



Pubs Code  
Adjudicator

**STATUTORY GUIDANCE**

Investigation & Enforcement

NOVEMBER 2016



## Pubs Code Adjudicator

Guidance published by the Pubs Code Adjudicator required by section 61 of the Small Business, Enterprise and Employment Act 2015 on:

- a) the criteria that the Adjudicator intends to adopt in deciding whether to carry out investigations;
- b) the practices and procedures that the Adjudicator intends to adopt in carrying out investigations;
- c) the criteria that the Adjudicator intends to adopt in choosing whether to use the enforcement powers in sections 56 to 58 of the 2015 Act;
- d) the criteria that the Adjudicator intends to adopt in deciding the amount of any financial penalty under section 58 of the 2015 Act.

Guidance published on 1<sup>st</sup> November 2016.

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# Investigations

## Chapter 1: Criteria for Commencing an Investigation

### Duty of the PCA

- 1.1 Section 53 of the Small Business, Enterprise and Employment Act 2015 (the Act) provides that the Pubs Code Adjudicator (the PCA) may carry out an investigation if the PCA has reasonable grounds to suspect that a pub-owning business (POB) has either failed to comply with The Pubs Code etc. Regulations 2016 (the Code); or has failed to follow a recommendation previously made to it by the PCA under section 56 of the Act.
- 1.2 ‘Reasonable grounds for suspicion’ might be derived by the PCA from a wide range of sources. These may include – but are not restricted to – evidence from complaints made by tenants (tied or untied) or their representatives; evidence from trade and professional associations and other third parties; from other POBs (within the remit of the Code or otherwise); from whistle-blowers; or from information that is otherwise in the public domain.
- 1.3 The PCA will take a targeted and proportionate approach and prioritise complaints and evidence that it receives in order to decide whether to commence, when to commence and whether to continue any particular investigation.
- 1.4 The PCA will use the following prioritisation principles in pursuing a targeted and proportionate approach to investigations:
  - Impact;
  - Strategic importance;
  - Risks and benefits;
  - Resources.

### Impact

- 1.5 The PCA will consider both the extent of the impact on individual tenants; and the number of tenants who are affected, both directly and indirectly.
- 1.6 The greater the impact of the alleged breach, the more likely the PCA is to commence an investigation, or to continue an investigation. The PCA will consider the total likely impact on tenants when deciding whether or not to commence an investigation; and will be more likely to do so where the alleged breach of the Code is likely to have an impact on a greater number of tenants.

- 1.7 Where a complaint relates to an alleged breach of the Code that is likely to affect a relatively small number of tenants, the PCA would be likely to commence an investigation:
- where the impact on each of the affected tenants is serious – for example, because it risks putting the tied tenant out of business; or
  - where the impact is considered likely to go on to affect an increased number of tenants without PCA intervention.
- 1.8 An allegation of a one-off breach of the Code – unless it is claimed to have had an impact on a very large number of tenants – would be less likely to lead the PCA to commence an immediate investigation. The PCA would expect to deal with such cases in the first instance by way of early discussions with the POB; or through the arbitration process where the tenant has made a formal referral.

### **Strategic importance**

- 1.9 The PCA will consider whether commencing an investigation will further its statutory obligations and uphold two core Code principles (the ‘fairness and no worse off principles’), namely:
- the principle of fair and lawful dealing by POBs in relation to their tied tenants; and
  - the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie.
- 1.10 The PCA will consider if the complaint appears to give rise to a likely pattern of behaviour leading to breaches of the Code.
- 1.11 The PCA will be more likely to commence an investigation where there are reasonable grounds to suspect a pattern of breaches, intentional or otherwise, designed to frustrate or otherwise have the effect of frustrating the principles underpinning the Code.
- 1.12 Where the alleged breach of the Code appears to the PCA to be an isolated, inadvertent breach or the result of issues relating to the interpretation of the Code, the PCA may elect to proceed in the first instance by discussing the matter with the relevant POB concerned.
- 1.13 The PCA may also consider whether an investigation is likely to have any deterrent effect by encouraging wider compliance with the Code in the future.

### **Risks and benefits**

- 1.14 Before commencing an investigation, the PCA will consider the effectiveness of the potential outcomes. These may not be restricted to formal enforcement remedies following a finding by the PCA of a breach of the Code; but may also include the effect of providing clarification of the Code.

- 1.15 When deciding whether to commence or continue an investigation, the PCA will consider the likelihood of the investigation resulting in the ending of practices that breach the Code.

### **Resources**

- 1.16 The PCA will only investigate or continue to investigate, and take action as a result of an investigation, where the PCA is satisfied that it is proportionate to do so.
- 1.17 Cost will not be the final determinant in deciding what action the PCA may take. The PCA may take action where the PCA assesses that the likely impact of the case on tied tenants, its strategic significance and the risks of not acting make an investigation an appropriate use of the PCA's time and resources, even where that may be resource-intensive. Conversely, the PCA may decide not to commence or not to continue with an investigation where the impact, significance and risk are not considered to (or no longer) warrant the allocation of resources.
- 1.18 The PCA will not simply look at the likely costs of the investigation itself; but will look to balance this consideration against the opportunity costs – in the form of savings on future demands on its time and resources from further complaints and referrals for arbitration on the same or similar matters when considering whether to investigate or continue to investigate.

## Chapter 2: Investigation Process

### Requiring the provision of information

- 2.1 Once a formal investigation is opened, the PCA has statutory powers to require a person to provide documents or other information that is in their possession or control<sup>1</sup>. This may include a requirement to provide information orally.<sup>2</sup>
- 2.2 The PCA has a duty to keep this information confidential in accordance with Part 9 of the Enterprise Act 2002.
- 2.3 The PCA may require any person to provide documents or other information in their possession or control. The PCA is not limited to approaching only the POBs suspected of breaching the Code; and may request documents or information from relevant third parties such as the complainant(s), other POBs, professional advisers, and trade and professional bodies.
- 2.4 The term 'document' includes, but is not limited to, all of the following – in both paper and digital form:
- tenancy agreements and licences (both tied and free of tie) and variations to such tenancy agreements and licences;
  - rent proposals and rent schedules;
  - statements of the nature of the tie;
  - other contractual agreements between a tenant and their pub-owning businesses;
  - records of conversations between tenants and representatives of their pub-owning businesses;
  - invoices and delivery notes;
  - other financial documents, such as sales projections and business plans;
  - other trade or business information; and
  - other relevant documents and information.
- 2.5 The notice will also explain the possible consequences for failing to comply.<sup>3</sup>
- 2.6 The PCA may also use its powers to require the production of information that is not already in recorded form. For example, the PCA may ask for information about informal or unrecorded meetings and contacts between a tenant and their Business Development Manager; or may ask a person to provide information about a particular aspect of the sector based on their knowledge and experience or the knowledge and experience of their staff.

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<sup>1</sup> Paragraph 19(1) of Schedule 1 to the Small Business, Enterprise and Employment Act 2015

<sup>2</sup> Paragraph 19(4) of Schedule 1 to the Small Business, Enterprise and Employment Act 2015

<sup>3</sup> Paragraph 19(6) of Schedule 1 to the Small Business, Enterprise and Employment Act 2015

## Form of the request

- 2.7 Whenever the PCA requests information from any person, it will provide a written notice (Disclosure Notice), specifying:
- the power under which the information is requested;
  - who is required to provide the information;
  - what information is required;
  - to whom the information is to be provided;
  - in what form it is to be communicated (e.g. post, e-mail);
  - where it is to be provided;
  - when, or the time by which, it is to be provided; and
  - the form in which it is to be provided.
- 2.8 A person may receive a Disclosure Notice for the production of documents or information on more than one occasion during the course of the same investigation.
- 2.9 If an individual is required to attend a particular place, the PCA will offer to pay the necessary travel expenses.<sup>4</sup>

## Deadlines for providing information

- 2.10 Delays in the provision of information can have a significant impact on overall timescales. The PCA, therefore, expects an individual to respond to a Disclosure Notice in the timeframe specified in the request.
- 2.11 When specifying the time limit for the production of documents or information, the PCA will consider:
- the amount and the complexity of the information required;
  - the resources that might be available to the individual, organisation or company concerned;
  - the urgency of the case; and
  - the overall public policy justification for speed of action.

## Proportionality of requests

- 2.12 In specifying documents or information in a Disclosure Notice, the PCA will not seek more documents or information than the PCA believes is necessary for the investigation.

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<sup>4</sup> Paragraph 19(7) of Schedule 1 to the Small Business, Enterprise and Employment Act 2015



## Failure to comply with a Disclosure Notice

- 2.13 It is an offence intentionally to fail to provide documents or information following a formal request by the PCA<sup>5</sup> which can lead to a fine if convicted.
- 2.14 It is also an offence, which can lead to a fine if convicted, to knowingly provide false information in response to a disclosure notice by the PCA.<sup>6</sup>
- 2.15 It is a defence for a person charged with intentionally failing to comply with a Disclosure Notice to prove that there was a reasonable excuse for the person's failure.

## Group undertakings

- 2.16 The PCA may determine during the course of an investigation of a POB (POB1) that a group undertaking of POB1 should be treated as a POB, as well as or instead of POB1.<sup>7</sup> The PCA may make this determination where evidence becomes available to the PCA during the course of the investigation of a POB that suggests:
- that the group undertaking is or has discharged, exercised or influenced any of the POB's obligations under the tenancy or licence to which the investigation relates; or
  - is responsible for, or exercises influence over:
    - that tenancy or licence;
    - the financial arrangements or charging policies affecting the tied tenant; or
    - any other administrative, managerial or executive decisions of the POB affecting the tied tenant in a way that is relevant to the investigation.
- 2.17 Where the PCA makes such a determination, this guidance applies to a group undertaking for the purposes of that investigation.

## Timescales for investigations

- 2.18 The PCA is not legally required to complete investigations within a specific period of time
- 2.19 The PCA is sensitive, however, to the impact that a lengthy investigation could have – in terms of cost, business uncertainty and the prolonging of unfair practices – on both the tenants and the POB concerned. The PCA will therefore endeavour to complete investigations as soon as reasonably practicable in light of all the circumstances, and in any event is likely to do so within 12 months.

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<sup>5</sup> Paragraph 20(1) of Schedule 1 to the Small Business, Enterprise and Employment Act 2015

<sup>6</sup> Paragraph 21 of Schedule 1 to the Small Business, Enterprise and Employment Act 2015

<sup>7</sup> Regulation 63 of the Pubs Code etc. Regulations 2016

## Costs of investigations

- 2.20 The PCA may require one or more POBs to pay some or all of the costs of the investigation if the PCA is satisfied that they have failed to comply with the Code or failed to follow a recommendation.<sup>8</sup> These costs are recoverable by the PCA as a debt.
- 2.21 A person whose complaint is found to be vexatious or wholly without merit may also be required to pay some or all of the costs of the resulting investigation.<sup>9</sup> While this power is designed to deter false complaints, the fact that a complaint does not ultimately result in a finding that the Code has been breached does not automatically mean that it will be considered by the PCA to have been vexatious or without merit.
- 2.22 Where the PCA requires a POB or other person to pay investigation costs, it will provide them with a Costs Notice specifying:
- the grounds for imposing the requirement;
  - how much is to be paid;
  - by when the costs are to be paid; and
  - how they are to be paid.
- 2.23 A person subject to a Costs Notice may appeal to the High Court in England and Wales against the decision to impose costs or the amount to which it relates.

## Investigation reports

- 2.24 The PCA must publish a report on the outcome of an investigation.<sup>10</sup>
- 2.25 The investigation report must contain:
- any findings by the PCA;
  - any action that the PCA has taken or proposes to take as a consequence; and
  - the reasons for those findings and any action taken or proposed.
- 2.26 The investigation report will not necessarily identify the POB concerned. Where a POB is to be identified, it will be given a reasonable opportunity to comment on the report in draft form before it is published.
- 2.27 Any complainants will not be identified in the report without their consent.

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<sup>8</sup> Regulation 63 of the Pubs Code etc. Regulations 2016

<sup>9</sup> Section 59(2) of the Small Business, Enterprise and Employment Act 2015

<sup>10</sup> Section 54 of the Small Business, Enterprise and Employment Act 2015

# Enforcement Powers

## Chapter 3: Enforcement Options

3.1 Where, following an investigation, the PCA is satisfied that a POB has breached the Code, the PCA will consider whether enforcement action is appropriate and if so may take one or more of the following enforcement measures:

- make recommendations to the POB or POBs concerned;
- require the POB or POBs concerned to publish information; or
- impose a financial penalty on the POB or POBs concerned up to a maximum amount equal to 1 percent of their total UK turnover.

[\(See Chapter 4 for further details\)](#).

### The PCA's approach to enforcement

3.2 In all cases, the PCA's decision on the most appropriate form of enforcement will be guided by the Macrory Principles on Regulatory Sanctions.

### The Macrory principles

3.3 The Macrory Principles recognise the importance of giving independent regulators the flexibility to impose the sanction that they believe is most appropriate in the particular circumstances of any given case. They provide a framework within which regulators may make those judgements.

3.4 There are six principles – that a sanction should:

- aim to change the behaviour of the offender;
- aim to eliminate any financial gain or benefit from non-compliance;
- be responsive and consider what is appropriate for the particular offender and the regulatory issue;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance where appropriate – although this does not extend in relation to the Code to the awarding of compensation to tenants; and
- aim to deter future non-compliance.

3.5 In applying the Macrory Principles, the PCA will pursue sanctions that are proportionate to the nature and seriousness of the breach. The PCA will therefore take an escalatory approach to the exercising of its regulatory and enforcement powers to secure compliance with the Code.

## Decisions on enforcement options

- 3.6 When considering its enforcement options, the PCA will consider how to best ensure the breach is not continued or repeated; and that POBs understand their compliance obligations. The PCA will also consider whether future compliance with the Code can most effectively be secured through informal interventions with POBs.
- 3.7 In taking an escalatory approach, a serious or persistent breach of the Code is more likely to lead to the imposition of a financial penalty. Where the PCA finds that there has been a serious breach of the Code the PCA will be more likely to take formal enforcement action. The PCA will have particular regard to the Macrory Principles on proportionality and deterrence.
- 3.8 In deciding what enforcement action is most proportionate in a particular case, the PCA will consider:
- the seriousness of the breach – including:
    - whether the breach is deliberate; as a result of negligence; or inadvertent;
    - whether it relates to the fairness and no worse off principles underpinning the Code;
    - the breadth of the breach – in terms of the number of tenants affected;
    - the depth of the breach – in terms of the impact suffered by each tenant;
  - the most effective way to ensure compliance with the Code and therefore likely to elicit fewer complaints in the future– including the likelihood that the enforcement option chosen will actively deter similar breaches in the future;
  - the likelihood of the enforcement option successfully restoring the tied relationship to what it would have been without the breach (although this does not include awarding compensation to tenants).

## Informal interventions

- 3.9 Where the PCA considers it appropriate, and that it will lead to a more effective outcome, the PCA will seek to pursue informal regulatory action with a POB – if the PCA considers that this is the most effective and appropriate way of quickly changing behaviour, eliminating the benefits of non-compliance, and therefore giving effect to the fairness and no worse off principles.
- 3.10 Informal regulatory action may include discussions with a POB; providing them with clear advice on their Code obligations; and publication of further guidance on the Code and the PCA’s approach to its enforcement.

## The seriousness of the breach

- 3.11 When considering the seriousness of the breach, the PCA will look at both the nature of the breach in the context of the Code; and the scale of the harm that the breach has caused in relation to tenants.
- 3.12 Breaches of the Code of which the POB was, or ought reasonably to have been, aware are more likely to be regarded by the PCA as serious. In addition, the PCA is

also more likely to consider breaches that could reasonably have been avoided as more serious. The PCA will also take into account the extent of the co-operation by the POB with the investigation.

- 3.13 The PCA is more likely to regard as particularly serious breaches of the Code that have or were intended to have the effect of frustrating the fairness and no worse off principles.
- 3.14 When considering the scale of the breach, the PCA will take into account not only the actual harm caused but also the harm that it was capable of causing.
- 3.15 When considering the impact of the breach on tenants, the PCA will assess both the number of tenants or groups of tenants that were or could have been affected; and the extent of the impact on individual tenants or groups of tenants.

### **Future compliance and deterrence**

- 3.16 The PCA will have particular regard to the level of enforcement necessary to ensure that the breach does not continue; and that it is not repeated by the POB in relation to which the investigation related. The PCA will also take into account the likelihood of enforcement action in one case having a deterrent effect on other POBs; and its capacity to incentivise compliance with the Code more generally.

## Chapter 4: Statutory Sanctions

- 4.1 The PCA's enforcement powers are set out in sections 55 to 58 of the Act and are summarised below. The powers are available where, following an investigation, the PCA is satisfied that a POB has failed to comply with the Code, or failed to follow a recommendation previously made by the PCA. The PCA may use these powers individually or in combination where different types of sanction are considered to best achieve effective compliance with the Code in a particular case.
- 4.2 Where an investigation concerns two or more POBs, the PCA may also decide to take different enforcement action in respect of different businesses; or to take enforcement action against some, but not all, of those businesses.<sup>11</sup>

### Recommendations

- 4.3 The PCA may make a recommendation to a POB recommending what the POB should do in order to comply with the Code and specifying the time by which they should do it.<sup>12</sup>
- 4.4 Where the PCA makes a recommendation, it will monitor whether the recommendation has been followed.<sup>13</sup>
- 4.5 For the purposes of this monitoring, the PCA may require a POB to produce documents or any other information in their possession or control. The PCA may specify:
- who is required to provide the information;
  - what information is required;
  - to whom the information is to be provided;
  - in what form it is to be communicated (e.g. post, e-mail);
  - where it is to be provided (and if an individual is required to attend a particular place, the PCA will offer to pay the necessary travel expenses);
  - when, or the time by which, it is to be provided; and
  - the form in which it is to be provided.
- 4.6 Failure to respond may be taken into account in considering whether the PCA has reasonable grounds to suspect that the POB has failed to follow a recommendation and whether to commence a further investigation.

### Effect of non-compliance

- 4.7 The Act does not expressly provide for a sanction to be imposed on a POB that fails to comply with a recommendation.

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<sup>11</sup> Section 55(2) of the Small Business, Enterprise and Employment Act 2015

<sup>12</sup> Section 56(1) of the Small Business, Enterprise and Employment Act 2015

<sup>13</sup> Section 56(2) of the Small Business, Enterprise and Employment Act 2015

4.8 Failure to comply with a recommendation may, however, be grounds to commence a new investigation.<sup>14</sup> Should a further investigation reveal that a POB has failed to comply with a recommendation, the PCA is likely to consider this to be very serious. The PCA would take further enforcement action that reflects the seriousness of such a finding.

### **Publication of information**

4.9 The PCA may require a POB to publish information. In particular, this sanction may be considered where publication is likely to lead to future compliance with the Code and where the information to be published can be taken into account by those dealing with the POB.

4.10 Enforcement by way of publication of information will take the form of a Publication Notice from the PCA to a POB specifying:<sup>15</sup>

- the information that is to be published;
- how it is to be published – for example:
  - the media in which it is to be published;
  - the length of time for which it is to be published;
  - the manner in which it must be published – including size and prominence; and
- the date by which it must be published.

4.11 The PCA might, for example, require publication by way of any or all of the following:

- a press release;
- the POB's website or in its annual report;
- a newspaper advertisement;
- an open letter to any relevant trade or professional bodies.

4.12 If the POB does not publish the information, the PCA may bring civil proceedings in the courts in England and Wales to obtain an injunction or court order to compel compliance.<sup>16</sup>

### **Financial penalties**

4.13 The PCA will use this power to impose a financial penalty on a POB to reflect the seriousness of the breach of the Code.

4.14 The PCA may take into account whether:

- the POB acted deliberately or was wilfully negligent;

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<sup>14</sup> Section 53(1)(b) of the Small Business, Enterprise and Employment Act 2015

<sup>15</sup> Section 57(2) of the Small Business, Enterprise and Employment Act 2015

<sup>16</sup> Section 57(3) of the Small Business, Enterprise and Employment Act 2015

- the breach relates to the fairness and no worse off principles underpinning the Code;
- the breach affects a large number of tenants; or has a disproportionately adverse impact on the affected tenants.

4.15 The PCA may choose to issue a financial penalty where it considers that it will constitute a serious and effective deterrent – both to the specific POB concerned and to any other POB – against future activities that may constitute a breach of the Code.

### **Amount of the penalty**

4.16 The PCA may impose a financial penalty up to a maximum of 1 percent of the ‘POBs’ annual turnover.<sup>17</sup> The pub-owning group is defined as the POB (as defined in section 69 of the Act) and its group undertakings (which has the meaning given by section 1161 of the Companies Act 2006).

4.17 The PCA will calculate the appropriate level of a financial penalty by applying the following steps:

- Assessing an initial amount based on the seriousness of the breach of the Code (or failure to follow a recommendation);
- Adjusting the initial amount to take account of any aggravating factors, such as:
  - the extent to which the breach or failure was intentional;
  - whether there had been repeated or multiple breaches or failures;
  - whether the breach continued following receipt of a recommendation from the PCA;
  - where the breach was considered to be the result of negligence on the part of the POB, and the extent to which it could reasonably have been avoided.
- Adjustments for any mitigating factors, such as:
  - the extent of the POB’s co-operation with the investigation;
  - the speed with which the POB acted to remedy the breach or failure.
- Any further relevant adjustments for example considerations of deterrence and proportionality.

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<sup>17</sup> Section 58(1) of the Small Business, Enterprise and Employment Act 2015; Regulations 5 & 6 of The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016



## Notification of the financial penalty

4.18 Where the PCA decides to impose a financial penalty, it must provide the POB with a written notice (Penalty Notice) specifying:<sup>18</sup>

- the grounds for imposing the penalty;
- the amount of the penalty;
- the period within which it must be paid; and
- how it must be paid.

4.19 The PCA will additionally explain in the Penalty Notice:

- the nature of the breach of the Code or failure for which the penalty is being imposed;
- the seriousness of the breach or failure;
- the extent of the impact of the breach on tenants; and
- the reasons why the PCA has therefore decided that other enforcement options are inadequate.

4.20 A POB may appeal against the imposition of a financial penalty or its amount to the High Court in England and Wales.<sup>19</sup>

4.21 Financial penalties are recoverable by the PCA as a debt.<sup>20</sup> They will be paid into the Consolidated Fund.<sup>21</sup> They will not be used to fund the PCA's activities.

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<sup>18</sup> Section 58(2) of the Small Business, Enterprise and Employment Act 2015

<sup>19</sup> Section 53(3) of the Small Business, Enterprise and Employment Act 2015

<sup>20</sup> Section 53(4) of the Small Business, Enterprise and Employment Act 2015

<sup>21</sup> Section 53(5) of the Small Business, Enterprise and Employment Act 2015