

July 2021

Wholesale Retail Code Change and Market Arrangements Code Change Proposals – CPM039 / CPW124 and CPM021 / CPW125

About this document

This document sets out Ofwat's decision to approve the proposed solution under CPM039 / CPW124 – Revisions to panel composition. The implementation date for these Change Proposals is 1 September 2021.

This document also sets out Ofwat's decision to reject the alternative solution under CPM039 / CPW124 and to reject CPM021 / CPW125.

This document is structured as follows:

Section 1 – outlines the background to these Change Proposals and their development

Section 2 – provides an overview of the key changes proposed by each of the Change Proposals. Section 2.1 sets out the proposed solution for CPM039 / CPW124, section 2.2 details the alternative solution presented by the governance sub-group under CPM039 / CPW124 and section 2.3 details the solution proposed by CPM021 / CPW125.

Section 3 – details the industry consultation, the governance sub-group's views and amendments to the proposals following consultation.

Section 4 – outlines the panel's recommendation that Ofwat approve the alternative solution proposed by the governance sub-group under CPM039 / CPW124.

Section 5 – sets out our decision to approve the proposed solution under CPM039 / CPW124 and the rationale for this.

Unless otherwise specified, the terms used in this document are those defined in the Wholesale Retail Code and the Market Arrangements Code as approved by this document. Ofwat and the Authority are used interchangeably throughout this document.

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1. Background and issue

In our '[Review of Incumbent Support for Effective Markets](#)' (project RISE) we concluded that - if the business retail market is going to deliver improved outcomes for customers, the environment and society more generally - then the market-led approach to governance needs to facilitate innovation and support real change that benefits customers, rather than focusing on minor amendments that reinforce the status quo.

We noted that the Market Operator, MOSL, was [working with the sector to identify and implement improvements to the existing model of industry-led governance](#) and strongly encouraged this work to consider how the focus on customers in decision making could be strengthened. Project RISE highlighted changes to the principles and objectives set out in the market codes as one example of how the market could sharpen its focus on the interests of end customers. It was noted as part of project RISE that we had seen some examples where companies have actively opposed or delayed initiatives aimed at improving the effectiveness of markets. In addition, in the course of our market monitoring and interaction with industry governance processes, and in particular during Covid-19, we witnessed examples of Trading Parties (both Wholesalers and Retailers) appearing to pursue commercial interests at panel and panel committee meetings despite the requirement to act independently. We encouraged that as part of its work in this space MOSL could also consider the composition of the panel and its committees.

Following project RISE, in October 2020, MOSL and the panel commissioned 'Satori Board Review' to undertake a '[Panel effectiveness review](#)'. This review highlighted that some stakeholders believed that the Panel should play a role in facilitating innovation and customer benefit. Neither of these are currently included in the principles of the WRC or the MAC. Initial outputs from the panel effectiveness review indicated that:

- “Governance should be market-led as opposed to industry-led, by encompassing wider stakeholder [including customer] voices and needs, not only those of Wholesalers and Retailers;
- A panel may act as a check and balance on Wholesaler and Retailer interests, through being informed by wider stakeholders and independent experts, where appropriate and ensuring independence and impartiality is maintained;
- There should be an increased focus on the delivery of good customer outcomes and that the customer voice should be further strengthened in delivering strategic market changes;

- The dual approach taken by the existing panel in trying to undertake technical code changes and act strategically has not worked; and
- There is a need to maintain an efficient mechanism for designing, and developing robust technical solutions for tactical market rules changes.

Consequently, it was concluded that the current panel composition and associated code provisions are unlikely to be able to support delivery against a revised purpose.

In April 2021, the panel established the [governance sub-group](#) ('the sub-group') to develop changes to the MAC and WRC, including to implement recommendations arising from the Panel Effectiveness Review. As part of this work, Ofwat raised CPM039 / CPW0124 which recommended amendments to the panel composition and structure. The sub-group also considered CPM021 / CPW125 which was proposed by Castle Water in November 2019¹.

Ofwat also proposed CPM040 and CPW121, which sought to improve the principles of the WRC and MAC by ensuring these are more focused on achieving desired outcomes and are appropriately defined, [CPM040 / CPW121](#) has now been approved.

¹ CPM021 / CPW125 was placed on hold pending the outcome of the Panel Effectiveness Review.

2. The Change Proposals²

Summarised below are the following Change Proposals:

- **Section 2.1** – The proposed solution under CPM039 / CPW124;
- **Section 2.2** – The alternative solution under CPM039 / CPW124 which was developed by the sub-group; and
- **Section 2.3** – the solution proposed by Castle Water under CPM021 / CPW125.

The summaries of the proposals provided below are the final versions which include the amendments made following consideration of the consultation responses by the respective Proposers and the sub-group. Details of the Proposers' amendments to their respective proposals in view of the consultation responses and sub-group discussions are detailed in section 3 of this document.

2.1 CPM039 / CPW124 – Proposed solution

Ofwat raised CPM039 / CPW124 to make amendments to the Panel composition. It is proposed that the current Panel is replaced by a 'Strategic Panel'³ and a Code Change Committee, with the current Panel's functions being split between these two newly created bodies. Further details are provided below.

2.1.1 Strategic Panel

Strategic Panel role: It is proposed that the current Panel will be replaced by a Strategic Panel. The focus of the Strategic Panel will be to operationalise the strategic direction (as defined by Ofwat and Defra) by prioritising areas of focus and establishing programmes of work for the sector to deliver. To enable the 'Strategic Panel' to maintain its strategic focus, such actions and programmes of work it identifies would

² The proposals and accompanying documentation are available on the [MOSL website](#).

³ It is intended that a future housekeeping Change Proposal will be raised to, amongst other relevant housekeeping changes to reflect the strategic nature of the newly formed panel, propose to amend references to from 'Panel' to 'Strategic Panel', 'Panel Chair' to 'Strategic Panel Chair', 'Panel Deputy Chair' to 'Strategic Panel Deputy Chair' and 'Panel Members' to 'Strategic Panel Members' within the code drafting. Throughout this document, 'Strategic Panel' has the meaning of 'Panel', 'Strategic Panel Chair' has the meaning of 'Panel Chair', 'Strategic Panel Deputy Chair' has the meaning of 'Panel Deputy Chair' and 'Strategic Panel Members' has the meaning of 'Panel Members' as defined in the legal drafting approved by this document.

be delegated to the Code Change Committee (see below), other committees, sub-groups or MOSL for analysis and development, as appropriate.

Composition and terms: The composition of the Strategic Panel is proposed to be as follows:

| Member | Membership type | Term | Re-appointment |
|---|--|------------------------------|-----------------------|
| One independent Chair | Voting | Up to three years | One further term |
| Ofwat representative(s) | Affiliated Member – entitled to attend and speak, but not vote | N/A | N/A |
| Market Operator representative(s) | Affiliated Member – entitled to attend and speak, but not vote | N/A | N/A |
| Defra representative(s) | Affiliated Member – entitled to attend and speak, but not vote | N/A | N/A |
| Four Trading Party Strategic Panel Members: Two Wholesaler members and two Retailer members | Voting | Up to two years ⁴ | One further term |
| One customer representative | Voting | Up to three years | One further term |
| Three independent Strategic Panel Members (one of which will act as Strategic Panel Deputy Chair) | Voting | Up to three years | One further term |

The only exception to the above composition is if there is a vacant position which cannot be filled due to a lack of suitable nominees, in which case a suitable nominee from the other industry constituency may be appointed. Alternatively, if no suitable candidates can be found from either constituency, the position may remain vacant.

Appointment: The Strategic Panel will be selected by a Panel Nominations Committee which shall be formed by the Authority and include the following members:

- A minimum of one (maximum of three) Ofwat representative(s);

⁴ Section 5.6.9 of the MAC provides for extension of terms of appointment where a written request has been received from the Authority.

- A minimum of one (maximum of three) MOSL representative(s);
- One Defra representative (optional); and
- Strategic Panel Chair (optional).

Members will be appointed to the Strategic Panel following a selection process ran by the Panel Nominations Committee. The Panel Nominations Committee will ensure transparency around the selection criteria and the selection process.

For each year in which there is to be an appointment of a Trading Party Strategic Panel Member, Trading Parties will be invited to nominate a candidate for appointment by giving notice to the Panel Secretariat. The Panel Nominations Committee will review the nominations and make a decision about which candidates will be progressed through to a selection process. The selection process may include, for example, interviews following which the Panel Nominations Committee will make a decision about which candidates will be appointed as Trading Party Strategic Panel Members. Once the Panel Nominations Committee has reached its decision regarding which Trading Party Strategic Panel Members to appoint, it will circulate its decision to Trading Parties and relevant stakeholders.

Candidates for the Independent Strategic Panel Member positions will be sought by the Market Operator using a recruitment search company. The Panel Nominations Committee will then undertake a selection process and appoint the candidates that hold the requisite skills and experience.

The Customer Representative Strategic Panel Member will be a Qualified individual nominated by CCW and appointed by the Strategic Panel Chair.

The Panel Nominations Committee will lead the process for appointing a Strategic Panel Chair. It will make a recommendation regarding the appointment to the Strategic Panel who will approve the appointment.

Observers: Unless the agenda item is held in a closed session, observers are able to attend Strategic Panel meetings although may only speak where invited to do so by the Strategic Panel Chair.

Meeting frequency: It is proposed that the Strategic Panel will meet quarterly with the ability to meet more frequently or on an urgent basis if required.

Quorum and voting: Quorum has been prescribed in the proposal as a minimum of the Strategic Panel Chair (or the Strategic Panel Deputy Chair if the Strategic Panel Chair is unavailable), two Trading Party voting members and two other voting members (made

up of either the independent members or the customer representative) or any of their alternates entitled to be present. Votes shall be decided by a simple majority of those in attendance and entitled to vote. The Strategic Panel Chair can cast a tiebreaker vote in instances where there is a deadlock.

Engagement: It is proposed that there is a codified obligation for the Strategic Panel to engage with the wider market and other stakeholders, although the method and scope of engagement are not codified to provide the ‘Strategic Panel’ with discretion as to the most efficient and effective engagement method for the matter it is considering.

Delegation: The Strategic Panel may delegate responsibilities to committees for consideration of specified matters. The Strategic Panel will be responsible for the composition and setting the terms of reference for the various committees. The Strategic Panel will be responsible for oversight of the committees that it has delegated authority to. The committees and industry groups will provide reports to the Strategic Panel with respect to its various areas of work in line with its quarterly meetings.

2.1.2 Code Change Committee

Code Change Committee role: The Strategic Panel will establish the Code Change Committee to whom it will delegate responsibility for reviewing and assessing Change Proposals. The Strategic Panel will provide strategic direction in relation to progression of Change Proposals, although it will be the responsibility of the Code Change Committee to make recommendations to the Authority on behalf of the Strategic Panel.

A Change Proposal that has, or potentially has, an impact on, or association with, a strategic programme of work as set out by the Strategic Panel may be referred to the Strategic Panel for its view on whether the proposal should be encompassed into an existing programme or action, or whether it merits its own distinct work programme. For any Change Proposal which is encompassed into a strategic programme in this manner, reports on progress will be provided to the Strategic Panel. However, the assessment and recommendation of the Change Proposal to Ofwat will remain the responsibility of the Code Change Committee.

The Code Change Committee will delegate to the Market Operator responsibility for making recommendations in relation to ‘housekeeping and non-substantive’ changes directly to the Authority on behalf of the Code Change Committee.

The Code Change Committee will provide a report to the Strategic Panel in line with its quarterly meetings which will outline the Change Proposals that have been triaged and assessed, including its determinations and recommendations. With this report the Strategic Panel will be able to review the effectiveness of the Code Change Committee, hold it to account and rectify any issues that it identifies.

Composition and term of appointment:

| Member | Membership type |
|---|--|
| One independent Chair | Voting |
| Ofwat representative | Affiliated – entitled to attend and speak but not vote |
| Market Operator representative | Affiliated – entitled to attend and speak but not vote |
| Four Trading Party Members: Two Wholesaler Members and two Retailer Members | Voting |
| One customer representative | Voting |
| One alternative customer body | Voting |
| Two independent Members | Voting |

All members of the Code Change Committee will be appointed for a fixed term not exceeding two years and shall be eligible for re-appointment for one further term following expiry of their initial term.

Observers: Unless the agenda item is held in a closed session, Observers are able to attend Code Change Committee meetings although may only speak where invited to do so by the Code Change Committee Chair.

Quorum and voting: Quorum will be a minimum of the Code Change Committee Chair (if unavailable the deputy Code Change Committee Chair), two Trading Party members (one Wholesaler, one Retailer) and two other members (either independent and/or the customer representative and/or the alternative customer body). Any vote will be decided by a simple majority, with the Code Change Committee Chair being entitled to cast a tiebreaker vote in the event of a deadlock.

Appointment: Members of the Code Change Committee will be appointed following a selection process undertaken by the Strategic Panel. In relation to Trading Party Code Change Committee Members, Trading Parties will be invited to nominate a candidate. The Code Change Committee will consider the nominations and decide which of these will progress through to the selection process. Once the Code Change Committee has

made its decision in relation to these appointments, it will circulate its decision to Trading Parties and relevant market stakeholders.

2.1.3 Transitional arrangements

To implement CPM039 / CPW124, transitional arrangements would be required. It is proposed that the current Panel's tenure is extended for a maximum period of up to six months. The rationale for this is that there needs to be sufficient time for the Panel Nominations Committee to be formed and for it to appoint the Strategic Panel Chair followed by appointment of the Strategic Panel, which will subsequently be required to appoint the Code Change Committee. The Strategic Panel will also require time once appointed to agree the terms of reference, set appointment criteria and invite nominations prior to appointing the Code Change Committee. It is proposed that the existing Panel will continue with its current role until such time that the inaugural Code Change Committee has been appointed, at which point it will be dissolved.

2.2 CPM039 / CPW124 – Sub-group alternative proposal

The sub-group agreed with the majority of the proposed solution for CPM039 / CPW124, but decided to recommend an alternative to the proposed solution. The alternative solution mirrors the proposed solution in many areas, except in the following:

Composition of the Panel Nominations Committee: The sub-group proposed an alternative composition for the Panel Nominations Committee which is as follows:

- One representative from Ofwat;
- One representative from Defra;
- The Strategic Panel Chair (or Deputy Strategic Panel Chair); and
- Two Strategic Panel Members.

Different composition arrangements have been proposed for appointment of the first Strategic Panel as the Strategic Panel Chair and the Strategic Panel Members who would ultimately sit on the Panel Nominations Committee would not yet have been appointed. It is therefore proposed that for the initial appointments, the Strategic Panel Chair will be replaced with the current panel chair and the two Strategic Panel Members will be replaced by two MOSL Board Members.

This alternative proposal has been made by the sub-group as it considers that this delivers Trading Party and industry representation on the Panel Nominations Committee, which in its view is missing from the proposed solution.

Composition of the Strategic Panel: The sub-group has also recommended an alternative to the proposed contingency provision which has been incorporated to account for circumstances in which there is an insufficient number of Strategic Panel Trading Party Members appointed. The alternative proposal put forward by the sub-group suggests that this should be broader, and instead provide that any individual (that need not be a Trading Party) with the ‘relevant skillset and experience’ can be appointed to a vacant Trading Party Strategic Panel Member seat if there is a vacant seat because no suitable candidate has been nominated by Trading Parties.

Transition arrangements: The sub-group has proposed that the Transitional Period, during which the appointment of the Strategic Panel and subsequently the Code Change Committee will take place, will be three months rather than a maximum of six months (as per the proposed solution).

2.3 CPM021 / CPW125 – Castle Water proposal

Castle Water raised CPM021 / CPW125 in November 2019. The current panel decided to place the development of these proposals on hold due to project RISE and the governance review. The Final Report highlights that the proposals are seeking to facilitate wider participation by Trading Parties in Panel proceedings. The Proposer considers that the current Panel does not benefit from the representation, views, and expertise of the broader membership of the market. Including, in part, because only Panel Members are entitled to speak and vote at panel meetings.

Similarly to the solutions proposed under CPM039 / CPW124, it is proposed that the current Panel is divided into two bodies; a code review panel and a code change panel. Further information regarding their respective roles is provided below.

2.3.1 Code review panel

Code review panel role: The Final Report details that the code review panel would be expected to operationalise the strategy required for the market to deliver strategic outcomes defined by Ofwat and Defra. It would develop the priorities, areas of focus and actions or programmes required for the operation, maintenance, and development

of the codes in line with the market strategy and for the benefit of Non-Household Customers.

The Final Report states that the code review panel would be responsible for reviewing market performance and Disputes via the Market Performance Committee and Disputes Committees respectively, along with any other ad-hoc committees required. It would also set the priorities and framework for each of the committees. The code review panel would not be responsible for the detailed development of code changes – instead, it would delegate this responsibility to the code change panel. However, it is stated that it could oversee their development and set priorities and parameters, such as scope and research required.

Composition: The composition of the code review panel would be as follows:

| Voting members | Affiliated Members |
|--|-----------------------------------|
| One independent chair | Defra representative(s) |
| Two Wholesaler Members | Ofwat representative(s) |
| Two Retailer Members | Market Operator representative(s) |
| One customer representative | |
| Three independent Members (one economic expert, one regulatory expert and one customer expert) | |

Quorum and voting: It is proposed that quorum would be a minimum of:

- The code review panel chair (or the code review panel deputy chair);
- One Wholesaler member;
- One Retailer member; and
- Two independent members.

Any vote will be decided by a simple majority. It should be noted that the code review panel chair would only be able to vote in the event of a deadlock.

Observers: It is proposed that observers may attend and speak at all meetings of the code review panel, but will not be entitled to vote

Engagement: It is proposed that a Trading Party forum should be established to replace the current Strategic User Forum. To ensure wider Trading Party engagement, it is proposed that an obligation is introduced for the code review panel to engage with the

newly formed Trading Party Forum along with the views of other stakeholders. Engagement would need to be conducted in line with a Trading Party forum engagement policy which would be developed by the code review panel once it had been appointed. All Trading Parties would be entitled to have a membership of the Trading Party forum and would be able to attend, speak and where relevant vote at this forum. It is also proposed that the Trading Party forum would be able to provide direct input to the code review panel in line with the engagement policy.

Appointment: The Wholesaler and Retailer members of the code review panel would be appointed by election following nominations from Trading Parties. The independent and customer members would be appointed by selection following an open recruitment process.

2.3.2 Code change panel

Code change panel role: The Final Report details that the code change panel would triage, assess, and make recommendations on Change Proposals to Ofwat (unless consideration of the Change Proposal was reserved to the code review panel.) It is also stated in the Final Report that the code change panel would decide whether Change Proposals fit within the market strategy; and their relative contribution to achieving the overall market purpose and objectives. It would set the assessment process to be followed whilst operating within the parameters of the code review panel engagement policy.

Composition: The composition of the code change panel would be as follows:

| Voting members | Affiliated Members |
|---|-----------------------------------|
| One independent chair | Defra representative(s) |
| Two Wholesaler Members | Ofwat representative(s) |
| Two Retailer Members | Market Operator representative(s) |
| One customer representative | |
| Three independent members, to include: <ul style="list-style-type: none"> • One economic expert; • One regulatory expert; and • One customer expert. | |

Quorum and voting: The quorum and voting requirements would mirror those of the code review panel, as detailed above. Any vote will be decided by a simple majority.

Similar to the code review panel, the code change panel chair would only be able to vote in the event of a deadlock.

Engagement: The engagement requirements would mirror those of the code review panel, as detailed above.

Appointment: The Wholesaler and Retailer members of the code review panel would be appointed by election following nominations from Trading Parties. The code review panel would appoint the code change panel chair following an open recruitment process. It is proposed that the code change panel chair shall be appointed by the code review panel. The code change panel chair would appoint the independent and customer members.

2.3.3 Transitional arrangements

Until the code review panel and the code change panel have appointed their respective chairs, it is proposed that the current panel chair will undertake these roles. However, the appointment of both chairs would be required to take place no later than three months after the election and appointment of the other members.

3. Industry consultation and assessment

3.1 Engagement

The Final Report details the engagement with industry and relevant stakeholders regarding the proposed changes through various forums to include, for example, the Strategic User Forum and the UK Water Retail Council. A number of ‘quick polls’ were also completed via channels such as social media and as part of an open webinar. The Final Report indicates that the majority of respondents to these polls support a strategic role for the Panel. Respondents are reported to have been split with regard to the appointment mechanism, election vs selection.

3.2 Consultation, views of the sub-group and amendments to the proposals following consultation

A joint consultation was completed for CPM039 / CPW124 and CPM021 / CPW125. The consultation opened on 24 May 2021 and closed on 18 June 2021. There were 35 respondents to the consultation, from 21 Retailers, 12 Wholesalers and two other respondents (CCW and the Major Energy Users Council).

A detailed summary of the consultation responses has been provided in the Final Report, along with a document setting out the verbatim responses. A summary of the key themes has been provided below and include where relevant the sub-group’s views and amendments made by the respective Proposer’s to their solutions in view of the feedback received.

Composition

An element of the proposals which divided opinion was the proposed composition of the respective panels/committees. Some suggested that these groups should be more heavily weighted with industry members, whereas others considered that a more balanced representation would better achieve the transition to a more market-led rather than industry-led and customer focussed approach to governance. 21 out of the 35 respondents were in favour of the compositions proposed under CPM039 / CPW0124, with responses suggesting that the composition and appointment mechanisms under these proposals would result in a better balance of industry / non-industry members and would strengthen the customer voice further. This in turn was said to have potential to reduce the risk of vested interests stifling implementation of positive change, for example changes that facilitate innovation. Some respondents however

considered that the composition should be more heavily weighted towards industry members. Some respondents recommended alternative compositions. One respondent said that they would want to see two customer representatives and two independents for both the Strategic Panel as well as the Code Change Committee.

A respondent did not support the proposed composition under CPM039 / CPW124 because the representation of four Trading Parties of ‘whatsoever nature’ as Wholesalers and Retailers are not well placed to understand each other’s perspectives, this respondent preferred the composition arrangements proposed by CPM021 / CPW125.

Some respondents suggested that there should be separate representation for ‘associated’ and ‘unassociated’ Retailers. Although other respondents suggested that this distinction is no longer necessary. It was also suggested that there should be separate representation for self-suppliers and NAVs.

Sub-group’s view

The sub-group noted that several respondents were concerned with the potential for a lack of representation for either Wholesaler / Retailer constituency on the Strategic Panel, as constituency was not initially prescribed for the CPM039 / CPW121 solution. The Final Report details that the sub-group felt that Retailers and Wholesalers have very different experience and as such, it should be ensured that both are represented on the Strategic Panel. The concerns relating to prescribed constituency did not apply to CPM021 / CPW125 as that solution prescribed equal Wholesaler and Retailer representation.

With regard to the proposed composition of the Strategic Panel, the Sub-Group was in favour of the CPM039 / CPW124 model which has an even split of industry to non-industry members. Overall, they believed this model provided the best balance in terms of expertise and independence.

For the solution proposed under CPM039 / CPW124, the sub-group considered whether one or two customer representatives were required on the Code Change Committee. It was queried what benefit an additional customer member could add to the technical development of a Change Proposal. However, it was recognised that whilst technical expertise is needed on this Committee, it is the end customer that will be impacted by these changes and as such, the addition of a further customer member will help to bring practical insight to the Code Change Committee’s deliberations. The sub-group concluded that the composition proposed through CPM039 / CPW124 was optimal as the original solution proposed under CPM021 / CPW125 proposed memberships which were weighted towards Trading Party representation. As an additional point, the sub-group noted that it is

important to ensure that the customer body appointed be representative of all customers. A recommendation was made that the Strategic Panel develop the ways in which it engages with customers to ensure effective input into the consideration of its work programmes.

In response to the comments relating to separate representation for ‘associated’ and ‘unassociated’ Retailers, the sub-group noted that they may have different customer bases however, whilst there are differences in experience between the two it was considered that not including separate representation would not translate to a lack of representation. However, the sub-group recommended that could be kept under review to ensure there is sufficient representation of both areas.

With regard to representation of self-supply and NAV constituencies, the Sub-Group felt that whilst there are differences in these business models, they can still be defined as Retailer and Wholesaler members and can therefore put themselves forward for these seats if they wished to do so (this is no different from the current Panel).

Amendments to the proposed solutions following consultation

CPM039 / CPW124 – The Proposer amended the proposed solution to account for concerns raised by Trading Parties that there could be a lack of representation for either the Wholesaler or Retailer constituency if these were not prescribed to ensure equal representation on both the Strategic Panel and the Code Change Committee. The Proposer agreed to amend the proposal so that it is prescribed that there would be two Wholesaler and two Retailer members.

To account for concerns that were raised about what would happen if the positions cannot be filled, the Proposer also introduced a provision that in the event of insufficient nominees meeting the required criteria, the Panel Nominations Committee could appoint a member from an alternative constituency if required, or decide not to appoint. The sub-group proposed an alternative contingency provision which would enable any Qualified individual to be appointed to vacant Trading Party seats.

CPM021 / CPW125 – The Proposer amended its solution to remove two Trading Party members from the code review panel and prescribe that the four remaining positions should be filled by two Wholesaler and two Retailer members.

The Proposer also made amendments to the proposed composition of the code change panel. It proposed reduction of the number of Trading Party members from six to four and for the membership to be prescribed as two Wholesalers and two Retailers. It also increased the number of customer representatives from one to two and proposed addition of two independent members. The amended proposal included that the customer

representatives would be eligible to serve on both the code change panel and the code review panel.

Following feedback from the sub-group the Proposer also amended the solution to require the chair of the code review panel and code change panel to be two different individuals. It had previously been proposed that these roles could be undertaken by the same person.

Appointment mechanism

In relation to CPM021 / CPW125, there was divided opinion about whether the members of the code review panel and the code change panel should be elected rather than selected. Some respondents favoured a selection process (as proposed by CPM039 / CPW124) because this would help to ensure those with the requisite skills and experience were appointed. Whereas others preferred the election solution presented under CPM021 / CPW125 because it would enable Trading Parties to vote for their preferred candidate to represent their constituency. Some respondents suggested potential hybrid solutions to the appointment mechanisms for example, a shortlisting process by selection followed by an election.

Sub-group's view

A hybrid approach was suggested which involved shortlisting followed by election, which could be more suitable for the Code Change Committee and could take into account the concerns raised that industry should be involved with the selection of their representatives on the Panel. This suggestion did not receive majority support from the sub-group however, with most members in favour of keeping the mechanism proposed by CPM039 / CPW124.

The overall opinion of the sub-group was that due to the knowledge and skillset required for the Strategic Panel, selection was the most appropriate mechanism. It therefore favoured CPM039 / CPW124 over CPM021 / CPW125. The sub-group believed that for any appointment process (election under CPM021 / CPW125 or selection under CPM039 / CPW124) to work optimally and to have industry support, it is essential that market participants feel enfranchised in the process. To achieve this, the sub-group recommended that the CPM039 / CPW124 solution was adapted to include Trading Party representatives on the Panel Nominations Committee responsible for selecting members of the Strategic Panel.

In contrast to the proposed solution, the sub-group felt that the representation of Trading Parties was best catered for by the inclusion of industry Strategic Panel Members on the

Panel Nominations Committee as opposed to MOSL. The sub-group felt that MOSL in its role as Market Operator, and therefore an organisation that functions on behalf of Trading Parties, was not appropriate to input into the selection and appointment of Strategic Panel Members.

In the case of the inaugural appointment of the Strategic Panel, where Strategic Panel Members are not yet appointed, the Sub-Group felt that Trading Party representation is best provided by individuals that have already been elected by the market and have the industry's confidence. As such, the recommendation of the sub-group to utilise MOSL Board members in this situation was seen to remove the need to design and implement a new process solely for the transitional arrangements.

Amendments to the proposed solutions following consultation

CPM039 / CPW124 – The proposer did not amend the solution to include Trading Party members on the Panel Nominations Committee and retained the proposed composition of this committee to include MOSL alongside Ofwat, Defra and the Strategic Panel Chair. The proposed composition was retained because it is intended for the Panel Nominations committee to be as independent and impartial as possible. The sub-group did not agree with the proposed composition of the Panel Nominations Committee and has therefore raised the alternative solution under CPM039 / CPW124 such that there would be Trading Party representation on the committee. The solution is detailed in section 2.2 above.

CPM021 / CPW125 – The Proposer retained the proposal for appointments to be made by election. It considered that the codes are intended to balance the interests of Trading Parties, customers, and the market and given a balanced Panel composition and independence, the Proposer thought that not allowing Trading Parties to elect industry members seems prejudicial to these aims. However, to take account of the feedback received concerning the election process the Proposer amended the solution so that only Retailers can vote for Retailer nominees and Wholesalers for Wholesaler nominees.

Improvement to the current arrangements

There was general agreement that both of the proposals improved against the current arrangements and there was clear support for the proposal included in both solutions to split the strategy and code change assessment functions across two different bodies. The majority of respondents favoured the solution proposed by CPM039 / CPW124 over CPM021 / CPW125. Some respondents also suggested a hybrid approach whereby there was increased Trading Party representation on the Strategic Panel and the Code Change Committee.

There was also general support from consultation respondents for there to be delegated responsibility to MOSL for progressing and making recommendations to Ofwat in relation to ‘housekeeping and non-substantive’ Change Proposals.

Sub-group’s view

The majority of the sub-group favoured the solution proposed by CPM039 / CPW124 over CPM021 / CPW125. However, the sub-group did not agree with all elements of the CPM039 / CPW124 proposal and developed an alternative solution to address its concerns. The alternative solution is detailed above in section 2.2 of this document.

Customer outcomes

Most respondents considered that the proposals would deliver improved customer outcomes. Improved outcomes that respondents considered could be achieved through the proposals included quicker decision making and improved focus on key market issues through the introduction of a Strategic Panel. One respondent noted a risk that governance could be changed in a way that does not benefit customers and adds additional burden or bureaucracy to the market. Others suggested that the proposals could improve customer outcomes but noted that ongoing monitoring and assessment of outputs against defined outcomes would be beneficial. CCW thought that customer representative members should represent all customers rather than a narrow sub-set of customers.

Sub-group’s view

The sub-group members agreed that the customer representative and alternative customer body appointed should represent all customers. The sub-group favoured the solution proposed by CPM039 / CPW124 over CPM021 / CPW125. A recommendation was however made that the Strategic Panel should develop the ways in which it engages with customers to ensure effective input into the consideration of its work programmes.

Engagement and transparency of the Panel

When asked whether the proposals would increase industry engagement there was divided opinion, although the importance of engagement and collaboration was stressed by many respondents. Some respondents expressed concern regarding the transparency and engagement of the Strategic Panel.

Whilst some considered that the Trading Party forum proposed by CPM021 / CPW125 had the potential to increase engagement, others expressed concern that this group may only represent Trading Parties that had the resource and time to actively engage. A respondent highlighted that the ‘open forum’ approach proposed by the CPM021 / CPW125 solution could result in logistical challenges which would make it difficult to manage. It was also noted by a respondent that engagement with this group would need to be balanced against engagement with other stakeholders.

It was suggested by a respondent that more could be done to improve engagement through existing channels. Although one respondent stated that they did not consider the current processes lacked industry engagement and another did not consider that the proposed changes would significantly alter engagement with the Panel process.

Some consultation respondents raised concerns relating to transparency and engagement of the Strategic Panel. A respondent who favoured the solution proposed by CPM021 / CPW125 noted that speaking rights at the Panel would provide a further vehicle for Trading Party influence.

Sub-group’s view

The sub-group discussed the extent to which engagement obligations should be codified and were in favour of engagement being prescribed but not necessarily detailed in the codes. The sub-group thought that consideration could be given to the creation of an engagement policy or including engagement in the terms of reference.

The sub-group noted the concern raised by some consultation responses around transparency and engagement of the Panels proposed by the solutions, including the comments made with regard to observers being able to speak at meetings. The sub-group discussed the role of observers at Panel meetings and the majority preferred the solution proposed under CPM039 / CPW124. It was deemed not appropriate to permit open and public input into Strategic Panel Meetings. The Final Report also details that the sub-group recommended that the provisions for observers at Strategic Panel Meetings should be reviewed to ensure that observers are allowed to make substantive points without constraint as a result of overly restrictive protocols. The sub-group recognised however that there is a need for balance in this area, with protocols that ensure efficient meeting management whilst allowing for the appropriate participation of observers. This evolution would be to the betterment of the Strategic Panel’s discussions and considerations and would likely deliver improved market outcomes.

Amendments to the proposed solutions following consultation

CPM039 / CPW124 – The proposer introduced drafting to the MAC which places an obligation on the Strategic Panel to engage stakeholders. The Proposer did not wish to prescribe how or with whom the Strategic Panel engages however, as the Proposer considered that this needed to remain flexible and at the discretion of the Strategic Panel itself.

CPM021 / CPW125 – The Proposer amended the obligation for the code review panel to consider feedback in relation to the Trading Party forum. The amendment included that there is instead an obligation on the panel to engage Trading Parties and stakeholders in line with the ‘engagement policy’ and to take due account of the views obtained rather than an obligation to engage with the Trading Party forum.

3.3 MOSL Board view

The MOSL Board considers the proposed solutions build on the principles of good governance and provide opportunities to prioritise action to address strategic challenges. In addition, the MOSL Board considered that the proposals have the potential to reduce costs when compared to the current arrangements and support the involvement of both industry and customer voices in decision making. The MOSL Board also thought that the proposals emphasise the need for transparency and engagement with all stakeholders.

The MOSL Board noted that while the solutions proposed under CPM021 / CPW125 and CPM039 / CPW124 have many similarities, on balance, it may be that a selection process, based on clearly prescribed expectations, would provide the best opportunity to ensure that any Panel or committee has the appropriate skills, knowledge and competencies among its membership (as proposed in CPM039 / CPW124).

3.4 Additional sub-group recommendations

In addition to the views of the sub-group detailed above, the Final Report details that during the course of its meetings, the following additional points were raised by the Sub-Group for future consideration:

- Early engagement with Ofwat on Change Proposals would create a more efficient process;

- The Strategic Panel should produce an ‘Engagement Policy’ to outline the way in methods of engagement and how feedback will be considered when setting strategic priorities;
- The Strategic Panel should review the composition and membership of its Committees early on to ensure they are optimally set up to deliver against the market’s strategic aims;
- A budget should be established for the Strategic Panel which allows it to bring in additional expertise as is required;
- A review of the provisions relating to who can raise Change Proposals should be undertaken as broadening this could increase the level of innovation and deliver improved outcomes.
- Reviews of Strategic Panel activities and post implementation reviews of Change Proposals should be introduced to measure improvements; and
- The Strategic Panel should have a program of work or a ‘business plan’ (published and consulted on) setting out its priorities for an upcoming period.

4. Panel recommendation

The panel⁵ considered these proposals at its meeting on 8 July 2021. It recommended that the Authority approve the alternative solution proposed by the sub-group under CPM039 / CPW0124 and reject the proposed solution. 11 out of 13 panel members considered that the alternative solution was better than the proposed solution. Two panel members did not agree that the alternative solution was better than the proposed solution.

Considering CPM021 / CPW125 separately, the panel also unanimously agreed that this improved upon the current arrangements and therefore should be recommended to Ofwat for approval.

12 out of 13 panel members preferred the alternative solution proposed by CPM039 / CPM124 over CPM021 / CPW125.

The recommended date of implementation for these proposals is 1 September 2021.

These recommendations have been made on the basis of improving the principles of efficiency and proportionality.

Panel deliberations

The panel members that favoured CPM039 / CPM124 over CPM021 / CPW125 preferred the proposal of a selection process to appoint members to the Strategic Panel. The Final Report states that it was considered that the selection mechanism would ensure a focus on obtaining the right competencies and skills. It was highlighted by one Panel member that there can often be a lack of information available to vote for candidates with the relevant skills and experience where an election process is undertaken. This panel member considered that the selection process proposed by CPM039 / CPW124 would more likely deliver candidates with the requisite skills and experience, whilst also being robust and transparent.

The panel discussed the focus on engagement in CPM021 / CPW125. A panel member questioned whether the proposed Trading Party forum would address the issues with engagement. Other panel members thought that engagement obligations should not

⁵ Use of 'panel' and 'panel member' in section 4 of this document refers to 'Panel' and 'Panel Member' respectively as defined by the MAC prior to implementation of CPM039 / CPW124.

be set out in the code but rather that they should allow for a more flexible approach to engagement. The panel member that expressed preference for CPM021 / CPW125 did so because they considered that Trading Party input and engagement is paramount to the success of the proposed arrangements. This panel member also expressed a preference for the shorter transitional arrangements proposed by CPM021 / CPW125.

The majority of panel members considered that the alternative solution was better than the proposed solution for CPM039 / CPW124 and should be recommended to Ofwat for implementation. Those that preferred the alternative solution did so because they considered that it better addressed one of the key themes that emerged through the consultation responses; that Trading Party engagement and participation is key.

The alternative solution was thought by the majority of panel members to better ensure that there would be Trading Party representation on the Panel Nominations Committee. The Final Report indicates that the panel considered that industry representation in appointments to the Strategic Panel would strengthen the collaborative nature of the proposed arrangements and ensure that Trading Parties would feel enfranchised. The Final Report details that one panel member challenged whether the alternative solution was viable as it is not known whether MOSL Board members would be willing to sit on the Panel Nominations Committee. MOSL highlighted that there could be a potential conflict of interest should a member of the MOSL Board be required to make an appointment decision for a candidate from their own organisation. A panel member disagreed with this concern though because there is a requirement for members of the Panel Nominations Committee to remain impartial.

The Final Report highlights that there was a discussion regarding the contingency provision proposed by the alternative solution which would allow for the appointment of any member to a vacant industry seat on the Strategic Panel or Code Change Committee. It was considered that there would be a risk that the ratio of industry to non-industry members could become unbalanced in favour of non-industry, altering the balance that the change sought to achieve. Panel members noted that whilst this situation was a possibility, it was unlikely to arise due to the calibre of expertise within the industry.

The two panel members that did not agree the alternative solution was better than the proposed solution thought that MOSL should be a member of the Panel Nominations Committee. Both members expressed the view that MOSL would provide experience and knowledge gained from working closely with all Trading Parties and as such it was able to represent industry well whilst remaining impartial.

5. 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 proposed solution under CPM039 / CPW124. We have decided to reject the alternative solution proposed by CPM039 / CPW124 and CPM021 / CPW125.

We have concluded that the implementation of the proposed solution under CPM039 / CPW124 will better facilitate the Principles and Objectives of the WRC Schedule 1 Part 1 Objectives, Principles and Definitions and the Principles of the MAC detailed in Schedule 1 MAC, Principles and Definitions, and that implementation of the proposed solution under CPM039 / CPW124 is consistent with our statutory duties. We have set out below the rationale for our decision against the relevant Principles and Objectives of the MAC and WRC.

Composition

We consider that the proposed solution under CPM039 / CPW124 more effectively promotes the principle of customer participation than CPM021 / CPW125. One of the reasons for this is the differences in the Strategic Panel composition and the greater representation of non-Trading Party voices on the Strategic Panel and Code Change Committee proposed by CPM039 / CPW124. We consider that the increased customer representation, along with the independent members, will contribute to an improved focus on improved customer outcomes as there will be a greater focus on end customers in the discussions and in the decision making process. As CPM021 / CPW125 is weighted towards greater industry representation, the customer voice would not be as strong and therefore, we do not consider that proposal would be able to contribute to improving customer outcomes in the same way that CPM039 / CPW124 would.

We recognise that the solutions which have been proposed all have the potential to deliver against the principle of efficiency, not least because they are broadly aligned with regard to the majority of the recommendations within them. However, it is our view that the proposed solution under CPM039 / CPW124 has the potential to deliver greater benefits, and we set out our rationale for this below.

The sub-group's alternative proposal recommended a different contingency provision to be used where sufficient Trading Party members cannot be appointed. The proposed solution provides that a vacant position could be filled by a suitable nominee from the other industry constituency, or the seat may remain vacant. However, the alternative solution includes that this position could be filled by any alternative person with the

‘relevant skillset and experience’. We consider that the proposed solution achieves more equitable outcomes as it seeks to avoid diluting the industry representation further, where possible.

Our view is that the amended structure, which divides the functions of the current Panel, will promote the principle of efficiency because at present the Panel does not have sufficient time, resource or the required combination of skills and experience to dedicate to considering the strategic priorities and direction for the market. Creation of the Strategic Panel will ensure that there is a body that is focused on achieving strategic outcomes, which will in turn provide the requisite direction to its committees and sub-groups. The provision of strategic direction will more efficiently drive improved outcomes for customers through improvements to the market.

A dedicated committee to assess and progress Change Proposals should also assist in creating a more efficient change process. The Code Change Committee will be guided by the Strategic Panel with regard to strategic priorities. Effective prioritisation of Change Proposals, assessed against the strategic priorities, is likely to ensure a sharper focus on the changes that will deliver the biggest benefits for customers.

Further, the addition of provisions which enable MOSL to make recommendations directly to Ofwat in relation to housekeeping and ‘non-substantive’ changes should contribute to these types of amendment being progressed more efficiently.

Appointment mechanism

Our view is that the proposal for members of the Strategic Panel and the Code Change Committee to be selected rather than elected will, in the longer term, result in the most effective and efficient functioning of these groups. We recognise that the proposed solution under CPM021 / CPW125 could contribute to appointments being made in a shorter timeframe as elections could take less time than a selection process. However, a selection process is more likely to result in the appointment of candidates with the requisite skills and experience to add the most value, as well as providing an opportunity to ensure there is a suitable mix of perspectives which should contribute to the Strategic Panel and Code Change Committee functioning as effectively as possible. We therefore consider that this will contribute to a stronger strategic focus, more efficient prioritisation and decision making in the long term once the Strategic Panel and the Code Change Committee have been constituted.

We acknowledge the alternative solution presented by the sub-group to CPM039 / CPW124. The sub-group did not consider that MOSL should sit on the Panel Nominations Committee because MOSL is an organisation that functions on behalf of

Trading Parties. The sub-group instead recommended there should be two Trading Party representatives from the MOSL Board, which going forward would be replaced by two Trading Party Strategic Panel Members. However, the solution under CPM039 / CPW124 proposes a Panel Nominations Committee which is intended to be as independent and impartial as possible. MOSL forming part of this committee enables a level of industry representation, although with a wider perspective than that of individual Trading Parties. One of the overarching aims of this review of governance is to ensure the governance framework is more evenly balanced, customer focussed and mitigates the potential for commercial interests to be pursued. While there are requirements for industry members to act impartially, as set out in the opening to this decision, we have seen evidence that this is not always the case. We therefore consider our decision in this regard to be consistent with the overarching aim to strengthen the customer voice in decision making.

We also note that there is potential for conflicts of interest to arise should individual Trading Parties form part of the Panel Nominations Committee. Maintaining as much independence as possible on the Panel Nominations Committee is likely to contribute to a more effective and efficient appointment process and this will be supported by transparent selection criteria and communication of appointments to Trading Parties.

Engagement

We consider that the proposed solution under CPM039 / CPW124 better furthers the principle of efficiency in relation to engagement. CPM021 / CPW125 proposed reforming the current Strategic User Forum to form a Trading Party forum with this forum feeding directly into the code review panel which would be required to consider the forum's views in line with an engagement policy. Our view is that the proposed solution presented by CPM039 / CPW124 promotes more efficient and effective engagement. The CPM039 / CPW124 solution provides a requirement that the Strategic Panel will engage, however, the Strategic Panel is provided with the requisite flexibility to decide how best to engage, and with whom. We consider this to better promote efficiency as the Strategic Panel will not be restricted by prescribed processes for engagement activities. We also fully expect the Strategic Panel to engage with a broader set of stakeholders, beyond Trading Parties, including stakeholders from outside of the water sector, and we think that prescribing detailed engagement could potentially restrict the Strategic Panel from engaging with these broader stakeholders.

Further, we note that some consultation respondents cited resource implications which could impact the effectiveness of the proposed Trading Party forum as smaller Trading Parties may not have the resources to engage. In addition, this forum would not include a wider range of stakeholders, including broader customer representation, meaning

that separate consultation would be required with customer representatives to ensure that customer views are considered.

We also think that the solution proposed by CPM039 / CPW124 has the potential to better further the principle of efficiency than CPM021 / CPW125 because of the provisions relating to observers at meetings. CPM021 / CPW125 seeks to enable observers to attend meetings and to speak freely, whilst CPM039 / CPW124 prescribes that observers would be able to attend but only speak where invited to do so by the chair. The solution proposed by CPM021 / CPW125 could result in meetings of the code review panel and the code change panel being less efficient because there could be a large number of observers that would like to speak, which could extend the time required to deliberate and could compromise the code review panel and the code change panels' ability to focus on key issues. It should be noted that Trading Parties and other stakeholders will have the opportunity to voice their views and opinions through the engagement that the Strategic Panel is required by the code to undertake and via consultations and engagement which will take place in relation to Change Proposals.

Transitional arrangements

We recognise that CPM021 / CPW125 and the alternative solution under CPM039 / CPW124 proposed a shorter transitional period (three months, as opposed to a maximum of six months). However, whilst the proposed solution provides an option to extend the exiting Panel's term by up to six months, it is not intended that the process will take this long, but rather that there is sufficient time prescribed in the codes for the selection processes to be robust, and for the appropriate candidates to be appointed. We consider that it will be more efficient in the long term for there to be adequate time for the initial selection processes to be successful and ensure that the right calibre of candidates are appointed to the respective bodies. Inclusion of the slightly longer timeframe also seeks to avoid a possible further extension if the required members cannot be appointed within the prescribed timeframe. An extension to the timeframe would require a further Change Proposal to be raised, which would not in these circumstances align appropriately with the principle of efficiency.

The new Strategic Panel

We consider that this Change Proposal – including the creation of a Strategic Panel – creates a key opportunity for the business retail market to focus and prioritise efforts to deliver improved outcomes for customers, including by creating a more effective market and delivering environmental improvements. Such improvements will include, but should not be limited to, initiatives that require changes to the market codes.

Delivery of improved outcomes for customers requires the new Strategic Panel to maintain a relentless focus on strategic matters in the market and to provide clear strategic direction to its committees and sub-groups. This requires active members who are sufficiently senior and strategic in their approach and a terms of reference that focusses attention to strategic matters. We will work closely with MOSL and other market participants to achieve this.

Decision notice

In accordance with paragraph 7.2.9 and 6.3.7 of the Market Arrangements Code, the Authority:

- Approves the proposed solution under CPM039 / CPW124;
- Rejects the alternative solution proposed under CPM039 / CPW124; and
- Rejects the solution proposed under CPM021 / CPW125.

CPM039 / CPW124 will be implemented on 1 September 2021.

Georgina Mills
Director, Business Retail Market

**Ofwat (The Water Services Regulation Authority)
is a non-ministerial government department.
We regulate the water sector in England and Wales.**

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