



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

Name: [REDACTED]

Organisation (if applicable): British Franchise Association

Address: 85f Park Drive, Milton Park, Abingdon OX144RY

Email: [REDACTED]

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

<input type="checkbox"/>	Pub-owning business with 500 or more tied pubs
<input type="checkbox"/>	Tied tenant
<input checked="" type="checkbox"/>	Interest group, trade body or other organisation
<input type="checkbox"/>	Other (please describe)

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

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see page 8 of the consultation document for further information.

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

I want my response to be treated as confidential ☐

Market Rent Only option and Parallel Rent Assessments

Question 1

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

Comments:

Question 2

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

Comments:

Question 3

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

Comments:

Availability of the Market Rent Only option at rent assessment

Question 4

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

Comments:

Question 5

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

Comments:

The Pubs Code - Information requirements

Question 6

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

Comments:

The bfa has its own disclosure requirements set out in the 'Guide to the Code of Ethics' which must be met before a franchisee signs a franchise agreement. The bfa agrees with the principal of disclosure, however, what is important and crucial is what and when disclosure is made. If it is a staged approach, it must be proportionate to where the franchisee is in the recruitment/interview process. The franchisor must have confidence that is the 'right' franchisee and at the appropriate time for the franchisee to understand it, as they are disclosing highly sensitive information to a prospective franchisee.

The bfa require disclosure to be in writing. It needs to outline the difference between statements of fact and statements of judgement, which should be clearly indicated. The following subjects should be disclosed to a franchisee (full description found in part 7 of the 'bfa Guide to the Code of Ethics')

- Business and financial position of the franchisor. What the business is, how it developed and over what period to assess the franchisor's business experience and background. The latest certified balance sheet and profit and loss account not more than twelve months prior to the date.
- People involved in the franchisor business – directors and senior executive staff with authority to make decisions directly and substantially affecting franchisees
- The franchise proposition – realistic description of the business format, initial and continuing services available to the franchisee. Details of pilot testing information for early start franchise brands or for established brands, the changes and franchisee views of the brand.

- If product is supplied by the franchisor, the franchisor should indicate what will happen if the source of supplies fail; if site approval is a feature, an explanation of the basis of approval.
- Franchisee information – how many in the network, who and where they trade from and when they opened their business; how many have terminated their franchise agreements the previous year and why; how many franchise agreements were terminated by the franchisor within that year and on what grounds; with how many franchisees or former franchisees the franchisor is then involved in litigation or arbitration and the nature of disputes; where the franchisor or any franchisee have previously traded in the territory proposed for a franchisee, the trading history of that territory over the period during which such trading has taken place for up to the previous 5 years should be disclosed
- Financial projections- no set format but they must clearly state the basis of the presentation of the financial projections. The franchisor should illustrate what they, or a franchisee, actually achieved in practice and what levels of gross profit/net profit might be achieved if certain turnover levels are reached. They should disclose and disclaim the statements.
- Use of guaranteed turnover promises – these are not a guarantee of profitability and require a specific caveat to clarify this in order to protect prospective franchisees.
- The franchise agreement that the franchisee is expected to sign and, preferably in writing, advise the franchisee to take independent legal advice to understand the contractual provisions.

Schedule 1

Part 2 (4) (2) to achieve 'suitable and qualified person' status it requires pre-entry awareness training, is this prior to signing any franchise agreement? The bfa does not have such a requirement due to the fact that training is supplied after the signing of the franchise agreement to ensure that the IPR and business model is not disclosed to someone who could set up in competition to the franchise business.

Part 2 (5) (1) – typically franchisees produce the business plan 'after' signing the franchise agreement as highly sensitive information is needed in order compile the plan or, as a minimum, at a later stage in the process when the information is provided at the appropriate stage in the recruitment/interview process.

Part 2 (6) (1) - information requirements are very extensive and appear to be required at a very early stage in the interview/recruitment process of a new franchisee. Although they are disclosed to 'qualified persons', in practice, someone could visit a pub site and confirm they are interested which qualifies them to receive all of the information. However, it is common practice in franchising to have a more 'staged' approach to disclosure, which is proportionate to where the prospective franchisee is within the recruitment/interview process. This staged approach enables the franchisor to disclose highly sensitive information to a prospect that is 'right' for the brand but also at a stage where the prospect will understand the information provided.

Question 7

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

Comments:

The point at which a person is recognised as a 'qualified person' and able to receive all of the information in schedule 1 is a concern if it is too early in the interview/recruitment process. If possible, could certain information related to business planning be disclosed when required, with additional information at a later date?

The Pubs Code – arbitrable provisions

Question 8

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

Comments:

Question 9

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

Comments:

The Pubs Code – repair provisions

Question 10

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

Comments:

The Pubs Code – arbitrable provisions

Question 11

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

Comments:

If the breach relates to provisions in the Pubs code, it is subject to the Adjudicator. However for other breaches, would a pub tenant of a bfa member have the right to use of the bfa dispute resolution scheme and/or Court for redress?

Contractual inconsistencies with the code

Question 12

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

Comments:

The exemptions from the MRO for 'genuine pub franchises' must be an explicit enforceable term.

Extension of code protections

Question 13

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

Comments:

Group undertakings

Question 14

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

Comments:

Exemptions from the Pubs Code – genuine franchise agreements

Question 15

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

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

The bfa has reviewed the definition of franchising in table 1 only in relation to the licensed trade/pub industry as it does not accurately reflect the definition of franchising in other sectors including all bfa accredited members.

The bfa has adopted the 'European Code of Ethics' and its own extensions and interpretations to form its own 'Code of Ethics' (Code) which its members adhere to and uphold. Within the 'Code' there is a definition of franchising of which many elements can be found in the definition of a 'genuine pub franchise'. The bfa agree that a 'genuine pub franchise' contains some of the key characteristics found in Table 1 parts 1. and 2.

There are additional elements not included in table 1 such as; *'secret' which means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; substantial which means that the know-how includes information which is indispensable to the franchisee for the sale of goods or the provision of services to end users... and the know-how must be useful for the franchisee by being capable, at the date of conclusion of the agreement, of improving the competitive position of the franchisee; identified which means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.*

The bfa agree with characteristic 3 - Part 40 (2)(f) – the franchisee must be able to sell his/her business to a third party or franchisor at market value but this should include 'goodwill' that the franchisee has built up in its business. In addition, franchise agreements do stipulate that the resale right of the franchisee is subject to the franchisor approving of such a buyer. This protects the incoming franchisee as it avoids an inexperienced unqualified person buying the pub from the outgoing franchisee and enables the franchisor to grant a franchise agreement to persons who have met their standards.

Characteristic 4 – Part 40 (2)(a) the bfa has in its membership 2 licensed trade members of which one has a rental payment element. This does not disqualify accreditation as a bfa member or recognition as a franchise but would mean they would not qualify as a 'genuine pub franchise' for the purposes of the Pubs Code. The bfa has a concern that this definition could be used as a template/ precedent for future definitions of franchising outside the specific area of pub franchising and this would be misleading and incorrect.

Characteristic 5 – Part 40 (2)(d) – the requirement for no payment to the pub owning business in connection with the supply of products, again, allows one bfa member exemption from the MRO but not another. The definition is narrow not allowing for expansion of the business model and if, as stated earlier, it is used as a template for defining franchising in other sectors it is an incorrect definition of the franchising sector. The additional characteristic regarding profit cannot in practice, be guaranteed by the franchisor, due to external factors such as wholesale prices.

Question 16

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

Comments:

The bfa agree with the Government's proposal for 'reasonable piloting' of the pub franchise model. As part of the bfa accreditation process for membership, franchisors are required to have proven that the concept works for a minimum period of 12 months, which we consider to be 'reasonable', in keeping with paragraph 2.2 of the European Code of Ethics. 'The franchisor shall have operated a business concept with success, for a reasonable time and in at least one pilot unit before starting its franchise network'.

The bfa do not require for membership piloting in more than one location but clause 4.1.3 of the 'Guide to the Code of Ethics' states that this is 'good practice'.

Question 17

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

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

Comments:

As there will not be a rental element characteristic in a genuine pub franchise agreement as defined in the Pubs Code, why is there a need for such information, whether historical or benchmarking?

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

Question 18

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

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

Comments:

Question 19

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

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

Comments:

Question 20

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

Comments:

Enforcing the Pubs Code – fee for arbitration

Question 21

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

Comments:

Enforcing the Pubs Code – costs of arbitration

Question 22

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

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

Comments:

Enforcing the Pubs Code – proposed maximum financial penalty

Question 23

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

Comments:

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

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

Part 11

Pub Franchise Agreements – additional points.

Part 40 (2)(b) – the bfa is concerned that this definition only allows for one fee to be paid in respect of the use of the franchisor model. More often than not, franchisors have several fees, such as the initial franchise fee; ongoing management service fee; marketing and advertising fee; training fee. This description is a narrow interpretation of the operational practicalities of the fees. All fees must be transparent to the franchisee prior to signing the agreement so that the franchisee is aware, upfront, of all the fees payable during the franchise agreement.

Part 40 (2)(e) – this level of detail is typically found in the operations manual which is a required document as defined in the franchise agreement. The operations manual allows for expansion and development of training, marketing and support. If defined in the franchise agreement it is static and does not allow for growth. 'Detail' needs defining further to clarify the level of detail needed in the franchise agreement. Typically there is a need for the franchise agreement and the operations manual.

Part 40 (3) – 'Fixed share of the turnover' – does this mean a franchisor could not have a stepped approach? Some franchise businesses charge a staggered fee based on turnover bands. If the staggered was 'fixed' at the start of the franchise agreement would this suffice or does it have to be one fixed fee?

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

Please acknowledge this reply ☒

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

☒ Yes

☐ No

BIS/15/533

