



Campaign for Pubs

Promote, Support and Protect Pubs

CMA Block Exemption Consultation Submission

July 2021

The Campaign for Pubs is the grassroots campaign group established to support, promote and protect pubs, bringing together publicans, pub campaigners, independent brewers and suppliers, customers and all who value our pub culture.. We differ from the vast majority of pub industry representative groups and consumer groups in that we are entirely free from any corporate influence.

Our directors and members include publicans and campaigners who have spent many years opposing and bringing to light unfair and anti-competitive practices in the pub industry, and who were centrally involved in the highly influential Fair Deal for Your Local campaign, which successfully lobbied MPs to support the introduction of the Pubs Code as voted through by Parliament in Nov 2014. The Campaign for Pubs is a member organisation of the British Pub Confederation, the confederation of independent pub sector organisations, that formed following the success of the Fair Deal for Your Local campaign.

Background

Our submission to this consultation is informed by our direct insight into the tied pub sector over the past 15-20 years. It is the same insight that informed our successful campaign to introduce the Pubs Code.

The Code was required because of a longstanding historic abuse of the profound privilege of the beer tie by pub-owning companies, especially since the introduction of the Beer Orders in 1989, and the radical remodelling of the UK beer market which followed.

The Beer Orders sought, quite rightly, to break up the dominance of the 'big 6' breweries who owned so many UK pubs and were thus able to dominate the on-trade beer market and exclude small brewers. However unfortunately the then Government was persuaded to only introduce a limit on pub ownership on companies that brew, in what was a cynical and deliberate lobbying ploy from the sector: The creation of the standalone pub companies was thus foreseen and planned for by sector bosses and corporate finance, as a way to continue to maintain a stranglehold on the pub sector and also, specifically, a way to continue to use (and abuse) the archaic beer tie as a means of profiteering for owners and pub estates.

In particular, that period saw the rise of new property companies who entered the market because they saw they would be able to supplement rental income for their newly acquired properties with additional beer wholesale revenue (including in cases where those companies were not brewers themselves). This played into a general move towards intensive securitisation within the sector, whereby such companies were able to bolster their borrowing (much of it in the form of foreign bonds) based on the extra revenue stream they could legally generate under the beer tie, thus giving them the ability to aggressively buy more and more pubs, in many cases at overvalued prices, and to end up with vast powerful estates, as in the case of Enterprise Inns and Punch Taverns at their height a decade or so ago. The tied pubco model moved to 25 year fully repairing and insuring leases, putting all the cost and risk onto the pub tenants, to make these agreements even more valuable to the pubco. As estates grew, on the back of the acquisition spree, pubco bosses paid themselves huge bonuses and some were awarded honours 'for services to hospitality' when in reality this was a get-rich quick scheme for those at the top, now commonly referred to as the Great British Pubco Scam.

Campaign for Pubs, The Volunteer Arms, 5 Watson Street, Holgate, York YO24 4BH

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The whole model was built on sand (and artificial valuations based on the value of the difference between tied prices and genuine brewery/wholesaler prices) and when the property market collapsed, these companies were in billions of pounds of debt, which has since led to an increase in their tied pricing (for beer they don't brew) as well as an increase in rents, meaning that individual publicans have been paying far more than is fair or sustainable. Punch Taverns and Enterprise Inns were collectively in debt of around £8 billion meaning that each pub in their estate was in effect saddled with a debt of several hundred thousand pounds, in some cases more than the real pub value. Ironically, after numerous city deals, buy-outs and mergers, the pub sector again became dominated by 6 giant pub-owning companies, which has also ensured they control the on-trade beer market, to the detriment of both their own tenants and also consumers. Whilst pubcos claim that they allow their tenants (lessees) to buy a large range of beer, in reality they only provide access to a fraction of the breweries that now exist nationally, with often even very local breweries denied access to their nearest tied pubs. Moreover, the prices that tenants have to pay – to their pubco – are significantly higher than the brewery price, whilst at the same time the smaller breweries only get onto to pubco list if they agree to sell at unreasonably low prices. So these giant property companies profit by underpaying suppliers and overcharging their own tenants.

This is clearly nothing like a free market and it is stifling genuine competition as well as preventing many tied tenants from dealing with local suppliers and offering their customers the beers they want to drink. There is often an absurd situation whereby a small brewery can only supply a local pub if the beer is then collected and taken to a depot many miles away, before being delivered back to the area.

The artificial pubco price lists from which tenants are obliged to buy have skewed the market and the tied prices themselves have increased year on year at a rate notably higher than the level of inflation.

Alas, the continuing situation with the beer tie has seen new property companies enter the market based on the fact that they are permitted to charge excessive tied prices. For example the property company and retail conversion specialist New River Retail entered the market buying pubs from other pubcos, yet then used the same model and distribution networks, enforcing the beer tie, when they don't brew beer.

The immense market power to which this situation gave rise has consistently been abused, with the result has been that the UK pub market (especially the substantial leased and tenanted portion that has been dominated by these large powerful players) has been a hive of unfair and anti-competitive practice. Abundant evidence has been supplied to Govt over the years, with no less than four successive business Select Committees condemning the behaviour of the pub-owning companies.

Many tenants have simply not been able to make a living due to the combination of excessive tied prices and rents and any attempt to buy direct from local brewers, at fair prices, is met with draconian fines, which in itself exposes the rotten reality of this model.

Numerous chances were given for the companies to self-regulate, but these were ultimately deemed a failure by policy makers, and, following a consultation which included many dozens of powerful testimonies from tenants who had suffered unfair and abusive treatment, the Pubs Code was introduced.

Following a certain amount of redrafting and unfortunately a degree of meddling from certain parties the Code itself did not ultimately deliver the original intention and is weak in various ways, and has therefore not been as effective as hoped. In particular a lack of precision in certain key areas has

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allowed the pub companies to circumvent many of its intentions via obstructive practices including obfuscation, delaying tactics and outright intimidation. In this they have been aided to a great extent by the appointment of a compromised and ineffective adjudicator, whose appointment was subsequently deemed unsound by the BEIS Select Committee (as chaired by Iain Wright MP) in 2016, which recommended that the appointment be revisited. That Adjudicator has now been succeeded by someone with a less compromised background, but the office remains ineffective to a large extent, having seemingly been largely infected and neutered by the underperformance of the first incumbent.

This Consultation

In the notes concerning this consultation on the VABER (which were posted online on www.gov.uk/government/consultations/retained-vertical-block-exemption-regulation) the following statement appears:

... some vertical agreements may negatively affect competition if the agreement restricts the supplier or buyer in such a way that, for example, it denies access to markets for other businesses, or otherwise reduces competition. This may lead to harm for consumers by increasing prices, limiting choice, lowering the quality of goods and services, or reducing innovation. Such harm may be more likely where 1 or more of the parties to the agreement possesses market power or where the agreement forms part of a network of similar agreements.

This statement encapsulates why the VABER should not, and probably should never have, allowed the beer tie to continue to exist, because the behaviour of the largest pub-owning companies that have enjoyed the profound privilege of the right to operate the beer tie has fallen short in every way listed.

The Pubs Code has imposed some limited control in recent years, but in essence the business model of the pub companies has always been to:

1. Limit competition in the market, by agreeing between themselves restricted supply lists which have denied access to their tied estates to the vast majority of UK breweries. In more recent years they have attempted to allay fears by allowing some limited access for smaller independent breweries via the likes of the SIBA Direct Delivery System (more recently called Beerflex) but this is very much a token gesture, and the beers (which are limited by geographical area) are only available to tied licensees at a price that is generally even higher than the already extortionate tied prices they are already expected to pay for those more generic national/regional brands that make up the standard supply list. The knock-on effect for consumers in terms of the choice available in tied pubs is self-evident.
2. Control prices in the market by exercising their absolute ability to control the wholesale prices chargeable to their tenants. Tied prices appear to have increased over the past 15 years or more by around 3% p/a regardless of what has happened with inflation or beer duty. The result is that tied prices are now wildly out of kilter with open market beer prices and have been for some time. Now a tied tenant may routinely be charged 90-100% more for a given beer than they would for the exact same beer in a normal open market arms-length transaction. Around 15 years ago the differential would have been more like 50%. The knock on effect in terms of price for consumers is obvious.

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3. Strictly control access to their estate for small innovative suppliers. There has been an explosion of innovation in the craft brewing industry in recent years, and also in other areas of product supply, with small, independent local firms finding a huge appetite for their usually high-quality, artisan offerings. Such brewers and other suppliers generally cannot get a look in when it comes to tied pubs, either because they are not part of the very limited schemes agreed by the pub-owning companies, or because they are simply unable to make a margin based on the strictly limited prices the pub-owning companies are willing to pay. Pub companies may overcharge tenants, but they also underpay their suppliers in order to maximise their own wholesale margin. The BBPA, who of course represent the largest and most influential pub-owning companies and breweries have about 50 members, yet their own website proudly states:

Our members account for some 90% of the beer brewed in Britain today and own more than 20,000 of the nation's pubs.

That's a clear admission of the anti-competitive reality! The stifling effect of these powerful few businesses on smaller, more innovative, and often more quality-driven independent producers is clear to see.

4. There is clear organisation between the large companies that enjoy the privilege of the beer tie which is allowing them to strike mutually beneficial arrangements to the detriment of the consumer and other business. For example both the BBPA and IFBB are large powerful industry bodies that fiercely defend the right of their members to operate the tie. It is largely the members of these bodies whose national/regional brands make up the bulk of any main supply list available to a tied tenant. There are a great many similarities in the ways in which these companies operate, and there is a widespread, and oft-voiced belief among tenants that they are "all the same" and are furthermore co-operating between themselves in many ways. It is the view of the Campaign for Pubs that there is ample justification for a full competition review of the sector. Prior to the Beer Orders of 1989 (over 30 years ago) there was a review of the UK beer/pub sector every 20 years or so. Such a review is now 10 years overdue by that logic, and we now indeed have a situation whereby the sector is once again dominated by large breweries/pub-owning companies in possession of estates of a size that would be illegal under the Beer Orders, were they still in force.

Certainly taken collectively, as shown above in the quote from the BBPA website, the companies operating the tie exceed the safe limits mentioned at www.gov.uk/government/consultations/retained-vertical-block-exemption-regulation where it states:

The retained VABER provides a general exemption for most vertical agreements entered into by businesses with market shares of 30% or less.

Yet, as the BBPA themselves state, between them around 50 firms directly account for some 90% of UK beer production and control something like 40-45% of UK pubs! The current situation is not working according to the very rules allowing the exemption.

A Note About SCORFA

It has often been noted that one of the justifications for the continuation of the beer tie is the notion that pub-owning companies offer their tied tenants other benefits in the form of “Special Commercial or Financial Advantages” (SCORFA).

This has long been the source of grim amusement among tied tenants who have collectively seen precious little in the way of any such benefits over the years. Industry claims of “investment” and “support” are not recognised by many publicans operating within the tied model, even though they are widely bandied about by pub company lobbyists in Westminster.

Financial support, if it is ever extended, is minimal and always discretionary. Traditionally, for example, it has tended to come in the form of a temporary change to the “discount” available to a tenant on their tied products. It is to be noted and remembered that this “discount” is from the full published wholesale price of a product as listed in the pub company’s price list, and as handed to that pub company by the large breweries with whom they do business. Nobody anywhere else in the trade pays anything approaching this price. It is simply there to allow the pub companies to claim that they are offering their tenants a “discount” when in truth, even at the discounted rate, many tied publicans will be paying around twice as much as a free of tie customer for exactly the same product.

Where “support” is given in terms of a further “discount” to a tied tenant who may be struggling, it is always reversible at the complete discretion of the pub company. Very often the reversal will occur once the pub company has sourced another tenant willing to come in and have a go at running the pub. The withdrawal of support has long been a way to remove a troublesome “underperforming” tenant.

Investment is similarly mythical. Pub companies often promise incoming tenants investments that never materialise, and any investment they do provide is typically rentalised (ie- loaded on top of the previously assessed rent) so that it is repayable by the tenant over their lease term. So effectively the only investment is actually of the tenant’s own money in the long term.

Finally, one of the largest and most oft-claimed myths regarding SCORFA is that tied rents are lower. Back when UKHospitality was still the ALMR they used to provide an annual set of industry benchmarking statistics. As far back as 2012 these benchmarking stats showed that, as a proportion of turnover, tied rents had overtaken free of tie rents.

There are many more myths about SCORFA which have been widely discussed over the years. If the CMA were to conduct the full review of the sector that is so sorely needed they would doubtless find that almost all claims of support, investment and SCORFA in general that have been made by the pub-owning companies over the years have been spurious and misleading.

At the Campaign for Pubs we also completely endorse the submission to this consultation that has been made by the Pubs Advisory Service (also members of the British Pub Confederation), and of which we have had sight. It is a crucial legal point that SCORFA is not enshrined in the lease and therefore is rendered illegitimate due to the fact that it has no legal status in the relationship between tied tenants and their pub-owning company.

Conclusion

It is our firm conviction that the tied model should no longer be allowed (and certainly not in the dreadfully abused form that has now become the norm) under any future form of VABER, due to the abundant evidence that the privilege of the tie has been systematically abused by powerful pub-

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owning companies, especially in the remodelled pub industry that has emerged in the years since the Beer Orders.

Tied pubs are no longer a shop front for proud breweries who invest and support them, but are instead treated as a cash cow by cynical property companies, or aggressive corporate brewers (hungry for ever more market share). These companies are simply intent on profiteering at the expense of their tenants and the communities they serve, and, in the process, on maximising the securitisation of existing sites in order to borrow more on the back of them than is either safe or reasonable.

The way in which pub owning companies have deliberately skewed and abused the beer tie in a way that was never envisaged nor intended by Government at the time of the Beer Orders, means that the beer tie should in our view certainly be illegal for companies that do not brew beer. How can it possibly be justified, or ethical, for a property company to demand excessive above market prices on beer that they do not brew (and especially when this is not linked to a compensatory lower rent)? There can be no justification for allowing property companies to exploit the beer tie in this way, and this must be outlawed, as well as allowing (if the beer tie remains legal) all tied tenants to have the right to independent rent review to ensure they are paying lower than free of tie rents if they are to remain tied.

As such we believe there is still not a single tied tenant anywhere in the UK to whom the “prime principle” that is supposed to underpin the Pubs Code currently applies. It is a powerful principle that has been accepted by Parliament that “a tied tenant should be no worse off than a free of tie tenant.” (see this link: [Fair deal for tied pub tenants under new government proposals - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/fair-deal-for-tied-pub-tenants)). Yet it still sadly remains only an ideal, and one that will quite evidently never be delivered under the existing tied model.

That, in short, is why the VABER should not be continued in its current form, and it is why any future form that may be under consideration should include very specific requirements, and strictly enforced safeguards, to prevent any continuation of the longstanding abusive and anti-competitive behaviour that continues to afflict our industry.

Signed on behalf of the Campaign for Pubs:



Greg Mulholland
Campaign Director



Paul Crossman
Chair

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