

## Wholesale Retail Code Change Proposal – Ref CPW108

<b>Modification proposal</b>	Wholesale Retail Code Change Proposal – CPW108 – Agreement to Unplanned Settlement Runs
<b>Decision</b>	The Authority has decided to approve this Change Proposal
<b>Publication date</b>	20 January 2021
<b>Implementation date</b>	26 January 2021

### Background

The Market Operator (MOSL) is responsible for completing Planned Settlement Runs and providing Settlement Reports which provide a calculation of the charges between Trading Parties. The last of the Planned Settlement Runs is the Final Settlement Run, this run will crystallise the data for each Supply Point for the relevant Invoice Period.

Where Trading Parties amend Data Items following the Final Settlement Run and subsequently want a recalculation of charges based on the amendments they are able to request an Unplanned Settlement Run in some circumstances. There are three types of Unplanned Settlement Run: Corrective; Post RF and Dispute. Every type of Unplanned Settlement run requires a materiality threshold to be met before it can be requested.

**Corrective Settlement Run:** Both the relevant Retailer and Wholesaler must agree to request a Corrective Settlement Run. A Corrective Settlement Run can either be a complete recalculation of charges or a recalculation of charges for a specific set of Supply Points and Service Components. A Corrective Settlement Run can only be requested within 2 Business Days of a Planned Settlement Run or within 10 Business Days after the Final Settlement Report has been provided.

**Post RF Settlement Run:** Both the relevant Wholesaler and Retailer must agree to a Post RF Settlement Run. All Post RF Settlement Runs are specific to the set of combinations of Supply Points and Service Components which are to be re-calculated. They do not result in a complete recalculation of charges across all SPIDs associated with the relevant Wholesaler / Retailer pairing. Post RF Settlement Runs can be requested up to 28 Months after the publication date of the relevant Final Settlement Report.

**Dispute Settlement Runs:** will be carried out where required pursuant to the Disputes Procedure. Dispute Settlement Runs are specific to the set of combinations of Supply Points and Service Components which are to be re-calculated. Dispute Settlement Runs can only be carried out following a MO Dispute or Trading Dispute and must be requested by the Trading Dispute Deadline (within 28 Months of provision of the relevant Final Settlement Report).

## The issue

The Proposer (Castle Water) has suggested that there is a gap in the Market Terms which means that a Trading Party cannot raise a Dispute if, following a request to another Trading Party to agree to a Corrective or Post RF Settlement run, that party fails to respond. The Proposer considers that where an amendment to one or more Data Item(s) is agreed, there is no basis on which to raise a Dispute should a Trading Party fail to respond to the request for an Unplanned Settlement Run.

## The Change Proposal<sup>1</sup>

It is proposed that an amendment is made to section 4.13.4 of the Market Terms to provide that “agreement to a Corrective Settlement Run or Post RF Settlement Run shall not be unreasonably withheld or delayed unless the Contracting Wholesaler or Contracting Retailer, as the case may be, has, within twenty (20) Business Days of receipt of a request for agreement from the other Party provided in writing a reasoned objection to the Unplanned Settlement Run”.

Further, if a reasoned objection is not provided within 20 Business Days, it is proposed that the request will be deemed to be refused. A Trading Party would then be able to refer an objection or deemed refusal pursuant to the Disputes Procedure.

## Industry consultation and assessment

### The initial solution

The initial solution included that following an undisputed Data Item amendment, a Trading Party should not be permitted to delay or withhold its agreement to an Unplanned Settlement Run except where it had an ‘objectively justified reason’. Any objection would be required to be provided within 10 Business Days of receipt of the

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<sup>1</sup> The proposal and accompanying documentation is available on the MOSL website at <https://www.mosl.co.uk/market-codes/change#scroll-track-a-change>

request or agreement would be deemed to have been given. The proposal had been raised as an Urgent Change Proposal and no consultation had been undertaken.

The initial solution was considered by the Panel at its meeting on 27 October 2020. The Panel raised concerns and queries about the concept of 'deemed agreement' to an Unplanned Settlement Run. They also queried the proposed timeframe before a Trading Party would be deemed to agree to an Unplanned Settlement Run, noting that there could be delays depending on the volume of data which required review prior to agreement. Discussion was also had about whether the Disputes Committee could play a role in resolving Disputes about agreement to an Unplanned Settlement Run.

The Panel agreed that further assessment of the Change Proposal was required, including consultation with Trading Parties, and it invited the Proposer to revise the solution and resubmit the Change Proposal no later than December 2020.

## Consultation

Following the Panel deliberations on the initial solution, the proposed solution was amended and a consultation was published on 3 November 2020 and closed on 13 November 2020. There were 16 responses from six Retailers, 10 Wholesalers and the Consumer Council for Water (CCW).

A summary of the consultation responses has been included below, the full consultation responses can be viewed in the Panel's [Final Recommendation Report](#).

## Interpretation of current provisions

Eight respondents agreed with the Proposer's interpretation that there is currently a gap in the codes which prevents a Dispute from being raised where agreement to an Unplanned Settlement Run is withheld. CCW also recognised that there is no reference to Trading Parties being able to raise a Dispute in the relevant section of the Market Terms.

Two Wholesalers that did not confirm whether they agreed or disagreed with the Proposer's interpretation suggested that where a Retailer considers that they have not been charged correctly it should raise a Dispute and withhold payment (as per section 9.7.2 of the Business Terms). In response to this comment the Proposer highlighted that as the payment would already have been made, the affected Trading Party would be unable to withhold payment.

A Retailer suggested that it had anticipated it would be able to raise a Trading Dispute should a Wholesaler not agree to an Unplanned Settlement Run as the run could be viewed as the last step in correction of the affected data.

Four Wholesalers did not agree with the Proposer's interpretation. One suggested that any Trading Party can raise a Dispute at any time, another considered that a Non-Trading Dispute could be raised in such circumstances. A different Wholesaler also challenged the Proposer's interpretation and did not consider that there is a gap in the codes which would prevent a Dispute from being raised where a resettlement agreement was not forthcoming. This Wholesaler said that the need for a Post RF Settlement Run will have arisen from an amendment to data and therefore falls within the scope of the Trading Disputes provisions or alternatively, the Non-Trading Disputes process could be used. This Wholesaler also considered that the drafting of the proposal may risk constraining the raising of a Dispute until after the 20 Business Days timeframe has elapsed. It suggested that the Panel should satisfy itself that this does not restrict Trading Parties current rights.

The Proposer did not agree with respondents that challenged its interpretation of the code. The Proposer highlighted that in addition to taking internal legal advice on this matter, it had sought external legal advice which the Proposer said aligned with its original interpretation. In response to concerns about the 20 Business Day timeframe could constrain raising a Dispute, the Proposer thought a delay of 20 Business Days would be insignificant when compared to current delays which can be experienced. It was also noted that this timeframe had been extended in response to comments from the Panel regarding the original proposal, which instead included a timeframe of 10 Business Days.

### **Views on whether the proposal will ensure there is an appropriate back-stop to ensure disagreements can be resolved**

The majority of respondents (13) agreed and considered that the proposed amendment would add clarity and remove ambiguity. One Wholesaler that agreed suggested that the Change Proposal would not be necessary if Trading Parties behaved correctly. The Proposer made reference to the Draft Recommendation Report which it considered evidences the need for this Change Proposal.

One Wholesaler suggested that the proposed amendment doesn't include how the Disputes Committee would reach a decision on such Disputes. This respondent suggested that it might be more appropriate to allow either party to request an Unplanned Settlement Run at their own cost. The Proposer considered this to be a potentially attractive option but suggested that others might see it as one-sided. The Proposer thought it likely that the option would likely also need to follow a similar process of establishing a basis of non-agreement, and a means of resolving any disagreement over the resulting settlement.

Two Wholesalers did not agree that the proposal provides an appropriate backstop. One did not consider that there are any code barriers that prevent a Dispute being raised to

resolve disagreements over Unplanned Settlement Runs. One Wholesaler suggested that the Proposer had not provided evidence to support this. Further, it considered that a gap in the codes is not, in itself, a reason to make a change but if the Panel thought that it was necessary to make such changes it should also consider undertaking a review of other potential code gaps where the (in)action of one Trading Party has a material effect on another.

The second Wholesaler that did not agree thought that the change does not allow Wholesalers to complete the necessary governance on data (to mitigate additional issues) prior to an Unplanned Settlement Run. This Wholesaler also suggested that if the proposed amendment is approved then the scope should be extended to cover Market Operator Disputes. In response to the concern raised by this Wholesaler regarding governance, the Proposer highlighted that the Change Proposal did not prevent or truncate a sensible process of agreeing how data should be presented following corrections.

### **Deemed rejection 20 Business Days after request**

Several respondents thought that the red line drafting provided with the consultation did not include the proposed 20 Business Day timeframe. They suggested that the red line drafting instead referred to deemed acceptance if agreement was not received within 10 Business Days<sup>2</sup>. One Wholesaler expressed concern about an approach of deemed acceptance.

CCW and 10 other respondents agreed that a 20 Business Day timeframe for responding to a request for an Unplanned Settlement Run was reasonable. CCW said that having a clear timescale also helps Retailers in their communications with customers. These respondents considered that a 20 Business Day timeframe would be sufficient for a request to be reviewed and a response provided.

One Wholesaler and one Retailer considered that a 20 Business Day timeframe was too long. The Retailer suggested that this should instead be 10 Business Days. The Wholesaler suggested that the response timeframe should be five to 10 Business Days after amendment to the relevant Data Item(s).

One Wholesaler said that it would consider the application of a Service Level Agreement to be reasonable to address the basis of the issues perceived by the Proposer. However,

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<sup>2</sup> The [consultation pack](#) included a consultation note and a red line version of the Market Terms which included the proposed 20 Business Day timeframe.

it raised concerns about submission of requests in large volumes including, if approved, using Bulk Submission Forms (CPW067).

### **Customer benefit**

12 respondents considered that customers could benefit from the proposed change. One Retailer that was in agreement said that accurate settlement allows for accurate billing which will generally benefit the customer. A Wholesaler that agreed thought that customers would benefit as the change would result in increased transparency and consistency which would help to manage customer expectations. Two Retailers said that the change could improve Retailer cash flow which they considered will ultimately benefit customers.

CCW did not have evidence of complaints which would suggest that this is an issue which requires addressing however it acknowledged that Retailers may have such evidence. CCW considers that the Customer Protection Code of Practice allows Retailers to make refunds to customers in the circumstances described as refunds are not reliant on an Unplanned Settlement Run having taken place first. The Proposer acknowledged this point, and highlighted that it does not have a policy of holding back on refunding customers pending receiving repayment from a Wholesaler. Noting that specifically where there has been deregistration it would be morally wrong to do so. The Proposer however said that it would also be improper for a Retailer to have to wait indefinitely for repayment of Wholesale Charges where prior to an Unplanned Settlement Run it would not have the means to know (within a reasonable margin) what is due to the customer.

A Wholesaler did not consider that customers would directly benefit from the change because it impacts settlement between Wholesalers and Retailers. This Wholesaler suggested that any customer related impacts should already have been addressed on a timeline not associated with this change. The Proposer thought that this view was questionable as it did not take account of the potential for double charging or bill shocks which could be avoided if an Unplanned Settlement Run is promptly agreed to.

Another Wholesaler did not consider that there would be any additional benefits to customers as a result of the change because it does not consider that there are any barriers which prevent Trading Parties from raising a Dispute. This Wholesaler suggested that the introduction of deemed refusal would drive costs for both Trading Parties and MOSL and will result in Disputes that could otherwise have been avoided. This respondent also highlighted that customer refunds are not linked to settlement and resettlement cycles and therefore did not consider that the change would benefit the end customer. The Proposer did not agree with this view.

## **Implementation and operational costs**

Most respondents thought that implementation and operational costs would be none or low.

A Wholesaler said that it didn't envisage any costs but did not consider that the change would result in additional benefits. This Wholesaler thought that inappropriate behaviours could be encouraged by the change as Trading Parties could use it as an alternative to working together to resolve matters.

Another Wholesaler said that it anticipated a need to reinforce resources analysing and handling resettlement cases and supporting disputes. The Proposer thought that additional investment of resource would be a positive outcome as its view is that there is customer and market interest in resolving the issue.

## **Implementation timeframe and timetable**

Most respondents agreed with the implementation timetable and stated that they would need no or little time to implement the change. One Wholesaler whilst suggesting that it would not require a long lead time to implement expressed concern that the new Disputes Committee and MOSL may not be ready to deal with potential issues to be raised.

The Proposer responded by stating that it is for MOSL and the Disputes Committee to express a view on whether they would be ready although their readiness does not affect the precise timing of the change given the process and lead times involved in raising a Dispute.

## **Principles and objectives**

12 respondents considered that the proposal furthers the principles and objectives for example, transparency, proportionality and efficiency.

Three respondents did not agree that the principles and objectives would be furthered. One Wholesaler said that it did not agree and that the suggested objectives and principles would be better met with a solution which avoided a Dispute. Another suggested that the proposal does not deliver against the principles of efficiency and of simplicity, cost effectiveness and security. This Wholesaler did not consider that Trading Parties are currently prohibited from raising a Dispute.

One Wholesaler said that whilst the change provides clarity it risks worsening of behaviour and therefore it struggled to assess whether the change facilitated the objectives and principles. A Retailer said that it is incumbent on Trading Parties to act

in a correct manner when the instances occur and not to object without proper reasons. In response to this concern, the Proposer suggested that it should instead encourage early resolution and implementation of the necessary Unplanned Settlement Runs. The Proposer also said that the change would put a structure around transactional decisions that might otherwise remain indeterminate.

### **Legal drafting**

13 respondents agreed that the proposed legal drafting delivers the intent of the change. One Wholesaler agreed but requested clarification on what would be accepted as a 'reasoned objection'. Another raised a number of questions about the legal drafting:

- The rationale for changing 'will' to 'shall' in section 4.13.4 of the Market Terms was unclear;
- The proposed drafting did not confirm which type of Dispute could be raised;
- The changes proposed to schedule 1 part 1 were not included in the consultation documents;
- The proposed change document did not reflect the latest version of the Change Proposal which was articulated in the change report and legal drafting. This respondent suggested that this resulted in confusion about what respondents were being asked to comment on.

The Proposer indicated that the legal drafting had been adjusted based on the Panel's requests, this was set out in the documents accompanying the Draft Recommendation Report.

### **Other comments**

One Retailer said that the market is three years old and there still appears to be a lack of maturity preventing an agreement without the need for changes to the codes.

A Wholesaler expressed concern about the process that the Change Proposal has followed suggesting this had been inadequate as the proposal had been dealt with as an urgent change. This Wholesaler suggested that there were unanswered questions, gaps and inconsistencies in the documentation provided and had concern about the truncated consultation timeframe. Its view was that because of these matters, the consultation would not solicit the required breadth or depth of views.

We note that the Panel considered this Change Proposal on two occasions and following its first deliberation the proposal was revised and a consultation was undertaken. There were 16 respondents to that consultation. We recognise that a decision on the Change

Proposal was needed promptly (by early February 2021) and therefore we agree with the process that has been followed for this Change Proposal.

## **Panel recommendation**

The Panel considered this Urgent Change Proposal at an Urgent Panel Meeting on 2 December 2020. It recommended, by unanimous decision (12 in favour and one abstention by the Panel Chair<sup>3</sup>), that the Authority approve this proposal. This recommendation has been made on the basis of improving the objectives and principles listed in section 8.1 of the Final Recommendation Report. The recommended date of implementation is five Business Days after Ofwat's decision.

The Panel agreed there is currently ambiguity in the codes regarding the ability to raise a Dispute if agreement to an Unplanned Settlement Run is withheld following the correction of Data Item(s). The Panel concluded that CPW108 would resolve this issue.

The Final Recommendation Report states that the Panel considered that the customer benefits were difficult to quantify but thought that the Change Proposal offered an indirect benefit as it would result in a more efficient and transparent market.

Some Panel Members were disappointed that it was necessary to clarify that a Dispute could be raised. The Panel's recommendation was on the principle of the change itself and not a judgement on the specific case that the Proposer had detailed in the Final Recommendation Report. The Panel emphasised that Trading Parties should work collaboratively to agree Unplanned Settlement Runs and that resorting to the deemed refusal after 20 Business Days should be the exception rather than the norm.

## **Our decision and reasons for 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 the proposal. We have concluded that the implementation of CPW108 will better facilitate the principles and objectives of the Wholesale Retail Code detailed in Schedule 1 Part 1 Objectives, Principles and Definitions, and is consistent with our statutory duties.

We do not agree that the current drafting prevents a Trading Dispute from being raised in the event that a Trading Party fails to respond to a request for an Unplanned Settlement Run after agreeing to amend one or more Data Items. However, we note

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<sup>3</sup> The Chair's practice since their appointment in September 2020 has been to abstain from Panel decisions.

that a number of Trading Parties agreed with the Proposers interpretation which evidences that the provisions would benefit from additional clarity.

We also recognise the arguments put forward by the Wholesaler that thought that the principles of efficiency and simplicity, cost effectiveness and security were not furthered. This Wholesaler considered that the drafting of the code already permits a Dispute to be raised. Approval of this Change Proposal clarifies that a Dispute is able to be raised and it also introduces a timeframe for Trading Parties to respond to a request for an Unplanned Settlement Run. The current provisions do not provide clarity around when it would be appropriate to raise a Dispute. This Change Proposal will therefore further the principles of efficiency and transparency as where a Dispute arises, it is clear that this can be raised in a timely manner which could in turn contribute to reducing the period of uncertainty around extended back-billing timeframes for customers.

We acknowledge the comments from Trading Parties that did not agree that the principles and objectives would be furthered by the Change Proposal. We agree that solutions which avoid Disputes are preferable. As outlined above, Trading Parties are already permitted to raise a Dispute and it is evident from the consultation responses that greater transparency around Disputes about agreement to Unplanned Settlement Runs will be beneficial. Therefore, approval of the Change Proposal should further the principle of transparency. We expect Trading Parties to negotiate the use of Unplanned Settlement Runs in good faith and to communicate effectively following receipt of a request. The Disputes Procedure should only be used in exceptional circumstances to avoid extended periods of back-billing uncertainty for customers.

## **Decision notice**

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

**Georgina Mills**  
**Director, Business Retail Market**