
Market Arrangements Code Change Proposal – Ref CPM036

Modification proposal	Market Arrangements Code Change Proposal – CPM036 - Provision to vary the term of Panel Members
Decision	The Authority has decided to approve this Change Proposal with modifications.
Publication date	27 January 2021
Implementation date	28 January 2021

Background

The Panel has commissioned a Governance Review which is expected to present its recommendations by the March 2021 Panel meeting. The review will be informed by research into other industries' governance arrangements. As part of this Governance Review, the Panel's recommendation may include amending the elected Panel representation which would require code changes to be consulted on, approved and implemented over summer 2021.

The term of office for currently elected Panel Members is due to expire on 31 March 2021. The elections for the new Panel term are expected to take place in February - March 2021, for the new term of office commencing 1 April 2021.

The issue

MOSL have proposed this change and state that the issue is that the recommendations of the Governance Review may include amending the elected composition of the Panel. It is therefore possible that, if the Panel election were to go ahead as planned, the newly elected Panel would have to be dissolved shortly after 1 April 2021 and further elections held depending on the

recommendation and outcome of the review. As a result, MOSL state there is a risk that the elections for the term beginning 1 April 2021 will not be an efficient use of resource, as it would mean that MOSL resource would be dedicated to an election that could be considered unnecessary if a further election is then required later in the year. MOSL also state there is a risk that it could lead to a loss of continuity when the Panel is considering critical market governance issues. This is because it would mean a newly formed Panel would be considering the recommendations from the Governance Review, rather than members who have been involved in Panel governance and the Review to date. MOSL have therefore proposed this change to avoid these issues and to ensure there is an option to extend Panel Member terms should this be necessary.

The Change Proposal¹

The Change Proposal seeks to amend section 5.6 of the Market Arrangements Code (MAC) to include a new paragraph '5.6.9 – Extension to term of appointment.' The full drafting can be found in Attachment 3 to the [Final Recommendation Report](#).

The Proposed solution seeks to enable Ofwat to amend the term of existing elected Panel members, if requested by the Panel. The amendment could be time bound, e.g. to extend terms of office by a fixed period, or event bound, e.g. to extend terms of office until an Ofwat decision or implementation of a change proposal.

These powers would be enduring and could be used to extend the term of existing Panel Members in each of the following foreseeable scenarios (although this is a non-exhaustive list of scenarios):

- The Governance Review recommendations will not be known until after the Panel Nomination Meeting to appoint Panel Members from 1 April 2021 is due to be held.
- The Governance Review recommends an amendment to the composition of the Panel which will require a new election.
- The Governance Review recommends [CPM021](#) be progressed which will remove the need for future Panel elections.
- The Panel Nomination Meeting is unable to be held or insufficient nominations are received for a category of Trading Party.

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>

Industry consultation and assessment

An industry consultation was undertaken in relation to this Change Proposal. The consultation received 13 responses: nine Wholesalers, three Retailers and CCW. All respondents stated that they agreed that the term of the Panel Members should be extended, with the majority of respondents (11 out of 13) stating there should be a time limit on the period of extension.

A summary from the consultation is listed below, with the full responses and a more detailed summary provided in the Panel's Final Recommendation Report.

Extending the term of Panel members

All 13 respondents agreed with the proposed capability to extend the term of elected Panel Members. The majority of these respondents stated the reasons they were supportive of this change were because it ensured the Panel's continuity while awaiting the outcome of the Governance Review and would avoid wasted resource.

Four respondents (two Wholesalers and two Retailers) agreed that the industry should be consulted before the Panel requests an extension. These respondents stated that it would be more transparent to notify the industry, explain reasons for the extension and provide an opportunity to respond. They suggested a short consultation of five to ten business days.

The majority of respondents (seven Wholesalers, one Retailer and CCW) disagreed that a consultation on an extension would be needed, and stated this would add delay and was unnecessary because the extension will be time or event bound and should not be common practice. They noted that Ofwat could consult within the 20-business day notice period if they had concerns with the proposal.

Time limit on extension

11 respondents (nine Wholesalers and two Retailers) agreed that there should be a time limit on the period of the extension. The respondents felt that the time period should be limited to between 6 and 12 months as this should allow a sufficient time frame to maintain continuity, however extensions should not be any longer than necessary.

One Retailer and CCW disagreed that a time limit would be necessary. The Retailer stated that they felt the proposed measures (consultation and Ofwat

approval) negate any potential risks. CCW stated that they would not necessarily support a limit on extensions, but a robust assessment of requests needed to take place to ensure that they were justifiable, taking into account the particular circumstances. CCW stated that this would be especially important if the time being requested in a 'time extension' was particularly significant.

Impact of Panel election delay

Five respondents (four Wholesalers and CCW) agreed that there are downsides to delaying a Panel election by up to six months and that this may delay or prevent new membership to the Panel. One Wholesaler that agreed there were downsides stated that it raises the potential risk of Panel members not being representative of the voting wishes of the constituency that the member represents, although given the Panel members were elected using a well-documented process, they stated that this seems unlikely. Another Wholesaler stated that it dilutes the opportunity for other Trading Parties/individuals to get involved and contribute, but also stated that this was a very small downside compared to the issues that the proposal seeks to address.

Eight respondents disagreed and did not think there are material downsides to delaying a Panel election when compared against the issues that the proposal seeks to address. A Wholesaler stated there were no downsides as they felt that a six month period would allow the Governance Review to be concluded and any recommendations implemented. A Retailer stated they believed going ahead with an election that might not be necessary would have more downsides.

Notice period to Ofwat

13 respondents (eight Wholesalers, three Retailers and CCW) agreed that the Panel should give 20 business days' notice in its request to Ofwat and stated that this was a reasonable timeframe to allow sufficient time for Ofwat to make an informed decision and minimise any potential delays.

One Wholesaler disagreed, stating that combining a consultation with 20 business days' notice in the request to Ofwat appeared to be quite a long period of time.

Voting arrangements

10 respondents (six Wholesalers, three Retailers and CCW) believed that, consistent with a Panel vote to remove a Panel Member, a vote to extend the term of a Panel Member should be decided by a qualifying majority (unanimous or 10 votes in favour) because it related to Panel membership.

Three Wholesalers believed that a simple majority plus one should apply, as for all other Panel business, qualifying majorities only being required for the removal of Panel Members.

Implementation date

All respondents agreed that the change should be implemented in time to delay the planned elections in March 2021, so as to allow the ongoing Governance Review's recommendations to be considered and implemented. One Wholesaler stated that the proposal means that the existing Panel members, who are familiar with the operation of the Panel, are in a position to consider and make recommendations on changes about its operation, rather than a new group of members who may not have experience of the way the Panel worked previously.

The Proposer's view on the consultation responses

The Proposer provided the following responses to points raised in the consultation:

- **Consultation and notice period to Ofwat** - The Proposer stated that if this change is approved, then it is envisaged that at the January 2021 Panel meeting, a decision would be taken as to whether to apply for an extension to the existing terms of office. A decision from Ofwat would be sought by 24 February 2021 which, if rejected, would still allow enough time to notify and hold a Panel Nomination Meeting by 31 March 2021 and so avoid a break in Panel membership. Therefore, the Proposer does not believe a period of consultation should be included as this would have required the Panel to decide to apply for extension in December 2020 or earlier, before this change will be approved and before receiving the initial findings of the Governance Review. The Proposer noted the support for the 20 business days' notice period to Ofwat and that Ofwat could consult with industry in this time and/or reject a request if it had concerns.
- **Period of extension** - The Proposer recognises that extensions of greater than six months would cause concern. The Proposer stated that the proposal does not amend the biennial terms of office beginning 1 April, and therefore as well as delaying the appointment and contribution of new Panel Members, extensions will truncate the term of office of new Panel Members, reducing the continuity and effectiveness of the Panel.

- **Appropriateness of extension** – The Proposer noted that extensions can prevent potential Panel Members from taking office and delay progression of Panel views. However, the Proposer believes that due to the timing of the Governance Review, an extension in this circumstance is justified as it offers other benefits such as increased efficiency and continuity in market governance. The Proposal requires that requests to extend terms of office should detail the reason and limit the period of extension. This approach allows Ofwat to consider each request on its own merits and approve or reject as it deems appropriate.
- **Voting majority** – The Proposer notes that the majority of respondents consider that the Panel should deliver a qualifying majority when voting to extend terms of office as the vote concerns Panel Membership, and the proposal was modified to reflect this.
- **Continuity of Nomination Process** – The Proposer notes that a Wholesaler’s suggestion, that the proposal only affects the change in Panel membership and the Panel Nomination Meeting and appointment process could continue according to existing timescales, does have some merit. This could allow the Panel Nomination Meeting to be held earlier, allowing more time for designated Panel Members to be inducted into their roles or the application to Ofwat to be submitted later. However, the Proposer notes that the Ofwat decision would have to be known by the time of the Panel Nomination Meeting so that the start of the designated Panel Members terms of office could be confirmed.

Panel recommendation

The Panel considered this Change Proposal at its meeting on 24 November 2020, where members unanimously agreed to recommend the change for approval (12 votes in favour), with the Panel Chair electing to abstain until they are more familiar with the Panel’s governance. The Panel was very supportive of this change and thought it was a sensible provision.

Due to the split views from respondents to the consultation on whether or not the industry should be consulted before the Panel requests an extension, a Panel Member requested that the industry should be notified of any request for extension in the interests of transparency. MOSL confirmed that they would ensure this occurred.

A Panel Member had a concern that the Panel might look closed off to the industry and appear that it was voting to extend its own tenure. However, those

concerns were addressed by the process provided by the change and regulatory oversight of any request for extensions.

Our decision

We have considered the issues raised by the Change Proposal and the supporting documentation provided in the Panel's Final Recommendation Report, and have decided to approve the proposal with modifications.

Reasons for our decision

We acknowledge the points raised by the Proposer and respondents to the consultation and fully support the need for appropriate and effective Panel governance. After considering the evidence received and reviewing the consultation responses, we have concluded that the implementation of this Change Proposal will better facilitate the principles and objectives of the WRC, particularly in relation to efficiency, for the reasons set out below.

We believe the Change Proposal is a pragmatic approach to ensure the MAC suitably covers any eventualities where extensions to Panel Members' appointments are required. We think that this change will allow the outcomes from the Governance Review to be considered by the existing Panel Members, which we believe is preferable due to the Panel's experience working within the current governance arrangements. We also believe the proposal avoids the potential situation where a newly elected Panel could be dissolved shortly after formation, which we agree with the Proposer would not be an efficient use of time or resource, both for MOSL, Trading Parties and Panel Members. We therefore think that this change is both efficient and proportionate in tackling the issue identified.

We have however made amendments to the legal drafting (highlighted in Appendix A to this document) to provide clarity on a potential situation where all Panel Members' terms are requested to be extended. In this instance, and as implied in the Panel Final Report, it is our understanding that the Panel Nomination meeting may be postponed and reconvened at an appropriate time, subject to the extension of Panel Members' terms.

We agree with respondents that there should be a limit to the Panel Member extension, and that this should not be any longer than is required. We note the concerns of CCW and some respondents that delaying Panel elections could lead to Trading Parties who are not represented feeling disengaged. Having said this, we believe that the timing of the Governance Review, which is in close proximity to the planned timing for the Panel election, should reduce this risk. In addition,

without knowing the outcome of the Governance Review we are not in a position to give a view on how long any proposed extensions should be in this particular instance, but we would advise the Proposer to consider the concerns raised over an extension of more than 6 months.

We do not believe it would be necessary to consult with industry before a Panel Member extension is requested, but agree with the Panel Member's suggestion to notify industry if an extension is requested. This would ensure transparency and that Trading Parties are kept updated.

We reiterate our support for the ongoing Governance Review and look forward to the recommendations arising from it. We understand the related timescales if an extension is requested and will work with the MOSL and the Panel should this be required.

Decision notice

In accordance with paragraph 6.3.7 of the Market Arrangements Code, the Authority approves this Change Proposal.

Emma Kelso
Senior Director, Markets & Enforcement

Appendix A: Modifications to the legal drafting for CPM036

Market Arrangements Code – page 30, section 5.6 ‘Panel Members’

5.6.2 **Date of the Panel Nomination Meeting** – The Panel Secretary shall, in consultation with all Associated Retailer Members, Unassociated Retailer Members and Wholesaler Members, fix the date of each Panel Nomination Meeting and shall give each Associated Retailer Member, Unassociated Retailer Member and Wholesaler Member not less than twenty (20) Business Days’ notice in writing of the date of such meeting. A Panel Nomination Meeting shall be held no later than 1 March in every second year following the Go Live Date. This paragraph is subject to the Authority’s decision in relation to the extension of Panel Members’ terms. If the Authority decides to extend all Panel Members’ terms under paragraph 5.6.9, such that there is no need for a Panel Nomination Meeting to occur on its intended date, then that meeting will be postponed and reconvened in accordance with the timing of the extension of the Panel Members’ terms.