
Market Arrangements Code Change Proposal – CPM004

Modification proposal	Market Arrangements Code Change Proposal CPM004 – Board Nomination Process Extension
Decision	Ofwat has decided to accept this change proposal
Publication date	11 September 2017
Implementation date	15 September 2017

Background

The Market Arrangements Code (MAC) came into effect on 1 April 2017 and, amongst other things, sets out the arrangements for how the retail market will operate.

The process for appointing both Retailer and Wholesaler Directors of the Market Operator, MOSL, is set out in both MOSL’s Articles of Association and the MAC. In December 2016, MOSL’s Members adopted revised Articles of Association (to take effect from 1 April 2017). In contrast to the previous MOSL Articles of Association, which prevented companies "associated" with Undertaker members from being Members at all, the revised Articles of Association included a new, non-voting membership class – Associated Retailer.

The issue

Section 4 of the MAC provides that although the Retailer Director can only be an employee of an “Unassociated” Retailer Member, each Retailer Member can nominate and vote in the process for appointing the Retailer Director to the Board of MOSL. This is because the definition of Retailer Member in the MAC makes no distinction between the two classes of “retailer” Member for these purposes.

Aside from this voting discrepancy, the procedures for appointing a Retailer Director in the MAC and Articles of Association are identical.

MOSL, as proposer, has reported that this discrepancy remains outstanding, although it is currently being considered by legal representatives. The latest date upon which the Retailer Director Board nomination process can commence to enable compliance with the deadlines in the MAC (1 September 2017) has now passed. In

order to resolve this matter, considering the merits of each alternative, MOSL propose that an urgent change be made to the MAC that extends the time period for the election to proceed from six months to 12 months post Market Go-Live. This would avoid market participants being in breach of the MAC and therefore condition B1 of retailers' licences and condition R3 of water company appointments in the interim. It would mean that the Retailer Director nomination process will need to be completed by 31 March 2018.

The modification proposal¹

This change is required due to a discrepancy between MOSL's Articles of Association and the MAC on which members of MOSL elect its Retailer Director. This issue is not capable of resolution in time to ensure compliance with the election requirements in the MAC. It will require time for a proper consideration of the relative merits of the different approaches in the MAC and the Articles of Association and then for amendment of the relevant instrument. This change proposal is seeking an interim solution that will allow the more substantive issue to be addressed by legal representatives. The proposal is therefore to extend the time period for holding the first Board Nomination Meeting for the election of a Retailer Director from six months to 12 months from Market Go Live.

It is recommended that these modifications come into effect on 15 September 2017.

Panel recommendation

On 23 August 2017, the Panel considered the Change Proposal and recommended, by unanimous decision, that the Authority approve this urgent change for implementation on 15 September 2017. The Panel recommended this change on the basis of improving the Principles of efficiency, proportionality, transparency and barriers to entry.

Our decision

We have carefully considered the issues raised by the modification proposal and the supporting documentation provided in the Panel's recommendation report.

We are disappointed that the discrepancy between the MAC and MOSL's Articles of Association remains outstanding, and has necessitated this urgent code modification proposal. However, we have concluded that the implementation of CPM004 will

¹ The proposal and accompanying documentation is available on the MOSL website at <https://www.mosl.co.uk/market-codes/change#scroll-track-a-change>

better facilitate the principles and objectives of the WRC, detailed in Schedule 1 Part 1 Objectives, Principles and Definitions and is consistent with our statutory duties.

With regard to the extended time period for resolution of this issue, we think that it is appropriate to extend this from six to 12 months given the level of complexity associated with the two broad issues that need to be considered. We therefore think that an additional six months provides sufficient but appropriate time for the issues and potential solutions to be adequately considered.

We would be concerned, however, if there was no effective resolution of the discrepancy in good time for the new election deadline to be met and urge industry to prioritise this matter.

Reasons for our decision

We set out below our views on which of the applicable Code Principles are better facilitated by the modification proposal.

Efficiency

On balance, we consider that this proposal is a pragmatic means to help resolve the outstanding issue of the discrepancy between the MAC and MOSL's Articles of Association, avoiding the additional uncertainty that would arise from Retailers and Wholesalers being in breach of their respective licences in the meantime.

Proportionality

We think that the amendment makes the simplest change to the MAC which would allow the more substantive issue to be effectively considered. We also think that this change creates a low burden in terms of implementation.

Transparency

We think that the amendment will help to provide clarity to existing and prospective market participants.

Decision notice

In accordance with paragraph 7.2.8 of the Market Arrangements Code, Ofwat approves this change proposal.

Cathryn Ross,
Chief Executive