

Mala Mistry
Consumer Competition Policy Directorate
Department for Business, Innovation and Skills
Room 414
1 Victoria Street
London
SW1H 0ET

4th November 2009

Dear Mala,

CAMRA response to review of the Land Agreements Exclusion and Revocation Order 2004

Thank you for the opportunity to respond to the consultation on the future of the above Order. Please see our detailed response below.

CAMRA, the Campaign for Real Ale is an independent consumer organisation representing over 100,000 consumers on matters related to beer and pubs. As an organisation it is our strong belief that the Land Agreements Exclusion and Revocation Order should be abolished immediately, in order to force pub companies to self-assess their arrangements, and prove that they are not preventing, restricting or distorting competition.

If you would like any further information, or if we can assist you at a future stage in your consultation please do not hesitate to contact me.

Yours sincerely

Jonathan Mail
Head of Policy and Public Affairs

**Department for Business,
Innovation and Skills**

**Review of the Land Agreements
Exclusion and Revocation Order
2004**



**CAMPAIGN
FOR
REAL ALE**

**A Response from CAMRA,
The Campaign for Real Ale
November 2009**

1. Introduction

- 1.1. CAMRA, the Campaign for Real Ale, is an independent consumer organisation which campaigns for real ale, pubs and consumer rights. Membership is open to all individuals and our membership is over 100,000. CAMRA is financed through membership subscriptions, sales of products such as books and clothing, from the proceeds of beer festivals and other fundraising activities. CAMRA was established in 1971.
- 1.2. Given our focus on campaigning for real ale, pubs and consumer rights, our response will centre on the consequences for consumers within the beer and pub markets of either maintaining or revoking the Order in its entirety.
- 1.3. CAMRA contends that restricted and distorted competition in highly-concentrated local markets within the UK pub market, due to the operation of the “beer tie” and other exclusive purchasing obligations, has artificially inflated the price of beer sold in pubs. CAMRA estimates that the cost to consumers of above-inflation increases in on-trade beer prices between 1990 and 2008 is in the region of £2.5 billion annually¹.
- 1.4. We support the revocation of the Land Agreements Exclusion and Revocation Order 2004 (“the Order”), as it is in our view a deregulatory measure, which will reduce the burden on small companies and protect them from having anti-competitive agreements forced upon them. Revocation will improve access to the market for small businesses including brewers, wholesalers and suppliers of technical services. This greater market access will benefit consumers through greater price competition, increased choice, greater investment and higher standards of customer service.
- 1.5. The Order has created a safe-harbour from scrutiny that has contributed to higher prices, reduced investment and unnecessary closures within the UK pub market
- 1.6. In addition to this submission CAMRA also endorses the submission from the newly formed Independent Pub Confederation (IPC), which brings together the key representative bodies and campaign groups representing publicans, consumers and small brewers.
- 1.7. John Grogan MP, Chair of the All Party Parliamentary Beer Group, tabled a cross party Parliamentary Early Day Motion (2108) on the 20th October supporting the revocation of this Order in the next Parliamentary Session. Thus far 64 MPs have signed the motion.

2. Land Agreements in the UK Pub Market

- 2.1. When assessing the impact of this Order, CAMRA will consider how it has enabled pub companies to tie tenants into land agreements² which restrict their purchasing freedom, and have a considerable impact on the UK pub market

¹ CAMRA’s super-complaint to the OFT, “*A fair share for the consumer*”, available online at <http://www.camra.org.uk/media/attachments/305998/Super%20Complaint.pdf>

² The definition of Land Agreements, as defined by the consultation, are: “agreements between undertakings that create, alter, transfer or terminate an interest in land”

2.2. The Order allows companies to impose exclusive purchase and non-compete obligations on pubs in five areas without the need to consider potential anti competitive affects:

- Beer
- Other alcohol products
- Technical Services and Technical Services Equipment
- Insurance
- Games and Prize Machines

These five “ties” appreciably restrict competition within the pub market and their cumulative effect must be taken into account.

2.3. Over 50% of UK pubs are tied in the provision of beer, meaning that their lessees are unable to negotiate the price of beer supplied to them, and therefore pay considerably more for their beer than non-tied tenants. Figures released by the Association of Multiple Licensed Retailers (ALMR) in February 2009 reveal that tied pub businesses pay around 50p a pint more than free-of-tie tenants when buying beer through the pubco³.

3. CAMRA’s Super-Complaint to the Office of Fair Trading

3.1. The use of beer and other ties by large pub owning companies (pubcos) leads to a loss of amenity for communities, higher prices and consumer detriment due to lack of choice. The detriment to consumers is so severe that CAMRA submitted a super-complaint to the Office of Fair Trading (OFT) in which we identified the damaging effect of practices such as:

- The use of a methodology to calculate rents which specifically excludes the “reward available to the supplier of tied products”
- The use of a hypothetical “fair maintainable trade” principle in assessing rents which is easily misrepresented and abused

Although no single company owns more than 15% of the UK’s pubs, the combined effect of anti-competitive practices by large pubcos is considerable⁴.

3.2. A key principle of CAMRA’s super-complaint was that a tied tenant should be no worse off than a free of tie tenant, a principle which has been recently endorsed by the Royal Institute of Chartered Surveyors. Competition cannot work effectively if tied pub operators are placed at a significant competitive disadvantage.

3.3. The OFT recently issued a response to our super-complaint, concluding that they would take no action to reform the beer tie. Their consideration of the complaint was, in our view, over-reliant on arguments and selective data supplied by the very companies we had hoped they would investigate. The OFT’s own analysis established that prices in tied pubs were 8 pence a pint higher than prices in free of tie pubs but concluded that this difference was marginal. Given the inadequate analysis provided by the OFT and their insufficient reasoning, CAMRA has urged the Government to refer the supply ties in the UK pub market to the Competition Commission for a market investigation. The

³ CAMRA’s super-complaint to the OFT, “*A fair share for the consumer*”, p16, available online at <http://www.camra.org.uk/media/attachments/305998/Super%20Complaint.pdf>

⁴ CAMRA’s super-complaint to the OFT, “*A fair share for the consumer*”, available online at <http://www.camra.org.uk/media/attachments/305998/Super%20Complaint.pdf>

failure of the OFT to sufficiently address legitimate concerns over the potential anti-competitive affects of tie agreements imposed by large companies makes it all the more important that the Government revokes this Order.

4. Disadvantages of maintaining the current Order

- 4.1. CAMRA sees no advantages in maintaining the current Order. Modernisation of competition law in 2004 removed the requirement to notify the OFT of individual agreements and so there seems no clear reason why this Order should continue to exist.
- 4.2. The Order has created an unhealthy presumption of legality, exemplified by the Competition Commission's 2008 report which noted: "the exclusion order had created an impression among some retailers that land agreements were not considered to raise competition concerns"⁵
- 4.3. This presumption of legality has allowed exploitation of 'beer tie' agreements and by some companies leading to high prices in pubs, lower amenity, restricted choice and pub closures. It has further meant that pub tenants in tied pubs have had insufficient protection from exploitative practices
- 4.4. The government notes in its consultation that "the exclusion order was never intended to enable parties to enter into anti-competitive agreements". Unfortunately large pubcos have manipulated the system so anti-competitive agreements are now widely used.
- 4.5. The Order has provided large pubcos with a safe-harbour from scrutiny, and has prevented competition bodies such as the OFT from giving serious consideration to anti-competitive practices within the UK pub market. For example, the OFT cited the Order as one of the reason for its rejection of the Federation of Small Businesses' complaint to them in 2003 on this subject⁶.
- 4.6. The Order has allowed large pubcos, which have a huge share of the pub market and are heavily influential within it, to exploit their tie arrangements for short-term gain. Some small and regional pub-owning companies have been forced to mirror this short-termism at the expense of long-term business objectives, as they are under pressure to match the returns of the larger companies or risk being a target for takeover.
- 4.7. We recognise that the burden of self-regulation caused by revocation of this Order will fall most heavily on large pubcos, but we believe that this is the right outcome, and that its benefit will trickle down to small businesses with the result that the pub market as a whole can become more healthy, competitive and viable in the long-term.

5. The impact of restrictive covenants on competition

- 5.1. Restrictive covenants can be used by a seller of a pub to prevent the purchaser from operating the premises as a pub. The impact of this is to restrict competition appreciably

⁵ The Competition Commission Market Investigation, "*The Supply of Groceries in the UK*", April 2008. Available online at http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538.pdf

⁶ CAMRA's super-complaint to the OFT, "*A fair share for the consumer*", p9, available online at <http://www.camra.org.uk/media/attachments/305998/Super%20Complaint.pdf>

within a locality thereby allowing higher consumer prices in remaining pubs and maintenance of market foreclosure to small brewers and other suppliers to pubs operating in that locality.

- 5.2. In a locality where there are few if any free-of-tie pubs, then a restrictive covenant can be used as an absolute barrier to market entry to small brewers and other suppliers of tied products. It is in the interest of pub-owning companies to keep independent operators out, so that their “tied” pub businesses can maintain high prices, which are necessary to pay high “tied” rents and beer prices.
- 5.3. Restrictive covenants are used to dispose of pubs, regardless of a pub’s importance to the community or potential viability, with the express aim of concentrating business into a reduced number of outlets, thereby enabling pub-owning companies to extract the maximum profit possible per pub.
- 5.4. The Competition Commission has indicated that “in highly-concentrated local markets exclusivity arrangements and restrictive covenants which restrict... retailing have had an adverse effect on competition”⁷. This principle can and must be extended to encompass restrictive covenants used in all commercial land agreements including the pub sector.
- 5.5. CAMRA hopes that revocation of the Order and the resulting self-assessment by pub companies will discourage the use of restrictive covenants, as they are unjustifiable and anti-competitive.

6. Consumer detriment

- 6.1. We welcome the government’s acknowledgement that revocation of the Order “is needed to” ensure “that the benefits to consumers of ensuring effective competition between enterprises are not lost as a result of a land agreement that does in fact restrict competition”, and note their recognition that the benefit to the consumer need not be financial in nature.
- 6.2. It is a key principle, firmly established in European competition law, that restrictive agreements (such as the beer tie) which are permitted by competition law must offer “a fair share of the resulting benefit” to the consumer.
- 6.3. However, the cost to consumers of above-inflation increases in on-trade beer prices between 1990 and 2008 are in the region of £2.5 billion (£2,500 million) annually. Further to the financial cost of the tie, consumers are denied choice due to the lack of access to market for small brewers and brewers from other EU countries; and pub closures at a rate of 52 per week mean that consumers also suffer a loss of amenity
- 6.4. In the current system, therefore, there is clear benefit for the tying company, but the lessee and the consumer do not receive anywhere approaching a fair share of the resulting benefit. We believe that pub companies should be forced to self-assess their arrangements in order to demonstrate and quantify the benefits of the tie to consumers.

⁷ The Competition Commission Market Investigation, “*The Supply of Groceries in the UK*”, April 2008. Available online at http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538.pdf

7. Recommendations

- 7.1. We note that the government's view on the Order is that "following modernisation of competition law in 2004, the reasons for having the exclusion for land agreements no longer apply and there appears no valid basis for continuing to exclude this one category of agreements from the provisions of competition law prohibiting anti-competitive agreements between undertakings." We further note the Competition Commission's conclusion that "there may be merit in revoking the Land Agreements Exclusion Order in its entirety"⁸. CAMRA agrees unreservedly with this view and believes that the Order should be revoked in its entirety, so that pub companies must self-assess their agreements and ensure that they are not likely to have anti-competitive effects.
- 7.2. Revocation of the Order would be wholly beneficial, and would:
- 7.2.1. Help to ensure a fair deal for consumers, allow access to market for small companies and establish fair and open markets by forcing pubcos to self-regulate and ensure that they are acting in compliance with competition law, taking into account each of their tying arrangements
- 7.2.2. Allow competition authorities to deal with practices, such as the use of restrictive covenants, in the UK pub market which appreciably prevent, restrict and distort competition in highly concentrated local markets
- 7.2.3. Address the imbalance of bargaining power and information between pubcos and their lessees, the need for which was a key finding in the Business and Enterprise Committee's 2009 Report into Pub Companies⁹
- 7.2.4. Remove distortions in the UK pub market such as the pressure that is placed on brewers to increase their wholesale beer prices, which allows pub companies to maximize profits on tied beer sales while at the same time increasing wholesale costs to competitors
- 7.2.5. Revocation of the Order will encourage evolution of beer tie arrangements which in turn will deliver a sustainable future for pubs and a fair deal for consumers
- 7.3 We note that a transition period will be required to allow the OFT to produce guidelines and to allow companies to self assess and make any necessary changes. Given the scale of consumer detriment in the UK Pub Market we would suggest a reduced transition period so that implementation of a self assessment regime is fully achieved before the end of 2010.
- 7.4 In addition to revoking this Order, government should urge the European Commission to remove the benefit of the Block Exemption from pub companies in the UK with a market share of over 5%.

⁸ The Competition Commission Market Investigation, "*The Supply of Groceries in the UK*", April 2008, p222. Available online at http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538.pdf

⁹ Business and Enterprise Select Committee Report, *Pub Companies*, April 2009. Available online at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmberr/26/2602.htm#evidence>

8 Conclusion

8.3 In conclusion, CAMRA concurs with the view of the Competition Commission and government that the Order is an anomaly and should be repealed in its entirety.

8.4 We believe the transition period should be shorter than the one year that is proposed.

8.5 After that transition period, we call on the government to ensure that the OFT is vigilant in ensuring that companies self-assess accurately and effectively. We appreciate that this may place a temporary burden on the OFT, particularly during transition, but are confident that this will be outweighed by the positive effects for consumers in the long-term.