Consultation questions

Introduction

Ei Group Limited and its property owning subsidiaries as the regulated businesses under Pubs Code form part of the Stonegate Group who are the largest Pub Company in the UK, operating c.3,100 regulated tied pubs under the Pubs Code in England and Wales with c.1,300 managed pubs outside the auspices of the Pubs Code across the UK, including c.40 in Scotland.

Ei Group Limited welcome the opportunity to respond to the Consultation questions.

1. What are your views about Parallel Rent Assessments for prospective tied tenants? Please provide the reason(s) for your answer.

As the experience of both Arbitrations and Independent Assessor awards under the Pubs Code and SBEE Act 2015 over the last five years have shown comparing different agreements and rents is not straight forward. To suggest that creating a simple 'Parallel Rent Assessment' at any point would be subjective, open to challenge and not provide any benefit to the process.

The questions for Parallel Rent Assessments is what problem are they trying to answer and is it the best way to answer it?

The problem appears to be thought to be a need for tied tenants to have a greater understanding of free-of-tie letting options when taking a tied lease.

Prospective tied tenants can look on the open market at comparable free-of-tie tenancies on websites such as Fleurets https://www.fleurets.com/properties/pubs-for-sale-or-let.html. We are happy to provide prospective tenants with the website details for such sites.

The Parallel Rent Assessment is a far more complex solution. Along with the Parallel Rent Assessment the landlord would also have to explain the notional free-of-tie tenancy that it values. The approach of the Pubs Code Adjudicator to MRO offer of a free-of-tie lease has been to discourage a "one size fits all" tenancy. The specific terms of the MRO tenancy for a particular pub has been the subject of significant litigation over the period of time since the inception of the Pubs Code. Therefore, there is a complexity as to what the notional free-of-tie agreement represents from a Rental Assessment perspective – quarterly rent, indexation, upward only rent reviews, full repairing obligations, less support and potentially a different term length.

The additional cost and complexity of a Parallel Rent Assessment piled on the already information over-loaded new tenant, mainly due to the Pubs Code, would be of no use as the offer for the notional free-of-tie tenancy would not be available. The information available on other real free-of-tie agreements in the market would be available to the new tenant.

2. What are your views about encouraging a trial period – for example 3 months - to help a prospective tied tenant familiarise themselves with the running of a new tied pub before entering into a commercial contract? Please provide the reason(s) for your answer.

Again, it is a question of what problem is a 'trial period' trying to answer? We think this is trying to solve a problem that does not exist and cannot find any evidence that this problem exists.

The reality is that most tied agreements are completed on a Pub specific basis. Ei Group Limited have agreements that provide for a trial period already, both in terms of one-year agreements or five year agreements where 3 months' notice can be served in the first year. But this must suit the operator, style of Pub and is market led – very rarely is the three-month notice period exercised.

When finalising the tenancy, the prospective Publican can pull put at any time, prior to the completion of their agreement. Of course they have the benefit of advice from a range of professional advisers as set out in the Code.

Also tenancies at will are frequently used during the negotiation of a substantive tenancy.

Ei Group Limited are firmly of the opinion that any probationary/cooling off period should be dictated by the dynamism of market conditions rather than advisory or voluntary obligations.

This potentially restricts investment as this requires certainty, which an obligation to provide a trial period in all agreements.

3. What are your views about reducing the current 6-month period in the previous qualification period? Do you think that a 3-month period in the previous financial year would be appropriate or would you support a different period? Please provide the reason(s) for your answer.

Ei Group Limited do not have an opinion on this question.

4. What are your views about a requirement for the landlord selling the pub to notify the PCA of any tied tenant(s) with extended protection? Should the PCA be informed when extended protection has ended? Please provide the reason(s) for your answer.

Ei Group Limited would be happy to inform the PCA of any pubs being sold which have the benefit of extended protection.

It is optimistic to expect unregulated businesses, and sometimes small businesses, to inform the PCA when extended protection has ended. There are bound to be many new landlords who will fail to notify of the end of extended protection. Tenants will also assign their leases, meaning that the information will become out of date, and the data held by the PCA will quickly become inaccurate. It seems to be added bureaucracy without a clear gain.

5. What are your views about a Parallel Rent Assessment at the rent assessment or lease (or licence) renewal stage for tenants with extended protection? What type of information should be set out in a PRA? Should there be a right to refer disputes related to the PRA to the PCA and, if so, on what grounds? Please provide the reason(s) for your answer.

See 1 above. Parallel Rent Assessment are an unhelpful burden without any basis of use, or foundation in reality, if the free-of-tie arrangement is notional.

6. What are your views about the examples set out above and what might work or what might not work? Do you have other suggestions on how the MRO process could be changed using existing powers? Please provide the reason(s) for your answer.

Ei Group Limited believe, as highlighted in the Ei Group submission to BEIS in xxxx 2019 the process for TPTs to claim MRO could be improved. A window where there is not the requirement for dispute resolution or referral for negotiation within a specific period which should be ideally c3 months before a referral is made.

In terms of the proposals within the consultation document Ei Group Limited would comment as follows:

Example 1 seems sensible. This puts the negotiations before the sending of the formal full response. It has clear time limits and the flexibility for the tenant to bring the date of the formal response forward if they do not think the negotiations are moving forward. However, we believe that three months would be better than the two months suggested, this historically has been the period the PCA usually offers for an initial stay.

There needs to be greater clarity around what the pub-owning business is expected to send in response to the MRO notice – is it heads of terms or a preliminary full response?

The initial period of negotiation should be expressly without prejudice to provide a space for constructive negotiation and to avoid the creation of secondary disputes as to what was or was not offered as a compromise.

Example 2 is more complex, and not one Ei Group Limited would advocate. The tenant providing details of what they want in the MRO notice is similar to what happens in s.26 notices under the 1954 Act, but under the Code there are a far wider list of possible factors. It will create a further area of dispute as to how much the tenants' wishes have to be taken into account. Drafting the full response will become more complex and costly, and potentially difficult for the TPT to deal with. The process of extending the period of negotiations risks becoming bureaucratic and a trap for the unwary TPT and POB, as currently happens with extensions under the 1954 Act.

Other ideas

1. As the tenant is being given more time to reflect on the offered terms, the referral to arbitration should be required to identify in detail the terms that the tenant objects to and their challenge should be limited to those clauses. At present some tenants' representatives put in vague assertions and only clarify at the point when the statement of case is served.

2. A window where there is not the requirement for dispute resolution or referral for negotiation within a specific period which should be ideally 3 months, before a referral is made.

3. There needs to be provision for what happens to the negotiation period when the parties agree the MRO terms in the middle of an arbitration, without there being a finding as to compliance of the full response. At the moment it is unclear when the negotiation period ends in such circumstances. The PCA's standards for arbitrators require arbitrators to set out the timescales for the negotiation period, without providing clarity for what those timescales are in this most common of situations.

4. There are cases where the MRO lease is agreed and the MRO rent determined, but the tenant can delay accepting due to the non-completion of the rent assessment (r.37(13)). We have been encouraged not to pursue tied rent assessments where there is an MRO claim, due to r.28 providing that no rent increase can be claimed where the tenant accepts the MRO claim. It would be useful, so MRO agreements do not effectively 'hang' for sometime that either:

    a. It be made clear that in such circumstances the landlord can progress the rent assessment, or
    b. R.37(13)(b) is deleted so there is a clear time limit for accepting an agreed MRO lease after the rent has been determined.

7. What are your views about requiring the inclusion of rent in an MRO proposal? Please provide the reason(s) for your answer.

Ei Group Limited already provide the Rent with the MRO proposal, from our point of view this would be a sensible requirement.

8. What are your views about removing the requirement that terms should not be 'uncommon'? Please provide the reason(s) for your answer.

Commonality, or terms that should not be 'uncommon' should be demoted to being an addition to one of the twelve factors that the PCA's Regulatory Compliance Handbook says play a role in determining reasonableness.

The main reason for this response is that terms that are "uncommon" is poorly defined and there are a wide variety of comparable free of tie leases in the market. The need for the terms to be common in isolation and in combination provides a further level of complication.

Giving the arbitrator to judge the terms on reasonableness (with commonality as a relevant factor) means that there will be less need for expert evidence. It should therefore save cost and time.

9. What are your views on amending the definition for the 'comparison period'? Please provide the reason(s) for your answer including, where available, views and evidence on whether pub-owning businesses are adopting a 13-month pricing period and the impact this has on business planning.

It would be sensible and reasonable to amend this to a working 12 month period, in line with most business increases.

It would also be sensible if the comparison took place on the date that the Pubco notified the tenant of an increase in prices, rather than the date of the first invoice for a particular product. The current system means that the price comparison can take place at any time throughout the year that the tenant buys a product for the first time since the price increase, which makes it impossible to be certain of a CPI figure. The change would make the formula and test far simpler to understand.

10. What are your views on excluding taxes and duties from the significant price increase calculations? Please provide the reason(s) for your answer.

Excluding taxes and duties is welcome as this is beyond the control of the pub owning business however in Ei Group Limited's view does not go far enough. It also needs to include tariffs.

11. What are your views about excluding other unavoidable costs from the significant price increase calculations? Please provide the reason(s) for your answer.

It is more common that Ei Group Limited's suppliers, rather than Ei Group Limited, who are the ones dealing with taxes, duties etc. This is a factor of being a non-brewer pub-owning business. A supplier may put the price up for a combination of reasons including tax, increased wage costs and distribution issues (eg lack of delivery drivers). For Ei Group Limited, splitting out the supplier's increase in prices between the various factors will be impossible. The proposal would create an uneven playing field in favour of brewer pub-owning businesses. It also would be simpler to adopt the "extrinsic increase" which is defined already in the Code in relation to trigger events and includes increases in the price at which Ei Group Limited purchases the product or service.

12. Do you think there should be an alternative appeal route to the current High Court or should the latter be retained? Please provide the reason(s) for your answer.

Yes there should be an alternative route to appeal.

There is an inconsistency amongst the arbitrator's decisions and a lack of precedent means similar disputes are being litigated repeatedly. Appealing to the High Court can be slow and expensive. The narrow remit of the High Court to review decisions (mistake of law, serious irregularity of procedure and lack of jurisdiction) is unsatisfactory.

For instance, in the Ei Group Ltd v [redacted] we were unable to challenge the arbitrator's erroneous finding on what was a market rent as it did not clearly involve a mistake of law.

13. If you believe that the appeal route should be changed, what do you think it should be changed to? Are there other ways to make an appeal more accessible and potentially less costly without changing the appeal route? Please provide the reason(s) for your answer.

The First Tier Tribunal Property Chamber ('FTT') is a better option than the High Court. The FTT only deals with disputes involving specific areas such as land registration and service charges, where a statute has given them the power to make decisions. The FTT can look into an issue afresh by way of rehearing. The FTT would not be bound by the limited remit of the High Court on an arbitration appeal. It is an "inquisitorial" tribunal, where the tribunal takes an active role in examining the issues, rather than relying on an adversarial approach between the parties. This will benefit tenants who may not be legally represented. The FTT can be flexible in terms of the procedure to be adopted and may therefore be quicker. FTT hearings are public and the decisions of the FTT although not technically binding precedent, would be helpful in building a bank of informative decisions on key matters. The application fee is cheaper (£100) than the equivalent High Court application (£255). Costs are generally cheaper and the FTT can only order costs if a person has acted unreasonably in bringing, defending or conducting proceedings (unless the statute gives it other powers). There are 5 regional centres of the FTT. The judges at the FTT are more experienced in land and landlord and tenant issues than the average High Court judge. There can be a further appeal from the FTT to the Upper Tribunal (Lands Chamber).

14. Are there any other ways that could be adopted to make the appeal route more accessible and potentially less costly without changing the appeal route? Please provide the reason(s) for your answer.

Ei Group Limited's preferred route would be that there could be an appellate board of specialist arbitrators set up with experience in the Code, from which a second arbitrator can review the decision of the first arbitrator.

Appeals from the arbitrator could be dealt with in a similar way to appeals from an Independent Arbitrator's decision, i.e. that there are criteria set out in the Code for the appeal of the decision, which could be wider than the criteria in the High Court. There would still be provision for appeal to the High Court from the second arbitrator's decision, but that would be rare.

There would also have to be provision as to who funded the costs of the appeal.

3rd July 2021