Pubs Code and Pubs Code Adjudicator: A Government Consultation - Parts 1 and 2

Response from HEINEKEN UK / Star Pubs & Bars

18th January 2016

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

Name: [REDACTED]

Organisation (if applicable): HEINEKEN UK / Star Pubs & Bars

Address: 3-4 Broadway Park, South Gyle Broadway, Edinburgh, EH12 9JZ

Email: [REDACTED]

X Pub-owning business with 500 or more tied pubs

Rent assessments

Question 1

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

1.1 We agree with the definition of rent assessment as a procedure rather than a fixed point in time. We support the rent assessment triggers as set out in Regulation 8.

1.2 Throughout the regulations (e.g. 9 and 10) it states that 'a suitably qualified valuer who is registered with RICS' must be used. A RICS registered valuer is not the appropriate person to be carrying out such a task (as they deal with asset valuations under 'Red Book' rules which is inappropriate for what is being dealt with here) - instead the regulations should state 'a Member or Fellow of RICS' should confirm that rent assessments have been carried out under RICS guidelines.

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?

2. No.

Question 3

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

3. Yes. The wholesale market price for beer is an appropriate baseline. To keep things simple and to reflect the actual impact on tenants, it should apply only to those products actually purchased by a tenant and should be a weighted average. A trigger event should not occur, for example, if the price of one product increases significantly, but others reduce in price; nor if products which the tenant rarely purchases and/or only in very small amounts increase significantly but there is no significant increase for regular and high volume purchases.

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?

4. Yes. 5% appears reasonable as the formula takes in to account other factors which are outside the control of pub companies such as duty, regulatory and raw material costs.

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?

5. Yes we agree with these exclusions because it achieves the aim of ensuring that tied tenants are treated fairly. Without these exclusions pub owning companies would be penalised for simply passing on costs which are outside of their control.

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.

6. Yes.

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?

7. Yes.

Question 8

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

8. Yes.

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?

9. Yes.

Question 10

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

10.1 We agree with the points at section 8.35 of Part 1 of the consultation. It would be helpful if this was clarified in the Regulation 2 (2) to reflect the reference to "brings about a permanent change to trading conditions, and not simply the result of normal variations in trading conditions." (8.35, point i) which does not appear to be addressed in Regulation 2.

10.2 Regulation 2(2) is ambiguous on whether points (b)(i - vi) must all apply before an event is considered a 'trigger event' due to the use of the word 'or' in (v). Our understanding is it is the Government's intention that if any of the conditions exist it is not a trigger event. As the regulations state that an

event is a trigger event 'only if' the event 'is not' one of those listed, it should be made clear that there is no trigger event if any of the conditions in (i-iv) exist. This should be done in conjunction with the point above on permanent change. It should be clear that it is a set of cumulative conditions, not alternate conditions.

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?

11. No.

MRO-compliant agreements

Question 12

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?

12.1 No. We have a number of concerns around how MRO at renewal is structured which we have summarised below. We support the more detailed response to this question in the BBPA response.

12.2 Section 9.4 of the consultation is clear that the Government's intention is that MRO agreements should 'be modelled on the standard types of commercial agreements that are already common for free-of-tie tenants.' We agree with this approach. However, to achieve this aim requires some further work. Some of the terms of tied agreements do not exist in the free-of-tie market. In the case of tied tenants who are contracted-in under Part II of the LTA and have a right to renewal it is important that this is not used to create a hybrid agreement that doesn't exist in the commercial FOT sector. This could occur, for example, where a three year LTA protected tied tenancy comes up for renewal and the tenant exercises their MRO right and demands another three year agreement, but on a FOT basis. As this kind of short agreement doesn't exist in the commercial FOT market it would create a hybrid and the tenant would be significantly better off than a FOT tenant.

12.3 Our reading of the LTA right to renewal is contingent on the tenant wishing to renew a similar agreement to that previously agreed with the landlord. An MRO agreement does not meet that test. In this situation the landlord should be able to accept the surrender of the previous tied lease and re-grant a commercial FOT agreement with the tenant retaining security of tenure as the new agreement must be protected by the LTA.

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.

13. No. MRO-compliant agreements should take the form of what is available in the open market. This proposal would make MRO FOT tenants better off than other FOT tenants and would represent an unjustified intervention in the commercial dealings between landlord and tenant.

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?

14.1 In answering this question we have assumed that the independent assessor is not conducting the assessment under the rules of the Arbitration Act, and is therefore acting as an independent expert.

14.2 The independent assessor should be allowed to set their own approach and request relevant information from both parties. We believe this should include:

- Documents that evidence the pubs trading for the past 3 years. (volume supplied, stock takers reports, accounts etc)
- A valuation prepared by each party with supporting rational and facts.
- A schedule of evidence of comparable and relevant transactions that support the valuation above.

14.3 It is important that the independent assessor is free to make an assessment of the market rent based on their own expertise and professional knowledge and ability to conduct their own research. They should not be limited to taking a decision solely on the basis of the information provided in documents listed in Schedule 3. The independent assessor should follow RICS guidance in reaching their assessment of the market rent. This would ensure that the assessor is free to determine the rent based on their own investigations, knowledge and expertise.

14.4 We have a number of concerns with the documents required by Schedule 3:

- The list of required documents set out in para 10.23 of Part 1 does not match the list in Schedule 3 of the Regulations published with Part 2. One refers to tied pubs and the other to pubs not subject to a tie
- It would be practically difficult (and in some cases impossible) for either the landlord or tenant to provide information of trading levels for pubs outside their own operational control. This applies equally to tied or free of tie pubs.
- In the case of free of tie pubs in the local area owned by the pub company, over time the pub company is likely to have less information.

It may not be possible to give much information beyond the rent paid. Therefore it may be difficult to make a "reasonable comparison"

- Where a pub company owns other pubs in the local area, the location may not be relevant: there could be huge variation in trading outlook and conditions between different types of pubs in the same area.
- Point (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'. We do not believe that this should be provided. SCORFA is a relative concept - the market value of which is extremely subjective in attempting to quantify and almost impossible to 'rentalise' as determined by RICS. The same benefit may have considerably greater value placed on it by one licensee versus another
- The assessor should determine the rental value of the pub let on an MRO lease, which will be based on rental evidence of similar pubs on similar agreements not by adjusting the rental valuation of tied pubs
- We would therefore strongly advocate 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.

Question 15

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

15.1 We believe that the overall timescales are tight, but achievable. We believe that they provide the right balance as it allows for certainty for both parties and for issues to be resolved quickly.

15.2 During the notification period there is no value in having a separate time period for acknowledging an MRO request and providing an MRO offer. This should be amalgamated into a single 28 day period. As a matter of best practice pub companies are likely to acknowledge receipt but this does not need to be something which can lead to a referral to the adjudicator. Simplifying it will reduce the number of referrals to the adjudicator for minor matters that can be quickly and easily resolved.

15.3 Electronic communications should be a valid method for lodging and responding throughout the process.

Question 16

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

16. During the independent assessment period, it is important that a tenant makes a clear decision to either accept the MRO offer or it is deemed rejected. It should not be deemed that a tenant has accepted if they have not responded by the end of the period.

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.

18.1 We agree that the qualifying investment must reflect the individual circumstances of each pub and there is an argument that this should simply be left to tenants (while taking professional advice) and the pub company to agree a deal which works for both parties. We believe that a significant investment should be agreed between the pub company and the tenant to provide flexibility. There are a range of reasons why both parties would wish to proceed with an investment at a range of levels.

18.2 We recognise that there has been concern among some tenant groups that greater protections are required. While we do not believe this is necessary (not least because Regulation 12(2)(5) provides significant protection), if the Pubs Code is to set a definition then it must reflect individual pub circumstances and this is best done by basing the amount on annual dry rent. To calculate on the basis of wet rent is unnecessarily complicated.

18.3 If the Government proceeds with setting a level in regulations we believe that up to 100% of the annual dry rent would be appropriate to secure a waiver of up to 7 years. However, we also believe that there should be flexibility to allow for larger and / or riskier investment where it could be to the benefit of the tenant and pub company to agree a longer waiver period. In this case and to reflect that these would likely be larger investments, we could envisage a qualifying investment increasing to 200% of dry rent.

18.4 These measures would allow us to proceed with the majority of significant investments in our estate while allowing some flexibility which would benefit tenants in two ways: first by potentially lowering costs by spreading the return on investment period over a longer time and second by guaranteeing no significant rent increases in that period as there would be no rent assessment. Some tenants will welcome the certainty that this arrangement provides while benefitting from improved trading conditions as pubs are improved.

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.

19.1 We agree that investments which the pub company has an obligation to discharge pursuant to a contractual obligation to the current tenant should not qualify as investment which can trigger a waiver as set out in 12(2)(a). However, we believe that the definition of the conditions of qualifying investment in 12(2) (c) are too restrictive and unnecessary.

19.2 There will be projects which require significant investment (for example 100% or more of annual dry rent) which do not require planning permission or infrastructure change. These could include major redecorations to change the identity and feel of the pub and could include significant costs for decoration, furnishings, equipment etc. We believe that these should qualify as significant investment - and could be argued qualify under 12(2)(c)(ii) "is made in connection with a project which would be reasonably expected to change the trading environment, nature or capacity of those premises". However the consultation document suggests in 12.19 b) that changes to the trading nature of the site would include examples such as an extension to the premises to provide a second bar areas or expanded dining area. We disagree that 'space' should be the basis of the definition of changing the trading environment, nature or capacity. A well-executed redecoration project can improve trade without necessarily increasing the space.

19.3 In any case we believe that it is not necessary to include 12(2)(c) because:

- 12(2)(a) will already ensure that the investment is not an existing contractual obligation on the pub company to that tenant;
- 12(2)(b) ensures the amount is significant;
- 12(5) ensures pub companies will have provided sufficient information to enable tenants to understand the implications of the agreement;
- And 12(3) and 12(5) ensure that the tenant will have obtained appropriate independent advice. If the tenant has not obtained such advice the agreement is of no effect

19.4 We believe that taken together these protections are sufficient to give tenants comfort while not disadvantaging others because their pub is incapable of the kind of changes envisaged in 12(2)(c)(i-iii) but would benefit from a significant redecoration to change the nature of the pub to better meet consumer demands.

19.5 There may be times where 'repairs' which are not the obligation of a current tenant should qualify as a significant investment. Repairs for which the pub company has an obligation to discharge pursuant to a contractual obligation to the current tenant should not qualify. However, there should be flexibility to ensure that in certain limited circumstances, some repair costs are valid. For example a FRI lease where the tenant has failed to meet their responsibilities and vacates the pub without the repairs work being done, it is reasonable that the pub company should be able to include this as a significant investment and therefore include a waiver. Without it the work would not be done. For clarity the same waiver should apply where a tenant has repair obligations but cannot afford to do them and the pub company takes them on.

19.6 There are two additions that we believe are required to Regulation 12 to encourage investment:

1. It is important that investment waivers are available to new tenants. The current regulations could stop this because they relate to previously paid rent - which may not apply to a new tenant. We propose that for new tenants who have not occupied the pub or paid no rent, a waiver should

apply based on the annual dry rent they will pay after the investment. To ensure this happens an addition is required to Regulation 12 to reflect that the new tenant will have paid no dry rent in the previous 12 months. In this circumstance we propose that 'qualifying investment' is defined on the agreed dry rent for the year ahead. This could be achieved by adding 12(2)(b)(iv) to cover the new tenant scenario where no occupation or rent has been paid prior to occupation. "Where the tenant has not occupied the pub in the period preceding the investment the amount of rent to be paid in the 12 months of the agreement following the completion of the investment".

2. Another important form of investment is that of co-investment. This can take different forms. It can include: where both the pub company and the tenant make a capital contribution to a significant investment; where the tenant invests capital and in return the pub company makes a contribution by reducing costs (for example through an extended rent free or reduced rental period); or a hybrid arrangement. These agreements provide real flexibility for tenants allowing them to secure the investment their business needs but in a way that suits them. We believe these agreements should be included and can be done quite simply by including in Regulation 12 on the basis that the pub company contribution can be shown to meet the other requirements of a 'qualifying investment'.
    a. This would need to be added as a new point at 12 (2) (c) (iv) - "It is made by way of a financial payment or extended period of reduced rent that is equal to or greater than the value in 12 (b) (i),(ii), (iii) and (iv), made by the pub owning company to the tied pub tenant in exchange for the tied pub tenant undertaking works in connection with points 12 (2) c (i), (ii) or (iii)".

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.

20.1 As per Q18 we believe that this is something which should be agreed between tenant and landlord with the tenant taking independent advice. However, if the Government proceeds with a maximum length in the Pubs Code, we believe that the majority of investment projects would proceed with a 7 year waiver. Most of our projects are based on a return on investment period within this timeframe.

20.2 It is important, however, to note that some very large and significant investment projects may require longer and therefore setting a maximum period reduces the chances of them proceeding. It is likely that some of the largest projects are for pubs which are struggling and the investment is the last chance to turn the pub around. In some circumstances that may need significant investment to completely refurbish the building and transform the consumer offer. Therefore we would advocate if setting maximum levels that a 10 year waiver should be allowed, based on 200% of annual dry rent.

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?

21.1 We agree with 12(5)(a)(ii-iii) and (b) that tenants should be provided with sufficient information to enable them to understand the implications of the investment agreement including the expected impact on the pub's trade and profit and any proposed change to the terms of the tenancy. We also agree that the tied tenant must have obtained appropriate independent advice on the agreement. That the investment agreement is of no effect if these conditions are not met sets a very high level of protection for tenants.

21.2 We do not agree with 12(5)(a)(i) which could be interpreted as requiring the pub company to provide the tenant with information on the pub company's expected return on investment on trade and profit for that pub. This information is commercially confidential. Furthermore it is of no relevance to the decision facing the tenant. They must decide whether or not to agree to the investment which they must base on their view of what is right for their business. They can do this safe in the knowledge that there is protection to ensure that they understand the investment agreement, have taken advice, and are happy to waive their right to a rent assessment for the defined period in return for the investment described in the agreement. Therefore 12(5)(a)(i) is unnecessary and should be deleted.

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?

22. It is important to note that while a new agreement is an option instead of the waiver, for some tenants on longer leases this would invoke a stamp duty charge which could cost them thousands of pounds. That's why we think it is useful to have the option of the waiver and a reason for allowing some flexibility in the length of agreements, subject to mutual agreement and the tenant taking independent advice. We believe that by providing flexibility, the majority of investments will be able to proceed.

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

None.

Consultation Part 2 Response

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.

1. We agree that the stated MRO procedure (MRO offer alongside tied rent review proposal) will allow tenants to judge whether or not they will be no worse off by remaining tied. By having the ability to view a tied and MRO offer 'in parallel', tenants will be able to choose between the pros and cons of each offer. Ultimately this is the only way for tenants to way up the risk and reward and potential opportunities and costs based on their own personal circumstances, attitude to risk, and ambitions for their business. This should be achieved by tenants having the right to choose between the tied and MRO offer - it should not be achieved by attempting a single formulaic calculation.

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.

2.1 Schedule 3 provides for evidence to be provided of the market value of SCORFA benefits. As stated in our answer in Part 1 Q14 it is subjective and difficult to value as the benefit and value will be personal to each individual tenant. As an alternative a list of the range of benefits provided by the pub company could be provided in order to help the tenant make their own evaluation and determination of value.

2.2 A traditional tied supported tenancy is very different to a standard commercial property lease with a very different risk and reward profile and capital required. Indeed for these types of tied agreement, there is no like-for-like free-of-tie model with which to compare rent assessments. Therefore for an independent valuer to determine whether the proposed rent under one model leaves the tenant better or worse off than under another model, and critically by how much, is simply not possible.

2.3 There can be no fixed formula as the comparables are not the same, as RICS have consistently made clear. Indeed, each pub is unique and valuation is not a precise science. However the rental value will ultimately be guided by the market reflecting the demand and availability of that particular type of

agreement in the market at a point in time and the availability of similar properties in the area.

2.4 A tenant, if offered the two options (as they must be under the MRO option), will need to make a judgement based on many factors including their access to capital, the level of risk they are prepared to take and the level of pub company support they would like or need. Individual tenants or lessees will therefore place differing values on the individual elements of the different agreements. This again demonstrates why it is simply not possible to place a single quantifiable and fair value on every tangible and intangible benefit and ultimately determine how much rent should be adjusted up or down to equalise the benefit to a licensee of two very different agreements.

See our comments in Part 1 Q14 response.

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?

4.1 It is a matter of fact that removing the condition for an increase in rent at rent assessment before a tenant can exercise MRO will allow more tenants to exercise an MRO right than if it is retained. Removing the condition returns to the situation envisaged when the primary legislation was passed. The Government has explained that the policy aim of adding the condition was not to reduce the number of MRO opportunities available to tenants.

4.2 HEINEKEN did not call for the introduction of this condition nor were we consulted in advance. However we recognise that there would be benefits to pub companies and to tenants of keeping the proposal:

- It would provide certainty to both parties allowing pub companies to plan for the long term;
- For tenants it would effectively introduce rent caps as there would be an incentive for pub companies not to increase rent to trigger MRO rights. Meanwhile free of tie tenants - which are generally on upwards only rent review terms - would be disadvantaged as their rents increased relative to tied tenants.

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.

5. We have provided information on rent review changes to the BBPA who will provide an aggregated view for the sector.

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?

6.1 We have always believed that providing information to tenants at the correct stages ahead of taking on a pub agreement is essential for both the tenant's understanding of how to run the pub to achieve their financial aspirations and wider obligations of running the business. It also benefits the company by ensuring they have a well informed and prepared tenant able properly to manage what is a substantial asset and achieve the potential of the pub.

6.2 However, the information requirements as set out in the Code are too onerous. We are of the view that the provision of information to prospective tenants (and when the full protections of the Code become active) should be subject to a staged approach, in order to make such a requirement workable in practice for both companies and tenants.

6.3 In particular the proposal to mandate that tenants have taken legal, valuation and property advice (in addition to professional advice), would seem excessive and add significantly to a prospective tenants costs. We agree that the companies should recommend that the tenant seeks appropriate advice over the mandated professional advice it must surely be for the tenant to decide if additional advice is required. A waiver approach could be adopted to safeguard that the prospective tenant has been made aware of the recommendation and has positively chosen the level of advice they require.

6.4 Currently, different companies will provide different levels of information for prospective tenants (dependent on their own commercial recruitment strategies) - with the minimum set out in the IFC. We envisage a similar approach for the Statutory Code. However, the issue remains that if Code protections, requirements etc. are applied to tenants at too early a stage (and crucially ahead of the pub company/brewery itself deciding whether an applicant is suitable for a specific pub site), this would result in an extremely high and disproportionate administrative burden for companies and the provision of some market and business sensitive information at a stage where nether party has made any real commitment to take the relationship forward. When advertising pubs to let there can often by a very high level of interest and enquiries.

6.5 The triggers for information requirements set out in the consultation document, and at regulation 5 (6) (a) and (b) of the draft Code, are too broad. The visit to the pub by the prospective tenant and confirmation of interest in the pub site are too low a bar.

6.6 We believe it is unreasonable for a prospective tenant to benefit from the Code protections in relation to information provision, ahead of developing a full business plan and proceeding to the final interview stage with the pub company. At this stage (and with heads of terms drawn up) protections in relation to information provision would commence. The incoming tenant would have recourse to the Adjudicator if, having signed the agreement, they had not in fact been given all the information required during final negotiations. Thus, we would envisage a system working as below:

Letting process	Information requirements	Code protections
Stage 1 - initial phone call enquiry into site, visit to pub in question.	None	No
Stage 2 - prospective tenant remains interested in site and makes a formal application to let AND pub company satisfied tenant is suitable for the site.	Information provided to prospective tenant to help formulate business plan. This may include types of tenancy, period of tenure, details of purchasing obligations, summary of repairs, price lists, contracted in/out etc.	No
Stage 3 - business plan developed and approved. Final interview/head of terms drawn up, credit checks undertaken etc.	The remaining information as set out in the Code over and above that needed to develop business plan.	Yes - at this stage the prospective tenant becomes 'protected' under the Statutory Code in relation to the upfront information requirements set out in schedule 2, i.e. upon signing an agreement the new tenant would then have recourse to Adjudicator if not in fact provided with all required information during the final negotiations.
Stage 4 - Agreement and commencement of new letting	Access to all code provisions	Yes - Full Code Protection

6.7 In the case of existing tenants information provision should be limited to where there has been a significant and substantial change in the information that would be required to be provided under Schedule 1 or 2. If there is no change there is no value in providing this information again. Existing tenants will already have a clear understanding of their business and so new documents should only be required if there is a significant change.

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?

7. Agreed.

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?

8.1 The concept of a 'rent proposal' as distinct from a 'rent assessment' is confusingly drafted in the consultation document, and in the regulations. By 'rent proposal' we are taking this to mean an event that results in a change in the amount of rent paid that does not fall under the legal definition (and therefore MRO triggers) of 'rent assessment' under the SBEE Act.

8.2 Therefore rent proposals will reflect where rent changes because of ad hoc support arrangements, indexation, tenant going FOT on a certain line etc. If these are subject to the extensive information requirements as set out in the draft regulations (in the same way as a formal rent review or new tenancy) then this will be extremely onerous and detrimental for both company and tenant. By having to go through the bureaucratic exercise of proving extensive information for instances mentioned above such as rent concessions, will mean it will be much more difficult for companies to offer these to tenants. This is surely not what the legislation is trying to achieve.

8.3 We would propose that 'rent proposals' be exempt from the information requirements, as such detail would not be needed by the tenant - and if they had an issue with the process they are still able to report the company in question to the adjudicator.

8.4 On the issue of renewals it is important that information provision is proportionate. At renewal the pub tenant will have significant information and experience of operating the pub. We believe that the regulations should be clearer that there should be no requirement to go through the "sustainable business plan" process where we renew a lease with an existing tenant as to do so would incur unnecessary time, bureaucracy and cost for the pub company and tenant who would also have to take external advice. Information provision should therefore be limited only to where significant and substantive changes have been made.

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)?

9. As above in answer to Question 8, we are strongly of the view that such provisions should be excluded from the information requirements in the legislation - as excessive and unnecessary regulation around these areas will lead to such rent concessions and ad-hoc agreed arrangements being discontinued. If there is to be any additional requirements this should certainly not be in relation to indexation provisions, rent holidays or temporary discounts.

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?

10.1 In our view it is imperative that the regulations require tenants to take their own professional advice in respect of repairs and dilapidations as part of their own due diligence when taking on a tenancy, as it is vitally important that the prospective tenant undertakes their own survey if they have repairing obligations. This would also reflect the current situation under IFC 6.

10.2 However, with regard to the breach of repairing obligations being a code issue referable to the adjudicator, we would hope the Adjudicator's guidance reflects the differences between minor and major breaches of repairing obligations and takes a proportionate view.

Extension of code protections

Question 13

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

13. It should be made clear in the regulations that at the point of transfer the outgoing landlord's obligations towards the tenant cease under the Code with no further recourse save for any breaches of the Code which are directly attributable to the outgoing landlord and that become apparent after the transfer date.

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?

14. We support the principle of ensuring that companies cannot avoid the Code by restructuring their operations in the ways envisaged in the consultation.

Both HEINEKEN UK and Star Pubs & Bars support the principle of ensuring there are anti-avoidance provisions in the Code in this respect. However the scope for group undertakings to be brought under investigation should be limited to those businesses with an involvement in tied pub ownership and management. HUK's brewing business is entirely separate from its pub owning operations and should not be caught by this provision. This answer should be read alongside Q23.

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.

18. We support the Government's proposal for 12 months defining a temporary agreement for the purposes of code (and MRO) exemption. It is vital enough time is given to find, recruit and train new tenants/lessees for substantive agreements and anytime shorter than a 12 months is likely to lead to an increase in temporary closures that are extremely detrimental.

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.

19. No. Many TAWs will be taken on by individuals and companies with significant experience in managing pubs during these periods. They specialise in this activity and do not require PEAT. Existing PEAT is designed for longer agreements and is not appropriate for TAWs. We believe that there could be a simple and short alternative pre entry training for TAWs that would be less onerous and more specific to the issues that should be considered. We do not think this needs to be set out in the Pubs Code itself. There should also be an ability to waive PEAT for TAWs where the tenant has previous experience.

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?

20. We propose a shortened and specific PEAT for TAW is developed.

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.

21. We agree.

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.

22. We agree that tenants should not be excluded from taking claims to arbitration on the pretext of costs. Provided that there is a provision that tenants should pay full costs in the case of claims being found vexatious the limit of £2,000 is accepted except in the case of MRO independent rent assessment where the awarding of cost should follow the event and behaviour of the parties. Our concern is that if costs are capped there is little incentive to negotiate on rent and the adjudicator is seen as the setter of rents across the sector. Many tenants could be susceptible to unscrupulous advisers encouraging tenants to take cases to the independent assessment process on the pretext of low cost risk, when in fact they will be liable to pay their own advisors fees which are significantly inflated by going through the process.

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.

23.1 HEINEKEN UK has a significant market share in beer and cider sales in the UK. Only a small proportion of those sales are made through our Star Pubs & Bars business. It is unacceptable that HEINEKEN UK could be fined 1% of total UK revenue due to breaches of the Pubs Code in our Star Pubs & Bars business. There is no logic to levying a fine on those sales outside the tied pub business and to do so would completely unreasonable and disproportionate.

It could lead to a position where a non-brewing pub company is fined one amount for a breach of the Code while a large brewer is fined ten or twenty times more for the same offence. This is clearly unfair and given that it would disproportionately affect HUK we believe it is anti-competitive and discriminatory. It is imperative that fines can only be levied on the turnover of the relevant part of the business which runs tied pubs which are subject to the Pubs Code.

23.2 The consultation states that fines are set in line with other regulators. We do not agree that this is adequate justification. Other competition regulators that adopt fines of this level do so because of the seriousness and scope of the breaches. Breaches of competition law are essentially fraud on consumers and have a materially detrimental impact on markets as a whole and all those operating in them. This cannot be regarded as commensurate with the breaches of a Pubs Code where the breaches are not against consumers and are likely to impact either one or a small number of individuals, not an entire market.

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.

General comment on Regulation 53

24. It is unclear why a company must disclose any intentions regarding sale of the freehold. Often these decisions are commercially sensitive, and potentially if those plans are disclosed could damage the trade of the pub and the tenants business. Not all plans to sell pubs materialises in a sale. It could severely impact the ability of companies to sell assets. These rules don't apply in other real estate sectors and are disproportionally impactful on pub owners covered by the code.

Comments on Part 13, Regulation 42 Business Development Managers

25.1 We believe that the approach outlined in Regulation 42 is disproportionate and leads to significant amounts of unnecessary red tape that do not add value to the process and undermine the relationship between tenants and BDMs. As drafted the definition of a BDM is very broad - essentially covering any employee of the pub company and third parties acting on behalf of the pub company. This covers a large number of people who across a very broad range of issues would be required to record minutes of conversations with tenants and provide a written note to the tenant within 7 calendar days. This is completely disproportionate and once again seems to conflict entirely with the Government's own drive to reduce burdens on business and keep regulation simple and transparent whilst maintaining competition.

25.2 We understand that some tenant groups believe that BDMs could make promises which are not kept. However, the Government should trust in the ability of the Adjudicator to hold pub companies who do not follow

reasonable processes to account. Where clear agreements and decisions are reached in discussions between a pub company and a tenant this should be captured in writing. However it should not be for the Government to dictate how and when a pub company communicates with tenants. Furthermore extending this to third parties makes the process even more unmanageable. This whole section should be rewritten to reflect the principle that regulation should be light touch and allow us much scope for pub companies and tenants to communicate in the way that best suits them - not dictated by regulations.

25.3 We propose a change in approach so that where a tenant believes that a BDM has made a commitment to them, they may request written confirmation of that within 7 days of the meeting and the pub company has a further 7 days to provide that. This means that the tenant is protected but stops a process where all parties are forced to provide documentation where there is no such need. We also propose a small change to 42(6)(b) to define a BDM as 'any other person who is authorised to represent the pub-owning business'.

Comments on Adjudicator levy

26. We are surprised and disappointed that with just a matter of weeks until the regulations come in to force that pub companies who will be required to pay a levy to fund the Adjudicator have been given no details on the contributions expected or had any consultation on how the levy will operate in the future.

Comments on timelines / phasing / advice to tenants

27.1 The regulations are due to come in to force on 26th May 2016. However, the regulations also create the concept of a rent assessment with a minimum six month period (Regulation 9(2)(a) states that a contractual rent review the rent review proposal must be sent to the tenant 'at least 6 months before the date on which the rent review is required to begin'). Our reading of this is that only tenants with a rent review due from 26th November 2016 (6 months from the regulations coming in to force) will be able to use the MRO procedure due to the rent assessment period preceding it. The other MRO triggers would apply immediately. It is vital that there is clarity on all sides that this is the case.

27.2 The Government must not underestimate the sheer scale of the additional burden that it is placing on pub companies who will have only a matter of weeks to make the system, process, training and communication changes necessary to comply with the Pubs Code.

27.3 Staff training will be hugely important given the potential for breaches of the Code if staff are not aware of all the provisions. The Code itself is very complex and not easily accessible to those without technical or legal experience and therefore staff training on its practical meaning and how it is embedded in our own processes and ways of working is crucial. Pub companies will need to train large numbers of staff at the same time as an added workload burden of preparing for the Code.

27.4 During this time we will also have to communicate with our tenants and reflect any supplementary guidance published by the Adjudicator in this time. While there are some changes that we can make in advance, the fact that the Government has already signalled some fundamental changes in its approach even in the course of the consultation means that we must await the passing of the Regulations through the Lords and Commons before implementing. With 18 weeks from the close of the consultation to implementation we are concerned that we may be left with 10 weeks or fewer to make these changes.

27.5 While it is important that the Adjudicator publishes guidance as soon as possible, it is important that this is done to a published timetable with a clear view on when the Guidance comes in to force. This is important because it seems unlikely that Guidance will be published ahead of 26th May (or far enough ahead of 26th May to allow pub companies to reflect on and take account of the Guidance). Clear phasing in of Guidance is therefore important to allow pub companies to reflect in our processes to what rules and interpretation we are working.

Comments on Dilapidations

28.1 Regulation 38(2)(b) specified obligations on the pub owning business to provide the tenant with information including on 'any dilapidations'. For clarity we propose this is reworded to state: 'any dilapidations that require to be completed prior to or as a condition of the assignment;'

28.2 Regulation 50(8)(b) seems unnecessary.

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

None.

ENDS