

Market Arrangements Code Change Proposal – Ref CPM028

Modification proposal	Market Arrangements Code Change Proposal – CPM028 – Aligning MOSL Board Governance with the Articles of Association
Decision	The Authority has decided to approve this Change Proposal subject to a modification
Publication date	18 August 2020
Implementation date	1 September 2020

Background

The Market Operator’s Annual General Meeting (**AGM**) was held on 16 July 2020. During this meeting the Market Operator’s Board considered eight resolutions.

Resolution 1: Approve the 2019/2020 Report and Accounts;

Resolution 2: Reappoint the Auditors for a further year (2020/21);

Resolution 3: The removal of the five-year industry restriction for the Board Chairman;

Resolution 4: Amending the term of the elected directors from two to three years (including to extend the term of those current in office);

Resolution 5: Amending the Board quorum and removing the option for alternate directors;

Resolution 6: Amending the Nomination Committee composition;

Resolution 7: The discretion to appoint a Senior Independent Director; and

Resolution 8: Measures to introduce modernised voting.

Following approval of these resolutions, the amended Articles of Association were filed with Companies House on 5 August 2020.

The issue

The Market Operator Board voted to approve the above changes to the Articles of Association. Resolutions 3, 4, 5 and 8 require corresponding amendments to the Market Arrangements Code (**MAC**) to ensure that the Articles and the MAC align.

Resolution 3: The removal of the five-year industry restriction for the Board Chairman

Section 4.4.1 of the MAC and the Articles of Association set out that the Board Chairman must not have been employed or engaged by a member company, or their affiliated companies, in the past five years.

MOSL worked with a recruitment agency advisor to recruit a new Board Chairman due to the retirement of the current Board Chairman. Whilst a new Board Chairman candidate has now been found, the recruitment adviser indicated the eligibility of the candidates of the applications received at the time would be reduced by 60% if the industry restriction remained in place. This has potential to restrict candidates who might be independent and of a high calibre but may have been employed or engaged with a member company within the last five years.

Resolution 4: Amending the term of the elected Directors from two to three years (including to extend the term of those current in office)

Both the MAC and the Articles of Association state that the elected Directors may only serve a two-year term on the Board. However, independent Board Directors are able to serve three years until they are required to stand for re-election. The Final Recommendation Report highlights that these two terms are not aligned. It also suggests that a two-year term is unusually short, which could have an impact on Board continuity because of increased Board turnover.

Resolution 5: Amending the Board quorum and removing the option for alternate Directors

Matters relating to Board quorum are dealt with solely in the Articles of Association, therefore no amendment to the MAC is required to change the quorum. A change is however required to the MAC in relation to removing the option for an alternate. Both the Articles of Association and the MAC currently permit appointment of an alternate by the elected Director. However, it is stated in the Final Recommendation Report that delegation of responsibility to individuals who might not be familiar with the business of the Board is sub-optimal governance.

Resolution 8: Measures to introduce modernised voting

Currently the Articles require that proxy voting forms are only valid if submitted 48 hours prior to the meeting. The Final Recommendation Report indicates that this has frequently resulted in proxy votes not being valid because they have arrived too late.

In addition, issues have been identified with the process for the election of new industry Directors. Currently the nomination meeting:

- Does not explicitly allow attendance by video conference which might impact attendance at nomination meetings;
- Uses paper voting forms which creates an administrative burden and is not efficient;
- Allows nominations for industry Directors to be submitted as late as five Business Days before the meeting; and
- Only permits circulation of the candidate details in the last 24 hours before the meeting. This timeframe may not provide sufficient time for consideration of the candidates.

Taken together, the above currently results in the process being overly bureaucratic and burdensome to administer, and could potentially impact attendance and participation at these meetings.

Board Minutes

Section 4.6.3 of the MAC places an obligation on the Market Operator to publish the minutes of the Board meetings on its website. The Final Recommendation Report suggests that this places an unrealistic obligation on the Market Operator to publish the Board minutes in full. It is highlighted that this would require significant redactions to preserve confidentiality.

Board Chairman Arrangements in the MAC

The Final Recommendation Report states that the Articles of Association are considered a more appropriate place for the Market Operator Board Chairman arrangements to sit as a matter for industry members, rather than the MAC. Therefore it is the preference of the Proposer that these arrangements are removed from the MAC.

The Change Proposal¹

It is proposed that sections 4.4.1, 4.4.3 and 4.5 of the MAC are modified to align with the amendments that have been made to the Market Operator's Articles of Association following the Boards passing of resolutions 3, 4, 5 and 8 at its AGM.

Resolution 3: The removal of the five-year industry restriction for the Board Chairman

It is proposed that the five year industry restriction that is applicable to the Board Chairman is removed from section 4.4.1 of the MAC.

Resolution 4: Amending the term of the elected directors from two to three years (including to extend the term of those current in office)

It is proposed that the MAC is amended to align with Article 12 of the Articles of Association which permits elected Directors to serve a term of up to three years. This will align with the term that is currently served by independent Directors and will reduce the turnover of the Board which can impact continuity.

Resolution 5: Amending the Board quorum and removing the option for alternate Directors

No amendment is required to the MAC to change Board quorum, this is dealt with in the Articles of Association.

To ensure that the Board continues to operate to a high standard of governance, it is proposed that MAC is amended so that the ability for an alternate to be appointed is removed. The Final Recommendation Report highlights that Board meetings are arranged to ensure maximum possible attendance. Further, if a Director had strong views on a matter to be decided at the meeting, the matter would be deferred to ensure that they are able to participate.

Resolution 8: Measures to introduce modernised voting

It is proposed that the MAC is amended so that:

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>

- proxy votes can be submitted up to one hour before the AGM rather than 48 hours before;
- it is clear that electronic / digital proxy voting forms are valid;
- attendance at a Board Nomination Meeting via video conference is expressly permitted;
- electronic voting forms can be used;
- nominations for industry directors must be submitted no later than five business days before the meeting with circulation of candidate details permitted up to five business days prior to the meeting.

The Final Recommendation Report indicates that these changes will reduce the administrative burdens associated with this process. The amendment relating to nominations will also ensure that there is sufficient time for members of the Nominations Committee to consider candidate details where there are nominations for a new Director.

Board Minutes

It is proposed that section 4.6.3 of the MAC is amended so that it aligns with MOSL's working practice that only a summary of the Board Minutes are published rather than full minutes.

Board Chair Arrangements in the MAC

It is proposed that all Board Chairman arrangements are removed from the MAC and instead sit in the Articles of Association. The proposal is that the following provisions are removed:

- the term;
- that the Chairman may hold more than one term; and
- removal of the Chairman.

Industry consultation and assessment

It was not considered that an industry consultation was required because Wholesaler, Associated Retailer and Unassociated Retailer Members attend and are able to vote at AGMs. The votes that are relevant for the purposes of this Change Proposal were also special resolution votes. Special resolutions require a two-thirds quorum from each of the three membership categories and 75% of those voting to approve it.

At the AGM, there was quorum across all three membership categories (there was a total of 56 votes). Relevant to this Change Proposal, three members voted against resolution 3, six members voted against resolution 5 and one against resolution 4. All other votes were in favour of the resolutions being passed.

The Customer Representative Panel Member (**CRPM**) provided comments regarding the proposal (which was subsequently expanded). They agreed that the proposed changes were sensible. The CRPM considered that removal the five year industry restriction for the Board Chairman, and to increase the Term of Elected Director, should help to achieve a good calibre of employee on the Market Operator Board. However, they questioned whether “recently employed” should be qualified as a time period, although not one as restrictive of five years. It was subsequently clarified that the proposal was to remove references to the election of the Chairman from the MAC, rather than to introduce alternative wording. The scope of CPM028 was expanded after the CRPM’s comments had been provided and therefore the Customer Representative has not had the opportunity to feedback on the amendments that cover the modernisation of voting arrangements, and the reduction of board quorum with the removal of alternates.

With regard to the amendment to permit Board Minutes to be in summary form, the Panel discussed the proposal at its meetings on 26 May 2020 and 30 June 2020. The Panel did not consider this to be contentious as this is the working practice of MOSL.

Panel recommendation

The Panel considered this Change Proposal at its meeting on 30 July 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 efficiency, proportionality and transparency. The recommended date of implementation is 1 September 2020.

The proposals to reduce Board Quorum and remove the ability for Directors to appoint an alternate attracted some discussion. Concern was raised about how issues might be deferred if a Director is unable to attend but wanted to contribute to the discussion and whether the elected Directors would be impartial. It was confirmed to the Panel that all Board Members should be impartial and consider impacts across all sectors of the market.

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. We have concluded that the implementation of CPM028 will better facilitate the principles of the Market Arrangements Code (MAC) detailed in Schedule 1 MAC, Principles and Definitions, and is consistent with our statutory duties.

Reasons for our decision

We have decided to approve this Change Proposal with an amendment to the cross reference in section 4.4.6(b), the section should read:

“Where a Director nominated by the Unassociated Retailer Members, the Associated Retailer Members or the Wholesaler Members ceases to be a Director by reason of resignation, removal (including under Section ~~Error! Reference source not found~~ 4.4.6(a), death, incapacity or any other reason in accordance with the provisions of the Articles of Association of the Market Operator or the Companies Act) the Unassociated Retailer Members, the Wholesaler Members, or the Associated Retailer Members (as appropriate) shall elect a replacement Director in accordance with Section ~~Error! Reference source not found~~.”

We note that a large majority of the Members that voted at the AGM supported the proposed amendments. The Change Proposal promotes the principle of efficiency by modernising and streamlining the governance and processes relating to arrangements for the Board and Chairman of the Market Operator. The measures to modernise voting arrangements and extension of the term for Elected Directors will help to reduce the administrative burden on the Market Operator and improve the governance arrangements of the Board.

Removal of the ability for Directors to appoint alternates may also help to strengthen governance arrangements of the Board. This is noting that the Final Recommendation Report highlights that meetings are arranged to ensure maximum attendance and items can be tabled where a Director has a particular interest. Proxy voting has also been retained should a Director be unable to attend a Board meeting. We consider that extending the term of elected Directors will also improve Board continuity by reducing turnover of the Board.

Removal of the five year industry restriction for the Chairman has potential to improve the efficiency of the recruitment process as the pool of eligible candidates is increased which could encourage a greater number of potential candidates in the future. Most of the governance arrangements relating to the Market Operator Chairman have also been removed from the MAC but are still included in the Articles of Association. This simplifies the arrangements and avoids unnecessary duplication.

However the removal of the five year industry restriction does mean it will be important to manage any actual, potential or perceived conflicts of interest. We expect the Nominations Committee to manage any conflicts when appointing the Chairman, including by disclosing to the Market Operator (MOSL) Board where a prospective Chairman has been employed or engaged in the industry during the period of five years prior to their date of appointment. We think this is consistent in spirit to the recent updates to MOSL's articles of association, in particular 12.2.6 that deals with the appointment of the MOSL Chair and now reads: *"an independent chairperson nominated by unanimous decision of the Nominations Committee as being an individual that they believe would enjoy the confidence of all stakeholders in the industry and who, in the opinion of the board of directors, shall be sufficiently independent of any member or an associated company of a member"*.

We consider the changes to the MAC are proportionate to address the identified issues.

Further to the above, we are encouraged that [CPW101 / CPM030](#) has been raised to address the use of non-gender neutral terms in the MAC and Wholesale Retail Code.

Decision notice

In accordance with paragraph 7.2.8 of the MAC, the Authority approves this Change Proposal with an amendment.

Georgina Mills
Director, Business Retail Market