



# Pubs Code Adjudicator

PCA Advice Note

Stocking  
Requirements

March 2017

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## **PCA ADVICE NOTE**

### **STOCKING REQUIREMENTS**

#### **OVERVIEW**

1. A brewing pub-owning business (brewing POB) is a pub-owning business which is a producer of beer or cider.
2. A stocking requirement is a contractual obligation in a tenancy/licence that requires a tenant/licensee to stock the brewing POB's beer or cider, but does not require them to buy it from a particular supplier.
3. If a brewing POB includes a stocking requirement in a Market Rent Only (MRO) proposal (a free of tie proposal) it does not automatically make that tenancy/licence tied (although other terms of the tenancy/licence may make it tied).
4. Where a brewing POB offers a tied pub tenant (TPT) a MRO tenancy/licence which includes a stocking requirement, that requirement must be MRO-compliant.
5. A TPT or POB can refer a dispute about whether a term is MRO-compliant to the PCA.
6. Where a tenancy/licence includes a stocking requirement, it could be considered unreasonable in the particular circumstances of the case. In deciding such matters the PCA will have regard to all relevant factors.
7. A stocking requirement that places restrictions on the sale of other beers and ciders not produced by a brewing POB may raise competition law issues. The PCA does not have power to decide whether a term is in breach of competition law.

## 1. Introduction

1.1 This note provides the following in relation to stocking requirements:

- An explanation of the law and its effect; and
- Advice to pub-owning businesses and tied pub tenants on how the PCA will approach referrals for arbitrations.

## 2. What is a stocking requirement?

2.1 A stocking requirement is defined in section 68(7) of the Small Business Enterprise and Employment Act 2015 (the Act). It forms part of the definition of a 'tied pub' in section 68 of the Act.

2.2 For premises to be a 'tied pub' under the Act they must meet 4 conditions - conditions A to D defined in s 68(2)-(5) of the Act. All 4 conditions must be met to be a 'tied pub'.

2.3 Condition D is that the tenant of the premises is subject to a contractual obligation that some/all of the alcohol to be sold is supplied by

- (a) *The landlord or a person who is a group undertaking in relation to the landlord, or*
- (b) *A person nominated by the landlord or by a person who is a group undertaking in relation to the landlord<sup>1</sup>.*

2.4 However condition D is not met if the contractual obligation is a stocking requirement<sup>2</sup>.

2.5 A term of a contract is a stocking requirement if—

- (a) *it relates only to beer or cider (or both) produced by the landlord (or by a person who is a group undertaking in relation to the landlord); and*
- (b) *it does not require the tied pub tenant to procure the beer or cider from any particular supplier; and*
- (c) *it does not prevent the tied pub tenant from selling at the premises beer or cider produced by a person not mentioned in paragraph (a) (whether or not it restricts such sales).<sup>3</sup>*

2.6 The stocking requirement definition means that it can only be applied by a pub-owning business (POB) who is a producer of beer or cider (or is a group undertaking in relation to that POB) (in this note referred to as a 'brewing POB').

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<sup>1</sup> See s68(5) of the Act

<sup>2</sup> See s68(6) of the Act

<sup>3</sup> See s 68(7) of the Act

2.7 Therefore if a brewing POB includes a stocking requirement in a MRO proposal it does not prevent a tenancy/licence from being a free of tie arrangement.

2.8 To be a stocking requirement the obligation cannot require the tenant to procure the beer or cider from any particular supplier or prohibit the sale of other beer or cider produced by other brewers. However a stocking requirement can include restrictions on the sales of other beer or cider products in other ways - so long as this does not amount to a prohibition on such sales. For example an obligation may require a % of the tenant's/licensee's stock to be made up of the brewing POB's beer or cider, but it cannot directly ban the sale of another beer or cider that is not brewed by the POB.

### **3. What is the effect of a stocking requirement?**

3.1 Where a term in a contract is a stocking requirement, Condition D is not met so the premises do not meet the definition of a tied pub. As a consequence, the tenant will not be a tied pub tenant for the purposes of the Act and the Pubs Code etc. Regulations 2016 (the Pubs Code). Of course other terms of the contract may make it a tied tenancy/licence.

### **4. Referrals for arbitration in connection with stocking requirements – advice for tied tenants and Pub owning businesses**

4.1 While a stocking requirement does not satisfy the conditions to cause a particular premises to be a tied pub, where a POB offers a tied pub tenant a market rent option which includes a stocking requirement, such requirement must be MRO-compliant.

4.2 A tied pub tenant can refer a dispute (brought within the relevant time periods specified in the Pubs Code) about a whether a particular stocking requirement in a particular MRO proposal is MRO-compliant.

4.3 This is the PCA's advice for tied pub tenants and POBs about stocking requirements and the operation of the Act and the Pubs Code. The PCA recommends this is taken into account in considering whether, and the grounds on which, to refer a matter about a stocking requirement for arbitration.

4.4 A MRO-compliant proposal must meet the definition in s 43(4) of the Act which provides:

*A tenancy or licence is MRO-compliant if—*

*(a) taken together with any other contractual agreement entered into by the tied pub tenant with the pub-owning business in connection with the tenancy or licence it—*

- (i) contains such terms and conditions as may be required by virtue of subsection (5)(a),*
  - (ii) does not contain any product or service tie other than one in respect of insurance in connection with the tied pub, and*
  - (iii) does not contain any unreasonable terms or conditions, and*
- (b) it is not a tenancy at will.*

Section 43(5) provides:

- The Pubs Code may specify descriptions of terms and conditions—*
- (a) which are required to be contained in a tenancy or licence for it to be MRO-compliant;*
  - (b) which are to be regarded as reasonable or unreasonable for the purposes of subsection (4).*

## **5. Service or product ties**

5.1 Where a contractual obligation is a stocking requirement, it is not a product tie<sup>4</sup>. Therefore it does not fall foul of s 43(4)(a)(ii) of the Act which prohibits product ties.

## **6. Unreasonable terms**

6.1 Where a tenancy/licence includes a stocking requirement, it could be considered unreasonable in the particular circumstances of the case. This must be judged in the light of the primary legislation which recognises that a stocking requirement may exist without making premises tied.

6.2 Pursuant to section 43(4) of the Act, the Pubs Code provides that certain categories of term are automatically unreasonable, and therefore not MRO-compliant. One such category, as set out in regulation 31(2)(c) of the Pubs Code:

- *are terms which are not common terms in agreements between landlords and pub tenants who are not subject to product or service ties.*

6.3 As the Act permits a stocking requirement within an MRO-compliant tenancy, the PCA does not consider that regulation 31(2)(c) would automatically deem a stocking requirement unreasonable solely because it is not common (for example, a stocking requirement which is the first of its kind to enter the market which is otherwise reasonable).

6.4 Whether a stocking requirement is unreasonable will be considered by the PCA in the light of all relevant considerations. One such consideration may be whether

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<sup>4</sup> Section 72(1) of the Act

the term exists elsewhere in the market between such brewing POBs and their tenants (i.e. whether it is common), however if it does not exist elsewhere the clause would not necessarily be unreasonable.

## **7. Competition law**

7.1A stocking requirement that places restrictions on the sales of other beers and ciders not produced by a brewing POB may engage competition law. Any question of whether such a stocking requirement breaches competition law is not a matter over which the PCA has jurisdiction. The PCA, or any appointed arbitrator, cannot therefore consider whether terms are anti-competitive.

**Pubs Code Adjudicator**