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Our Ref: WST/EG

18th January 2016

The Pubs Code & Adjudicator Team
Floor 2
1 Victoria Street,
London
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By post and email: pubs.consultation@bis.gsi.gov.uk

Dear Sir/Madam

Re: Pub Code Consultations

I am replying on behalf of Enterprise Inns plc to your invitation to continue to participate in consultations about the final form of the proposed Pubs Code. This response covers both parts 1 and 2 of the consultation document and comments upon various details of the draft regulations. Our aim is to assist in the design of the Statutory Code so that this works fairly and at least cost for everyone in the industry.

We are keen that the statutory framework should not create an environment that would stifle investment, innovation and evolution in the pubs market at a time when consumers are rapidly changing the way they eat out, socialise and seek entertainment, and when competition for the "leisure pound" in the UK is intense. It is vital to the future of pubs in the UK that a light touch is adopted as far as possible, and that when terms are openly and transparently agreed between a tied pub company and a tied tenant, those terms are not subject to continuing uncertainty. Freely agreed contracts should be honoured by both parties on all their terms, including the tie.

The new Code should apply only the two fundamental principles of the SBE&E Act; of fair and lawful dealing and "that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie". It is not a fundamental objective of the Act or this Code that there should be a transfer of cash value from the pub-owning business to all tied pub tenants: - open market pub letting evidence of both tied tenancies and free of tie leases shows that new rents, freely offered and accepted on the basis of current tie and available discounts, are inherently "fair" taking into account the features and benefits of each legal agreement.

I hope my following responses are helpful. Please do not hesitate to contact me should you have any queries in relation to the matters referred to.

Yours sincerely
Enterprise Inns plc

Simon Townsend
Chief Executive Officer

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

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

Pub-owning business with 500 or more tied pubs YES
Tied tenant
Interest group, trade body or other organisation
Other (please describe)

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 NO

Question 1	**Rent assessments** **Do you have views on the proposed definition of a rent assessment?**
Section 42 (4) of the Act leaves it to the Code to define "rent Assessment" but the Code does not seem to clearly do so. We understand a rent assessment to be a new Code process relating only to tied rents, triggered by a rent proposal set out by the pub owning company. During the course of the process the parties will start with the rent proposal to negotiate the content of a shadow P&L as well as the tied rent outcome. There is no requirement for the pub owning company to deliver any further formal rent proposal during the course of such negotiations. The trigger event only happens once in each rent review or lease renewal. It would be helpful to provide more interpretation of "Rent Assessment" in this Code. As "Rent Assessment" is a new concept which is specific to this Code, the wording of Regulation 8(2) appears illogical because no tenant could possibly have had any Rent Assessment (as now defined) in the past 5 years. We suggest that better wording would be "a) The tied pub tenant has not had the opportunity of a rent review within the 5 years prior to the date of the request."	

Question 2	Are there any other circumstances where a renewal would arise and which should trigger MRO beyond those we have set out?

L&T Act protected: We agree that a renewal under the L&T Act should be a trigger but we have concerns about the way the consultation proposes it should be implemented (see Q12).

Contracted out tenancy: When there is a contracted out tenancy which contains no contractual right to renew, any further agreement to let that pub to the same publican (following expiry of the contracted out tenancy) is a new letting and should not be considered to be a renewal.

Contractual right to renew: Enterprise Inns considers that the contractual terms of the pre-defined right to renew on a **tied** basis should be the whole, and only, basis on which the lessor should be required to grant this lease renewal. There are no other circumstances in which one party to a contractual right to renew leases would be able to require the other to vary pre-defined lease renewal terms lawfully. There is already adequate code protection to ensure that a fair tied rent can be settled, so regulation 14(3) should be deleted.

Question 3	Is the wholesale market price for beer the appropriate baseline for determining a significant price increase?

The relevant wholesale price is the price in relation to all products **available** for the tenant to purchase as shown in the **lessor's** current tied price list at the relevant time, (not "the wholesale market price of beer" as predicated in this question) based on a weighted average by volume which may be sold by the lessor across their range. The same basis should apply to all ciders (which are not specified in these regulations). This baseline should not reflect only the products the tenants **choose** to buy from the tied price list.

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?

Yes

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?

Yes There are no other factors to be excluded	
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.**
It is difficult to define a single method to cover all the products and services which a tied pub owner may provide to a tied tenant. We have no alternative to suggest.	
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?**
This question may be wrongly phrased. The consultation and regulations refer to "an **amount** [of cost] that is 20% or more of the tied pub tenant's turnover for that period". We agree with that measure.	

Question 8	**Are the proposed percentage increases in price (30 percent and 40 percent) appropriate? If not, please explain your reasoning and an alternative.**
We agree this is a viable measure.	
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?**
Yes.	
Question 10	**Do you have any comments on points i. to v. (significant impact trigger events) in Chapter 8?**
For ease of use of the Code, it would be helpful to import the wording of section 43(9) of the Act into the regulation as you had done in phase 1 consultations.	
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?**
No	

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Question 12	**MRO-compliant agreements** 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?

We do not think the Consultation at 9.13 is accurate; either as a statement of law in relation to the L&T Act, or as a summary of the proposed Code. We notice that regulation 22(1)(b) has been amended to refer to regulations 14 to 17, instead of regulations 15 to 17 as in part 1 of the consultation. We think this amended drafting is correct, so that the definition of "reasonable terms and conditions" will equally apply to lease renewals as to rent reviews, such that the FOT lease terms in either case should be the Industry-standard terms of business between FOT pub lessees and their landlords.

We believe the fundamental objective of the Act and the Code should be to provide to a tenant who calls for it, a package of tied tenancy terms at an open market rent and a package of Industry-standard FOT lease terms at an alternative open market rent, both of which they can consider when making their choice.

The Courts do not have the power to create alternative forms of lease on lease renewals; the judge is expected to determine a single form of lease, on terms that are as close as possible to the present tied terms, then assess the open market rental value based on those lease terms. In order for the lessee to see an FOT lease package they should apply to the pub owning company for MRO then, if not agreed, to the Adjudicator in the same way and with the same dispute provisions as they can for MRO applications at rent review.

The consultation has rightly assessed that a twin track process is potentially costly. In our view the most convenient and cost-effective point when the lessee should weigh the tied or FOT lease terms in the balance would be when the pub-owning company has provided a "full response" under regulation 20, having already given the lessee a tied rent assessment with the L&T Act s25 notice or its L&T Act s26 notice response. The lessee would then elect to follow either the FOT route to the Adjudicator, or the tied route to the Court, but not both.

A difficulty arises if the pub owning company serves an opposed s25 notice citing any combination of the relevant statutory grounds set out in s30 of the L&T Act, or responds to oppose a s26 notice from the tenant on those grounds. It is clearly inappropriate for the Adjudicator to order the pub owning company to grant a new FOT lease to a lessee whose tied lease renewal is opposed on valid statutory grounds. We therefore suggest that the Code should permit the lessee to give notice under regulation 13(1) but for the continuation of the MRO process to be suspended until such time as the validity of the statutory grounds of opposition is determined by the Court or is resolved by agreement between the parties.

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.**
The Industry-standard terms for FOT commercial leases can change over time, as market conditions change. This is a Code relating to tied pub agreements, so (apart from all the provisions of regulation 21 as drafted) none of the other alternative FOT lease terms should be defined by this Code.	

Question 14	**MRO procedure** 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?
The Adjudicator or any appointed independent assessor should conduct these disputes in accordance with the Arbitration Act 1996. If an independent assessor is to act as an independent expert, he will require the prior agreement of both parties. Whether the assessor acts as arbitrator or as expert he or she should set directions and call for the parties to settle a Statement of Agreed Facts. What is relevant content of that Statement will be particular to each case and it is therefore not necessary for this Code to include Schedule 3 at all. It has been widely acknowledged that it is impossible to attribute specific SCORFA values to particular benefits of the tied trade relationship. They are part of an integral package deal of lease terms, codes of practice, purchasing terms and supportive services, all at an overall tied open market rental value.	

Question 15	**Do you have any comments on the timescales for the MRO procedure proposed for the Code?**
For the reasons given above, the arbitrator or expert should be empowered to set the directions and timetable once there is a referral of a dispute under regulation 26. All the timings shown in regulations 30 and 31 should be unspecified. In all earlier phases of the MRO process we consider the timings to be tight but achievable.	

Question 16	**Do you have any views on the proposed circumstances in which the MRO procedure will come to an end?**
The MRO procedure must automatically come to an end when the pub company and the tenant legally complete the tied rent review that was the starting point for the tenants request under 13(1). The current wording ends the MRO process only when new FOT lease terms are completed in writing in respect of the matters mentioned in regulations 24(2)(a) and (b). A new 34(b)(vii) should be added such as "on the day on which the parties complete the relevant tied rent review."	

Question 17	**MRO Disputes** **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.**
We support the proposal at 11.4 of the Consultation that either party will be able to refer MRO disputes to the Adjudicator. Unfortunately that does not seem to be in line with the draft regulation 25(1) which allows only the tenant to apply. We think this should be changed.	
Question 18	**Waiver from MRO in return for significant investment** **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.**
The Government recognises the need to continue to invest in pubs if they are to be able to survive and thrive in competition with all the other diverse food, drink, social and entertainment opportunities that are available to consumers. It is an unavoidable truth that the banks do not willingly provide loan finance to pub tenants, so the majority of investment in pubs is resourced by the pub owning companies or by equity investments by publicans. In either case the investor needs long term security. We consider that, so long as the pub tenant takes good professional advice, there should be no constraints on the type of investment, cost of investment or the secure lease term of a freely-agreed "investment agreement". We can give an example of why each factor should be flexible 1 - style of investment. An investment in structural alterations by a pub owning company is unlikely to achieve its potential if the publican cannot obtain funds to invest in the décor and furnishings at the same time. Rather than leave that pub outdated and/or dilapidated the pub company should be free to invest in the whole scheme, including the lessee's repairing and decorating liabilities. 2 – cost of investment. A large multi-bar pub may need an investment of several hundred thousand pounds to achieve a simple refurbishment. At the other end of the scale, if a formula is applied for qualifying capital cost to be, for instance, twice the amount of the tied rent, it might be difficult to spend as much as £50000 on a complete overhaul in a small community pub with a rent of £25000pa, but that type of pub may well be where the need for use of the pub company's capital is greatest. There is also a greater benefit for pub customers if capex is spent "little and often" as opposed to leaving the pub to deteriorate to the point where the total cost is sufficient to qualify for any "investment agreement" hurdle. 3 – length of term. Some schemes are bound to have a quicker pay-back than others and it tends to be the more ambitious, transformative schemes that may take as much as 20 years to recoup their original cost and then achieve a viable level of incremental return over and above the cost of finance. Any constraint on the length of term is likely to divert such high-quality schemes to be delivered only into managed pubs.	

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.
See response to Q18. We consider this distinction to be harmful to the future health of tied pubs.	

Question 20	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.
A minimum of 10 years, but preferably with no maximum. See our answer to Q18. No qualifying capital expenditure could be undertaken without an agreed business plan to form the basis of the agreed returns on capital for both parties. If there is a subsequent material adverse change in the local market the publican would be able to prepare a new business plan to support a call for a new rent assessment and at all times the tied pub tenant has the protection of the statutory code and recourse to the adjudicator if the pub owning companies terms for investment were considered to be "unfair".	

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?
If this question relates to Regulation 12, we agree that an "Investment Agreement" is necessary, with all the features that have been set out in 12(3), apart from the length of term (see above). There is no specific reference to the Adjudicator in this Regulation but we agree with the Adjudicator's role as set out in 12.26, 12.27 and 12.28 of the Part 1 consultation. We consider that, so long as the pub tenant takes good professional advice, there should be no constraints on the type of investment, cost of investment or the secure lease term of a freely-agreed "investment agreement".	

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?
See answer to Q18	

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

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

Pub-owning business with 500 or more tied pubs YES
Tied tenant
Interest group, trade body or other organisation
Other (please describe)

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 NO

Question 1	**Market Rent Only option and Parallel Rent Assessments** 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.
We agree that the MRO process will achieve this goal in relation to rent reviews and can achieve the same goal in relation to L&T Act renewals (see our answer to Q12 in part 1).	

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.

We do not agree that schedule 3 is necessary at all. An arbitrator or independent expert both have powers to call for whatever evidence either party can provide to assist him or her to make a fully-informed assessment.

In particular item 3 asks for FOT trading information which is not within the knowledge of the pub owning company, and item 4 asks for SCORFA values to be attributed to particular features of tied terms that are part of an integral package deal of lease terms, codes of practice, purchasing terms and supportive services, all at an overall open market rental value. Tied terms have a different value to different publicans depending on their skills and prior experience, and can even have a different value to the same publican in the same pub at the start of their term at that pub, versus later when they have a well-established business there.

Tenants, as well as pub companies, should be required to deliver to the arbitrator or expert all relevant information and evidence in their possession which should include their actual accounts, VAT returns, stocktaking and delivery records and their business plan forecast for the next two years.

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.

These regulations are disproportionate in as much as they impose multiple obligations upon the pub owning company for the delivery of information and trade projections but do not require the tenants to engage actively with the negotiation of either tied or FOT rents. Examples of such one-way traffic are regulations 7(4) and 10(3). Regulation 24 does require the tied pub tenant to seek to agree an FOT rent, but nowhere is there a similar requirement for the tied pub tenant to seek to agree the tied rent event. This provides an inherent bias towards FOT outcomes when the Act expects there to be a fair balance between tied and FOT outcomes.

Question 4	**Availability of the Market Rent Only option at rent assessment** 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?

In section 8.12 of Part 1 of the consultation and regulation 15 (b) it has been proposed that the requirement for a rent assessment would apply only if the pub owning company proposed to increase the rent. This proposal is fair, proportionate and balanced for the following reasons:

Rent levels

- By the time the Code comes into effect in May 2016 every lease will have had a cyclical rent review (on an upward or downward basis) or been let on open market terms since the 2008/2010 recession, so all rents have thus taken full account of that downturn. For pubs with 3 year rent cycles they would have potentially had 2 such reviews.
- All tied leases have an upwards or downwards rent review provision, or are covered by a Code of Practice which provides the same comfort – in marked contrast to the FOT market place
- Every lessee has had the opportunity for their rent at review to be determined independently at low cost using the industry's own scheme (PIRRS), or by independent expert or arbitration, as contractually provided for in the lease. The fact that so few have elected to take this up should provide reassurance that current rent levels are fair and reasonable.
- We believe that most lease agreements granted in recent years contain initial cooling off periods which enable any new lessee to break from the agreement in the event they consider the rental terms to be onerous, or once they have become a publican for the first time they decide it is not the life for them. Very few exercise it; in the experience of Enterprise Inns our six month cooling-off period has only been exercised 29 times out of 469 assignable leases granted in the last 4 years (6.2% of the total).

Rent reviews

Regulation 15 provides publicans with 3 layers of comfort at rent review and each addresses the common desire for a fair tied rent model:

1. A FOT lease and rental option only if the pub owning company quotes a tied rent increase. In effect this imposes a tied rent control on pub owning companies.
2. The maintenance of the same rent (other than indexation) for typically another 5 years if they are content with its level. This is extraordinary inflation-proofing at a time when takings should be steadily increasing.
3. The guarantee that a downward rent review will be considered, whatever the contractual lease terms say, with the potential use of a low cost independent determination of the rent if a satisfactory rent reduction cannot be agreed, when there are particular adverse local trading circumstances.

All of this at a time when market evidence shows that FOT lease rents are increasing (see attached report from CBRE). This provision does address the objective of ensuring that the tied letting model is fair. It is not always necessary for the parties to incur all the cost of assessing two different rents on tied or FOT terms at every qualifying event.

Investment

Regulation 15 provides <u>both</u> parties with an incentive to invest :

- For publicans they can do so safe in the knowledge that a pub-owning company would adopt a cautious approach to cyclical rent reviews knowing that the trading tie is otherwise put at risk –thereby effectively countering the arguments that a tenants investment is subsequently penalised through rent increases.
- For pub-owning companies it will provide an incentive to maintain all forms of investment (and not just the 'significant' investment for which a rent review deferral may be allowed). Much of the investment in pubs can be regular, discretionary and not always costing tens of thousands of pounds – but it should always be impactful, and is often necessary when publicans with limited free cash flow, facing the reluctance of banks to lend to small businesses, need to address external or internal decoration, new signage, garden schemes, car parking etc. The removal of regulation 15 would create an environment where such smaller investments would be seen as too speculative to pursue.

Goodwill

Regulation 15 also enables another of the alleged concerns to be addressed, where it is said that Landlord Companies sometimes rentalise publicans' personal goodwill, which is not a view that Enterprise Inns accepts. To attempt to do so by increasing rents when publicans are successful through their own efforts, would risk the continued existence of the trading tie because the proposed rent increase would crystallise an MRO event.

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.

- In Enterprise Inns' year ending ("YE") Sept 2013 - 437 rent reviews resulted in 81 increases, 145 frozen and 211 reductions. 243 of these rent reviews were in agreements with RPI (55%). The overall impact on the rents of leases without RPI was -0.3% when restated for inflation.

- In YE Sept 2014 - 461 rent reviews resulted in 116 increases, 182 frozen and 163 reductions. 209 of these rent reviews were in agreements with RPI (45%). The impact on the rents of leases without RPI was -1.6%; the total increase in rents was +0.2% when restated for inflation.

- In YE Sept 2015 - 485 rent reviews resulted in 177 increases, 192 frozen and 116 reductions. 203 of these rent reviews were in agreements with RPI (42%). The impact on the rents of leases without RPI was +1.2%: the total increase in rents was +1% when restated for inflation.

Question 6	**The Pubs Code - Information requirements** Do you agree that these are appropriate conditions to be met before it becomes mandatory to provide specified information to a prospective tenant?

We refer you to Enterprise Inns' answer to question 1 of the "Stakeholder Questions" in August 2015 – attached again now. In our view it is essential that any prospective new publican be interviewed by the pub owning company before formally viewing any pubs. Such an interview is intended to establish that applicants have a real understanding of what pub life entails, are solvent, are capable of lawfully holding a premises licence for on-sales of alcohol, and it establishes the kind of outlets and local environment where the particular applicants are most likely to succeed. The attrition rate following such interviews should not be underestimated. The statistics at the end of Enterprise Inns' August 2015 stakeholder response show that 500 actual lettings were achieved from a total of 23000 initial enquiries and from 3500 actively-interested parties to whom we

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delivered pub-specific information AFTER a successful interview. That shows a "hit rate" of 46:1 in terms of initial enquiries and 7:1 in terms of pub-specific enquiries. Only the 3500 can reasonably be regarded as "a prospective tenant".

In relation to paragraph 8.18. At present Enterprise Inns does not deliver our opinion of the optimum trading style for the pub or its Fair Maintainable Trade until after the tenant and his advisors have prepared their business plan. We feel strongly that the requirement in this Code for any pub-owning business' opinions to be delivered "up front" is wrong. A pub building is a canvas upon which the applicants (which may be several in competition) should present their own ideas and trading models, using their business plan presentation to convince the pub-owning business that their proposals are the best to serve the local consumers and thus generate best profit and best sustainable rent. The leisure market changes quickly, and we do not think it appropriate for a pub-owning business to impose our own preconceptions by presenting its FMT opinion as if it were the only logical choice. We also know that, especially for enthusiastic applicants keen to secure their preferred pub, there is a natural risk that, if the pub company delivers its FMT workings at the outset, the applicant would show the pub company a very similar business plan on the basis that "the pub company must know best" and possibly undertake less rigorous customer research of their own. That can lead to a claim of misrepresentation if their business does not thrive on those terms. In Enterprise Inns' own case, although we do not provide a worked FMT assessment at the outset, we do provide a guide rent at the outset, so applicants should not make over-optimistic rent bids.

Consultation paragraph 8.19 and regulation 7 need to make it clear that it is not expected that the whole package of new letting information, including a new trading assessment, must be delivered by the pub owning company to the existing tenant before each annual indexation of the existing tied rent, if requested by the tenant. The same applies to the other excluded negotiations set out in regulation 8(5). It would be unrealistic, massively bureaucratic, costly and completely unnecessary. RPI applies automatically, and the other excluded matters are non-contractual concessions made by the pub company to the advantage of the tenant, so it seems wholly disproportionate to impose onerous information requirements and preparation of a new open market FMT and rent assessment upon the pub owning company.

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?

After a successful first interview to establish the applicant is suitable in terms of personality, experience, licensing and financial health as well as PEAT-training, a business plan should be written by every applicant for a substantive agreement. The specified information should be delivered after a first interview and before the pub-specific discussion of terms in light of the applicant's business plan. We have concerns that Regulation 4 does not seem to provide a rigorous minimum standard. Some applicants may be disqualified by reason of past misdemeanours or financial misconduct from being company directors, premises licence holders or acting as Designated Premises Supervisor, for instance.

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?
The distinction between a "rent proposal" and a "rent assessment" (Regulation 9) is unclear. The rent assessment is a process that can lead to a request for an MRO. If a rent proposal is required in respect of the excluded matters set out in regulation 8(5) how is that different, when 8(5) says that a "rent assessment" is not required? We see no reason why an existing tenant should ever need the information listed in Schedule 1 because they should know this already, and where the rent is not being reviewed on an open market basis (as is the case for all the excluded matters listed in regulation 8(5)). Delivery of open market evidence and a new forecast profit and loss account set out in Schedule 1 also seems to us to be pointless red tape.	

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)?
There is no merit in requiring rent proposals for these. See our response to Q8 above.	

Question 10	**The Pubs Code – repair provisions** 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?
The requirement for the pub-owning company to prepare and deliver a schedule of condition in every case (apart from new TAWs) is onerous and costly red tape which could seriously delay the entry of publicans into their chosen pubs with little or no benefit to them in many cases. When the tenant is going to become responsible for all or a substantial part of the repairing liability we consider it is vital that they should obtain their own survey from a suitably-qualified person, regardless of whatever details the pub-owning company has been able to provide – just as any domestic or commercial tenant should do prior to entry into any agreement which carries repairing obligations. In Enterprise Inns' case an explanation of the tenant's future	

repairing and maintenance obligations is part of the agreement summary pack we provide to all applicants on our website.
Paragraph 14 of schedule 1 goes on to say "Where the tenancy or licence requires the pub tenant to repair or maintain the premises....confirmation that, unless otherwise specified in the tenancy or licence, the requirement is to keep or maintain the premises in the condition set out in the schedule of condition." When the tied pub owning company intends to grant a tenancy which is free of all repairing and decorating liability upon the tenant, we think that a schedule of condition will serve no purpose.
Therefore we consider that Schedule 1, paragraph 10(e) should commence "When it is intended that the new tied tenant will become responsible to repair or maintain all or part of the premises, a Schedule of Condition....." to be in line with Schedule 1 paragraph 14.
The information to be delivered to an assignee under Regulation38(3) will be materially different from that to be provided to a new lessee because the Code should not have the effect of retrospectively varying the contractual terms of the lease that the assignee is buying. There should be a new, shorter Schedule for this.

Question 11	**The Pubs Code – arbitrable provisions** In the draft Code are there any provisions that you consider should be specified as non-arbitrable? Please explain the advantages of doing so.
The matters listed in regulation 8(5), because these are either pre-agreed (RPI) or voluntary concessions made for the benefit of the tenant, or the result of non-contractual discussions during routine business reviews	

Question 12	**Contractual inconsistencies with the code** Do you have any comments relating to the proposals for void and unenforceable terms?

We do not understand why the Adjudicator must "capture" (by regulation 32(b)) any tied rent review disputes that would otherwise be put to arbitration or independent expert under the terms of the particular lease, simply because the publican has triggered a parallel MRO process. The duties of the Adjudicator also seem to require that the pragmatic and cost-effective PIRRS process can no longer be used to resolve tied rents. We think that the tied rent reviews should remain routine transactions to be handled just as they have been until now. Tied lease renewals where no valid MRO request has been made will still be handled by the Courts in accordance with the L&T Act.

At s50(1) the SBE&E Act provides that such tied rent arbitrations or PIRRS cases can continue if they do not include a "Pubs Code Dispute" (as defined at s50(2)) but the definition at 50(2) **does not** include the circumstance where the tenant has triggered the MRO procedure under Regulation 13, the parties have properly complied with the process but have not been able to agree terms, so the tenant has then referred the new lease terms and rent to the Adjudicator. Regulation 32 has been given substantially wider scope than s50 of the Act, and we think it should not have been.

Consultation 9.5 and regulations 41(1)(c) and 41(3) appear to be predicated on an assumption that flow monitoring is inaccurate, and will always remain inaccurate. We do not accept that is the case and S47 of the SBE&E Act does not require this

issue to be addressed at all. We consider non-compliance with purchasing obligations to be a very serious matter enforceable as a serious breach of contract. In our view it should remain a matter for the Courts to decide whether the pub company has provided enough evidence of tie breaches to make a case that the lease or tenancy terms should be enforced against the publican, potentially leading to forfeiture of the lease or tenancy. Alternatively an injunction may be sought to restrain breaches. In either case the recovery of damages should be determined by the Court, if not agreed between the parties, as would be the usual case relating to a breach of a commercial contract.

In Enterprise Inns' case, if we have reason to believe that there has been a material variance between the delivered volume and that which has been dispensed, we will undertake a thorough investigation using all available data. In some cases the equipment may have been tampered with so, where we are relying upon data produced by a flow-monitoring system, we will recalibrate the meters to ensure the equipment is working correctly. If the tenant refuses to cooperate with our request for additional information and there is no satisfactory explanation for the variance, or if the tenant refuses access to the cellar by us or our agents, we will draw an inference from such refusals that further evidence of breach of the tie exists but is being withheld. The Courts can call upon the tenants to present evidence in their defence but the present wording of the Code could lead tenants to think that non-cooperation with investigations by the pub company into tie breaches will be supported by the Adjudicator instead.

Question 13	**Extension of code protections** Do you have any views on the extent of the extended protection that is proposed?
It is an unwarranted intrusion into commercially sensitive negotiations to uniquely require pub owning companies to disclose to their tenants that they are taking steps to sell their interest to another investor or pub company before contracts have been exchanged. Such provisions do not apply to any other property investor. Freehold purchasers usually want such deals to remain confidential until such time as contracts have been exchanged. Regulation 53(1)(a) should therefore be deleted. Subject to that proviso, we consider the Extension of Code protections to be reasonable.	

Question 14	**Group undertakings** Are there any elements of these proposals regarding group undertakings that you think would not work as intended or that require amending?
We have no issues with this	

Question 15	**Exemptions from the Pubs Code – genuine franchise agreements** 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.

This definition sets out a very high standard for a valid franchise agreement. We do not currently operate any agreements on such terms, so we will leave it to others to comment in detail

Question 16	Do you agree with the Government's proposals for 'reasonable piloting' of the pub franchise model. If not, please explain your answer.
No comment to make	

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.
No comment to make	

Question 18	**Exemptions from the Pubs Code – tenancy at will and short-term agreements** 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.
We think Parliament intended that any TAW tenant who operates a pub on those terms for more than 12 months should be able to call upon all the protections of the Code, apart from the right to call for MRO. Otherwise, that would create the only circumstance in which an MRO could be triggered by a tenant after only 12 months occupation of a tied pub. The length of term of a TAW is indeterminate, so the application of regulation 22(2)(a) would be puzzling and "the remaining term" in regulation 21(2)(b) is apparently "nil". We think Regulation 39 should be amended to dis-apply regulations 13, 15 and 17.	

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.
No. Tenancies at will are a means to keep pubs open for the benefit of their customers and local communities. It is in nobody's interests to force pubs to close. Such events can happen very suddenly, so any preconditions on TAWs are likely to have unintended consequences.	

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?
As stated above, tenancies at will are invariably used to keep the pub doors open and the occupier is likely to enjoy substantially discounted terms. It is vital that such occupiers fully understand the nature of a tenancy at will; in that it can be terminated by either party at will. Any tenant at will who wants greater security for that pub or any different pub which is available to let can register as an applicant and then receive all the information set out in Schedule 1.	

Question 21	**Enforcing the Pubs Code – fee for arbitration** 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.
Fees and costs are going to be a difficult issue. Generally there is an inequality of resources between large tied pub companies and their tenants and the regime should therefore provide low cost entry. On the other hand we might expect some tenants to abuse the process by lodging appeals on process issues that have little or no merit. We therefore feel that it is necessary to give the Adjudicator discretion to allocate fees after the event, based on the merits of the tenant's case. On that basis we would support the low entry cost of £200.	

Question 22	**Enforcing the Pubs Code – costs of arbitration** 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.
No. We think the Adjudicator should have full discretion as to costs when the dispute relates to implementation of Code processes or matters of law such as the terms of FOT leases (for which PIRRS is inapplicable). However, when the dispute relates only to the amount of a tied or free of tie rent and is decided by independent expert, rather than arbitration, the PIRRS process could apply until now. If the adjudicator is prevented from using PIRRS and must replicate a version of it under his or her own control, then we agree that the maximum recoverable costs from the tenant to the pub owning business should be set at £2000.	

Question 23	**Enforcing the Pubs Code – proposed maximum financial penalty** 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.
We are concerned that the penalties regime is now part of this consultation when the guidance about what constitutes an "investigation" has not yet been published by the Adjudicator in accordance with s61 of the SBE&E Act. However, we are very concerned about the suggestion that the maximum penalty could be based on total UK annual turnover of the subject group. That is blatantly unfair to pub owning companies/groups who also own a brewery, or who also operate managed pubs, or who let pubs on free of tie leases, or whose groups include other types of business. The maximum penalty should clearly be based on a percentage of the pub owning company's earnings from only the operation of tied pubs agreements that are the subject matter of this Code. On that basis the suggested 1% of turnover seems valid.	

	Please use this space for any general comments that you may have. Comments on the layout of this consultation would also be welcomed.
1 We are disappointed that the "plain English" style of the Industry Framework Code could not be carried forward into this Code which seems plagued by cross-references. We think it will be difficult for tied tenants to understand their rights and obligations set out in this Code. 2 We are also disappointed that there are material discrepancies between the summary of terms given in the Consultation Document and the draft Code itself. Especially notable is the section regarding L&T Act-protected lease renewals. We hope and anticipate that there will be a further substantial period of consultation on the further revisions to this Code and any guidance proposed by the Adjudicator in order that these discrepancies can be shown to have been fully understood by all parties, and dealt with. It would also be helpful if BIS were to emphasise that the drafting of the Consultation parts 1 and 2 is not, except where specifically noted as such, to be regarded as statements of the Government's position. 3 We are also disappointed that there has been no Impact Assessment in relation to this Code. 4 There is a fundamental and unfair inequality of duties in this Code. Information flows before and during negotiation (which, to be successful, must always be a two-way process) are entirely one-way; from the pub company to the tenant. Nowhere is the tenant under any obligation to provide information to the pub-owning company to assist in the negotiation of their tied or free of tie rents. Nor is there any obligation on the tenant to deliver such information to the Adjudicator or assessor. Examples of such information should be the tenants trading accounts and VAT returns, delivery records and, in the case of FOT rents, their research into the availability of free trade discounts and/or free trade loans from wholesalers. 5 We have a number of further drafting points which are not covered by the two series of questions above:	

A) The definition of Business Development Manager at 42(6)(b) is far too wide: it brings into the definition the estate surveyors, property surveyors, BDMs' line managers and even the Board Directors whenever any company employee visits the pub to meet the tenant. It could even be read to include external agents appointed to report on the pub on behalf of the Company. We suggest this should be amended to define the BDM as the "person nominated by the Company to take day to day responsibility for the Company in its dealings with the Tenant in respect of the matters listed in paragraph (4)(a)"

B) The definition of the Valuer in regulations 7(3), 9(3) and 10(9) is also incorrect. Auditing a valuation by another employee of the pub-owning company to ensure it has been undertaken in accordance with RICS guidance is not in itself a further valuation by the RICS member. The RICS requires members to register as a "Registered Valuer" when they undertake "Red Book" valuations for loan securities and Company financial reports (as defined by RICS Valuation Standards PS2.1). Only a firm carrying out such valuations for other businesses or people can become a registered firm; pub companies valuing on their own behalf are not be able to. RICS members employed by pub companies can register on their own behalf, but will not be able to do any such work for other businesses because they would not be able to secure Professional Indemnity Insurance cover. The wording of these two clauses should be "from a suitably qualified valuer who is a Member or Fellow of the RICS". We consider that the regulations are correctly worded at s42(3)(a) for the BDM to be responsible for conducting rent assessments, which the RICS valuer then confirms have been carried out in accordance with RICS Guidance.

C) It is not necessary for the pub company to deliver to the tenant the entire list of documents at Schedule 1 when the tenant is renewing the lease of the same pub under the L&T Act. The tenant will have been in the pub for a significant period prior to the renewal and should therefore already be aware of all this. We therefore suggest regulation 4 (7) should be deleted.

D) Schedule 1, paragraph 22 (g) should start "A description of the benefits.." It is impossible to quantify individual or total SCORFA benefits because their value is different to each recipient and can rise or fall over time depending on each tenant's personal circumstances.

E) There seems to be some confusion about the inclusion of a manager's salary in the operating costs, at Schedule 2, paragraph 4(d). In the open market most pub rent bids will be made by publicans intending to run the pub hands-on, taking their reward in the form of the net profit after rent. If a publican decides to absent themselves from the operation of the pub, they will need to pay the manager out of their share. The only circumstance where a manager's salary would be a valid cost is when all bidders for a large and complex pub or restaurant business would employ managers.

F) Regulation 10(5) is mis-worded. The tied pub should be visited during the three months BEFORE the rent review proposal.

G) Service of notices under these regulations. There is an issue with proving the date of receipt of notices in either direction. Service of L&T Act notices is governed by s23 of the L&T Act 1927 which says "Any notice, request, demand or other instrument under this Act shall be in writing and may be served on the person on whom it is to be served either personally or by leaving it for him at his last known place of

abode in England or Wales, or by sending it through the post in a registered letter addressed to him there...." There should be consistent certainty about the date of receipt of notices under this Code to be the same as when the document is deemed served under the L&T Acts.

H) In relation to tenancies which are contracted out of the Landlord & Tenant Act but which contain a contractual right of renewal, at Regulation 14(3), there is some ambiguity about the trigger date. It says the "event" is the day on which the tenancy may be renewed under the terms of the tenancy. It is normal for such tenants to be required by the existing tenancy contract to give at least six months prior notice, with time to be of the essence. Once past that deadline there is NO date on which the tenancy may be renewed, so we think this Regulation intended to mean that the trigger date is the last day by which the tenancy can serve the notice to exercise the contractual right of renewal, not the end date of that tenancy.

I) Regulation 19(1) (continuation of existing lease terms) should cross-refer to s24 of the L&T Act 1954: – continuation of any L&T Act protected lease.

J) Reference to regulation 8(1)(c) appears to have been missed from 9(2)(6), 10(11) and 11(3)(6) with the effect that there are no time limits in respect of a tenant's claim for a rent assessment at a special change of circumstances.

K) There is some minor duplication of regulations at paragraphs 21(3) vs 21(4) and at 34 (v) and 34 (vi).

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