
Market Arrangements Code Change Proposal – CPM009

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| Modification proposal | Market Arrangements Code Change Proposal CPM009 – Further Board Nomination Process Extension |
| Decision | Ofwat has decided to accept this change proposal |
| Publication date | 9 March 2018 |
| Implementation date | 16 March 2018 |

Background

The Market Arrangements Code (MAC), 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.

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.

The original deadline for commencing the Retailer Director nominations was 6 months post Go Live. However, this discrepancy was not resolved before this date and as a result, in September 2017, Ofwat approved CPM004 that extended the deadline for this process to 12 months post Go Live.

The issue

In September 2017, MOSL received legal advice that it should not proceed with the Retailer Director nomination process without resolving the inconsistency between its Articles of Association and the MAC. The MOSL Board consulted its members in October 2017, the result of which was a preference for creating an additional class of membership for Associated Retailers. This would involve full voting rights and a new Board position for an Associated Retailer Director.

Giving effect to this change involves making changes to both MOSL's Articles of Association and the MAC which would have to occur concurrently. These changes are currently in the process of being drafted, with the intention of presenting a complete solution to the Panel in March 2018. As a result, it is unlikely that this issue will be fully resolved prior to 1 March 2018, which is the date upon which the Retailer Director Board nomination process can commence.

The modification proposal¹

In order to resolve this matter, MOSL proposes that a change be made to the MAC that further extends the time period for the election to process from 12 months to 18 months post market Go Live. This would mean that the Retailer Director nomination process would need to be completed by 30 September 2018.

Panel recommendation

On 30 January 2018, the Panel considered the Change Proposal and recommended, by unanimous decision, that the Authority approve 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 note that there has been progress on resolving this issue and in particular note the efforts made by MOSL in consulting and engaging its members in an attempt to resolve this issue. We have therefore concluded that the implementation of CPM009 will better facilitate the principles and objectives of the WRC, detailed in Schedule 1

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>

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 12 to 18 months given the level of complexity associated with the issues that need to be considered and the need to ensure that the solution is legally robust. 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 MOSL and the 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 solution to be developed further. We also think that this change creates a low burden in terms of implementation.

Transparency

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.

Emma Kelso,
Senior Director, Customers and Casework