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November 2016

Trust in water

# Consultation on the Market Arrangements Code

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## About this consultation

At the moment only a small number of business, charity and public sector (“business”) customers across England and Wales can choose their water retailer and most business customers must use services provided by the monopoly water companies. The Water Act 2014 (WA14) will allow eligible business customers to choose their supplier of water and wastewater retail services from April 2017.

This means that for business customers who use the water supply or sewerage system of an appointed company whose area is wholly or mainly in England, the market will be extended to include all business customers. However, for those who use the water supply or sewerage system of an appointed company whose area is wholly or mainly in Wales, the market will not be extended, reflecting the different policy position of the Welsh Government which retains the 50ML threshold.

A new legal and regulatory framework is being put in place to facilitate the new business retail market, and provide the necessary market governance. This framework includes a number of codes which together set out the rules for the new market.

This consultation focuses on the Market Arrangements Code (MAC). The MAC is a key element of the regulatory framework for the new business retail market as it sets out the functions of the Market Operator and the Panel together with the modifications processes for the Wholesale-Retail Code (WRC) and the MAC.

We are seeking feedback from respondents on the changes set out in Section 5 and whether any further changes are needed to the MAC before we issue a further version in 2017.

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## 1. Responding to this consultation

We welcome your comments on the Market Arrangements Code by Friday **16th December 2016**.

Please submit email responses to [retailmarketopening@ofwat.gsi.gov.uk](mailto:retailmarketopening@ofwat.gsi.gov.uk), with the subject **“MAC Consultation”** or post them to:

MAC Consultation  
Retail Market Opening Programme  
Ofwat  
21 Bloomsbury Street  
London  
WC1B 3HF

We will publish responses to this consultation on our website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk), unless you indicate that you would like your response to remain unpublished. Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with legislative or regulatory requirements, such as access to information legislation – primarily the Freedom of Information Act 2000 (**FoIA**), the Data Protection Act 1998 and the Environmental Information Regulations 2004.

If you would like the information that you provide to be treated as confidential, please be aware that, under the FoIA, there is a statutory ‘Code of Practice’ which deals, among other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that we can maintain confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on Ofwat.

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## **2. Overview of legal framework**

### **2.1 Background**

There are a number of codes which together set out the rules for the new business retail market. Some of these codes are required by legislation (Wholesale Retail Code (WRC), Interim Supply Code and Retail Exit Code) and some will be required under obligations contained in companies' (Instruments of Appointment (IoAs) and Water and Sewerage Supply Licences (WSSLs), Market Arrangements Code (MAC) and Customer Protection Code of Practice). The WRC and the MAC form a key part of the regulatory framework. In addition to this Consultation there is a separate consultation on the WRC. The other market codes – Interim Supply Code, Retail Exit Code and Customer Protection Code of Practice – are outside of the scope of either of these consultations.

### **2.2 Market Arrangements Code (MAC)**

The MAC is a non-statutory code which is established by conditions in Water Supply and Sewerage Licences and Instruments of Appointment (MAC Condition). The MAC applies to all Licensees and Appointees in England and Wales as a consequence of the MAC Condition. The MAC Condition places obligations on Licensees and Appointees to ensure that the MAC is established and maintained; and sets out the minimum requirements for what should be covered by the MAC. This includes the setting up of a panel to help oversee the WRC and the MAC including any changes to these codes, the role and function of the Market Operator (MO) and the systems and processes to support the Panel and the MO.

Integrated Undertakers are subject to the provisions of the Stapling Condition which in turn refers to Schedule 8 to the MAC for interpretation of obligations in the WRC, for these purposes. If an integrated undertaker wishes to seek further derogations from the application of the WRC to its particular circumstances, application can be made to Ofwat in accordance with the Stapling Condition Derogation process set out in the Derogations Guidance.

The MAC has been developed through detailed consultation with industry by the Open Water Programme alongside the WRC, for nearly two years and more detail on this process of development is contained in Section 3. The MAC has also been subject to change control by the Interim Code Panel (ICP) since August 2015 and more detail is provided in Section 4.

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## 2.3 Market Architecture Hierarchy

The legal framework makes limited provision for the hierarchy of documents for the purposes of a licensee or appointee seeking to comply with its obligations or in the event of conflict, particularly as regards the various new codes which could all fall within the definition of “Law”. Ofwat has determined that a hierarchy in the legal framework which sets out the precedence of these documents for all interpretation purposes is required. Text has been added to the MAC which sets out the hierarchy in case of conflict, and the definition of “Law” has been amended consistent with the position on hierarchy

The text that has been added deals with the situation where there is any conflict between any of the codes with the statutory provisions or the Licences or Appointments, the order of precedence shall be:

- (i) any Law other than any Appointment, any Licence, the Market Arrangements Code, the Wholesale Retail Code, the Interim Supply Code, the Retail Exit Code and the Customer Protection Code of Practice;
- (ii) any Appointment or Licence;
- (iii) the Market Arrangements Code;
- (iv) the Wholesale-Retail Code;
- (v) the Interim Supply Code and the Retail Exit Code; and
- (vi) the Customer Protection Code of Practice.

The intention is that Licensees and Appointees will be better able to ensure compliance with their obligations and Ofwat will be better able to enforce compliance with those obligations where appropriate.

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## **3. The development of the Market Arrangements Code**

### **3.1 The Market Blueprint**

The MAC has been in active development since 2014. It was first mentioned in the Market Blueprint, an initial consultation by Open Water published in January 2014. Details of the market blueprint and its development can be found [here](#).

The MAC went through a number of detailed consultations during 2014 and 2015, as set out below.

### **3.2 Market Architecture Plan (MAP1)**

The Market Architecture Plan (MAP1) was consulted on in July 2014. The results of the consultation are published [here](#). MAP1 set out the principles behind the design of the market architecture, how companies and market participants would interact and how the MAC would develop and operate. This is important as the principles behind the development of market codes by industry ensure that all parties have an involvement and interest in the efficient operation of the market. This ensures that lessons are learnt, codes are efficient and the regulatory burden is minimised whilst ensuring efficient market operation.

### **3.3 Market Architecture Plan 2 (MAP2)**

The second Market Architecture Plan (MAP2) was consulted on in December 2014. The results of the consultation are published [here](#). MAP2 built on MAP1, further developing the market codes and architecture. It also considered the structure and interactions with the price review and how this would affect the operation of retail markets, data cleansing, and interaction with the systems, governance of the market architecture, the setting and structure of wholesale tariffs which are vital for market operation and payment credit and terms. The responses to the MAP2 consultation contained significant feedback on the MAC and how it should develop. This included how it would operate, what activities were included, how these activities should occur, the differences and similarities with the Scottish codes and how the legal framework would work.

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### 3.4 Market Architecture Plan 3 (MAP3)

Market Architecture Plan (MAP3), which included of a full set of revised code technical / documents was published by MOSL in May 2015. The MAP3 publication (which came as a result of engagement through MAP2 and beyond) consisted of the fullest update / review and publication of documents to date. It provided an amended and updated MAC in track change version for market participants to have clear visibility of the discussion and amendments and updates that had been made. MAP3 is published [here](#).

The Drinking Water Inspectorate (DWI) and Environment Agency were extensively consulted on the MAC.

### 3.5 Post MAP3

Intensive work through 2015 on the 'page turn' exercise as well as numerous workshops produced the version of the MAC which was used by the ICP and is available [here](#).

Workshops held over 2015 considered a large number of the issues and the paperwork of these meetings and the reasons behind the existing drafting is available [here](#).

The development of the MOSL CMOS system and its interaction with the MAC and WRC involved the creation of both a [Pre Vendor MAP](#) and a [Post Vendor MAP](#).



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## 4. Open Governance under the Interim Code Panel

### 4.1 Role of the ICP

MAP2 introduced the provisions for an [Interim Code Panel](#) (“ICP”). The ICP was established in the summer of 2015 just before the publication of MAP3. It was set up to consider and recommend changes to the WRC and MAC in the period between publication of the Pre-Vendor Market Architecture Plan (MAP) and the establishment of the Panel in accordance with the provisions in the MAC. The ICP deals solely with changes to the WRC and MAC, a subset of the role of the Panel to be established under the MAC, and conducts its business in line with the relevant MAC provisions. Its terms of reference are [here](#).

### 4.2 Composition of the ICP

It was felt that the detailed and technical changes presented by the development of the CMOS system would require a level of expert input best served by a cross section of industry experts. Hence the ICP is made up of a Chair appointed by Ofwat and two independent members appointed by the Chair and six members elected by Wholesalers and Retailers. All members speak as experts and do not represent the views of their employers nor the constituency which voted for them.

### 4.3 Governance during CMOS development

As the system build continued, the ICP provided a transparent, adaptable process which could consider the impact of changes to the WRC and MAC on the development and operational capability of CMOS as well as the wider implications to market participants’ systems. The ICP process has enabled the WRC and MAC to be changed without impeding the development of CMOS.

### 4.4 Proposing changes to the codes

Ofwat, MOSL and participants have proposed changes to the market codes. The ICP’s core remit was to make recommendations to Ofwat to either accept or reject the proposed changes to the WRC and the MAC. The formal baseline documents for this process were the versions that were included in the Pre-Vendor MAP, with any proposed changes to these falling to ICP to consider.

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This open governance has given stakeholders the ability to raise changes and challenge each individual change.

## **4.5 Recommending and deciding on changes to the codes**

The ICP only makes recommendations as to whether or not proposed changes to the Codes should be made. Ofwat decides whether or not proposed code changes are to be implemented. In total, over 60 changes have been approved by Ofwat. The code changes approved by Ofwat are published [here](#).

The key criteria which govern the ICP's recommendations in respect of any change proposal are the Objectives and Principles set out in the Codes.

## **4.6 ICP Secretariat**

MOSL provides secretariat services to the ICP, including the ICP Secretary. In fulfilling this role, MOSL maintains and controls the code documentation, incorporating changes once they have been agreed by Ofwat.

Further information about the ICP can be found in MOSL's Information Note [ICPIN01](#).

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## 5. Proposed further changes to the draft Market Arrangements Code

As part of this consultation on the draft MAC, we are seeking views on some proposed further changes to the draft MAC in relation to the code change process. These proposed further changes are required to (1) make sure that the code change process is robust and effective, and (2) comply with the provisions of the MAC condition which is in the Instruments of Appointment (IoAs) and the Water Supply and/or Sewerage Licence (WSSL) standard conditions [both available here](#)

### 5.1 Background

The provisions of the Water Industry Act 1991 (as amended by the Water Act 2014), include provisions for Ofwat to modify and re-issue the WRC, as required. This includes a special process for urgent or minor changes, by which Ofwat may amend the code without consultation. In addition, to these statutory processes for amending the WRC, we propose to draw on the expertise of the Panel to inform our decision making in relation to the WRC. Details of the composition and role of the Panel are included in Section 5 of the draft MAC, and Section 6 includes provisions that set out the process for the Panel to consider and report to Ofwat on proposed modifications to the WRC.

As the MAC is not a statutory code, it is not covered by the statutory modifications process. Instead, the MAC condition in the IoAs and WSSL standard conditions require appointed companies and licensed retailers to make sure that the MAC includes certain provisions, including in relation to its own modifications process. Section 7 of the draft MAC contains provisions on the modifications process for the MAC. It is proposed that the Panel will have a similar role in relation to MAC modifications, by considering and reporting to Ofwat on any proposed modifications to the MAC.

We propose to amend the draft MAC to address four issues in relation to the code change processes. These are:

- Ofwat being able to set a timetable and/or process for the Panel's considerations in certain circumstances;
- Requiring the Panel to always provide a recommendation to Ofwat, to avoid the code change process stalling before Ofwat makes a decision;

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- Adding provisions to allow the Panel to review and revise its Final Report, if necessary to correct any deficiencies in the report or to address any queries from Ofwat; and
  - Adding provisions requiring the implementation of any changes to the MAC.

The rest of this Chapter explains these proposed changes in more detail. These proposals have been discussed with the ICP, and have been updated and refined to reflect comments from the ICP but did not go through the ICP process. We are now seeking comments from companies and other interested stakeholders on these proposed changes, before finalising the draft MAC.

## **5.2 Ofwat setting timetable for Panel considerations**

The MAC condition in IoAs and WSSL standard conditions requires companies to make sure that the MAC includes provisions which allow Ofwat to set a timetable for the Panel to consider and report on proposed code changes. For example, in situations where code changes may be required as part of the implementation of wider regulatory developments or legislative changes.

To address this, we propose to introduce two new additional categories of code change proposal, for which Ofwat could set a timetable and/or process to be followed:

- Ofwat Timetabled Change Proposal (proposed by Ofwat); and
- Applicable Law Change Proposal (proposed by any other relevant party, and confirmed by Ofwat)

The table below summarises these different categories of code change proposals. Although the MAC condition only requires these in relation to MAC changes, we consider that there would be significant benefits from making similar changes to the WRC code change process too, as it would allow the Panel to consider related MAC and WRC proposals within the same process/timetable, and would allow Ofwat to seek the Panel's view on an urgent WRC change proposal in a situation where Ofwat may otherwise have to rely solely on the statutory process for urgent changes. So we propose to amend the WRC change process in Section 6 of the MAC to include these provisions, too.

## Summary of the different types of change proposals

	<b>Standard code<sup>1</sup> Change or Charging Change Proposal</b>	<b>Applicable Law Change proposal<sup>2</sup></b>	<b>Authority Timetabled Change Proposal<sup>3</sup></b>	<b>WRC only – urgent or minor changes</b>
<b>Description</b>	<p>Any Change Proposal or Charging Change Proposal which does not require Ofwat to timetable an exceptional process.</p> <p>We expect that the majority of code change proposals will fall into this category.</p>	<p>A Change Proposal or Charging Change Proposal that the proposer states is necessary to comply with or implement any Law, and Ofwat agrees that it is.</p>	<p>A Change Proposal or Charging Change Proposal raised by Ofwat which Ofwat considers should be managed in accordance with a timetable and/or process provided by Ofwat.</p> <p>This may include change proposals which are required to implement wider policy or legislative changes, or those that Ofwat considers are required urgently. Derogation changes may also fall into this category, because Ofwat would have already consulted on the proposals and would not want a duplicative process.</p>	<p>Urgent or minor change to be made by Ofwat under the process set out in legislation</p>
<b>Applies to WRC and/or MAC changes?</b>	MAC and WRC	MAC and WRC	MAC and WRC	WRC only

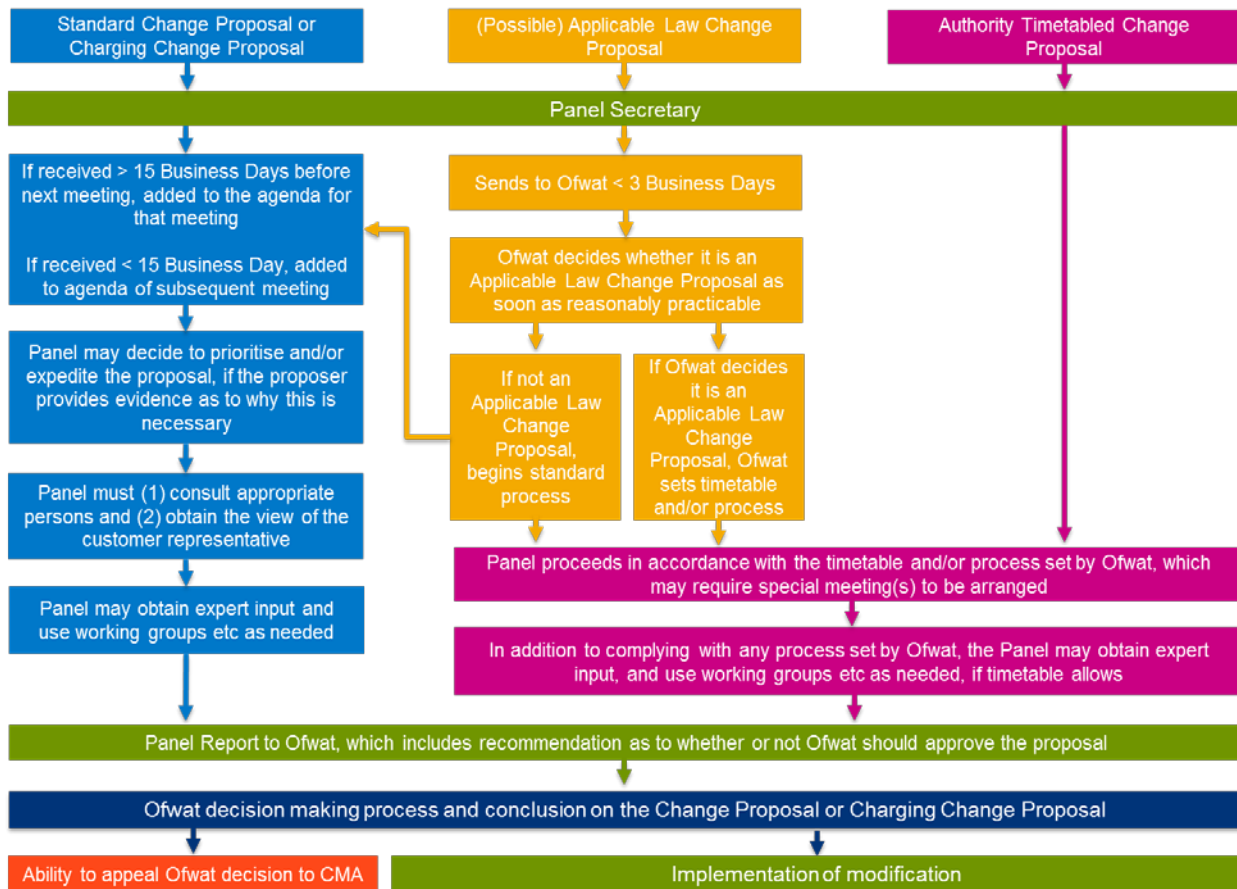
<sup>1</sup> In the Market Arrangements Code change process, the proposal is called a “Market Arrangements Code Change Proposal”. In the Wholesale-Retail Code change process the proposal is called a “Change Proposal”

<sup>2</sup> Called an “Applicable Law Market Arrangements Code Change Proposal” in respect of such a proposal made in relation to the Market Arrangements Code

<sup>3</sup> Called an “Authority Timetabled Market Arrangements Code Change Proposal” in respect of such a proposal made in relation to the Market Arrangements Code

<b>Relevant legal and/or regulatory framework</b>	MAC and MAC Condition in Instruments of Appointment and WSSL Standard Conditions	MAC and MAC Condition in Instruments of Appointment and WSSL Standard Conditions	MAC and MAC Condition in Instruments of Appointment and WSSL Standard Conditions	Water Industry Act 1991 (as amended by the Water Act 2014)
<b>Who can propose?</b>	Any relevant party, including Ofwat	Any relevant party, except for Ofwat	Ofwat only	Any stakeholder may request/provide evidence to Ofwat as to why an urgent or minor change is required
<b>Process and timetable to be followed</b>	Standard code change process as set out in MAC. The Panel may decide to prioritise or expedite certain Change Proposals or Charging Change Proposals if the proposer provides evidence to justify why that is necessary.	Timetable and/or process set by Ofwat	Timetable and/or process set by Ofwat	The Panel will not be involved in the process for urgent and minor changes. As set out in s66DC of the Water Industry Act 1991 Ofwat may implement the change without consultation, but must then issue a notice explaining whether Ofwat considered that consultation was unnecessary for the change or whether Ofwat considered that the change being made without delay was necessary or desirable. If such a notice is not issued within 6 months of the change being made, the code change falls away.

The processes to be followed for each of these code change proposals are summarised in the following diagram:



In relation to the standard code change process (on the left hand side of the diagram above), we have proposed slightly amended drafting in sections 6 and 7 of the MAC to require the proposer to confirm when the proposed change should be implemented, and to fully justify any request for the Panel to progress the change proposal as a matter of urgency. This is to make sure that such requests for urgency are only made when the proposal is genuinely urgent. Exceptionally, and separate to the Panel process, it is possible that a company or other stakeholder such as a customer organisation may provide evidence to us and request that we use our statutory powers to make an urgent change to the WRC without consultation, if appropriate.

If these proposed changes are confirmed, further consequential amendments to the Code Change Proposal Forms in Schedule 7 may be required. For example, to require the proposer to indicate whether or not the proposed code change is required to comply with, or implement, any Law.

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### **5.3 Panel Recommendation**

We propose to amend the provisions about the Panel's recommendation, so that it is clearer that the Panel must always make a recommendation to Ofwat (to avoid the process stalling before Ofwat makes a decision), but recognising that the Panel only votes positively on the proposed code change. So we propose to remove the words 'if any' after 'recommendation', and add a statement, 'the Panel shall recommend that the Authority should not approve a Market Arrangements Code Change Proposal unless the Panel votes in favour of recommending the approval of that Market Arrangements Code Change Proposal'.

### **5.4 Panel Final Modification Report**

We have proposed an amendment so that the Panel can review and revise the Final Report if necessary, without having to begin the whole code change process again. For example, this process may be used to correct any deficiencies in the report, or to allow the Panel to respond to any specific queries from Ofwat. We consider that this is a sensible improvement to make the process more efficient.

### **5.5 Implementing the code change proposals**

Although the WRC code change process sets out provisions about implementation of code changes in the Market Terms and CSD 0501, the MAC code change process in section 7 does not include any provisions about implementation of the changes. So we propose to include provisions in section 7 about implementation of the changes.

### **5.6 Drafting and next steps**

We have marked proposed amendments on the draft MAC to implement the proposals above as follows:



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## Summary of proposed amendments to the draft MAC

<b>Policy proposal</b>	<b>WRC change process (section 6)</b>	<b>MAC change process (section 7)</b>
<b>Compliance with MAC condition – Ofwat setting timetable</b>	6.2.1 (e) 6.3.1 6.3.3	7.1.2 (e) 7.2.1 7.2.3
<b>Compliance with MAC condition – Applicable Law proposals must be accepted by the Panel and cannot be withdrawn without permission</b>	6.2.1 6.3.1(b)	7.1.3 7.2.1 (b)
<b>Justifying urgency</b>	6.2.1.(d)	7.1.2 (d)
<b>Panel recommendation</b>	6.3.5	7.2.5
<b>Ability to revise and resubmit Report</b>	6.3.8	7.2.7
<b>Implementing changes</b>	See Market Terms and CSD 0501	7.2.9

Stakeholders are encouraged to review and comment on the proposed drafting changes that are marked on the attached draft MAC, as part of any responses to this consultation. We will then consider those comments and, if necessary, amend the drafting. We plan to publish an updated version of the MAC in 2017, when we will confirm the final drafting for these changes. The changes would only take effect on the effective date of the MAC which will be set out in the MAC Framework Agreement. Please note these changes are only those that we consider necessary for compliance with the licence and accept further consequent changes (such as to the proposal form) may be needed in the future.

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## 6. Consultation Questions

### **Consultation Questions**

We would be grateful for comments on the MAC drafting set out in the Consultation. In addition, we would welcome any suggested improvements to the MAC for the purposes of Market Opening as well as issues such as the document hierarchy or Stapling Condition.

To aid our consideration of your comments or suggested drafting it would be helpful if you could ensure that you make a full reference to the MAC provision you are making a comment about or to which you are suggesting a change.

In addition you should explain the rationale for the comment or suggested change together with your view on whether the change is needed prior to Market Opening and why. You should also explain why this change has not been raised earlier to the ICP or indeed whether this change has already been considered by the ICP.

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## 7. Next steps

We welcome responses from stakeholders to the proposals set out in this consultation document. **The deadline for responses is Friday 16th December 2016.**

We will assess and consider all suggestions for changes to be made to the MAC on a range of criteria including how critical the changes are to the functioning of the Market in April 2017. We will balance any requirements to make a change with the impact on the central systems and the Market Opening date. Changes identified which are not critical for Market Opening will be considered by the Panel once it is established under the MAC.

Subject to the outcome of the consultation process, we plan to issue a further draft of the MAC in 2017 pending finalisation of the MAC for signature of the Framework Agreement. We anticipate the MAC Framework Agreement being signed in 2017 and further details will be provided in the Programme Note on Transition to be published in November 2016.