

Market Arrangements Code Change Proposal – Ref CPM026

Modification proposal	Market Arrangements Code Change Proposal – CPW026 – Panel Chairman and Alternate
Decision	The Authority has decided to approve this Change Proposal with modifications
Publication date	29 July 2020
Implementation date	28 August 2020

Background

The Market Arrangements Code (**'MAC'**) sets out the governance arrangements for, amongst other things, how the Panel is constructed and how Panel Meetings are conducted. At full complement, the Panel shall comprise the following Panel Members:

- the Panel Chairman;
- three (3) Associated Retailer Panel Members;
- three (3) Unassociated Retailer Panel Members;
- three (3) Wholesaler Panel Members;
- three (3) Independent Panel Members; and
- one (1) Customer Representative Panel Member.

Currently, the MAC provides that the Chairman of the Market Operator (MOSL) Board also acts as the Panel Chairman. The Panel Chairman's alternate is an Independent Director of the Market Operator.

The Panel Chairman is entitled to vote and is required to be present at the Panel Meeting for it to be quorate. If the Panel Chairman is unable to be present at a meeting of the Panel, it may appoint an Independent Director of the Market Operator to act as chairman of that meeting.

The issue

The Panel are often required to make decisions which might have an impact on the Market Operator. Where the Panel Chairman is also the Chairman of the Market Operator, this could result in a potential conflict of interest. However, eligibility for the

Panel Chairman position is currently restricted because it must be the Chairman of the Market Operator.

The Final Recommendation Report states that the resignation of the current Chairman of the Market Operator at the end of the current term (in August 2020) is an opportunity to expand the eligibility criteria relating to the Panel Chairman role and their alternate which can help to build confidence that the Panel is independent from MOSL.

In addition to the above, currently where the Panel Chairman and their alternate (which must be an Independent Director of the Market Operator) are not available to attend a Panel Meeting, the Panel would be inquorate. This proposal also seeks to further mitigate this risk and expand the eligibility of those that are able to act as an alternate for the Panel Chairman.

The Change Proposal¹

The proposed change is that the requirement for the Panel Chairman to be the Chairman of the Market Operator is removed. Instead, the Panel Chairman would be sourced by a Panel Chair Nomination Committee, with support from the Market Operator. The Panel Chair Nomination Committee would provide recommendations to the Panel which would then make the final decision on the appointment.

The Panel Chairman would be funded by the Market Operator and as such, there would be a requirement for the Board of the Market Operator to be advised in advance of any appointment. The Authority will also be consulted on any potential nomination before they are appointed as Panel Chairman.

The proposed change does not restrict the Chairman of the Market Operator from being appointed as Panel Chairman, instead it expands those who may be eligible. The Panel Chairman will be appointed for a three-year term and may have a maximum of three terms in office. The Panel Chairman will be able to nominate one of the Independent Panel Members as Panel Deputy Chairman who will chair any full or partial Panel meeting where the Panel Chairman is not available. Where both the Panel Chairman and the Panel Deputy Chairman are unavailable, the Panel Members at the meeting would be able to appoint one of the Independent Panel Members present (or their alternates) to be the Chairman for that Panel Meeting.

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>

The Panel Chair and Panel Deputy Chairman will be able to vote and form part of the quorum.

A Panel Chairman policy document has been developed and it is proposed that this will be maintained by the Panel Chair Nomination Committee. The policy document contains guidance to support with recruitment. It is proposed that this would not be codified to enable this to be easily updated by the Panel as required.

Industry consultation and assessment

The Customer Representative Panel Member said that they were supportive of the proposal. They also welcomed a clear and transparent process of how the Panel Chairman and alternate will be appointed.

In addition, the change was reviewed by the Panel Chair Nomination Committee as part of their work on the recruitment guidance document and job specification. Following their review, some amendments were made to the proposal, further information can be found in the [Final Recommendation Report](#).

The Final Recommendation Report states that at its meeting on 28 April 2020, the Panel agreed by majority (five in favour, three against, four abstentions) that a consultation would not be required for this change. The Panel questioned whether a consultation would provide any further evidence, given the familiarity of the Panel with its own mechanisms and operations. Additionally, it is highlighted that the Panel had not consulted on previous changes that impacted on Panel governance, for the reasons outlined above (CPM006 – Urgent Change Process, CPM013 – Customer Representative and CPM016 – Panel Voting Majorities).

The Final Recommendation Report indicates that some Panel Members considered that there should be an industry consultation due to the significance of the change and its impact upon governance arrangements within the MAC. Two Panel Members abstained from voting as they considered that the Panel Chair Nomination Committee should decide whether an industry consultation was needed. The Panel Chair Nomination Committee subsequently agreed that an industry consultation was not required.

Panel recommendation

The Panel considered this Change Proposal at its meeting on 30 June 2020. It recommended, by unanimous decision, that the Authority approve this proposal. This recommendation has been made on the basis of improving the principles of transparency, non-discrimination and efficiency. The recommended date of implementation is 28 August 2020.

Although the Panel voted to recommend the proposal for approval, they expressed concern that 'chairman' is not a gender-neutral term. However, the Final Recommendation Report states that as the MAC currently has over 80 occurrences of 'Panel Chairman' the Panel agreed that a separate housekeeping Change Proposal should be raised as soon as possible to amend these references to a gender neutral term.

The Panel also discussed whether the Panel Chairman should be able to vote. It concluded that the role would be more appealing if they were able to do so.

Our decision

We have considered the issues raised by the Change Proposal and the supporting documentation provided in the Panel's Final Report and have decided to approve this Change Proposal, subject to the amendments to the legal drafting set out at Appendix 1. We have concluded that the implementation of CPM026 will better facilitate the principles of the MAC detailed in Schedule 1 of the MAC: Principles and Definitions, and is consistent with our statutory duties.

Reasons for our decision

We agree with the Panel's assessment about how the Change Proposal will further the principles of efficiency and transparency.

We consider that a minor amendment is necessary to section 5.3.3 of the MAC as set out at Appendix 1 below to change 'nominate' to 'designate'. This is to make clear that, in this context, the Panel Chairman will be making the appointment, rather than suggesting someone for the position. In addition, having received clarification from MOSL as to the status of the Panel Chair Nomination Committee, we also consider that an amendment to the definition of 'Panel Chair Nomination Committee' is necessary so that it is clear that this is an Additional Panel Committee (as defined in the MAC), and as such it will be bound by the requirements of Schedule 12 of the MAC.

Whilst there is no obligation to amend the drafting, having reviewed the Panel Chair Appointment Policy, we consider that the first paragraph could be amended to remove reference to a 'competitive process' as there is no other reference to this in the policy; and to make it clearer that the decision as to whether the Panel Chairman remains in place after one term rests with the Panel. The proposed amendment is set out at Appendix 2.

Expanding the eligibility criteria so that the Panel Chairman does not have to be the Chairman of the Market Operator will assist in building confidence that the Panel is

truly independent from the Market Operator and is empowered to hold the Market Operator to account. The Change Proposal will further the principle of transparency as it removes the potential for conflicts of interests where decisions that affect the Market Operator need to be made by the Panel. The proposal is also supported with a guidance document which ensures transparency about how the Panel Chairman is to be appointed.

Implementation of this change may also contribute to improving efficiency. There will be arrangements in place to reduce the risk that the Panel will not be quorate and therefore unable to conduct business at Panel Meetings where the Panel Chairman and the Panel Deputy Chairman are not available. We note the Panel's recommendation on allowing the Panel Chairman to vote and abstain, and agree with the view of the Panel Chair Nomination Committee that this position maintains the status quo.

We approve CPM026 noting that a housekeeping change proposal to amend Panel Chairman to a gender neutral term in the MAC will be raised. We fully support this and consider that it should take account of all references to 'Chairman' in the MAC (inclusive of Chairman of the Market Operator and the Market Performance Committee Chairman). A Wholesale Retail Code (**WRC**) change proposal will also be needed to address the references to 'Chairman' in that code. Prior to either change proposal being raised we would encourage a full review of both the WRC and MAC to address any non-gender neutral terms that are used. We suggest that these change proposals are raised as soon as reasonably practicable.

Decision notice

In accordance with paragraph 7.2.8 of the Market Arrangements Code, the Authority approves this Change Proposal.

Georgina Mills
Director, Business Retail Market

Appendix 1

1. MAC amendments

Section 5.3.3

Delete the reference to 'nominate' or 'nomination' and replace with 'designate' or 'designate' so that the paragraph reads:

'The Panel Chairman shall be entitled to **designate** any one of the Independent Panel Members to act as their Panel Deputy Chairman and they may change this **designation** at any time. If the Panel Chairman is unable to be present at a meeting of the Panel, then the Panel Deputy Chairman shall act as the Panel Chairman for the duration of that meeting of the Panel. Where both the Panel Chairman and Panel Deputy Chairman are unavailable, the Panel Members in attendance shall appoint a Panel Chairman for the relevant Panel Meeting from the remaining Independent Panel Members, or their alternates. Any Panel Member acting temporarily as the Panel Chairman shall both count as the Panel Chairman for quorum purposes and be entitled to vote as the Panel Chairman.'

Schedule 1, definition of Panel Chair Nomination Committee

Delete 'A sub-group of Panel Members' and insert 'An Additional Panel Committee' so that it reads:

'**An Additional Panel Committee** responsible for leading the process of appointing a Panel Chairman and making a recommendation to the Panel to approve. The sub-group shall, as a minimum, be composed of one (1) Wholesaler Panel Member, one (1) other Retailer Panel Member (being either an Associated or Unassociated Panel Member) and one (1) Independent Panel Member;'

2. Panel Chair Appointment Policy amendments

Amend the first paragraph so that it reads:

'The Panel Chair may be appointed for more than one term of office, but no more than 3 terms. Any discussion by the Panel on whether or not to reappoint the Panel Chair after their first term of office, must be chaired by the Deputy Chair or appointed Deputy Chair. After two terms, the Panel Chair may put their name forward but may only be appointed once the competitive procedure set out in paragraph 3 of this document has been followed.'