Department for Business, Energy & Industrial Strategy

Consultation on proposals to amend the Pubs Code

Response form

The consultation is available at: https://www.gov.uk/government/consultations/options-to-amend-the-pubs-code

The closing date for responses is 5 September 2021, 23:45.

Please return completed forms to:

Pubs Code Team
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET

Email: pcareview@beis.gov.uk

Please be aware that we intend to publish all responses to this consultation, subject to redactions we may make for legal reasons.

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see the consultation document for further information.

If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

I want my response to be treated as confidential ☒

Comments: We consider parts of our consultation response to be commercially sensitive.

About You

Name: [Redacted]
Organisation (if applicable): Star Pubs & Bars (part of HEINEKEN UK)
Address: HEINEKEN UK, 20-22 Great Tichfield Street, London, W1W 8BE

	Respondent type
☐	Tied pub tenants
☐	Non-tied tenants (please indicate, if you have previously been a tied tenant and when)
☒	Pub-owning businesses with 500 or more tied pubs in England and Wales
☐	Other pub owning businesses (please describe, including number of tied pubs in England and Wales)
☐	Tenant representative group
☐	Trade associations
☐	Consumer group
☐	Business representative organisation/trade body
☐	Charity or social enterprise
☐	Individual
☐	Legal representative
☐	Consultant/adviser
☐	Trade union or staff association
☐	Surveyors
☐	Other (please describe)

Questions

Question 1

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

Comments:

It is not clear from the consultation what specific problem the proposal for PRAs is seeking to resolve. There is no evidence presented in the consultation of how prospective tenants are being adversely affected. For the reasons set out below, Star Pubs & Bars' view is therefore that there is no issue here that demonstrates the need for a PRA. Given that the addition of PRAs on top of an already complex Pubs Code would be costly and complex, it is our firm view that it is unnecessary.

There is already choice in the market for prospective licensees. They can choose from the range of leased & tenanted models offered by Star (or other pub companies) which allow licensees access to their own pub business for a comparatively small investment, while benefitting from economies of scale. Or they can opt for a free trade pub in the wider market (if they are able, or prepared, to make a lager upfront financial commitment). Our licensees are not forced to be 'tied' – they choose to rent a pub with us on a supply agreement.

Where a prospective tenant chooses to pursue a tied tenancy, the Code already equips them with the information to understand and assess the tied terms and rent offered - in the form of the Schedule 1 information specified for the purposes of a new agreement and the Schedule 2 and information specified for the purposes of a rent proposal or rent assessment proposal. There is no suggestion in the consultation that these existing Code provisions covering pre-entry training, pub-specific information and business plans, and the evidence required in support of the tied rent assessment, are failing to ensure that prospective tenants receive transparent information about the tied tenancy as the Code intended.

Nor does the consultation acknowledge industry initiatives to give tenants access to the professional advice they need before entering into an agreement. On the contrary, it is widely agreed that the introduction of the Pubs Code has resulted in better recruitment and on-boarding of licensees with improved transparency on all sides. We believe that the Code has achieved the correct balance in prioritising such transparency in furtherance of the core Code principle around fair and lawful dealing in respect of prospective tenants. The embedding of these Code disciplines gives all parties' confidence that Code requirements around transparency are being applied throughout the recruitment process.

Specifically, in addition to mandating that potential licensees attend our own Innside Knowledge course (a bespoke 5 day entry-level training course), we advise all licensees to complete appropriate training such as from the BII. In 2019, Star Pubs & Bars was an industry leader in investing in free BII membership for all their core leased & tenanted licenses. This level of pre-entry information and training ensures that prospective Star tenants are well-informed before making a decision about whether or not to enter into an agreement.

While we can see how a hypothetical Parallel Rent Assessment (PRA) figure might aid transparency in theory, we have significant practical concerns. We believe it would cut across the current focus in the Code on presenting tenants with real world information about their actual options. We also envisage that setting out a non-exercisable free of tie option to prospective tied tenants would be challenging to put in context; would be very likely to generate confusion with the existing Code rights to MRO; could promote tenant dissatisfaction with the process; and potentially lead to additional disputes. It is also unclear how or whether a PRA could then be challenged by a prospective tenant or their advisors.

Requiring pub companies to complete PRAs would also prolong and complicate the induction process, resulting in delays for tenants and additional costs for all parties. One specific problem with determining a PRA is the suggestion of a "notional free-of-tie tenancy" and what this means. Defining this, on a consistent basis, would create problems and be a complicated process in itself. We don't believe there exists, nor have we been supplied with, evidence to justify these additional burdens.

In terms of costs, Star Pubs & Bars manage a huge number of new agreements through our pub estate each year – we estimate that the requirement to provide a PRA for each new prospective tenant would cost us in excess of £500,000 per annum (based on the need for an additional 5-8 more estates managers; FTE each at c.£100,000 PA). We would argue the cost burden of this would far outweigh any perceived benefit, not least as there is no current evidence of harm.

Question 2

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

As this approach is voluntary, we are interested to hear stakeholders' views about the incentives for both pub-owning businesses and tenants in agreeing this sort of trial arrangement. We would particularly welcome comments from individual tied tenants who completed a trial period prior to signing their tied agreement and what they thought had worked well and what could have been better. We would also be interested in hearing from pub-owning businesses about whether they have arrangements in place, or planned, to allow prospective and new tied tenants a trial or opt-out period before finalising a tied arrangement.

Comments:

As we outline in our response to Question 1, it is not clear what issue the proposal for mandatory trial periods is seeking to resolve. Prospective licensees already have freedom of choice before entering into an agreement. This decision is market-led already.

They will also take into account any offer of trial periods or break clauses included in an offer. Star Pubs & Bars already allow tied tenants a trial period in new agreements. In our Foundation Tenancy (which is our standard agreement) the licensee can terminate the agreement on three months' notice at any point. The trial period and three-month notice is essentially an additional SCORFA benefit – it is not a common feature of a commercial lease.

Importantly, the commercial reality is that it is not in a POB's commercial or reputational interest to keep a licensee running a pub if, for example, they've decided they want to leave the pub, or the business is not performing. Many pub companies already offer trial periods and break clauses – those are commercial decisions and there is no evidence to suggest it should be mandated through Government intervention.

There could also be a number of unintended consequences in mandating this. For example, we would point out that it would be unlikely that either a new licensee or a pub company would invest in the business if there was a lengthy mandated trial period. This would obviously result in any necessary investment being delayed. Another example would be the resulting impact this might have on temporary management agreements (TMAs) or tenancy at will agreements (TAWs) which are already subject to code practices.

In summary we would argue that mandating a trial period would again add cost and complexity to the legislative framework. We are unclear what this proposal is seeking to resolve, not least given the industry is already responding to these issues through offering trial and notice periods.

Finally, whilst acknowledging this is intended to be a voluntary trial, if the intention is to establish the option to partake in the trial through legislation, this will likely require legislative intervention that goes beyond the scope of this Consultation. Whilst as matters stand the Small Business, Enterprise and Employment Act 2015 (the "2015 Act") provides powers in respect of the scope of the Code, including in relation to tied pub tenants, we anticipate a trial of this nature would require amendment of section 42 (Pubs Code) and section 70 (Definition of "tied pub tenant") of the 2015 Act. Such amendment would likely go beyond the powers afforded under section 46 of the 2015 Act (Review of Pubs Code) upon which this Consultation is based, given section 46(5)(b) is explicit in referencing only "any revisions of the Pubs Code which, in the Secretary of State's opinion, would enable the Pubs Code to reflect more fully those principles" and does not extend to amendment of the 2015 Act itself.

Question 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.

Comments:

As a pub business already regulated by the Pubs Code, we do not have a view on how many months the qualifying period should be. However, we would call for fairness and

proportionality in any changes. If a pub company acquires enough pubs to meet the 500 pub threshold, then there should not be scope for that timing to be 'gamed' and this should be planned into the acquisition timing and transition planning. There needs to be sufficient time for a pub company to prepare before coming in scope formally, and the period should also avoid the creation of 'cliff edges' to avoid the numbers in scope changing dramatically. If a pub company reaches the 500 pub threshold, they should move in a timely way towards regulation.

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.

Comments:

The PCA is already made aware of the numbers in a pub disposal, and whether these have been sold to another regulated pub company or not. All POBs already report – on a quarterly basis – their estate numbers, including disposals.

Star Pubs & Bars makes approximately 50 individual disposal transactions each year to companies or individuals that are not covered by the Pubs Code regulations. If we are selling a pub to a non-regulated pub company, we always advise those licensees of their extended protection rights.

It is also worth pointing out that the vast majority of pubs we sell to non-regulated companies are not actually on tied agreements – most of them will be on temporary management agreements or will be closed. Our largest transaction in this regard, when we sold 76 sites to New River on 5 December 2018 (then not within scope of the code), the vast majority of these were on temporary management agreements – only 3 of the sites were on tied agreements.. From a proportionality perspective (given this is an issue affecting a relatively small number of pubs) we would question whether further requirements in this area are really necessary.

Whilst we can only speak for our own business, we don't believe there is any evidence to suggest that isn't happening more broadly in the market or that tenants are unaware of their extended protections. A requirement to provide specific details of each transaction and each individual pub does not seem to serve any useful purpose and it is totally unclear from the consultation what this information would be used for by the PCA. We would argue the PCA should better use existing data already available to them – such as through quarterly reporting or compliance reports.

Question 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.

The Government would in particular welcome evidence in respect of the number of tenants and pub companies dealing with matters related to extended protection in order to help decide whether this is a proportionate measure.

Comments:

It is unclear what the issue is that this proposal is seeking to resolve, or what evidence has been presented of an issue. A requirement to present a PRA to a tenant with extended protection presents the same difficulties as set out in our answer to Q1, notably the additional cost and burden, and the potential for confusion.

However, in this scenario any such tenant no longer has a right to MRO, and therefore there is no rationale for the need for a PRA. The aim of extended protection is to ensure that the tied rent coming out of regulation would be fair because it was concluded under Schedule 2 rules. There is no indication that this is not being afforded to tenants with extended protection. Any pubs that are covered by extended protection will very likely also be covered by the Pub Governing Body's voluntary code, and therefore have access to PIRRS if there is a need.

Question 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.

Comments:

Firstly, we would make the point that the Pubs Code is not all about MRO and the operational success of the Code must not be judged by the number of MRO agreements that have been granted. MRO is simply one element of many there to ensure that licensees get a fair deal – it absolutely does not mean that an MRO deal is the best option for licensees or something that every licensee would wish to take up. That a number of licensees are looking at MRO and choosing the lower cost, lower risk, high support of continuing their lease with a supply agreement proves that the legislation is working - as it means that licensees are able to see that they are no worse off and are choosing to remain on their supply agreement with us. MRO provides POBs with the opportunity to explain the benefits of the model to TPTs and provide TPTs with a choice.

The Code applies a number of timescales in order to incentivise parties to complete the MRO process efficiently. When the legislation was drafted, it was envisaged this process would run openly and co-operatively alongside their tied rent assessment. At the time the legislation was consulted on in June 2014[1], the Government envisaged a dispute

[1] Pub Companies and Tenants: Government Response to the Consultation June 2014 – Q6 Future of self-regulation, page 42.

resolution process founded on in-house mechanisms in the first instance and access to independent and industry fora, before escalating more serious matters to the PCA for formal arbitration (albeit with safeguards to ensure that access to the PCA was not frustrated). This policy is reflected in the longer timescales for referral in respect of non-MRO disputes[2].

The reality is far from this. The MRO process is complex and technical, and we always recommend that our licensees take independent advice on what the best option is for them. Some TPTs are not being well advised as to realistic outcomes from the arbitral process and there are a group of advisers who have a modus operandi of simply referring cases to the PCA, solely as a means to reserve their positions – also known as 'protective referrals'. Those advisers are essentially "gaming" the MRO process in order to make money from spurious referrals. This is stopping pub companies from taking the time to negotiate with licensees, is distorting the numbers and ultimately adding to the PCA's workload.

The main aspect that needs to be addressed is the elimination or reduction in the numbers of TPTs making referrals solely as a means to reserve their positions. This could be achieved (i) in terms of amendment to the 14 day period for making referrals provided under regulation 32(4) of the Pubs Code to provide for a longer period for discussion and negotiation between the parties prior to the commencement of arbitral proceedings and (ii) amendment to regulation 32(3) of the Pubs Code to require intimation of not only the intention to make a referral before that referral is made, but also the perceived deficiencies in the MRO offer the POB has issued: Star has experience of receiving multiple referrals and indeed arbitral claim forms from advisors indicating nothing other than the offer is considered to be non-compliant, with no further detail provided whatsoever. We therefore believe there needs to be a more reasonable time limit, and there needs to be some kind of filter or sift applied to referrals prior to arbitration commencing, plus a limit on the costs for which POBs are liable in order to discourage vexatious or otherwise unmeritorious referrals.

We would suggest that there is potential for a hybrid option as outlined in the consultation, with more time at the outset for negotiation by both parties and therefore a greater opportunity to come to an agreement without the shadow of arbitration hanging over it. For example, no referrals to be allowed within the first 28 days of negotiation. We would also suggest that if changes are to be made to the MRO process steps in terms of timescales and deadlines, these should be "stress tested" first using real life cases to ensure that by seeking to address existing concerns, new problems are not inadvertently created.

Finally, whilst we welcome the Government reviewing the MRO process as part of this consultation, we hope any resulting changes will not result in unintended consequences or create any new opportunities for dispute. The principle of 'no worse' off is a fundamental, yet complex, element of the Code - we would argue that rather than consult on this principle in a fragmented way, the Government would be better to wait until the second statutory review period next year and look at it as part of its wider review. Fundamentally all parties want an MRO process that is simple, clear, provides certainty and works for

[2] Pub Companies and Tenants: Government Response to the Consultation June 2014 – Qs 13-15 PCA powers, page 86.

everyone. The Government clearly envisaged this in its response to the 2014 consultation[3].

Question 7

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

Comments:

Star Pubs & Bars already include rent with an MRO proposal, and therefore our view is that the proposed change is unnecessary. The commercial reality is that pub companies are doing this anyway so we'd question why it needs to be legislated for.

Question 8

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

Comments:

The Code requires an MRO proposal to be reasonable, which is judged in the circumstances of each case, and it must not contain terms that are 'uncommon' in free of tie agreements.

We are of the view that the requirement that terms should not be 'uncommon' should be retained. Uncommonness is part and parcel of unreasonableness – it is one aspect of unreasonableness and you can make an objective assessment on it.

We have concerns that the removal of the requirement has the potential to open the floodgates to a large range of unique and unrealistic requests and add further uncertainty to the test of MRO compliance. This in turn would increase the number of disputes and referrals. Whether terms are uncommon or not should be reflected in the broader "reasonableness" debate, but we would suggest that much greater clarity is provided as to what is "reasonable".

Question 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.

[3] Pub Companies and Tenants: Government Response to the Consultation June 2014 – Qs 13-15 PCA powers, page 87: *'We are proposing that the Adjudicator should issue advice and guidance to pub owning companies and tenants on interpretation of the Code. This would help encourage compliance with the Code and help prevent disputes occurring in the first place, as well as ensure tenants know their rights under the Code. Guidance will also ensure that standards of fair and lawful dealing are promoted across the sector'.*

Comments:

The Code describes four circumstances (or MRO trigger events) under which a tied tenant may request an MRO proposal – one of which is where there has been a significant increase in the price of a tied product or service. Since coming into force, this has presented difficulties for pub companies to implement, as the significant price increase threshold and period - as it stands - fails to reflect the commercial realities of extrinsic price increases for products, ingredients and commodities.

We believe that for annual price increase thresholds, the 'comparison period' should be 4 weeks starting on the 12 month anniversary, not ending on the 12 month anniversary. Currently, a price increase of 13 months after the previous could be counted as a single "annual" price rise in terms of a trigger event which is not the intention.

It cannot be right that by applying an 'expected' annual increase each year, we subject ourselves to a significant increase in price due to the 'comparison period' of 13 months. The result of this is that our price changes move forward by four-weeks each year to ensure the tenant is not appearing to get two annual price increases in the same period. In addition it could be argued that POBs are artificially subsidising the TPTs business by not passing on costs which competitors would be passing on to their customers. We would suggest that this was not what Parliament intended should happen.

It is also worth highlighting that under free market policy principles - and for pub companies with under 500 pubs not bound by the Code - additional costs associated with such externalities may freely be passed onto the licensee and ultimately the consumer, who, in turn, can make an informed decisions on purchasing. This principle has been lost under the Code.

Star Pubs & Bars have always sought to do all that we can to keep price changes – both on our own products and through third party suppliers – to an absolute minimum as it's important our pubs offer great value for money to consumers. Prior to the Pubs Code coming into force, prices for Star Pubs & Bars licensees changed every 12 months in line with our wider free trade customers. As a result of the code coming into force, we altered this to every 13 months for Star Pubs & Bars licensees.

Given the significant Government restrictions and resulting challenging trading conditions due to the current pandemic, we took the decision to delay our 2020 price increase so that our licensees did not receive a price increase for over 19 months. There was no price increase for Star Pubs & Bars core leased & tenanted customers between June 2019 and January 2021 (N.B. HEINEKEN UK did implement a price increase for free trade customers in early 2020).

For absolute clarity, we changed our wholesale selling prices (WSPs) on all beer, cider, wine and soft drink deliveries (applied to draught and packaged products produced by HEINEKEN UK and other third party suppliers) from Monday 11 January 2021 for Star Pubs & Bars licensees. This was our first price increase in over 19 months (the previous price increase was June 2019) - clearly our costs had increased significantly over the prior 18 months and we needed to mitigate this impact by increasing prices by a sensible level. Importantly, we also offered our licensees significant other commercial support through the pandemic including significant rent concessions, support with point of sale, advice and so

on.

For annual price increase thresholds, the ‘comparison period’ should therefore be 4 weeks starting on the 12 month anniversary, not ending on the 12 month anniversary. We believe this was an unintentional outcome of legislative drafting and it has the effect of preventing annual price increases and creates unnecessary complication for both POBs and TPTs.

Question 10

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

Comments:

While excise duty and VAT are excluded from the significant price increase calculation, other tax increases are not. No allowance is made for any other tax price increases – such as the ‘sugar tax’ which was announced by the Government in 2016 and introduced in 2018.

An ‘extrinsic increase’ should not be considered a significant increase in price, and therefore we would welcome changes to these provisions to enable POBs to pass on extrinsic price increases to TPTs provided that it is not using this to increase its profit margin. We would suggest the same clauses used in the ‘trigger event’, clause 7(6) of the Code, can also be used in the significant increase in price clauses.

If the regulations are not amended we foresee, for example, some future environmental policy objectives which are required but which are incapable of being implemented by regulated POBs.

Question 11

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

Comments:

It is our view that unavoidable costs should also be excluded. One way of achieving this would be to use sector specific inflation data from ONS quarterly reports rather than the broader indictor of CPI. We also suggest we should have the ability to challenge unforeseen increases that are cited as being trigger events.

Question 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.

Comments:

The statutory appeals process arising under the Pubs Code requires any appeal to be referred to the High Court under the Arbitration Act 1996. This is an adversarial process which, in terms of the appellate procedure, requires to involve the licensee (as both Claimant to the initial arbitration and Respondent to the High Court appeal). This is despite the determination subject to appeal regularly concerning the PCA or alternative arbitrator's determination in the referral alone, as opposed to any action of the licensee. It also exposes the licensee to expenses and further strains the relationship with the pub-owning business.

In the eyes of licensees this may be unexpected and, insofar as we are aware, this is not set out as a potential consequence or risk in seeking to exercise the MRO option. In instances, this has been viewed by a licensee as effectively expecting the licensee to defend the decision of the PCA or alternative arbitrator who issued the award in court proceedings in circumstances where the PCA or alternative arbitrator may not apply to become a party.

As we outlined in our response to the Government's First Statutory Review, we believe that it would be appropriate to consider an alternative method of review of arbitral awards rather than solely providing the statutory right of appeal under the Arbitration Act 1996. In this regard, it would be helpful to consider whether such decisions could be subject to challenge by a pub-owning business by way of a review procedure undertaken by a third-party decision maker, with submissions from the arbitrator and pub owning business (and with participation from the licensee being optional).

Judicial review may be viewed as offering such a remedy, albeit only insofar as a court considers any award to possess the necessary "public" element to attract such a remedy. While the matter is untested in the context of an arbitral award under the Pubs Code, the availability of such remedy may be limited if a court considers such an arbitration to be a private law dispute between the parties, notwithstanding the PCA (or an alternative arbitrator appointed thereby) exercising a statutory function. In addition, judicial review is also a complex and costly process and therefore, not, in our view an adequate remedy.

The benefit of a third-party procedure over an appeal under the Arbitration Act 1996 (or any uncertainty over judicial review) is that the pub-owning business (or, if launched by a licensee, that licensee) would be the principal party to the proceedings with the arbitrator as respondent. Any involvement on the part of the licensee (or pub-owning business where proceedings are launched by a licensee) would be discretionary.

In summary, all parties agree that requiring licensees to be respondents in appeals to defend the PCA's decisions (while giving the PCA no role) makes no sense at all and an alternative solution should be found.

Question 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.

Comments:

Please refer to our answer to Question 12 above

Question 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.

Comments:

Please refer to our answer to Question 12 above

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☐

At BEIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒Yes ☐No