

EXPLANATORY MEMORANDUM TO
THE PUBS CODE (FEES, COSTS AND FINANCIAL PENALTIES) REGULATIONS
2016

2016 No. XXXX

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 regulate payments to be made by large pub-owning businesses (defined in the Small Business, Enterprise and Employment Act 2015 (the SBEE Act) as those owning 500 or more tied pubs) and their tied pub tenants by way of fees and costs in relation to Market Rent Only (MRO) disputes and arbitrations of Pubs Code disputes. They also stipulate the maximum financial penalties which may be payable by pub-owning businesses following investigations into breaches of the Pubs Code undertaken by the Pubs Code Adjudicator. The Regulations are consistent with the principles of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants, and that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is linked to The Pubs Code etc Regulations 2016. It will commence on 26 May 2016; or, if later, on the day after the day on which it is made. There would usually be a 21- day period between the making and commencing of an instrument such as The Pubs Code etc Regulations 2016 since it will have the effect of requiring different patterns of behaviour due to a change in the nature of the obligations imposed on on pub-owning businesses and tied tenants. This 21-day period is being curtailed in light of the statutory deadline for introducing the Pubs Code, being 26 May 2016, and in light of the following reasons.
- 3.2 The pub-owning businesses and tied tenants affected by these regulations have been aware since March 2015 that the latest day that the Pubs Code could come into force would be 26 May 2016. These regulations need to be in place when the Pubs Code etc Regulations 2016 come into force in order that the framework set up by the Pubs Code works effectively. This implementation date is a duty placed on the Secretary of State via the SBEE Act, and has also been made clear in the detailed consultation documents and associated draft regulations that were published on 29 October and 4 December 2015. This date for implementation reflects the will of Parliament, both through the SBEE Act and during discussions in both Houses about the Pubs Code during the passage of the Enterprise Bill. Pub-owning businesses and their tied tenants

in England and Wales are expecting it to come into force on 26 May 2016 regardless of whether they expect its impact on them to be positive or negative.

Other matters of interest to the House of Commons

- 3.3 This entire instrument applies only to England and Wales.
- 3.4 This instrument applies only in England and Wales because Part 4 SBEE Act applies only in England and Wales.
- 3.5 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

4. Legislative Context

- 4.1 Part 4 of the SBEE Act requires the introduction of a statutory Pubs Code for England and Wales setting out obligations on certain pub-owning businesses in their dealings with their tied pub tenants, and provides for an independent Pubs Code Adjudicator to enforce it. Part 4 also provides additional powers to make regulations on matters relating to the Pubs Code which are now included in this instrument. A consultation on the matters covered by this instrument closed on 18 January 2016. The Pubs Code etc Regulations 2016, also made under Part 4 of the SBEE Act, contain related provisions and are being laid at the same time as these regulations.
- 4.2 Commitments were made by ministers during the passage of the SBEE Act to make and consult on certain provisions within secondary legislation. These were:
 - To provide ‘extended code protections’ for tied tenants whose pub is sold to a business not in scope of the Code.
 - To ensure that under the Code tied tenants can receive a Parallel Rent Assessment as well as a MRO Option.
 - To provide for a deferral of certain points at which the MRO option would be available for tenants in exchange for ‘significant investment’.
 - To provide for an exemption for ‘genuine pub franchise agreements’ from the right to MRO.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales only.
- 5.2 The territorial application of this instrument is set out in Section 3 under “Other matters of interest to the House of Commons”.

6. European Convention on Human Rights

- 6.1 The Minister for State for Small Business, Industry and Enterprise has made the following statement regarding Human Rights: “In my view the provisions of the Pubs Code etc. Regulations 2016 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 Further to recommendations by Trade and Industry Select Committees from 2004 onwards, the pubs industry introduced a voluntary code of practice to address shortcomings in the relationship between tied pub tenants and their brewery and pub company landlords. Despite some improvements, in November 2011, the Government announced that it was giving the industry one last chance to deliver a self-regulatory approach that would address the problems.
- 7.2 Following a call for evidence in October 2012, it became clear that the self-regulatory approach has not been sufficiently far-reaching. Although many pub companies treat their tenants well, publicans continued to highlight cases in which they had been treated unfairly and suffered significant hardship. The Government consulted on a statutory framework in 2013 and published a response in 2014 that concluded that two core principles were critical to address the problems. These were: that tenants should be treated fairly, and that the tied tenant should be no worse off than the free-of-tie tenant. It also concluded that “the best way to deliver these core principles is to introduce a Statutory Code to govern the relationship between pub owning companies and their tied tenants.”
- 7.3 Part 4 of SBEE Act implemented these findings by requiring the Secretary of State to make regulations – The Pubs Code – about practices and procedures to be followed by pub-owning businesses in their dealings with their tied tenants in England and Wales. The Act requires the Code to be consistent with the two core principles, redefined slightly as: the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub 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. The Act also defines a tied pub tenant and a pub-owning business for these purposes, establishes a Pubs Code Adjudicator and lists various issues on which the Pubs Code must or may contain provisions.
- 7.4 The Pubs Code sets out the requirements on pub-owning businesses – defined in the SBEE Act as those with 500 or more tied pubs in England and Wales – in relation to procedure and information to be provided to tenants and licensees in connection with new tied tenancy and licence agreements, assignments, rent proposals, rent assessments, repairing obligations and the MRO option. The MRO option allows the tied tenant to continue to occupy their pub but under a tenancy or licence that does not contain any product or service ties (other than for buildings insurance) and for which the tenant pays a market rent or a rent agreed under the MRO procedure in the Pubs Code.
- 7.5 Six businesses are expected to meet the definition of pub-owning businesses when the Pubs Code comes into force. They own a little over 12,000 tied pubs in England and Wales.
- 7.6 Part 4 of the SBEE Act also contains regulation-making powers for matters relating to the Pubs Code. This instrument is made in exercise of those powers and sets out the applicable fees payable by a tenant or a pub-owning business for referrals of Pubs Code breaches and MRO disputes to the Pubs Code Adjudicator for arbitration. It also contains provision as to the maximum amount of costs that a tenant may be required to pay a pub-owning business following arbitration by the Pubs Code Adjudicator. Finally, it provides the maximum financial penalty which can be imposed on pub-

owning businesses by the Pubs Code Adjudicator following an investigation into failures to comply with the Pubs Code.

Consolidation

7.7 There is no need for any consolidation.

8. Consultation outcome

8.1 A consultation on the measures in these regulations was carried out from 29 October 2015 and 4 December 2015, with a common closing date of 18 January 2016 – see <https://www.gov.uk/government/consultations/pubs-code-and-adjudicator-market-rent-only-option-and-rent-assessments> and <https://www.gov.uk/government/consultations/pubs-code-and-adjudicator-fees-enforcement-and-other-parts-of-the-code>.

8.2 The consultation sought views on how to implement the Pubs Code and related provisions, including the level of fees, costs and financial penalties and how they should be imposed.

8.3 80 responses were received. These included responses from all six of the pub-owning businesses expected to come within scope of the Code; from organisations representing tenants, consumers and businesses that own pubs; from individual pub tenants/ex-tenants; and from other professionals and organisations working with the industry.

8.4 The responses to the consultation also helped the Government with decisions on the level of fees and charges and on the financial penalty following an investigation by the Pubs Code Adjudicator.

8.5 The Government's response to the consultation can be found at <https://www.gov.uk/government/consultations/pubs-code-and-adjudicator-fees-enforcement-and-other-parts-of-the-code>.

9. Guidance

9.1 It is a requirement of section 61(1) of the SBEE Act 2015 that the Pubs Code Adjudicator must issue guidance within 6 months of being established about:

- Criteria the Adjudicator intends to adopt in deciding whether to carry out investigations;
- Practices and procedures the Adjudicator intends to adopt in carrying out investigations;
- Criteria the Adjudicator intends to adopt in choosing whether to use the enforcement powers and which ones;
- Criteria the Adjudicator intends to adopt in deciding the amount of any financial penalty following an investigation.

9.2 In addition, sections 61(2) and (3) state the Adjudicator may publish guidance on:

- Practices and procedures the Adjudicator intends to adopt in carrying out other functions;
- The application of any provision of the Pubs Code;
- Steps that pub-owning businesses need to take in order to comply with the Pubs Code;

- Any other matter relating to the Pubs Code.
- 9.3 Before publishing guidance under section 61 the Adjudicator must consult any persons he thinks appropriate.
- 10. Impact**
- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment is published alongside the Explanatory Memorandum on https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408449/bis-15-64-pubs-statutory-code-and-adjudicator-final-stage-impact-assessment.pdf
- 11. Regulating small business**
- 11.1 The legislation does not apply to activities that are undertaken by small businesses.
- 12. Monitoring & review**
- 12.1 Regulation 7 requires the Secretary of State to carry out a periodic review of regulations 3 and 4. The timetable is aligned with the related SI – The Pubs Code etc Regulations 2016 – and the review provisions in Part 4 of the SBEE Act.
- 13. Contact**
- 13.1 John Wright at the Department for Business, Innovation and Skills (Tel: 020 7215 3507 or email: john.wright@bis.gsi.gov.uk) can answer queries regarding the regulations.