



Pubs Code
Adjudicator

**CONSULTATION SUMMARY OF
RESPONSES**

Investigation & Enforcement
Guidance

NOVEMBER 2016

Contents

Introduction.....	3
Purpose of the Consultation	3
Consultation Process.....	4
The Statutory Guidance.....	4
The Consultation Questions	5
Consultation question 1	5
Consultation question 2	11
Consultation question 3	14
Consultation question 4.....	17
Annex A: Consultation Respondents	22
Annex B: Changes to guidance following the consultation.....	23

Introduction

Purpose of the Consultation

The Pubs Code Adjudicator (the PCA) was established by Part 4 of the Small Business, Enterprise and Employment Act 2015 (the Act). The PCA is appointed by the Secretary of State, and Paul Newby took up the role as the first PCA on 2nd May 2016.

The PCA's role is to encourage and enforce compliance with The Pubs Code etc. Regulations 2016 (the Pubs Code) which came into force on 21st July 2016. The Code has two over-arching principles:

- fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants;
- that tied pub tenants should be no worse off than they would be if they were not subject to any product or service tie.

The 'pub-owning businesses' (POBs) to which the Code applies are pub companies that own 500 or more tied pubs in England and Wales. At the time that the Code was introduced there were six such companies, collectively operating around 12,000 tied tenancies:

- Admiral Taverns Ltd
- Enterprise Inns PLC
- Greene King PLC
- Marston's PLC
- Punch Taverns PLC
- Star Pubs and Bars (Heineken UK)

The PCA has a statutory power to investigate where it has reasonable grounds to suspect that there has been a breach of the Code. If the Pubs Code has been breached, the PCA may take one or more of a number of enforcement actions – including the imposition of a financial penalty.

Section 61 of the Act requires the PCA to publish statutory guidance on the criteria that it intends to adopt when deciding whether to carry out an investigation; the practices and procedures that it intends to follow when carrying out an investigation; the criteria that it intends to adopt when choosing whether to use its enforcement powers and which ones; and the criteria that it intends to adopt when setting the amount of any financial penalty. It requires the PCA to publish this guidance within six months of the date of the establishment of the PCA; and to consult appropriate persons before doing so.

Consultation Process

The consultation opened on 19th August 2016 and closed on 30th September 2016. It was published on the PCA pages on the GOV.UK website, and views were sought specifically from the tied tenants protected by the Code and from the six POBs that are subject to it; and welcomed views from trade and representative bodies and from anyone else with an interest in the pubs sector.

In addition to the formal consultation, the PCA held two workshops – one for POBs and one for tenants and tenant and consumer bodies – on 12th September.

The PCA received 13 substantive responses to the consultation. These are listed in full in Annex A; and are categorised below.

Pub-owning businesses and their representative bodies	Tied pub tenants and their representative bodies	Others
7	5	1

The PCA would like to thank all of those who responded to the consultation and whose comments have informed the published guidance on investigations and enforcement.

The Statutory Guidance

We have sought to make this a self-contained response to the consultation that replies in detail to all of the substantive points and questions raised by respondents on the draft guidance. We have included a summary of the main changes that have been made as a consequence to the guidance at Annex B. Other minor amendments have been made to ensure consistency. It may, however, aid interpretation to read this document in conjunction with the statutory guidance that has been published concurrently: www.gov.uk/government/publications/pubs-code-adjudicator-investigation-and-enforcement.

This document is the Office of the PCA's response to the consultation. It does not form part of the PCA's statutory guidance. The PCA will apply the statutory guidance in relation to any particular investigation decision.

The Consultation Questions

Consultation question 1

Does the draft guidance provide clarity on the criteria the PCA will apply when considering whether to commence or continue an investigation?

Are there any other factors that you think should be taken into account?

Evidence

Tenants and their representatives felt that it was not clear what level of evidence would constitute 'reasonable grounds for suspicion'. They were concerned that the wide discretion given by the Act would make it difficult to hold the PCA accountable. They therefore asked for specific guidance on how to submit evidence; its content and the form it should take; the issues that the PCA will prioritise; the weighting that the PCA will give to different types of evidence; and whether there would be any recourse for a tenant who was unhappy with the PCA's decision.

Pub company respondents also sought greater clarity on what the PCA will regard as evidence; and by extension what will amount to 'reasonable grounds' to suspect a breach of the Code – this should be a clear, objective test. They argued that the guidance should be explicit about the format and the quality of the evidence that the PCA will require – which should be robust, substantial and relevant; demonstrate the impact of the alleged breach on the tenant(s) concerned; and relating to events that occurred after the Pubs Code came into force. One pub company respondent expressed the concern that investigations should not be based on speculation or rumour. There was an assumption that a complaint from a single tenant would ordinarily be dealt with as an arbitration rather than leading to an investigation.

Pub company respondents noted the wide range of sources of information referenced in the guidance, and said that the PCA should place greater emphasis on evidence that comes directly from tenants or their representatives than on evidence arising from 'class actions'. A number of pub companies questioned why the guidance made reference to evidence from untied tenants, who are outside the scope of the Code. It was suggested that all sources of evidence should be identified by the PCA.

Pub company respondents were concerned that an investigation should not be commenced to permit the PCA to go 'fishing' for evidence.

One tenant respondent suggested a formal pre-investigation evidence-gathering stage to assess whether there were reasonable grounds to proceed to an investigation proper. Other tenant respondents said that it would be helpful if the PCA were to set out some examples of the types of issues that are likely to lead to an investigation and if the PCA could clarify exactly who in addition to tenants – such as representative, trade and consumer bodies – may bring matters to its attention.

Tenant respondents sought greater clarity on how the PCA will decide whether a case is vexatious or frivolous. Pub company respondents sought a clear statement from the PCA on how it will deal at the pre-investigation stage with vexatious or frivolous cases; and suggested that the guidance should include (as does the GCA's) examples of the kind of complaints that will be considered without merit.

One tenant respondent felt strongly that any evidence of collusion between POBs should substantially increase the likelihood of an investigation.

Informal action

Tenant respondents were troubled by the concept of informal investigations by the PCA. On a point of principle, many believed that evidence of breaches of the Code should ordinarily result in a formal investigation; from a legal perspective, there were some concerns that an initial informal approach by the PCA would risk prejudicing any subsequent formal investigation.

Pub company respondents sought further detail about how the PCA will conduct its pre-investigation work. They welcomed the statement in the guidance that the PCA would seek in the first instance to discuss with pub companies breaches of the Code that appear to be inadvertent or due to a misunderstanding, but sought a more explicit commitment from the PCA that such breaches would be dealt with through discussion and guidance and not formal enforcement proceedings.

Pub company respondents felt that a formal investigation should be the last resort, and that the PCA should encourage the parties to resolve their differences outside the statutory process wherever possible. One pub company respondent stressed that a formal investigation should be an objective decision for the PCA only; and that it should be based on a belief of deliberate, wilful and systematic breaches of the Code, and following previous warnings or clarifications from the PCA.

A number of pub company respondents said that they should always be given a right to respond to alleged breaches before the PCA launches a formal investigation.

Prioritisation

There were general concerns from tenants about the definitions and interaction of the prioritisation principles. There were widespread tenant objections to the prioritisation of PCA investigations on resource grounds, which was seen as contrary to the PCA's statutory responsibilities to uphold the Code. Some tenant respondents questioned why resources were a consideration at all on the basis of their understanding that the PCA is part funded from any financial penalties that it imposes. One tenant respondent argued for a single public interest test combining considerations of risks, benefits and resources.

One tenant respondent expressed the view that section 53 of the Act did not give the PCA the discretion to terminate an investigation once one had been commenced.

A number of pub company respondents sought advice from the PCA on how it would interpret and exercise its statutory powers. In particular, they asked for examples of the type of issues that may lead to an investigation; and for non-confidential information on actual investigations that would help them to understand the precedents being set.

Impact

Some tenant respondents were concerned about the use of an impact test – suggesting that impact should only be a measure of priority, and not of whether to investigate at all. There were particular concerns about the suggestion that the number of tenants affected by the alleged breach would be a factor in deciding whether or not to investigate. Tenant respondents stressed that an alleged breach should be investigated on principle irrespective of the number of tenants affected; and that failure to do so risked the PCA treating all cases as isolated incidents and therefore missing common themes. Others argued that an alleged breach that has an impact on a small number of tenants should be prioritised if it poses a risk to the tenant's business – in line with the policy of the Groceries Code Adjudicator (GCA).

One pub company respondent stressed that the impact of an alleged breach of the Code should be quantifiable and not speculative. Impact can be assessed on assumptions so long as assumptions are reasonable.

PCA Responses

Evidence

The evidence needed to decide whether to commence an investigation or not is clearly very important. The test (taken from the Act) is whether the PCA has reasonable grounds to suspect a Code breach, or failure to follow a PCA recommendation. The PCA's decision to commence an investigation is susceptible to judicial review.

The PCA will consider all relevant information brought to it – in whatever form and from whatever source – when making its investigation decisions. All information will be considered on its merits. The more cogent it is and the more it is directly connected to an alleged breach of the Code, the greater the likelihood that the PCA will consider the test for commencing an investigation has been met. The PCA may follow-up on information received to understand it better.

Decisions by the PCA on whether to commence an investigation will be considered on a case-by-case and issue-by-issue basis; and based on the four prioritisation principles in the draft guidance (impact, strategic importance, risks and benefits, resources). We do not consider that it would be appropriate to either set out more detailed standards for launching an investigation or to provide examples. To do so risks limiting the PCA's flexibility to act as it considers appropriate in light of the circumstances of the case.

We agree in principle that the PCA's investigation powers relate to alleged breaches of the Code that occurred after the Code came into force. The exact nature, timing and duration of any alleged breach will be a matter to be determined on the basis of the facts in each individual issue.

Whether a person has made a vexatious or frivolous claim will also be considered on a case by case basis.

Any steps that the PCA might take in relation to any pre-investigation evidence-gathering will depend upon the nature of the issue and the information provided.

We encourage everyone – tied tenants, their representatives, trade bodies and anyone else – with information they think is relevant to a Code breach to send that information to the PCA. A particular point was raised about whether evidence from an untied tenant could ever be considered. We believe it could be – if, for example, it serves to inform the PCA of the types of untied terms and conditions that are common in the market in the context of an issue to which those facts are relevant.

We understand concerns about an investigation giving rise to a 'fishing expedition'. The 'reasonable grounds' test for launching an investigation set out in section 53 of the Act, and the four prioritisation principles identified in the PCA's draft guidance are there to ensure that the PCA only commences an investigation where it has reasonable grounds to suspect a breach of the Code or a failure to follow a recommendation. Requests for information once an investigation has been launched will relate to the nature of the possible breach.

As we make clear in the draft guidance, the PCA may initially seek to discuss issues with the POB or POBs concerned to understand their interpretation or approach before making a decision on whether to commence a formal investigation.

Informal action

We do not agree that informal action taken to raise any alleged breaches of the Code with POB(s) would prejudice any subsequent formal investigation if discussion has not brought about the envisaged change. Neither do we think that we should limit the PCA's discretion by committing to pursue informal resolution first in all cases. Whilst the PCA might seek to do this in most cases, where it is appropriate the PCA may also decide to move more quickly if, for example, there are time-critical factors.

Although the PCA encourages POBs and their tied pub tenants to continue to seek to resolve their disputes through discussion wherever possible, the PCA must be able to act to ensure the Code principles are upheld. The PCA encourages tied pub tenants who are concerned about their rights under the Code to contact the office of the PCA.

Prioritisation

The draft guidance identified that the four principles of impact, strategic importance, risks and benefits and resources will be considered when deciding whether or not to commence an investigation.

Given the consultation responses we have looked again at the framework the four principles provide. We do not consider that the PCA should commence an investigation without taking these prioritisation principles into account. We believe that the PCA would not be exercising its investigation powers proportionately (a principle underpinned by the good practice identified in the Regulator's Code) if every suspected Code breach automatically led to the launch of an investigation. For the same reasons, we do not agree that an investigation should only proceed where there is evidence of deliberate or systematic breaches, or that it would add any further clarity or certainty to introduce a single public interest test in place of the four principles.

We remain of the view that the four prioritisation principles are appropriate when considering whether to exercise the PCA's powers to launch an investigation in any particular case.

We understand the desire of stakeholders for advice on the types of issues that are likely to result in an investigation. However, we are committed to making sure the guidance does not prejudice any future decisions the PCA will make, each of which must be reasonable and proportionate. The PCA must retain discretion to commence an investigation after having considered the prioritisation principles set out in the draft guidance.

The PCA will provide information on investigation activities both in any investigation report (section 54(2) of the Act) and in the PCA annual report (section 62(2) of the Act). We also intend to consider how further advice or statutory guidance may be provided to assist those in their compliance obligations.

The Office of the PCA is funded wholly via a levy on the POBs to which the Code applies. The Office of the PCA does not receive any funding from any financial penalties imposed – these must be paid into the HM Treasury Consolidated Fund (section 58(5) of the Act). While section 59 of the Act enables the PCA to recover some or all of the costs of its investigation from a POB who has either breached the Code or has failed to follow a recommendation, or from a person whose complaint was vexatious or frivolous, the PCA will exercise these powers in a way that is proportionate in all the circumstances.

We do not agree that the PCA has no discretion to terminate an investigation once one has started. The power is to investigate where the PCA has reasonable grounds to suspect a breach of the Code or a failure to follow a recommendation. By necessary implication, there is a power for the PCA to end an investigation where, for example, the evidence no longer supports those initial reasonable grounds.

Impact

The PCA may, in assessing the impact of any alleged breach of the Code, make reasonable assumptions about the possible level and future level of harm.

We appreciate that the impact of any alleged breach on individual tied pub tenants will of course be a particular concern to them, and such impact is a relevant prioritisation factor for the PCA. However it should not be the only consideration when deciding whether to launch an investigation. Individual breaches impacting individual tied pub tenants are likely to be better addressed in a referral for arbitration. The PCA will, however, consider

intelligence from arbitrations as well as from other sources when deciding whether to start an investigation.

The draft guidance provides that the PCA will be likely to initiate an investigation where – amongst other things – the impact on affected tied pub tenants is likely to be serious. Having considered the representations made **we have included in the guidance a reference to a serious impact as including one that risks putting the tied tenant out of business.**

Consultation question 2

Does the draft guidance sufficiently explain the process that the PCA will follow when conducting an investigation?

If not, how could further clarity be given?

Process & Timescales

Tenant respondents were generally dissatisfied with the approach to investigations set out in the guidance, and wanted a formal PCA framework for the conduct of investigations – including regular progress reports to stakeholders. Most thought that the timescales for investigations lacked clarity; and favoured both clear deadlines for each stage of the process and a commitment to an overall end date and the publication of the investigation report. Comparisons were drawn with the GCA, which commits in its guidance to providing indicative timescales and to aim to complete investigations within 12 months.

The Parliamentary and Health Ombudsman's target of resolving 65% of cases within 13 weeks was also referenced. It was suggested that interested parties should be updated on the progress of the investigation and on the reasons for any changes to the timetable; and that a tenant connected to an investigation should have the right to challenge the PCA's timetable if he or she thinks it is too slow.

Pub company respondents also expressed concerns about a lack of detail in the guidance on the PCA's processes and timescales for investigations. They called for the guidance to include a flowchart illustrating the stages and timing of a typical investigation; for the PCA to set out an indicative timetable for each investigation; for such timetables to allow flexibility around the provision of complex information; and for a commitment from the PCA to complete investigations within 12 months. Illustrative case studies would also be valued. One pub company respondent suggested that the guidance should replicate the provision in the industry framework code setting a deadline by which further complaints may be made in a particular case.

Both tenant and pub company respondents requested practical advice on the conduct of bilateral relations between complainant tenant(s) and their POB(s) during the course of an investigation; and additional guidance on whether the time taken by the PCA to investigate would affect any bilateral rights or duties under the tenancy agreement or count towards any statutory time limits under the Code.

One pub company respondent expressed the expectation that the rules of natural justice should apply to PCA investigations. Another asked whether the PCA would apply the civil or criminal standards of proof.

A pub company respondent asked for the PCA guidance to provide the same level of certainty as the GCA guidance does on when an investigation may be stopped for reasons of proportionality.

Information

One tenant respondent sought a more detailed definition of what will constitute 'information' in the context of an investigation – and suggested the addition to the list in the guidance of company emails; company meeting notes; training material; and trade association meeting notes and emails.

One tenant respondent questioned the subjective test to the proportionality of requests in the draft guidance and suggested that the duty should be to provide the information that **is** necessary rather than the information that the PCA **believes** is necessary.

Pub company respondents asked for greater clarity on how the PCA will request information under Disclosure Notices. They suggested that these should give the reason for the request; set out a clear deadline for the provision of the information; provide for discussions with the PCA on the extent, relevance or proportionality of the request; allow for the extension of deadlines where appropriate (it was noted that the Competition and Markets Authority (CMA) allows recipients to challenge a request, and is prepared to discuss the impact that a request for information may have on its recipient); explain how the PCA will proceed when information is not available; and explain the consequences of non-compliance – in particular, what will constitute a reasonable excuse for failing to comply and whether the PCA will prima facie view failure to meet an initial deadline as a criminal offence under Paragraph 20(1) of Schedule 1 to the SBEE Act 2015.

Pub company respondents suggested that the PCA should adopt the tests that the CMA applies to non-compliance with its civil powers – whether there is an adverse impact on the investigation; whether the failure is significant; whether there is an element of recidivism; whether a penalty will encourage compliance; or did the subject of the investigation gain an advantage from the failure to comply.

A number of pub company respondents asked for the guidance to make clear that the PCA will have no power to require the provision of information that is subject to legal or professional privilege.

Data protection

Some tenant respondents sought greater clarity on the PCA's privacy statement and on whether and the extent to which information provided by tenants as part of the investigation would be shared with the POB (as it would be in an arbitration); and if not how confidentiality would be ensured. There was an acceptance, however, that tenant anonymity was likely to be of limited practical benefit.

A number of pub company respondents asked for further clarity on how the PCA will safeguard confidential, trade sensitive and legally privileged information provided during the course of an investigation – in particular in respect of any freedom of information request; or when the PCA makes requests for information to third parties that might reveal the identity of the POB under investigation.

Pub company respondents were also concerned to know whether the PCA will seek permission before disclosing personal data; and how information will be dealt with following an investigation that finds there has been no breach of the Code. It was also pointed out that the PCA's responsibilities around the handling of information derive from Part 9 of the Enterprise Act 2002, and not Schedules 14 and 15 of that Act.

Reporting

Tenant respondents wanted more transparency throughout the investigation process. Specifically, there was a request for a formal public statement that an investigation has been commenced – including the nature of the issue and the name of the POB(s) concerned.

Tenant respondents questioned whether the PCA's proposal for investigation reports was fit for purpose. There was a view that transparency required the POB to be named in all cases. There were also suggestions that permitting the POB to comment on the draft investigation report would be prejudicial, unless the tenant(s) concerned were given the same opportunity; and that there should be an acknowledgement in the investigation report where the report has been changed following representations from the POB.

One tenant respondent said that the tenant(s) concerned should receive prior notice of the outcome of the investigation and the contents of the investigation report; and that – in line with the approach adopted by the Financial Conduct Authority – they should then have the opportunity to provide further information to the PCA. Another suggested that, in place of giving the POB the opportunity to comment on a draft report, the PCA should instead put in place an internal complaints process for all parties to challenge investigation reports after publication. One tenant respondent highlighted the danger of POBs seeing market sensitive data about each other in draft reports of investigations that involve more than one POB.

Tenant respondents also stressed the need for the publication of information about all investigation activity and decisions in the PCA Annual Report.

Pub company respondents asked for further clarity on the rights that POBs will have to comment on the draft investigation report; for assurances that POB comments will be considered and reflected in the final report; and on the circumstances in which the PCA will consider it appropriate to name the POB in the investigation report. One pub company respondent suggested that it may not be appropriate to grant anonymity to the complainant where that complainant is a campaign or lobby group.

One pub company respondent asked whether an investigation report will still be published in respect of a terminated investigation.

PCA Responses

Process & Timescales

The test that the PCA will apply when considering whether to commence an investigation is whether the PCA considers it more likely than not that a breach has occurred. Investigation decisions are susceptible to judicial review, and this would include considerations of natural justice as appropriate.

We have clarified in the guidance that the PCA has a power under regulation 63 of the Code to treat any group undertaking of a POB (POB1) as a POB itself instead of, or as well as, POB1 for the purposes of an investigation where the PCA has evidence that suggests the group undertaking (a) is or has discharged, exercised or influenced any of the POB's obligations under the tenancy or licence to which the investigation relates; or (b) is responsible for, or exercises influence over the tenancies or licences concerned, the financial arrangements or charging policies affecting the tied tenants, or any other administrative, managerial or executive decisions of the POB affecting the tied tenants, and it is relevant to the investigation.

We agree that the PCA should complete investigations as quickly as possible – dependent on the nature and complexity of the individual case. This is included in the draft guidance. However, we are not convinced that including intermediate or overall deadlines in the investigation process would help achieve timely and proportionate investigation outcomes. Instead, the draft guidance proposes that the PCA adopt a proportionate approach to prioritising investigation decisions – including both whether to commence and continue to pursue an investigation. **In response to the consultation responses, we have amended the guidance to indicate that the PCA will in any event seek to complete investigations within 12 months.**

We will consider - in the light of experience – whether illustrative diagrams may assist in understanding how the PCA will apply the guidance.

Any on-going investigation does not have any automatic effect on the Code obligations and rights for tied pub tenants in individual cases. However, the impact of a specific, on-going investigation on an individual arbitration case may be considered, including proposing a stay of proceedings pending the outcome of the investigation, if that is considered appropriate.

Information

We do not think it appropriate to change the draft guidance from 'requests for information when the PCA believes it is necessary' to enable information to be requested only when it is objectively necessary. The PCA must consider how to conduct the investigation and in order to exercise its statutory functions the test must necessarily be one that is when the PCA considers it necessary to request the information.

We included in the draft guidance the types of information that may be requested in the course of an investigation. We understand the desire on the part of some stakeholders for this to be expanded so as not to risk the exclusion of information that they consider may be important. **While the list in the guidance is indicative and non-exhaustive, we have added a specific reference to ‘other relevant documents and information’ to the list to provide further clarity about the extent of the PCA’s powers in this respect.**

We considered whether the approach undertaken by the Competition and Markets Authority over its activities in the competition sector is an appropriate comparator for the approach to the PCA’s activities, which are to consider whether a breach of the Pubs Code has occurred. We have concluded it’s not an appropriate comparator.

Whether the PCA will refer a failure to comply with a relevant Disclosure Notice to the prosecution authorities will be determined in each case. The offence is one of intentional failure. The more flagrant the breach the greater the likelihood that the PCA will refer the breach to the prosecution authorities.

We agree that the PCA’s powers do not extend to requiring the provision of information that is subject to legal professional privilege. However, whether and the extent to which any privilege exists will be determined on the facts of each case.

Data protection

Managing data appropriately was a concern raised both by POBs and tied pub tenants.

In undertaking any investigation, the PCA will provide sufficient information to the POB in question to enable the POB to understand the allegations made and to have the opportunity to respond.

The PCA will seek the consent of an individual complainant before providing their personal data directly to a POB in connection with an investigation. However, we do not envisage the same direct link between complaints from individual tenants and investigations that many respondents to the consultation have presumed. While we do not exclude the possibility that a single complaint could lead to an investigation, we do not anticipate that this will be the norm. We expect that individual complaints will ordinarily be better managed through arbitration.

The PCA will ensure that, if a POB is not to be named during the investigation, any requests for information by third parties are dealt with in a manner that protects confidentiality. While information held as part of an investigation may fall within the scope of a request for information under the Freedom of Information Act 2000, the Act provides exemptions – including exemptions in section 30 (relating to investigations and proceedings conducted by public authorities); in section 43 (commercial interests); and in section 44 (prohibition by or under any enactment) which are likely to apply to information held in relation to an investigation. The PCA would not disclose any information in response to an FOI request in contravention of the Enterprise Act 2002; and would seek to provide the person whose information is being considered for disclosure with an opportunity to comment in advance of disclosing it.

Thank you for identifying that the reference to the Enterprise Act 2002 should be to Part 9 of that Act. We have amended the guidance accordingly.

Reporting

We agree with respondents about the importance of transparency in the investigation process. We expect to provide public confirmation when we start an investigation, and we expect to set out the subject matter of that investigation. We will decide whether it is appropriate to name the POB or POBs involved at the outset, depending whether we believe it will further the investigation or not.

Section 54(3) of the Act specifically provides that an investigation report need not name the POB concerned, and in line with that statutory requirement, decisions by the PCA on the naming of the POB or POBs in the investigation report will be based on all the circumstances of the case.

We note the suggestion that we should publish investigation reports without sharing it with the POB in advance, but instead put in place a formal process for interested parties to challenge the published report. Where a POB is named in the investigation report, section 54(4) of the Act requires that a POB is given a reasonable opportunity to comment on the draft report before publication, and implicit in this is that the PCA will take into consideration the comments made. The Act does not, however, require the PCA to share the draft report when the POB is not to be named; and neither does it impose any parallel duty to invite comments from complainants. As explained above, we do not expect that there is always a direct link between a particular investigation and specific complaints or arbitration cases.

We note that a concern was raised about sharing market sensitive data where a draft investigation report is shared with more than one POB who are subject to an investigation. The PCA will operate in accordance with the requirements in Part 9 of the Enterprise Act 2002 in respect of commercially sensitive information.

In accordance with section 54(2) of the Act an investigation report will identify any findings that the PCA has made; any action taken or proposes to take; and the reasons for the findings and any action taken or proposed. We also confirm that the PCA will include in its annual report, (as required by section 62(2) of the Act), summaries of the investigations carried out and details of cases where enforcement action has been taken.

Finally, we confirm that the PCA would not expect to publish a full investigation report where an investigation has been discontinued since no findings will have been made. However, we consider it good regulatory practice for the PCA to provide a statement about any investigation that has been discontinued. This would also be included in the summary of investigation activity in the PCA's annual report.

Consultation question 3

Does the draft guidance provide clarity on the considerations that the PCA will take into account in the exercise of its enforcement powers?

Are there any other factors that you think should be taken into account?

A number of tenant respondents expressed concern about a lack of clarity around the PCA's approach to proportionality – in particular because they felt that there was an absence of transparency and accountability in the way that these decisions would be taken. It was suggested that the PCA should publish the tests that it will apply for each of the various sanctions. There was a general consensus amongst tenants that deliberate breaches or wilful circumvention of the Code should be punished harshly. One tenant respondent suggested that – in line with the sort of principles on 'whistleblowing' applied by the Competition and Markets Authority – a POB that informs the PCA about breaches of the Code by other POBs should be exempt itself from a financial penalty.

Pub company respondents generally welcomed the adoption of the Macrory Principles on regulatory sanctions; but requested greater clarity on how the PCA proposes to use its powers in escalation. Pub company respondents argued that enforcement should begin with informal interventions; and that the financial penalty should be reserved for cases where the other powers are deemed inadequate – this was implicit in places in the draft guidance, but should be made clear throughout. One pub company respondent questioned whether the use of enforcement powers in combination would be consistent with the proposed escalatory approach. Pub company respondents asked for illustrative examples of the types of breaches to which the PCA would expect to apply its various enforcement options.

Pub company respondents suggested that the PCA should draw a clear distinction between intentional and unintentional breaches. Some pub company respondents suggested that where a breach is found to be a consequence of uncertainty around the interpretation of the Code (particularly in the early days of the Code) or is a one-off incident, the guidance should provide for the remedy to be informal advice to the POB and clarifying guidance from the PCA. Another suggested that the initial mode of formal enforcement should be by way of recommendation, unless there is evidence of ongoing and wilful non-compliance leading to material loss.

A pub company respondent questioned the relevance of the reference in the guidance to the PCA considering whether the breaches related to the fairness and no worse off principles – since these encompass the whole of the Pubs Code.

One pub company respondent asked whether the PCA will handle its investigations in line with civil service protocols; and whether this should be referenced in the guidance.

PCA Responses

We understand the desire amongst respondents for more detailed guidance on the types of enforcement action that the PCA is likely to take in respect of particular breaches of the Code. However, each case will turn on its own particular facts. We do not accept that it is possible now to categorise breaches into types in the way some respondents appear to be suggesting. We do not consider it appropriate to amend the guidance in a manner that limits the PCA's discretion to act proportionately and appropriately on the basis of the particular facts in an individual case.

We note that some respondents highlighted examples of types of behaviour or its causes that they believe ought to lead to harsher or more lenient enforcement action. We want to re-iterate what is said in the draft guidance, namely that when considering proportionate enforcement action, we will consider the seriousness of any breach – including whether the breach is deliberate, the result of negligence or inadvertent; whether it relates to one of the fairness or no worse off principles; the number of tenants affected; and the impact on each tenant affected. We do not think it is appropriate to amend the guidance in a way which would limit the PCA's flexibility to act proportionality in all the circumstances of the case.

For the same reasons, we do not think we should limit the PCA's ability to impose a financial penalty only to circumstances where other sanctions are deemed inadequate. If the PCA is considering a financial penalty, the draft guidance provides that the PCA may take into account a number of other factors (in addition to considerations of whether the POB acted deliberately or was wilfully negligent) which we also consider important.

We do not agree that using enforcement powers in combination would be inconsistent with the approach in the draft guidance of a proportionate and escalatory approach to enforcement. Section 55(1) of the Act specifically provides for the imposition of one or more of the available enforcement measures, and does not make them mutually exclusive.

Consultation question 4

Does the draft guidance sufficiently explain the nature of the statutory sanctions available to the PCA?

Does the draft guidance explain clearly how the PCA intends to apply these sanctions?

If not, how could the guidance provide clarity?

Tenant respondents thought that the range of sanctions was clearly set out in the guidance; although some noted that these were inadequate because they do not provide for compensation to be paid to tenants.

Tenant respondents sought more clarity on what sort of breaches of the Code would result in what sort of sanctions. There was no real consensus on the right approach, however. Some tenants felt that initial breaches of the Code should be dealt with strictly to prevent them from becoming persistent or widespread. Another favoured a more escalatory approach – with POBs being encouraged in the first instance to accept recommendations as to their future conduct in lieu of a financial penalty. The same respondent stressed, however, that non-compliance with a PCA recommendation should lead to a financial penalty; and there was a wider desire for greater clarity on exactly what level or duration of non-compliance would attract a financial penalty.

There was little enthusiasm amongst tenant respondents for informal regulatory action. One expressed the view that informal resolution would be inappropriate unless the breach had been the result of a genuine misunderstanding (such that the PCA had acted to clarify the interpretation of the Code); and the POB had acted to reverse the detriment. Another said that it would only be acceptable where the breach did not have a critical effect on the businesses of the tenants concerned.

One tenant respondent queried whether even a penalty of 1% of turnover would be a deterrent in circumstances where the benefits to the POB of the breach of the Code exceeded that amount.

On a related point, tenant respondents expressed concern about the prospect of tenants facing costs themselves for making vexatious or frivolous complaints. They stressed that it was properly the job of the PCA to identify such cases before the commencement of a formal investigation.

Pub company respondents argued that informal interventions should be the PCA's standard, proportionate approach to enforcement (as is the stated policy of the GCA), with formal enforcement only where the PCA judges that the seriousness of the breach warrants it.

Pub company respondents sought further clarity on when and how a financial penalty will be applied – including when the PCA will regard a financial penalty to be a serious and effective deterrent; and how the PCA will set the initial amount of the penalty, before

adjustments. There were concerns that considerations of deterrence should not be at the expense of a proportionate approach.

A number of pub company respondents asked for further guidance on the options for appealing the PCA's enforcement decisions – specifically whether the PCA might consider an alternative to judicial review; and in one case whether there could be the right to a form of statement of objections of the type available under competition law. Others sought confirmation that any appeal of a financial penalty to the High Court suspends the obligation to pay.

One pub company respondent asked for further guidance on the PCA's powers to monitor compliance with a recommendation – and specifically whether the same rules on the provisions of information should apply as to Disclosure Notices during an investigation; and whether failure to provide information will also constitute a criminal offence under Paragraph 20(1) of Schedule 1 to the SBEE Act 2015.

One pub company respondent was concerned that the principle of equal treatment would be ignored if the PCA were to take different enforcement action against different POBs following an investigation that involved multiple POBs.

PCA Responses

The Act does not provide the PCA with any statutory power to award compensation to any tenant or tenants if a breach of the Code is identified following an investigation. (And of course there may not always be a direct link between specific complaints from individual tenants and the wider evidence on which an investigation has been founded). Section 58(5) of the Act says that any financial penalties received by the PCA must be paid into the HM Treasury Consolidated Fund.

While we understand the desire of some stakeholders for more clarity on what sort of breaches of the Code will result in what level of sanction, as stated above the PCA intends to use the prioritisation principles set out in the draft guidance to consider all the circumstances of the case, before deciding what action will best support the principles underpinning the Code in each case.

The maximum financial penalty that the PCA can impose has been set by Parliament in regulation 5 of The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016). This is set at 1 percent of annual turnover of the 'pub-owning group' – which means the POB and any of its group undertakings. We note that we must report on issues of avoidance as contained in section 71A of the Act.

We agree that the PCA's role includes seeking to identify vexatious or frivolous complaints when we consider whether there are reasonable grounds to start an investigation. We expect questions about whether complainants are liable for investigation costs would most likely only arise when there had been a deliberate attempt to mislead the PCA into starting an investigation.

Whether to issue a financial penalty as a result of finding a breach of the Code or failure to follow a recommendation following an investigation will be a judgement to be made by the PCA in each case on the basis of all of the facts. The PCA confirms that it will follow the Macrory Principles when balancing considerations of proportionality and deterrence when applying any financial penalty.

Enforcement decisions by the PCA are susceptible to judicial review. Appeals against decisions about the imposition or level of any financial penalty (section 58(3) of the Act) or the recovery or level of investigation costs (section 59(4) of the Act) are by way of a direct appeal on the facts to the High Court.

We expect POBs to comply with reasonable and proportionate requests to enable the PCA to monitor compliance with recommendation(s). If the response to monitoring requests is insufficient, the PCA may consider whether this is evidence that the POB has failed to comply with the recommendation itself, and therefore grounds to commence a further investigation. Any second investigation would have the same terms and the same range of enforcement measures available to it.

We do not accept that different enforcement action against POBs involved in the same investigation would offend principles of equal treatment. This will depend upon all the relevant factors identified in the draft guidance in deciding the appropriate enforcement action, including for example, the conduct of individual POBs and the respective number of breaches.

Annex A: Consultation Respondents

Pub-owning businesses with 500 or more tied pubs / trade associations:

- Admiral Taverns Ltd
- British Beer and Pub Association
- Enterprise Inns Plc
- Greene King Plc
- Marston's Plc
- Punch Taverns Plc
- Star Pubs & Bars (Heineken UK)

Tenant groups, trade bodies and other organisations:

- Association of Licensed Multiple Retailers
- British Pub Confederation / Pubs Advisory Service and MRO Advisory Service
- Campaign for Real Ale
- Forum of Private Business
- Justice for Licensees
- Punch Tenants Network

Annex B: Changes to guidance following the consultation

Paragraph	Detail
1.7	We have added to the guidance on impact a reference to a risk of putting the tied tenant out of business as being an example of a serious impact.
2.2	We have amended the reference in the guidance to refer to Part 9 of the Enterprise Act 2002.
2.4	We have added a reference to 'other relevant documents and information' to the non-exhaustive indicative list of the information that the PCA may require a person to provide as part of an investigation.
2.16 & 2.17	<p>We have added a reference to the PCA's power under regulation 63 of the Code to treat any group undertaking of a POB (POB1) as a POB, as well as or instead of POB1, for the purposes of an investigation where the PCA has evidence which suggests that:</p> <ul style="list-style-type: none"> • the group undertaking is or has discharged, exercised or influenced any of the POB's obligations under the tenancy or licence to which the investigation relates; or • is responsible for or exercises influence over: <ul style="list-style-type: none"> ○ that tenancy or licence; ○ the financial arrangements or charging policies affecting the tied tenant; or ○ any other administrative, managerial or executive decisions of the POB affecting the tied tenant; <p>in a way that is relevant to the investigation.</p>
2.19	We have included in the guidance confirmation that, when endeavouring to complete investigations as soon as reasonably practicable in the light of all the circumstances, it is likely to do so within 12 months.