

BUSINESS, INNOVATION & SKILLS COMMITTEE Pub Companies: Follow Up Report in March 2010

- The Business, Innovation & Skills Committee (BISC) published its second report into the relationship between pub companies and its lessees on 4th March. The report is a result of the decision to hold a follow-up evidence session in December 2009 to review developments since the original report published in May 2009.
- The report does not seek to revisit the analysis of the problems and Committee concerns set out in the May 2009 Report into Pub Companies. That report and its full panoply of recommendations remain current and are not in any way retracted by this follow-up inquiry. It goes without saying that they remain to be addressed by the Government in its formal response to the Reports – expected summer 2010.
- The report reiterates earlier concerns about “systemic problems” in the market and the serious imbalance in power between lessee and landlord. The overall conclusion is that the initiatives set in train since May 2009 have yet to overcome this. The Committee acknowledges that the problems identified are capable of being addressed by industry measures other than regulatory intervention, but would be more confident believing this “if the record of pubcos in addressing issues of legitimate concern was better”.
- The key difference between the two inquiries is the shift of focus away from the activities of individual companies and their relationship with their lessees and towards the activities of the trade organisations – notably the BBPA – and the relationship between the representative bodies on both sides. This is important because it has resulted in some subtle changes to the wording of recommendations which mean the sector as a whole rather than individual company behaviour is brought within its scope.
- The Committee expresses a degree of frustration at the lack of effective and constructive dialogue – repeated references are made to the fact that they “deprecate the lack of engagement by BBPA” and that distrust by lessee groups can “magnify disagreements on this issue and undermine the Framework Code”. It calls for an end to the “vicious cycle of distrust and confrontation” and urges the industry to work together
- There is also a palpable sense of frustration at having to arbitrate in what is essentially an intra-trade matter, with recommendations having to be directed at the industry rather than at Government policy towards the sector as would be the norm.

Regulatory Intervention

- The headline recommendation of the Report is undoubtedly the granting of a period of grace to allow the BBPA and pub companies to deliver on their promises of reform – but this must be read in the context of the report as a whole. The follow-up inquiry revolved around the central question of whether the BBPA had satisfactorily addressed the concerns raised in May 2009. In December they asked whether the BBPA could be trusted and this report examines whether they had “done enough” to convince the MPs of the seriousness of their intent to implement and enforce the reforms it believes necessary. The report suggests that they have not.

- Whilst the report acknowledges that there have been developments as a result of the May 2009 Inquiry which have the “potential” to correct the serious imbalance in commercial relationships it had previously identified, it makes clear that continue to have “grave doubts about industry’s willingness to do enough voluntarily to prevent statutory or regulatory intervention”. The acid test is whether the promised reforms can be delivered and enforced.
- The new timetable of June 2011 is therefore a stay of execution rather than an easing of regulatory pressure or scrutiny. Indeed, the Report makes clear that it expects the Government to monitor initiatives to deliver against the Committee’s recommendations in the intervening period. More importantly, the threat of a Competition Commission reference is kept “firmly on the agenda” if pubcos fail to deliver or problems persist.
- The key recommendation could therefore be interpreted as akin to “undertakings in lieu of reference” rather than a recommendation for periodic review as per the TISC 2004 report. There is a clear message that this is the “last opportunity for self-regulatory reform” and that failure to act will see the full force of legislative intervention.

Framework Code of Practice

- The Report reiterates that the recommendations of the TISC 2004 Report had not been met in respect of the delivery of an effective industry code of practice, and that the BBPA assertions in this respect were wrong. It states that previous codes were insufficiently robust and were not complied with; “there is a history of evasiveness which requires a critical response to the new Framework”.
- The report acknowledges that the BBPA Framework Code is a “modest step” towards addressing the Committee’s concerns about transparency and disclosure. It also recognises that “modest progress” has been made by the major pub companies since May 2009 to reform the relationship with their lessees. There is a stark warning, however, that the Committee views the Framework as the “bare minimum” required and an “absolute de minimus” which must be built on by the *major* pub companies.
- The key recommendation in respect of the industry framework is for their successor committee to assess in 2011 the extent to which the largest companies have genuinely built on this minimum and to evaluate its effectiveness in improving the relationship with lessees. They note that they will require “compelling and continuing evidence” of observation and enforcement of codes if statutory intervention is to be avoided.
- It calls upon the BBPA to produce a clear route map and timeline for implementation with key stages specified to assess achievement and progress. The Framework provides insufficient detail on these issues. This will cover processes and procedures as well as guidance on how elements of the code are to be interpreted eg. the waiver on training and the requirements for assignments – further information on how these are to be managed is required by August 2010.
- The report makes clear that BBPA not the pubcos will be held responsible for any slippage in the proposed timetables. Any delay in implementation beyond June 2010 for largest pubcos will not be acceptable. Equally BBPA will be held to account for the commitment to abide completely by new RICS guidelines when published.

- The Framework is criticised for its failure adequately to address three issues of concern identified by the Committee in May 2009 – UORR clauses, AWP tie and flow monitoring. The Committee recommends that the Framework should require UORR clauses to be removed by deed of variation with the cost borne by the pubco. Reforms on AWP ties are acknowledged as a “belated step in the right direction” but the MPs believe that there has been an “unacceptable failure” to address the issue of royalties or the tie.
- The MPs would like a clear, public and unambiguous direction from the BBPA on the appropriateness of Brulines and other flow monitoring equipment. This should make clear that physical evidence of buying out will be required to support flow monitoring data. The commitment given in oral evidence not to apply automatic direct debit fines must be carefully monitored. The Committee also calls on the Government to clarify the position of flow monitoring equipment under the Weights & Measures Act.

Enforcement

- The Committee remains concerned about the enforceability of the Codes of Practice and notes that previous codes have not been complied with and questions whether the sanctions will be sufficient. It calls on the BBPA to do more to highlight the importance of lessees choosing a BBPA member or looking for BII Accreditation when selecting a lease to increase the effectiveness of the penalty.
- It acknowledges that the requirement on both parties to sign the code is a step forward but continues to have reservations as to whether this does indeed make it legally watertight. It notes that there is a difference between an obligation on a member of a trade body and truly binding document. Despite the BBPA’s legal opinion, the Committee states that “unless the BBPA can prove beyond doubt that the Codes will be legally binding then incorporation of the codes into the lease is the only option”; the Committee recommends that this should be adopted.
- The Report gives a cautious welcome of the BII’s enhanced role as policeman but notes that it must do more to demonstrate its independence and necessary authority to be an effective and impartial arbiter. It notes that the “success of all the reforms proposed by the industry hinges on the credibility of the BII” and hopes that this confidence is not misplaced. Should the BII fail to monitor the new regime effectively and provide evidence of this by June 2011, then the Committee remains open minded about an Ombudsman for the pub sector or regulatory intervention.

Valuation guidelines/Benchmarking

- The Report welcomes the constructive and positive response from RICS to the May 2009 Report and its determination to address “the shortcomings of its existing guidance”. It notes that the success of this initiative depends on the extent to which it provides clarity on valuations, the principle that the tied tenant should be no worse off than a free of tie tenant and what constitutes a countervailing benefit. If it does then the Committee believes it will be a “significant step forward in resolving a number of concerns”.
- The Committee accepts the evidenced presented by several parties that a national register of rents may not be deliverable or effective in addressing concerns. It notes the RICS call for a national database of trading information and reiterates support for the *ALMR* Benchmarking Report. Work between RICS and *ALMR* on this initiative is applauded and the RICS is asked to report back on the establishment of a national database of trading information by June 2010.

- The Committee notes, however that for any scheme to be successful it requires landlord as well as lessee input. The Committee is concerned that the BBPA has resorted to “resistance, obfuscation and hostility” on this initiative and appears “recalcitrant and reluctant to engage” and work constructively with lessee groups.

Dispute Resolution

- The Committee welcomes the establishment of the Pubs Independent Rent Review Scheme (PIRRS) but is concerned that it is limited to disputes involving rents. It is critical that the Framework provides little more on dispute resolution than the existing Code. The Committee describes this as a “wholly inadequate response to a pressing need”.
- It calls on the PIRRS scheme to be expanded and the BII recognised as an independent dispute body with the pubcos providing a clear mechanism for lessees to apply for help to the BII; “the absence of such a mechanism may yet trigger regulatory intervention”.

Tie

- The Committee restates its view that all lessees should be offered the choice to be free of tie as the only effective means of assessing the fairness of the lease arrangements. However, it acknowledges that not all the problems in the industry are caused by the tie and not all complaints about the pubcos are well founded.
- If companies do not offer a free of tie option, then the Committee recommends that the BII should list the prices charged and discounts available to allow tenants to compare their arrangements against the free trade. This could be expanded to include a comparison of business support and the overall deal. The OFT could also monitor prices to keep a check on substantial price rises.

Conclusion

- The Committee’s follow-up report makes clear that MPs continue to believe that “systemic problems” exist in the market and that further action is required to address them. In May 2009, the Committee concluded that the Government needed to intervene now to ensure that the legislative framework was robust and competition concerns thoroughly investigated.
- The shift in focus between May 2009 and March 2010 is the acknowledgement that these problems may be capable of being addressed by alternative industry actions rather than legislative/regulatory intervention. The Committee acknowledges that resolution of the problems is more important than the method by which this is delivered but warns that “should problems persist beyond June 2011, we will not hesitate to recommend that legislation to provide statutory regulation be introduced”.

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Ealing

8 March 2010