



# Department for Business, Innovation & Skills

## Annex D: The Pubs Code and Pubs Code Adjudicator: Part 1 - response form

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

Following the close of the consultation period, the Government intends to publish all of the responses received, unless specifically notified otherwise.

This closing date for this consultation is 14 December 2015.

Please return your completed form to:

The Pubs Code and Adjudicator Team  
Department for Business, Innovation and Skills  
2nd floor, Orchard 2  
1 Victoria Street  
London SW1H 0ET

Email: [pubs.consultation@bis.gsi.gov.uk](mailto:pubs.consultation@bis.gsi.gov.uk)

### The Pubs Code and Pubs Code Adjudicator: Part 1 - response form

Name: [REDACTED]

Organisation (if applicable): Marstons plc

Address: Marstons House, Brewery Road, Wolverhampton, WV1 4JT

Email: [REDACTED]

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

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

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



# Department for Business, Innovation & Skills

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 7 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 ☐

## Rent assessments

### Question 1

Do you have views on the proposed definition of a rent assessment?

**Comments:** We support the proposed definition of a rent assessment and the clarification in section 6.9 detailing when a rent assessment can be triggered. We agree with the proposal to exempt annual indexation, rent changes due to a change in tie or other ad hoc arrangements from the rent assessment definition.

Regulation 9.3. refers to rent review proposals being undertaken by a Registered Valuer. Registered Valuers undertake Red Book Valuations, public house rent assessments do not fall within this category. We agree that all rent assessments should be undertaken by a qualified Member of the Royal Institution of Chartered Surveyors.

## Market Rent Only option

### Question 2

Are there any other circumstances where a renewal would arise and which should trigger MRO beyond those we have set out?

**Comments:** We agree with the proposal that the statutory renewal of an agreement which is contracted into the Landlord and Tenant Act 1954 should trigger an MRO.

We believe that where an agreement is contracted out of the provisions of the Landlord and Tenant Act 1954 and there is no statutory right to renew, but the agreement includes a contractual right to renew that this should not trigger an MRO. The contractual obligation is limited to providing a renewal on the same contractual terms, if the tenant chooses not to accept the offer of a new agreement on the same terms then there is no further contractual or statutory right to renew, at present. The proposal would give the tenant a statutory right of renewal, which they currently do not have and would place the tenant in a better position than existing if, as proposed, they have a statutory option of an MRO.



## Question 3

**Is the wholesale market price for beer the appropriate baseline for determining a significant price increase?**

**Comments:** We would suggest that a weighted average of the wholesale prices of products sold at the premises be used to determine a significant price increase. Any price increases in the calculation of a significant price increase should relate to products being purchased by the tenant. Any price increases relating to products not purchased by the tenant should be disregarded as these will not affect the viability of the tenant's business and they are 'no worse off' if they do not purchase these products.

## Question 4

**Is a five percentage point threshold above any increase in the wholesale price of beer (which will reflect any increases in inflation, taxation and other input costs), the appropriate measure?**

**Comments:** We believe that it is appropriate to discount any external costs attributable to tax, duty or regulatory costs from the calculation to determine a significant increase in the price of beer. The price of raw materials should also be added to the list of excluded items. The 5% increase above these items appears reasonable.

## Question 5

**Do you agree that the calculation of a significant increase in price for tied products and services other than beer should exclude any increase in the wholesale price that results from rises in tax, duty, regulatory compliance costs or inflation (RPI)? Are there any other factors that should be excluded?**

**Comments:** Yes we agree. The pub companies have no control over these increases and it would be inappropriate to penalise them for passing on costs outside of their control. This is a sound principle and on that basis we believe that the increase in the price of raw materials should also be excluded as this is outside of the control of the pub owning company.



# Department for Business, Innovation & Skills

## Question 6

**Is this the appropriate way to measure a significant price increase for tied products and services other than beer? If not, please explain the alternative you would recommend.**

**Comments:** We agree this is an appropriate way to measure a significant price increase for tied products and service other than beer. As specified in the draft regulations these should relate only to products and services bought and used by the tenant.

## Question 7

**Is a two tier approach appropriate? If so, is the proposed threshold of contributing to 20 percent of the pub's turnover the right one?**

**Comments:** We agree with this on the basis that it relates to the definition within the regulations that state 'where the cost to the tied pub tenants of purchasing the product or service during the relevant period is an amount which is 20% or more of the tied pub tenant's turnover for that period'.

## Question 8

**Are the proposed percentage increases in price (30 percent and 40 percent) appropriate? If not, please explain your reasoning and an alternative.**

**Comments:** We agree that these proposals seem appropriate.

## Question 9

**Do you agree that a significant price increase should be calculated by reference to the price paid by the tenant at a previous point in time? If so, should that be six months ago?**

**Comments:** Yes we agree that there should be a timeline, 6 months appears an appropriate length of time.





## Department for Business, Innovation & Skills

### Question 10

**Do you have any comments on points i. to v. (significant impact trigger events) in Chapter 8?**

**Comments:** The proposal that this provision should only be able to be triggered in extreme circumstances seems sensible and measured. The consultation document clauses 8.35 (i) & 8.35 (iii) refers to an event which brings about a permanent change in trading conditions and an impact which specifically affects the tenant's pub and is not an impact that can be shown to affect other pubs too respectively; we do not believe that these two points are reflected in the regulations as drafted. We believe that these two measures should be specifically included within the regulations.

### Question 11

**Can you suggest any other circumstances that would be likely to have a 'significant impact' on the expected business of a pub; and that you believe would not be covered by the proposed definition in the Code?**

**Comments:** We cannot suggest any other than the proposed amendments detailed in the previous answer.



**Do you agree with the distinction drawn between an MRO compliant agreement that arises from a request for MRO at renewal and an MRO compliant agreement that arises from a request for MRO during the course of the tenancy?**

**Comments:** We agree with the principle that the tenant who has security of tenure under the provisions of the Landlord & Tenant Act 1954 should have security of tenure under their FOT MRO agreement. It seems reasonable that where the MRO is triggered during the term of the agreement that the proposed new agreement should be for a minimum of 5 years or the remainder of the existing tied tenancy, whichever is the shorter with a maximum term of 20 year.

There are however issues relating to the renewal process. We believed that the intention was to provide the tenant on renewal with two options i) a proposal for a new tied agreement and ii) an alternative proposal under MRO for a FOT agreement. As stated in clause 9.4. the government does not propose to provide a prescribed model for the Free of Tie agreement. Agreements will be negotiated between the parties and be based on what is currently available in the commercial market.

These are two distinct proposals and agreements.

Currently where a tied tenant has security of tenure under the provisions of the L&T Act 1954 and they are unable to agree all the terms for a new tied tenancy agreement they have the right to apply to court for the court to decide on the issues in dispute. This process relates to renewals of 'similar types' of agreement. The court will only set the terms in dispute under the tied agreement.

Under provision 9.13 the Code states during the renewal process 'the tenant may argue that they should not be subject to terms that are not applied in other free of tie agreements'. This would produce a hybrid agreement which is neither a renewal of the existing agreement or a commercial FOT agreement. We do not believe that this will fall within the courts remit under the renewal provisions of the Landlord & Tenant Act 1954. We do not believe that the court will provide two separate proposals one in respect of the tied and one in respect of the MRO. This is not our understanding of what was proposed.

There should be two distinct processes. The first for tenants who want to renew their protected tied agreement, but cannot agree terms, current standard procedures would apply. Tenants should in accordance with the existing Landlord & Tenant legislation apply to the courts, who will rule on the outstanding issues.

Tenants wishing to take the MRO option should refer any issues relating to the proposed terms to the Adjudicator who will be able to determine if the agreement is MRO compliant.



## Question 13

**Do you support the requirement that an MRO-compliant agreement should provide for an open market rent review every five years? Please explain the effect of such a requirement on the commercial relationship between the tenant and the pub owning business in an MRO agreement.**

**Comments:** The MRO-compliant agreement should reflect the standard terms currently adopted in the commercial market for rent review provisions. The consultation confirms that the government 'expects MRO agreements to be modelled on the standard types of commercial agreement that are already common for Free of Tie tenants'. Rent reviews will be part of the terms and conditions agreed between the parties. The introduction of a requirement for a rent review every five years would interfere with the commercial negotiation between the parties.

## MRO procedure

### Question 14

**Does the list of required documents set out in paragraph 10.23 provide the independent assessor with all the appropriate information to make an independent assessment of the MRO rental figure? Should any other documents be added?**

**Comments:** It is extremely unlikely that either party tenant or pub owning companies would have access to documents which provide evidence of similar tied pubs or free of tie pubs level of trading in the area. This is sensitive business information.

With regard to SCORFA benefits it is difficult to quantify the monetary value of certain items i.e. how do you value the benefit of the Statutory Code. Other values are subjective, such as the value of a Business Support Manager, or some may be open to different interpretations i.e. the cost saving of block policy insurance compared to taking out an individual insurance policy. Different items will have differing values to specific individuals and to their business.

We would suggest that the range of SCORFA benefits should be listed but it is not possible to apply a monetary value to the individual items.



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### Question 15

Do you have any comments on the timescale for the MRO procedure proposed for the Code?

**Comments:** We agree that there should be a timetable. We believe that it would be appropriate for the Adjudicator to set the timetable as they will be responsible for dealing with any breaches of the process.

The timetable needs to be aligned to the Landlord & Tenant Act renewal process and the rent review process in order to ensure that the tenant gets both the tied and FOT rent or renewal proposals at the same time. It would be sensible to draw up a timetable and procedure for renewals and a separate timetable and procedure for rent reviews.

Rent reviews normally take circa 200 days the proposed timetable for notification and negotiation for MRO is only 120 days. The tenant will get their MRO proposal before their tied proposal not at the same time as proposed. This will force the Independent Assessor process on MRO (if not agreed) ahead of the tied settlement.

Due to the tight timetable it is essential that electronic delivery of notice is acceptable. The proposed timetable for the appointment of an independent assessor is not long enough.

Clarity is required on whether the timetable is referring to calendar or working days.

### Question 16

Do you have any views on the proposed circumstances in which the MRO procedure will come to an end?

**Comments:** Where there is a contractual rent review and the tenant requests an MRO within 14 days of receipt of the rent proposal then the MRO procedure applies. Clause 24(2) (a) & (b) refer to the MRO agreement and the rent payable under 'that' agreement. There is no reference to any rent agreed in respect of the tied agreement. Clause 24 (4) states the tied tenant 'may' notify the pub owning company of its intention to terminate the MRO negotiations. There is no specific provision for this to be done if or when the tied rent is agreed and leaves the tenant with the option of continuing the MRO negotiation once they have agreed the rent under the existing tied agreement.

The MRO procedure diagram incorporates the option for the tenant to terminate negotiations under Clause 24 (4) and stay tied. It appears that there is a disparity here between the procedural diagram and the drafting which needs to be addressed. It appears from the diagram that there is an intention to allow for the MRO process to be terminated where a contractual rent review is concluded, but this is not accurately reflected in the drafting of the regulations. The removal of the term 'may' from the diagram would remove this discrepancy.



## MRO Disputes

### Question 17

**Do you have any concerns about these proposals for the resolution by the Adjudicator of disputes related to the MRO procedure? If so, please explain your concerns.**

**Comments: We believe the ability for either party to be able to refer matters to the adjudicator is fair and just.**

## Waiver from MRO in return for significant investment

### Question 18

**How do you believe the “amount” of investment for the purposes of “qualifying investment” should be defined? Please explain your view by reference to the type of rent payment and percentage which should be used, with evidence to support your response.**

**Comments: We would recommend that there is not a fixed sum or % of rent which would constitute a qualifying investment. The amount of investment will vary significantly depending on the different trading formats, the level of investment and extent of the works; these will vary from small refurbishments to large extensions. The effect and potential uplift on the trade of the specific business is the critical point.**

**We would suggest that there be flexibility whereby the parties are free to negotiate and agree an investment project, if both parties agree then they can enter into an investment waiver. This would encourage more investment.**

**If it is to be a fixed amount then the amount of investment should be based on a known sum, the dry rent or rent payable, is the most appropriate measure, both parties are aware of this amount and will be able to establish if the proposed investment qualifies, subject to documentation for a waiver.**





## Question 19

**Do you agree with the proposed definition of “qualifying investment” in terms of the “type” of investment? If not, please explain why not, and suggest an alternative definition, with evidence to support your response.**

**Comments:** We agree that where the works are the Landlords contractual obligation to undertake that these should be excluded from the definition of ‘qualifying investment’, however if the Landlord is undertaking works which form part of the Tenants contractual obligations, where the tenant is unable to fund such works then these should be included within the definition of ‘qualifying investment’.

**What do you consider should be the maximum length of the waiver period (a) 7 years; (b) 10 years; or (c) another option? Please provide an explanation for your answer and any evidence to support your case.**

**Comments:** We would support the maximum length of waiver to be flexible and agreed between the two parties. It would be sensible for the Adjudicator to be able to make provision, where the parties agree to extend the waiver period. If a maximum period has to be included then it should be at least 10 years. Any shorter period will deter Landlords from making large capital investments in properties, as they may not receive a commercial return on their investment. In order to secure investment, investors require a financial return over and above the sum invested; otherwise commercial rationale will ensure that the monies will be invested elsewhere. It is reasonable to expect a commercial return on monies invested.

**We believe that there is a duty of care for the tenant assigning their agreement to make any assignee aware of any existing investment waiver.**

## Question 21

**Do you agree with the safeguards proposed by the Government and the role proposed for the Adjudicator? Are there other safeguards that you consider should be provided? If so, what and why?**

**Comments:** Yes we agree with the proposals.





**Question 22**

**Do you believe that there are any unintended or undesirable consequences of the proposed definition of “qualifying investment” or of other conditions referred to in this chapter on the MRO investment waiver?**

**Comments: The introduction of the MRO will we believe have an adverse impact on the level of investment in pubs. Any business will look at the potential commercial return on their investment and any the level of risk prior to making a capital investment. Pub companies will generally only invest where they can generate a reasonable commercial return on their investment. The proposed time limit on the investment waiver, the continuing possibility of an MRO, where there is a ‘significant impact’ trigger event and the inability to undertake a contractual rent review during the waiver period, will make a number of proposed investments less attractive. Capital will no doubt be invested in other parts of the business which provide a better commercial return.**



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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.

### **Comments:**

**We believe that there needs to be some transitional arrangements put into place for the introduction of the Pubs code. There are a number of issues which need to be addressed.**

**The code will come into effect by May 2016, as yet the adjudicators is not in post and has not set up processes and procedures to be followed by both parties where referrals are made to the adjudicator.**

**There is currently no training available in respect of the code and this will not be available for a period of time after the code is finalised and approved by both Houses. Neither party are in a position to implement any training in respect of staff until such time as the code is finalised and approved training is available.**

Please use this space to explain why you consider the information you have provided to be confidential.



## Department for Business, Innovation & Skills

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/15/522/RF**





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

Name: [REDACTED]

Organisation (if applicable): Marstons plc

Address: Marstons House, Brewery Road, Wolverhampton, WV1 4JT

Email: [REDACTED]

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

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

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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:** We confirm that we agree by providing the tenant with a Tied Rent Proposal together with a Free of Tie Proposal the tenant will be able to make an informed decision on which option they wish to choose. They can consider the two options in parallel and decide which their preferred option for their specific business is. They will be able to assess if they are any worse off with tied or the free of tie option.

The MRO process needs to dovetail with the rent review process and the Landlord & Tenant Act 1954 renewal process in order to ensure that the tenant receives details of the tied and FOT offer at the same time.

### 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:** We would question the practicality of point (iii) under section 10.23 (and schedule 3 of the regulations), which states that the documentary evidence should be provided regarding 'relevant comparisons with similar tied pubs in the local area'. Neither tenant nor landlord will have access to such information and will certainly not have any documentary evidence. This information, where available will be subject to data protection.

Section 10.23 (iv) and schedule 3 of the regulations stipulate that evidence should be provided that analyses 'the market value of any special commercial or financial advantage provided to the tied pub tenant under the terms of the tenancy or licence'. SCORFA is a relative concept – the market value of which is extremely subjective and will have a different value for different tenant depending upon their business model. We would suggest that in place of SCORFA, the requirement should be to outline the range of benefits available to the tied tenant, but not assign a specific market value to them.

Chartered Surveyors must value in accordance with RICS regulations. There will be no documents or accepted way to analyse the market value of SCORFA benefits, as required by item 4 Schedule 3.



The prospective tenant will have both proposals; a tied offer and a free of tie offer, it is an informed commercial decision for each individual operator to make. Each will have their own business objectives. Some will require the support of a tied proposal other will be prepared to take a great financial risk and opt for a free of tie agreement.

Section 10.23 (v) and item 5 of Schedule 3, value of housing or other commercial premises in the area are not relevant to establishing the value of the Licenced premises on either a tied or FOT basis. Any comparable information will relate to other licenced premises.

We believe that all Independent Assessors should be independent professional qualified individuals with the relevant expertise. We would recommend that the adjudicator approves a list of suitably qualified individuals.

### 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:** We believe that by providing the tenant with the two options, a tied tenancy proposal and a FOT (MRO) proposal in parallel this enables the tenant to consider both options and provide them with the information in order that they can make an informed decision which. By providing this information we believe that the 'no worse off' principle is delivered.

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:** This provision was introduced by the government prior to the issuing of the consultation. Whilst we had not anticipated this provision, the proposal introduced an artificial rent cap which gave some certainty to both parties in relation to the rent payable under the terms of the agreement going forward.

### 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:** Over the last 28 months just over 60 % of rent reviews completed were agreed at a nil increase or rent reduction. Our current lease and tenancy agreements have annual RPI increases, but not in the same year as a rent review. Some of our older lease and tenancy agreements do not contain indexation provisions.

## 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:** We believe that it is important to ensure that all prospective tenants are provided with the appropriate information to ensure that they can make an informed decision before entering into an agreement. We have a number of enquiries for each vacancy and it would be too onerous to be expected to provide all potential applicants with the full list of required information included in the code following one inspection of the premises and confirmation of their interest in the pub business. It is disproportionate to provide all the information in Schedule 1, this amounts to over 80 pieces of information, at this stage there would have been no opportunity for the applicant to consider the proposal and ask pertinent questions and the pub owning company would not have undertaken credit checks or requested right to work documentation.

We would suggest that there are three stages. Stage 1 would include an initial discussion to establish if this is a serious and viable application, followed by an inspection of the premise. Stage 2 an interview, where the information required to prepare the tenants business plan is provided and where both parties have an opportunity to discuss the proposal and ask specific questions. Stage 3 further meeting/interview and provision of any outstanding information requirements. We believe that this is a more measured approach. A stage approach would be more practical, benefit both parties.

Clause 8.4 regulation 7 (3) makes reference to any valuation should be prepared in accordance with RICS guidance and signed by a registered valuer', this should be a qualified member of the RICS, not a registered valuer. Registered Valuers undertake Red Book valuations and these are not Red Book valuations.

8.12 as drafted gives prospective tenant's a statutory right to receive information under the provisions of the Statutory Code before they have an agreement under the Statutory Code. The tenant should receive certain information prior to entering into an agreement but until they have entered

into a substantial agreement or been in occupation for 12 months, the pub owning business should not be in breach of the Statutory Code if they have failed to provide any of the required information. Any referral to the Adjudicator should be by tenants who have an agreement covered by the Statutory Code and where pub owning Companies have breached the provisions of the code. Once the tenant signs an agreement that is subject to the Statutory Code or is in occupation of the premises for 12 months or more then they will have the protection of the code and the pub-owning company will be in breach if they have not provided all the required information. The tenant should then have recourse to the adjudicator, if there has been a breach of the code.

#### **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: We believe that all prospective tenants should provide a business plan for each individual business.**

As stated previously we believe that there should be a process to follow. A prospective tenant and pub owning company should follow the process to ensure that both parties have the required information at the appropriate stage. It is essential that there is dialogue between the parties in order that the prospective tenant can ask questions and the pub owning company can explain any matters that the prospective tenant requires further clarification on.

A prospective tenant should be checked to ensure that they are a suitable and qualified person; this should include a credit check and right to work check. We agree that the prospective tenants require certain essential pieces of information in order to prepare a business plan. The prospective candidate will require some but not all of the specified information to complete their business plan. A number of the items included in Schedule 1 & 2 are not required to draft the prospective tenant's business plan.

A viewing of the premises and confirmation of interest is a very low bar to identify a genuine suitably qualified candidate. The requirement to then provide over 80 pieces of information at such an early stage in the recruitment process will deter potential applicant when they are presented with this raft of information. The dialogue between the parties has been ignored in this process. As drafted we believe that this process will cause delays in letting premises and will lead to pub closures and more temporary agreements being put in place whilst both parties satisfy the onerous information requirements of the code.

## 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:** Clause 6.14 states that 'Other contractual terms and formal or informal negotiations that may affect the rent will not be prohibited by the provisions on rent assessment. These include annual indexation provisions: ad hoc arrangements in support of the tenant: rent changes connected to changes in the nature of the tie; changes relating to a benefit in kind; and periodic general business review. These will not constitute a formal rent assessment under the Code'.

This suggestion appears to contradict this statement. Any increase in the amount of information required in order to process any of these changes would undoubtedly significantly reduce the instances when such concession are granted. The work involved in providing the information is completely disproportionate. An index linked RPI increase in rent is a simple mathematical calculation.

This is a different situation from providing information when letting premises to a prospective tenant considering taking a pub tenancy who may have little or no relevant information. The tenant would be in occupation, trading the premises and will have signed an agreement which details a significant amount of the information covered under Schedule 1. They would be aware of any changes to the Licence or in the immediate area which may affect their business, they will know how the volume figures as they will be operating the business. We do not agree with this proposal and believe that is unnecessarily onerous proposal.

### 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:** We would refer you to our comments above. Any increase in the amount of information required in order to process any of these changes would undoubtedly significantly reduce the instances when such concession are granted. The work involved in providing the information is completely disproportionate.

It is completely disproportionate to provide all the information in Schedule 1 to a tenant in occupation and operating the business for a pre agree

**indexation increase or a temporary change to rent, usually either seasonalisation or rent holiday or temporary reduction, all of which are to the benefit of the tenant. If these requirements are incorporated then these temporary arrangements which are not contractual but benefit the tenant will cease to be granted, we do not believe that this is the intention.**

#### **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: It is essential that all new tenants and assignees undertake their own due diligence in respect of the repairing obligations they are undertaking and the condition of the premises when they enter into an agreement. The Code should make this an obligation on the tenant, to ensure that they fully understand the commitment that they are entering into. The tenant should be obligated to obtain their own independent professional advice from an appropriately qualified person.**

**There should be some measure of reasonableness with regard to referring items of disrepair or lack of maintenance to the Adjudicator. It seems disproportionate to suggest a failure to replace a washer in a tap could be referred to the Adjudicator as a failure of maintenance obligation, this provision need to be more balanced The Adjudicator should review serious or systematic breaches or those resulting in a loss of trade.**

**Access to premises is normally detailed within the contractual agreement between the parties, where this is the case this should be adhered to. Where there are no such provisions within the tenancy agreement in cases of emergency access should be given at any time. For routine maintenance and repairs access should be by arrangement between the parties.**

#### **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: Any provisions which if not fully complied with will not affect the profitability of the tenants business or would not form a breach of the contractual agreement or Statutory Code on their own should be non-arbitrable.**



## Contractual inconsistencies with the code

### Question 12

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

**Comments:** The provisions of the UK Pub Industry Framework Code Edition 6 are contained within individual Company's existing Code of Practices. The IFC 6 prohibits the inclusion of Upward Only Rent Reviews in new agreements and makes them unenforceable in existing agreements. The IFC 6 also clearly states the requirements relating to the installation of Flow Monitoring Equipment and the requirement for additional supporting evidence before taking enforcement action on purchasing obligations. Any clauses within tied agreements which seek to avoid the provisions of the Statutory Code would be unenforceable unless permitted within the regulations, i.e. Investment Waiver Agreements, exemptions permitted under Part 11.

## Extension of code protections

### Question 13

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

**Comments:** We believe that it is reasonable to provide tenants with some extended protection where the ownership of the premises that they occupy changes to a company or individual who is not a pub owning company under the act and is not subject to the code.

From the drafting it appears that the tenants would continue to benefit from all the provisions of the Code. The provisions of the extended code protection should be proportionate. The information required under Clause 10.9 is significant. Small companies or individuals who purchase pubs may not employ BDM's or Compliance Officers. This will potentially hamper the sale of premises.

Clause 10.2 states that the tenant would have no right to request an MRO, however Clause 10.9 a) gives entitlement to a rent assessment carried out in accordance with the Code, clause 6.4 part 1 of the consultation states having a rent assessment will entitle the tenant to request an MRO agreement there appears to be a contradiction here, please clarify.



## 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:** Clause 11.4 provides for all Group Undertakings to be included when assess the maximum financial penalty that can be imposed. This proposal seems disproportionately excessive for companies where a large proportion of their turnover is derived from income sources other than wet and dry rents. We do not consider this approach to be flexible or proportionate. We strongly believe that fines based on turnover should relate to the turnover from the relevant division or company within a Group Undertaking who are responsible for any breach of the Code.

Any apportionment of turnover to different trading divisions is available within Company accounts, which for plc are published and available to all. We do not agree with the assertion that it is too difficult to obtain this information.

If this provision is implemented in its existing form this will deter companies from continuing to own and operate tied leased and tenanted pubs which fall within the code. This will reduce the number of opportunities for low cost entry into the pub trade. Companies will divert funds and investment into other sectors of their businesses.

## Exemptions from the Pubs Code – genuine franchise agreements

### Question 15

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

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

**Comments:** The MRO is intended to apply to all tied pubs in which the operating model could, if applied inequitably through setting rent or prices charged for tied products, result in the licensee of a tied pub being deemed to be at a commercial disadvantage to a free of tie licensee. We agree with the proposal that operating models, such as genuine franchises, which do not provide for the payment of rent and where the licensee's profit share is not affected by prices paid for tied products should be exempt from the MRO provisions within the code.

We agree that there should be some criteria which should be met in order to qualify as a genuine franchise for the purpose of the statutory code. These

should not however hamper the development of franchising within the pub sector. By inclusion within the code pub franchises are already disadvantaged compared with other franchise models in different types of businesses which are not covered by these statutory requirements. In order to operate and to develop franchising in the pub sector there needs to be as much flexibility as possible, whilst adhering to the two principles of no worse off as a free of tie tenant and fair and lawful dealing.

With regard to the proposed key characteristics of a genuine franchise Item 1, Regulation 40 (4) (a) & (b) relating to reasonable piloting of the system. We agree that a business model, which has been trialled in at least two pubs for a period of 12 months, seems a sensible definition for reasonable piloting. This will ensure that the technical systems and procedure methods have been tested prior to them being adopted into the franchise model. Franchisees will be provided with business models that have been tested and have the potential to succeed.

Item 2 the provision of a business format, which has been piloted which relates to Regulation 40 (2) (b) (e) & 40 (4) (c). 'Business format franchising is the granting of a license by the franchisor to the franchisee, which entitles the franchisee to trade their own business under the brand of the franchisor, following a proven business model. The franchisee is given training and ongoing support to operate the business. The franchisee is buying the right to operate the business using a proven business format, provided by the franchisor. The franchisee will pay for the initial start-up package including equipment, training etc., the initial fee or cost is not referenced in the statutory code, this is standard for franchise operations in all business sectors. The franchisee owns the business and operates it in accordance with the business model, using the business brand. The franchisee will pay an ongoing fee in respect of the use of that model; in return they will receive a contractually agreed share of the turnover of the business. The franchisee shares in the profitability of the business, has limited financial investment and limited risk. Both parties are working on the same profit and loss account and there is complete financial transparency between the parties, thus providing fair and lawful dealings between the parties.

Due to the commercial sensitivity of the information provided and the intellectual property rights related to a pub companies individual franchise business model detailed in regulation 40 (4) (c) we do not believe that the requirements in relation to the provision of information detailed in Schedule 1 should be released in accordance with regulation 5 (5) (a) & (b). There is a process involved where information is provided in stages following interview and after undertaking credit check and upon receipt of right to work documentation. Sufficient information should be provided in order for the franchisee to complete a business plan. Items referenced under regulation 4 & 5 are not relevant to franchise; training is different for a franchise pub than it is for a leased or tenanted pub. We believe that genuine franchises should be exempt from Part 2 of the code and an additional schedule attached detailing information requirements relating specifically to genuine franchise schedule 4 see further details under Question 17.

Item 3 we agree with the principle that the franchisee should have the right to sell their business to a third party. This gives the franchisee the opportunity to realise the value of their business and any additional value that they have added. However it is essential that the franchisor has the right to ensure that the proposed purchaser is a suitable and qualified person, otherwise they will be in breach of the code, we believe that this proviso should be documented in the code for clarity of all parties; this is standard procedure on the sale of any franchise agreement. We would also suggest that the pub owning company has the option to purchase the franchise at open market value.

Regulation 40 (2) (c) (Item 4 ) the removal of any rent payable ensures that the Franchisee is not subject to any commercial disadvantage in respect of rent if there is no rent payable under the terms of a genuine franchise. This will ensure that the principle of 'no worse off' will be achieved. It will minimise the risk to the franchisee. To ensure fair and lawful dealings the franchisee will receive an agreed fixed share of turnover, in accordance with regulation 40 (2) (a). We would seek clarity that this would permit agreements where turnover is a fixed percentage of income, where the percentage is agreed for the term but may relate to levels of turnover for instance on turnover of £500,000 franchisee receives 20% on turnover £500,001 to £750,000 they receive 21% and 22 % on any turnover over £750,000.

We agree that the tenant's share of turnover should not be affected by the price paid for tied products. As drafted, at present, we believe that the code goes beyond the principles of 'no worse off' than a FOT tenant in regulation 40 (2) (d) which will stifle the development of franchising and franchise models. Additional products and services may be developed and offered to existing franchisees, the franchisor should be able to recharge the cost of these, as drafted this is prohibited. The issue on non-exempted agreements within the code relates to the mark up on these items, the cost to the tenant should not be above what a tenant free to source these items should pay, the same principle should apply here.

Where franchisors are members of the British Franchise Association they operate under the British Franchise Association Code of Ethics and are obligated to comply with the BFA's Disciplinary, Complaints and Appeals Procedures, which provide systems and procedures for dealing with any disputes between the parties. This also ensures fair and lawful dealing between the parties.

We believe that the criteria set for the definition of a genuine pub franchise should ensure the two underlying principles of 'fair and lawful dealing' and that tied tenants should be no worse off than free of tie tenants. They should permit flexibility in order to ensure development of franchise operating models in the pub sector.

#### 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:** We agree with the government proposal for 'reasonable piloting' of business formats. We confirm that the proposal for this to be at two or more pubs for a period of no less than 12 months appears reasonable.

Companies will remain innovative and test ideas and innovations in other business models and where appropriate rolled out and incorporated these into their franchise business model. By trialling and testing innovations prior to incorporating them within the franchise business model this reduces the risk and cost to the franchisee. This is a significant move away from the traditional pub business model.

We also believe that genuine franchise agreements should also be exempt from Part 8 of the Regulations which covers 'the end of the MRO procedure'. If they are exempt from MRO then this section is not applicable.

#### 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:** We understand, as drafted, that the provision of information required would relate to Schedule 1 only, which relates to regulation 6 (Part 2) and regulation 38 (Part 10). As genuine franchises are exempt from Parts 3, 4 & 7 Regulations numbered 7, 9 & 30 (30) would not be applicable and so Schedules 2 & 3 would not apply.

Items referenced under regulation 4 & 5 are not relevant to genuine franchise; training is different for a franchise pub than it is for a leased or tenanted pub and PEAT is not used for pub franchises, as it is not relevant and will not establish if the applicant is a suitable and qualified person to enter into a franchise agreement. Training which is relevant to the specific business model should be provided not training currently used for leased and tenanted pubs.

We agree that a franchisee should produce a business plan; however a number of the items detailed in this section are not relevant to a business plan for a genuine franchise. Franchisors do not just provide potential franchisees with a pack of information there is a recruitment process involving interviews, discussions and exchange of information. Commercially sensitive information relating to a pub company's specific individual trading model would be released later in the process but prior to the potential



franchisee entering into an agreement and in plenty of time for them to review and to take all necessary professional advice.

We believe that genuine franchises should be exempt from Part 2 of the code and an additional schedule attached detailing information requirements relating specifically to genuine franchise (proposed Schedule 4) would be a more sensible approach.

#### 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:** The IFC provided for temporary agreements of 12 months or less to be exempt from Company's individual Code of Practice. This has become an accepted timeframe for companies to collect all Code of Practice required and to convert tenants onto a substantive agreement. We support the proposal to grant exemption for Tenancy at Will or other temporary agreements for a period of 12 months. This acknowledges the importance of being able to grant a temporary agreement to keep premises trading whilst ensuring time to comply with the provisions of the Code.

##### 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:** Temporary agreements are used in a number of circumstances either to keep premises trading whilst a suitably qualified tenant is recruited or to trade whilst all the information, processes and training required under the provisions of the Code are complied with. By making pre-entry training compulsory for tenancies at will this will undermine these principles. The Tenancy at Will is terminable by either party on short notice so the tenant is not committed until they sign a substantive agreement and can terminate the agreement if they wish to do so.

The current UK Pub Industry Framework Code Sixth Edition states that Tenancies at Will and Temporary Agreements of one year or less. These are short-term agreements which are used to cover either temporary

**arrangements or interim arrangements whilst long term agreements are finalised. Do not fall within the provisions of the Industry Framework Code.**

**These agreements are therefore exempt from the requirement to undertake PEAT.**

**A proposal has been put forward for a short 30 minute online course aimed specifically at tenants taking temporary agreements.**

#### **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: Temporary agreements are used for different reasons, they may be holding agreements until a suitable candidate is found to take a substantive agreement or they may be used whilst both parties complete Code of Practice or going forward compliance with the requirements of the Statutory Code. If the latter is the case then the tenant will receive all the information required under the provisions of the code.**

**Any obligation to provide significant amounts of information for tenant entering into a temporary agreement will undermine the use of a temporary agreement and result in pubs closed for trading.**

#### **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: There is no mention of how much a pub owning company will have to pay to refer a dispute to the adjudicator; presumably this will also be £200. It is stated that the fee will be £200 for a pub owning company to refer an MRO dispute to the adjudicator. We believe that it is right that there should be a referral fee in each instance. £200 is a relatively small sum and may be insufficient to deter frivolous or vexatious referrals.**



## 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:** Under the provisions of the Arbitration Act 1996 the Arbitrator has the power to decide on the awarding of costs, and how these are split between the parties taking all factors into account. We see no reason to alter this. The arbitrator sees all the facts and information submitted in each individual case and is better informed to decide on the award of costs.

Whilst there is a proposal that cost may be increased where the referral was vexatious, this is insufficient to protect against ill- advised or referrals with little if any chance of success.

## 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:** This proposal seems disproportionately excessive for companies where a large proportion of their turnover is derived from income sources other than wet and dry rents. We do not consider this approach to be flexible or proportionate. We strongly believe that fines based on turnover should relate to the turnover from the tied pub estate, this would be more proportionate. This information is available in the Company's published accounts and is already in the public domain. In 2015 Marstons turnover was £845.5 million, £268.3 million proportion of revenue derived from our tenanted and leased estate (which includes some agreements outside the statutory code) or 31.7 %. 1% of the total turnover is £8.46 million 1% of turnover from the pub tenanted and leased estate would be is £2.68 million.

It is inequitable and totally disproportionate to base any financial penalty on sectors of a business which are not covered by the statutory code.

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.

**Comments:**

**5 (2) (a) the business plan should be completed prior to not after pre-entry training**

**7 (7) please clarify what this means**

**10 (5) visits pub within 3 months of the proposal being provided should be 3 months prior to the proposal being provided not after**

**11 (2) & 11(3) (ii) states that a new rent under a rent review will not come into effect until the date that the pub owning company and tenant agree the new rent in writing, if that is later than the rent review date. The contractual terms of leases already provide the date that the rent review takes effect the correct basis for backdating overdue rent reviews and any interest provisions. It will delay implementation of any rent reductions for tenants as well as rent increases for pub companies and provides a perverse incentive to delay agreement either way.**

**12 (2) (b) (i) the amount payable is more than the passing rent as it includes insurance and service charge. This should read passing rent**

**14 (3) contracted out renewal 'on the day the tenancy may be renewed under the terms of the tenancy' unless there is a contractual provision there is no such date. A contracted out agreement will automatically terminate at the end of the agreement.**

**20 (3) (b) Is this Heads of term or a copy of the proposed agreement? Please clarify**

**25 (1) & 29 (2) The Independent Assessor should be qualified member of RICS with relevant experience**

**30 (9) (a) gives the tenant the right to reject the independent assessors assessment of MRO within 7 days, if this person is independent and qualified it seems inequitable that only one party should have the right to reject the assessment, if there has been no breach of procedure we do not understand the reasoning behind this proposal. As the tenant is the only the party that**

has the right to reject the initial assessment it would only be fair and equitable that they pick up the additional costs of the appointment of a second independent assessor.

36 (2) (c) contracted out agreements on the date of expiry should be added.

38 (2) (iii) It is the assignees responsibility to undertake due diligence when entering into an assignment. They should take professional advice, to ensure they fully understand the repairing obligations they are taking on. They should also have a building survey of the premises to establish its current condition and any wants of repair. This is the normal process in commercial lettings in other property transactions.

An assignment of a lease is an arm's length negotiation between two parties, the tenant and the prospective assignee; these negotiations should not be fettered by a third party. Any interference could result in litigation against the third party.

Tenants are entitled to quiet enjoyment of their premises Landlords interference with a proposed assignment is a potential breach of the tenant's right to quiet enjoyment.

Landlords are obligated not to unreasonably withhold consent to an assignment. Any interference with the negotiations between the tenant and prospective assignee may be deemed to be unreasonable.

40 (1) should include Part 8

42 (3) (a) should be a Chartered Surveyor or suitably qualified person who undertakes the valuation and should be a member of the RICS

42 (6) (b) add (3) (a) & (b). It is confusing to refer to everyone as a Business Development Manager, we would suggest pub-owning company employee.

50 (3) A Schedule of Condition reflects the condition of a property at a moment in time it is used to record the condition of premises at the commencement of an agreement. It will not be prepared until any work undertaken prior to entering into the agreement have been completed

50 (5) (a) & (c) The Schedule of Condition documents the condition of the premises at the time of letting it does not form part of the letting negotiation and will not be prepared until any works have been completed and the parties are ready to enter the agreement.

50 (6) (a) & (b) A Schedule of Condition is not reviewed once the agreement is signed and it is attached. As stated it documents the condition of the premises at that point in time.

50 (8) (b) Dilapidations are a breach of contract between two parties. Where a schedule of dilapidations is prepared by a Landlord it will take into account

the contractual obligations between the parties, taking account of any Schedule of Condition. As dilapidations are contractual breaches then the tenant will be responsible for these if they are in breach in accordance with the terms of their agreement. The clause states 'whether' the tenant is responsible, if they are in breach then they will be responsible.

RICS Dilapidations Protocol 6<sup>th</sup> Edition defines a Schedule of Dilapidations as: 'a documents which identifies relevant lease/tenancy obligations; alleged breaches of those obligations; any remedial works that have been completed or are proposed in order to rectify each alleged breach; and, in certain circumstances, the estimated or actual cost incurred in rectifying those breaches'.

50 (10) Rights of access will be documented within the agreement.

53 (2) (b) this may not be know

#### **Schedule 1**

10 (e) A schedule of Condition is a document which is used to document the condition at a certain point in time; these often include a photographic schedule. They are attached to leases to clarify or modify the repairing obligation. The SoC records the condition it is not a building defects survey. An ingoing tenant should be required to undertake their own due diligence and commission a building survey.

15 (c) This is stipulated in Regulation 50 (7) (b) as 'at least 6 months before the end of the tenancy or licence

15 (d) This is detailed in the RICS Dilapidations Protocol 6<sup>th</sup> edition.

Please use this space to explain why you consider the information you have provided to be confidential.

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

Please acknowledge this reply ☒

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

☒ Yes

☐ No

**BIS/15/533**



