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## Submission to the All-Party Parliamentary Pub Group Inquiry

UK Pubs Observatory, York Law School, University of York, UK

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This submission deals with two issues: (i) the work of the UK Pubs Observatory research project, and (ii) a brief analysis of limitations within the Pubs Code Regulations 2016 and actions the APPG could recommend to Government.

We understand that the terms of reference within the All-Parliamentary Pub Group Inquiry are broader ranging than tied-pub tenants – we hope our future findings within the UK Pubs Observatory project will help to inform the APPG’s ongoing work in other areas. **As a project, we would welcome the opportunity to share data or present our work to date to the APPG, as they analyse responses to this consultation.** Please do not hesitate to contact us if we can be of further assistance.

### 1. About the UK Pubs Observatory

The UK Pubs Observatory is an ongoing research project at York Law School, University of York, UK funded by an ESRC grant. There are three work packages as part of this project:

- i. **Work Package One – “Live” UK Pub Map:** We are tracking English and Welsh pub data in “real time” through the Valuation Office Agency business rate listings. We have produced a map of UK pub establishments and are automatically updating English and Welsh entries using the twice-weekly VOA updates. *This allows us to track changes in the sector over time at an establishment level and undertake detailed spatial analysis.*
- ii. **Work Package Two – Pubs Code Qualitative Work:** We are undertaking interviews with regulated tied-tenants who have either triggered the “Market Rent Only” process under Reg.23 Pubs Code Regulations 2016, or have discussed pursuing an MRO lease with their PubCo’s Code Compliance Officer. *This allows us to explore issues arising in published arbitration awards in more detail; in particular, barriers to the realisation of code rights and possible reforms to the Pubs Code Regulations 2016.*
- iii. **Work Package Three – Pubs Code legal analysis:** We are undertaking a detailed analysis of all published Pubs Code Adjudicator arbitration awards and High Court appeals to arbitrations under s.69 Arbitration Act 1996. *This allows us to identify areas of legal uncertainty within the Code and analyse common issues that form the basis of arbitration awards.*

All three work packages are currently ongoing – we intend to issue our first report in the summer of 2021.

## **2. Data available to the APPG**

We would be delighted to inform the work with the APPG to share our data – in particular, as part of Work Package One. If that – or a short presentation from us to a meeting of the APPG – would be of interest, please do not hesitate to contact us using the details above.

## **3. Pubs Code Regulations 2016: Areas of reform emerging from early project findings**

This evidence focuses specifically on areas of concern emerging within the operation of the Pubs Code Regulations 2016. Our findings to date point to three key issues: (i) problems of delays and cycles of arbitration, (ii) the need to increase referral windows, and (iii) interactions with the Landlord & Tenant Act 1954. Each are dealt with briefly in turn.

### **i. Delays and cycles of arbitration**

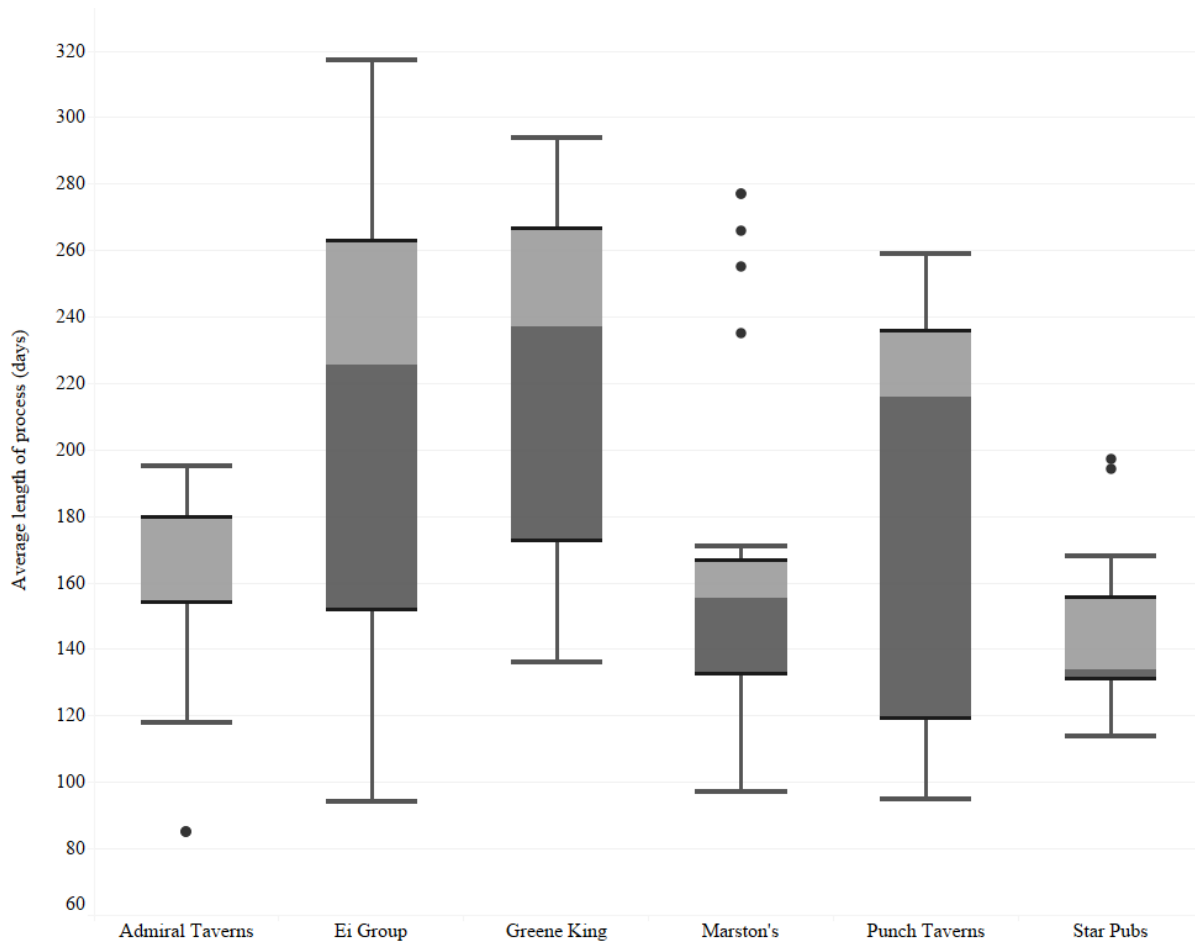
The time taken to resolve a dispute is an important key performance indicator of any dispute resolution model. This is especially true in instances where there are inherent resource imbalances between the involved parties. Within the Pubs Code Regulations, protracted processes and delays can disproportionately deplete the resources of the smaller party, which in turn provides an incentive to delay the process for PubCos.

Contributors to the Government’s statutory review of the Pubs Code pointed to problems with the length of the process between triggering an MRO right and a negotiated outcome, leading both to the costs associated with arbitration and the “delay in seeing the benefits of a new tied agreement or MRO.”<sup>1</sup> Data on MRO processes in **Figure One** illustrates that there is considerable variations between PubCos, with a median of 164 days from triggering the process to an outcome. However, particularly for Ei Group and Greene King, it is not usual for this period to be far longer, with median timescales of 226 and 237 days respectively.

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<sup>1</sup> Department for Business, Energy and Industrial Strategy, ‘Statutory Review of the Pubs Code and the Pubs Code Adjudicator: 2016-2019’ (2020) at <https://tinyurl.com/mz3nvkmu>.

**Figure One:** A box-plot illustrating the average delay average delay between MRO applications and outcomes between 1<sup>st</sup> July 2017 to 1<sup>st</sup> January 2020. Raw data available via the BBPA. Interactive version available at: <https://tinyurl.com/y7kph4e9>.



There are structural reasons within the Pubs Code which may exacerbate these delays. Principally the power of an arbitrator to direct the inclusion of specific terms within an MRO lease. This was the focus of a referral to the High Court under s.69 Arbitration Act 1996 in *Punch Partnerships v Highwayman Hotel*<sup>2</sup>, in which the court considered whether an arbitrator could direct a particularly term – in this case, a specific lease length – into an MRO offer in order to avoid protracted litigation between the parties. At the initial arbitration, the PubCo had argued that the power of the arbitrator (in this case, the PCA themselves) under regulation 33(2) of the Pubs Code Regulations 2016, only allowed them to direct a revised MRO response: not to specify what terms should be included in such a response. In the original arbitration, the PCA noted that:

“[The PubCo’s] interpretation of my powers under regulation 33(2) is such as to provide the potential for locking a tied pub tenant into a cycle of litigation. Such

<sup>2</sup> [2020] EWHC 714 (Ch)

delay would place a greater burden on the tenant than on [the PubCo] as a huge international brand with deep pockets."<sup>3</sup>

This danger of the revolving door of litigation was noted by the High Court, which accepted that such an interpretation of the arbitrator's powers poses "a risk of further delay, cost and attrition involved in repeated offers and arbitration" that "might harm the Tenant more than the [PubCo]".<sup>4</sup> However, although the Pubs Code provides the PCA with the power to require a PubCo to issue a revised response, they could not determine the terms within that response: that is to be left to the PubCo, and then subject – if needed – to further arbitration. The permissive language in reg.33 was not enough to "empower the arbitrator to interfere with the economic and property interests of the parties" – for the court to be satisfied that such a power exists, it needed to be more clearly expressed in the underpinning legislation.<sup>5</sup>

**Recommendation:** The reg.33 power should be revised to clarify the powers of the arbitrator to direct MRO terms where required.

**ii. Increase in referral window**

The strict 14-day referral window for tied tenants to refer an MRO to arbitration is insufficient – it gives too little time to negotiate meaningfully with the PubCo and should be increased. This may be a partial cause of the high number of referrals dealt with via an agreement outside of the MRO process (as reflected in **Figure Two** below).

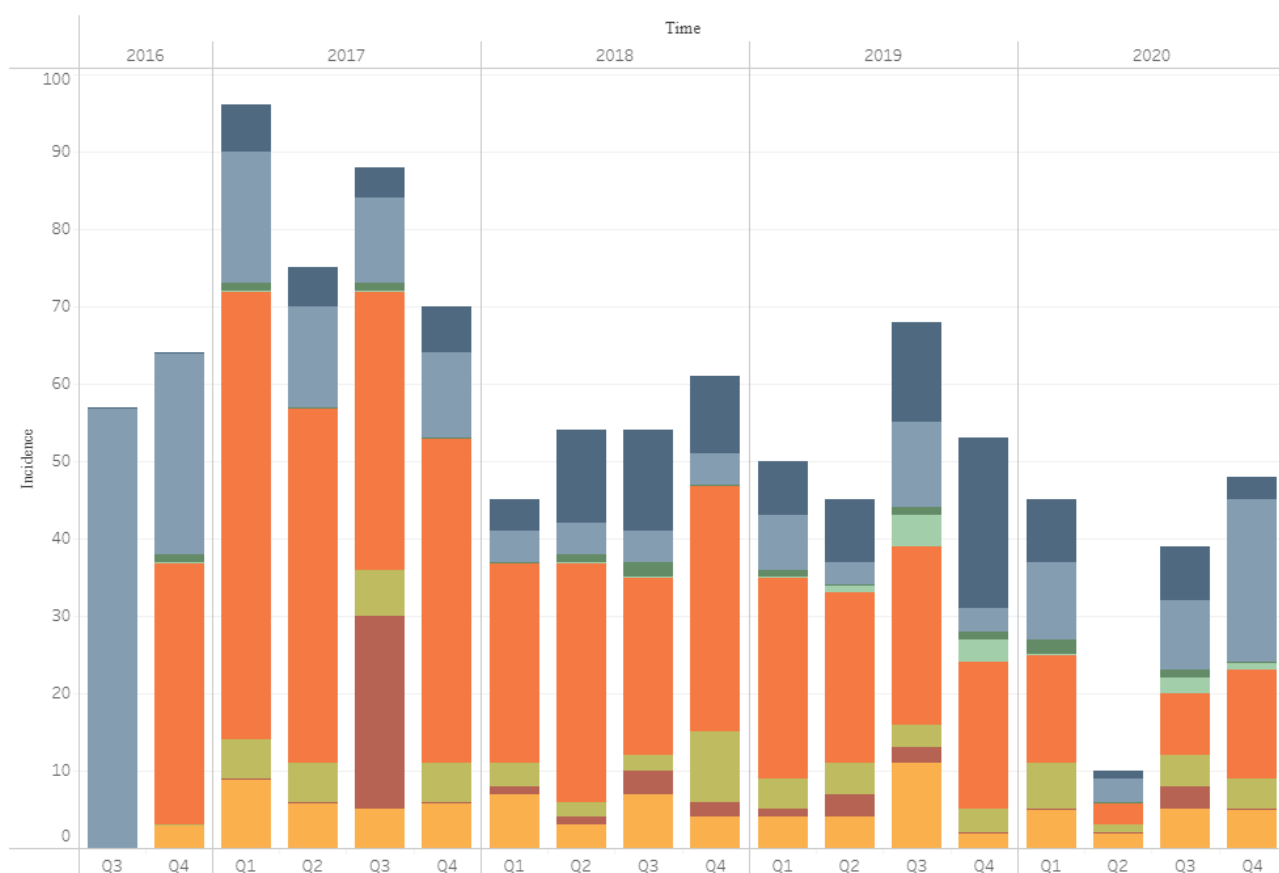
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<sup>3</sup> para 62 of the PCA award, detailed in [28]. *Punch Partnerships (Ptl) Ltd v Highwayman Hotel (Kidlington) Ltd* [2020] EWHC 714 (Ch).

<sup>4</sup> *Highwayman Hotel* at [107].

<sup>5</sup> *Highwayman Hotel* at [102].

**Figure Two:** Outcomes following an MRO request from the introduction of the Pubs Code Regulations 2016 to the end of 2020. Raw data available via the BBPA. Interactive version available at: <https://tinyurl.com/n6v3bjzw>.



**Recommendation:** To lobby for an increase in referral windows within the Pubs Code Regulations 2016.

### iii. Interaction with the Landlord & Tenant Act 1954

For tenancies regulated by the Landlord & Tenant Act 1954, a PubCo can issue a hostile notice opposing renewal of a tenancy in order to change the premises from a tenanted pub to an owner-managed one (s.30(1)(g) Landlord & Tenant Act 1954). This process is subject to some controls (e.g. the tied-tenant can contest the validity of the hostile notice and some compensation must be paid), but is not treated as a “trigger event” under the Code. As a result, publicans may face the prospect of entering an MRO and subsequently having their lease renewal opposed, or fighting a hostile notice outwith the protections of the code.

**Recommendation:** The Government should be called on to provide better alignment between the 1954 Act and the operation of the code, especially in relation to timetables for renewal/the agreement of lease terms, and to mitigate the effect of hostile notices.

#### **4. Summary and contact**

This submission has focused on three core problems in the functioning the Pubs Code Regulations 2016. Our ongoing project is far broader and our first report, due in the summer of 2021, will cut across the APPG's other terms of reference for this consultation.

We would welcome the opportunity to share data and inform the work of the APPG going forward – please do not hesitate to contact us if we can be of further assistance to their ongoing work.

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