responsible companies if the Code instead said that pub companies must compensate tied tenants by ensuring that the higher prices they pay for beer are matched by a lower rent.

Which do you think would be the best way of ensuring that tied tenants are no worse off than a free of tie option?

- ☐ A compulsory free of tie option
- ☐ Ensuring that if a tenant pays more for drink prices than they could get on the open market they must be charged a lower rent and vice versa
- ☐ Another option that we have not considered (if so please let us know via the main consultation – link at end)

- The above question is a better example of good practice. Although not perfect, the above introduces both sides of the argument and for the first time recognises that 'the tie can be used responsibly'. However, it is worth noting that Question 5 is the first instance where a positive case for the tie has been made and the introductory statement only acknowledges that 'some' pub companies treat their tenants fairly.
- Also, as is the case in many instances elsewhere, there is no obvious means for respondents to indicate that they have no preference for any course of action or that they 'don't know' should the question not be relevant to them in their role.

Fig.4 Details of the new policy

6. It has been suggested that the Government also strengthen the proposed Statutory Code in other areas, to help ensure that tenants are treated fairly.

Which of the below do you think should be addressed in the proposed Statutory Code (please tick all that apply):

- ☐ An increased right to an open market rent assessment. This would allow a tenant to request a rent assessment if they have not had one for five years or if the pub company puts up their beer prices or if unexpected circumstances (flood, fire, recession etc) occur
- ☐ Increased transparency. Assessing profitability can be difficult. This would require pub companies to publish parallel 'tied' and 'free of tie' rent assessments so tenants can check they are no worse off
- ☐ Abolish the gaming machine tie. Under the gaming machine tie, pub companies take a share of the profits from gaming machines, which can reduce tenant profits. This would abolish that practice
- ☐ A guest beer option. This would allow tenants to buy one beer of their choice from any source they chose, for example a popular brand or a beer from a local micro-brewery
- ☐ Regulate flow monitoring equipment. Concerns have been raised that the equipment used is often unreliable. This would mean that a pub company could not use evidence from flow monitoring equipment to fine a tenant for breaking their contract

7. The Government intends to establish an Independent Adjudicator to enforce the Code. The Adjudicator would need to have a range of functions in order to ensure that all companies were complying with the Code.

Which of the following powers do you think it would be helpful for the Adjudicator to have? (Please select all that apply).

- ☐ Ability to arbitrate individual disputes about the Code, to ensure tenants could get compensation for any losses they had suffered
- ☐ Ability to carry out investigations to discover widespread breaches of the Code by pub companies
- ☐ Ability to impose fines on pub companies that breach the Code
- ☐ Ability to give advice and guidance to pub companies on how to comply with the Code and to tenants on their rights under the Code

- The above questions outlining some proposed measures that might be included in a Statutory Code or powers that could be given to an Independent Adjudicator do not give the option for respondents to either indicate the strength of their support for each measure and also do not

allow respondents to indicate that they 'don't know' which options they prefer or indeed that they support 'none of the above' options. This contradicts rule B14_2 of the MRS code that efforts should be made to ensure that 'respondents are able to provide information in a way that reflects the view they want to express, including don't know/prefer not to say where appropriate'.

- It is true that respondents are not required to answer these questions however, the absence of a clear means of indicating that they do not support any of the measures listed encourages respondents to answer even if they do not hold a view.

Fig.5 Details of the new policy

8. In order to place the most proportionate burden on business, the Government proposes that the new policy should apply to all pub companies with more than 500 pubs. This is because the evidence suggests that smaller companies are generally behaving well and because this way the regulation would not cause a burden for smaller companies which might find it difficult to afford it.

What do you think the threshold should be?

- ☐ Companies with 500 or more pubs
- ☐ All pub companies

9. Others have suggested there is a significant difference between leases and tenancies. The main difference is that leases tend to be for a longer period of time and place a greater burden on the tenants to repay the pub. The Government's view is that all tenants should be treated fairly, regardless of whether the pub is a lease or a tenancy.

Do you think there should be a distinction between leased and tenanted pubs?

- ☐ Yes
- ☐ No

- Looking at Question 8 above, it is immediately clear from the question wording that the Department for Business, Innovation and Skills takes the view that any new policy should apply specifically for pub companies with more than 500 pubs. The introductory statement for Question 8 sets out the case that this is the Government's proposal, gives a reason why, and then asks the public whether or not they support this measure. In addition, as elsewhere, no option is given for 'don't know' should respondents not have a view on this matter.
- However, there is an inherent assumption made in the question that a threshold is required. There is no option for selecting 'I do not think there should be a threshold'.
- Question 9 assumes a sufficient degree of industry knowledge required to be able to answer the question and does not offer a 'don't know' option. The explanation provided is insufficient as it does not provide context to allow respondents to make an informed decision. The phrasing of the question also lacks clarity and appears to imply that those that assume a distinction between leased and tenanted pubs do not agree with the Government's view that all tenants should be treated fairly, regardless of whether the pub is a lease or tenancy. It does so by suggesting that 'others' suggest there is a 'significant difference' between the two but that the Government's view is that 'all tenants should be treated fairly'. In this context, it is difficult to draw any satisfactory conclusions from the results to Question 9 around whether or not there should be a distinction between leased and tenanted pubs.

Survey audience and routing

Issues with survey structure have already been raised in the above analysis; for example it has been highlighted that there are many instances in the survey where respondents are asked questions in a way that does not allow them to indicate whether or not they hold a qualified view on the matter or how strongly they hold the opinion that they hold.

In addition to the above, there are other issues with the survey structure and design that raise concerns about whether the right questions are being asked of the right audiences (survey routing) and call into question the quality of the resulting data collected to be used as evidence for the consultation. The key concerns raised include:

- It is not clear who is taking part in the consultation and how informed they are on the issues, raising questions on the validity of the findings from the survey.
- The survey routing is inadequate, respondents can answer questions not relevant to them, influencing results in areas that they should not be providing feedback for.

Fig 6. Survey audience.

10. Please confirm whether you are answering:

- ☐ As an individual
- ☐ On behalf of an organisation that you are officially representing

11. Are you (pick the single option that best applies):

- ☐ A tied tenant (includes lessees)
- ☐ A free of tie tenant (includes lessees)
- ☐ Someone who works or has worked in the pub industry who is not a tenant (includes pub managers, bar staff, surveyors etc.)
- ☐ A consumer (i.e. someone who does not work in the pub industry)

- Questions 10 and 11 make an attempt at defining the audience that each respondent falls into reasonably well. Although in Question 11, there is no satisfactory answer choice provided for those working on behalf of a pub company.
- However, respondents do not have to answer these questions and therefore if sufficient numbers do not, it will be difficult to draw definitive conclusions to subsequent questions from the results of the consultation.

Fig 5. Survey routing issues

12. If you were offered a free of tie option, would you take it, even if it meant paying a higher rent, (provided that rent was assessed fairly)?

- ☐ Yes
- ☐ No

13. In your opinion, what are the three biggest challenges that you are facing as a tenant? (Please tick up to three boxes).

- ☐ The beer tie
- ☐ Unfair treatment by your pub company
- ☐ Taxation (including beer duty)
- ☐ The recession
- ☐ The smoking ban
- ☐ Other Government regulation
- ☐ Supermarket pricing
- ☐ Cultural change
- ☐ Other

14. Which pub company or brewer are you a tenant of?

- ☐ Punch Taverns
- ☐ Enterprise Inns
- ☐ Marston's
- ☐ Star Pubs
- ☐ Greene King
- ☐ Admiral
- ☐ Spint
- ☐ Wellington
- ☐ Trust Inns
- ☐ A family brewer
- ☐ Other

15. How long have you been a tenant?

- ☐ less than 1 year
- ☐ 1-2 years
- ☐ 3-4 years
- ☐ 5+ years

- Questions 12 through to 15 are only relevant to tenants but the option is given for anyone taking part in the survey to answer these questions. This raises serious concerns about the credibility of such results when used as findings from the consultation. For example, a pub company representative could decide to answer these questions as a 'spoiler', perhaps to indicate that 'other Government regulation' is a bigger challenge than the beer tie.
- Question 13 suffers from question order bias. Given the entire survey before this point has focused on the apparent unfairness of the relationship between pub companies and tenants and the unfairness of the beer tie, the positioning of this question here is very likely to lead respondents to select answer choices 1 'the beer tie' and answer choice 2 'unfair treatment by your pub company' as their biggest challenges. In addition, the fact that these answer choices appear as choices 1 and 2 in the first place leads to order bias in the question also, meaning that these answer choices are likely to be selected most often if they appear first and second for every respondent.

CONCLUSIONS

In conclusion, having conducted a thorough review of the content, structure and delivery of the survey, it is the opinion of ComRes that a sufficient number of concerns have been raised to call into question the validity any findings drawn from the results and therefore any conclusions drawn for the Government consultation on the relationship between pub companies and their tenants.

These concerns can be summarised as follows:

- 1) It is not sufficiently clear who takes part in the survey. The quality of respondent cannot be guaranteed through the survey vehicle used.
- 2) The introductory statement preceeding the survey sets out the case for Government action in a biased manner, meaning respondents are already likely to be in favour of change before they have taken part in the survey.
- 3) Too many questions use leading words and phrases that encourage respondents to answer in a certain way. This is both damaging to the credibility of the results of the survey and also directly contradicts the MRS Code of Conduct.
- 4) Survey routing is inadequate meaning that respondents are able to answer questions that do not apply to them.
- 5) The overwhelming majority of questions asked do not offer the respondent the opportunity to say 'don't know' or 'prefer not to say' which acts in contrary to the MRS Code of Conduct. This creates the risk that respondents will guess the answer of questions rather than respond from an informed viewpoint.