

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: THE PUBS CODE ADJUDICATOR AND THE PUBS CODE

The Pubs Code

Section 42: The Pubs Code

281. Subsections (1) and (2) of this section provide that the Secretary of State must make regulations, to be known as the Pubs Code, within one year of this section coming into force, which will be two months after this Act receives Royal Assent – see section 165(3)(d)(i). The Pubs Code, which applies to England and Wales, must set out the practices and procedures which pub-owning businesses must follow when dealing with their tied pub tenants.
282. The Code is intended to ensure that pub tenants with an alcohol tie to a pub-owning business – as described in section 68 – are treated fairly. The Code’s purpose is to provide such tenants with increased transparency and fair treatment in their dealings with their pub-owning business, particularly in regard to rent assessments. This Act provides them with the right to take disputes on issues covered by the Code to the Adjudicator. The Code imposes obligations on pub-owning businesses with tied pub tenants, and everything else in this Part relates to that – for example, the Adjudicator’s arbitration and enforcement powers relate to whether the pub-owning business has complied with its obligations in the Code.
283. The Secretary of State must seek to ensure that the Pubs Code is in line with the principles of fair and lawful dealing and that tied tenants should be no worse off than if they were not bound by any product or service tie (subsection 3).
284. Subsection (4) sets out what the Pubs Code may cover; for example, the Code can set out requirements relating to the information which pub-owning businesses must provide to their tied tenants and can require pub-owning businesses to provide rent assessments to their tied tenants in certain circumstances. The Government plans to set out in the Code, following consultation, different rent assessment periods in situations where different amounts of substantial capital investment have been made, extending the rent assessment interval beyond the usual five years where it is appropriate to do so. This would have the effect of deferring the Market Rent Only option for that period until the next rent assessment (unless a significant price increase as set out in section 43(6)(c) or a trigger event beyond the tenant’s control as set out in section 43(9) take place. The Code will also set out the safeguards that must be met for an extended rent assessment interval to apply.

285. As some tenants make payments linked to the pub's turnover rather than a fixed rent, the Pubs Code can also require pub-owning businesses, in certain circumstances, to provide an assessment of any money payable by the tenant in lieu of rent (subsection (4)(b)(ii)).
286. The Pubs Code may also require pub-owning businesses, in certain circumstances, to provide parallel rent assessments to their tied tenants (subsection (5)). As set out in section 72(1) a "parallel rent assessment" will be defined in regulations.

Section 43: Pubs code: market rent only option

287. This section provides for a Market Rent Only option to be offered to tied tenants of pub-owning businesses covered by section 70(1)(a), i.e.: existing tenants of the business but not to prospective tenants who are negotiating to take on a tenancy or licence.
288. Pub-owning businesses will be required, in circumstances to be specified further in the Pubs Code, to offer their tied tenants the right to pay no more than a 'market rent' and to release them from all product or service ties, other than for the insurance of the tied pub. These circumstances must include the renewal of the pub's arrangements for renting or taking a licence or with regard to any of its tie arrangements; rent reviews or reviews of the assessment of money paid by a tenant in lieu of rent; a significant and unexpected price increase in a tied product or service; or a 'trigger' event. A 'trigger' event will also be defined in the Pubs Code but must be one which is beyond the tenant's control, not reasonably foreseeable and one having a significant impact on the level of trade that could reasonably be expected at the tied pub.
289. Subsection (2) has the effect that a tenancy or licence will be 'MRO-compliant' if the rent is either one agreed between the pub-owning business and the tied tenant that is in accordance with the MRO procedure or, failing such agreement, a market rent which it would be reasonable to pay for occupation of the particular premises based on the five assumptions set out in subsection (10)(a) and (b).
290. Subsection (4) says that a tenancy or licence will be 'Market Rent Only compliant' if it complies with the description of terms and conditions to be set out in the Pubs Code. However, it must not contain any unreasonable terms or conditions, must not be a tenancy at will and must be considered together with any contractual arrangement between the tied tenant and the pub-owning business that relates to the tenancy, licence or alcohol tie.

Section 44: Market rent only option: procedure

291. This section outlines the procedure, to be detailed in the Pubs Code, for the Market Rent Only (MRO) option to be exercised. It makes clear that the Pubs Code may confer relevant functions on the Adjudicator (subsection (1)(b)); provides for the tied tenant to notify the pub-owning business when it considers that circumstances have arisen that entitle it to a MRO offer; specifies a negotiation period before the next stage of the procedure takes place, during which the two would be expected to try to agree a rent for a MRO-compliant tenancy; requires the appointment of an independent assessor at the end of the negotiation period to determine the market rent within a specified reasonable period; requires that appointment to be made jointly by the tied tenant and the pub-owning business or, if they cannot agree, by the Adjudicator; and may require the Adjudicator to set criteria for someone to qualify as an independent assessor for these purposes.
292. The Pubs Code may also specify that the independent assessor has to determine the market rent in accordance with specified documents – for example, the Code may specify guidance produced by the Royal Institution of Chartered Surveyors.
293. Subsection (4) allows the Pubs Code to specify the circumstances when the MRO procedure should be treated as having come to an end. The Code may also provide

for tenancy, licence or other contractual agreements in force when an MRO option procedure is initiated to continue until that point (subsection (3)).

Section 45: Market rent only option: disputes

294. The Secretary of State may by regulations empower the Adjudicator to resolve disputes relating to a Market Rent Only option offer.
295. He may also by regulations give the Adjudicator authority to determine whether a proposed tenancy or licence meets the requirements for being MRO-compliant, whether an independent assessor's determination of the market rent has been made in accordance with the Pubs Code, and whether any other required MRO procedure has been followed. These regulations may also specify circumstances in which the Adjudicator has the authority to decide the market rent of a pub tenancy or licence.
296. The provisions in sections 43 and 44 are separate from the arbitration provisions in sections 48 to 52; nothing in the latter applies to the former, though there may be some similarities in the provisions made under sections 43 and 44.

Section 46: Review of the Pubs Code

297. This section states that the Secretary of State must carry out an initial review of the Pubs Code by 31 March following the second anniversary of it coming into force; and further reviews every 3 years after that. Once a review has been completed, the Secretary of State must, as soon as practicable, publish a report of the review's findings and lay a copy of the report before Parliament. This is in line with the Government's better regulation objective that all regulations should be reviewed as to their effectiveness and whether they are achieving their objectives (subsections (1) to (4)).
298. Subsection (5) specifies that reviews of the Pubs Code must look at how far the principles at section 42(3) have been met and whether the Pubs Code should be revised to reflect these principles more fully.

Section 47: Inconsistency with Pubs Code etc

299. Subsection (1) of this section provides a power for the Secretary of State to make regulations about terms of tenancies or other agreements between pub-owning businesses and tied pub tenants. The regulations might provide that terms which are inconsistent with the Pubs Code would be void or unenforceable. The regulations might also cover terms which would penalise the tied tenant for requiring a pub-owning business to behave in accordance with any provision of the Pubs Code the pub-owning business is bound to comply with; or which say that a rent assessment or fee in lieu of rent due for a tied tenancy may only be initiated by the pub-owning business or that a rent or fee assessment may conclude only that the amount payable is to be increased.
300. Subsection (3) allows the regulations to make provision about terms of agreements entered into before the regulations come into force.
301. Any agreement between a pub-owning business and a tied pub tenant is void to the extent that it prevents or penalises the tenant from referring a dispute to the Adjudicator for arbitration in accordance with section 48; and the agreement is unenforceable if it is an arbitration agreement that is inconsistent with sections 50 and 51, covering arbitrations, or with regulations covering the award of costs against a tied tenant in respect of an arbitration, made under section 51(7).
302. Subsection (6) states that subsections (4) and (5) apply to terms in agreements made before – as well as after – this section comes into force.