
Wholesale Retail Code Change and Market Arrangements Code Change Proposal – Ref CPM015 and CPW071

Modification proposals	Market Arrangements Code and Wholesale Retail Code Change Proposals ¹ – CPM015 and CPW071
Decision	The Authority has decided to reject this Change Proposal
Publication date	23 March 2022
Implementation date	N/A

Background

The Market Arrangements Code (MAC) and Wholesale Retail Code (WRC) form part of the governance arrangements for the business retail market. Section 5 of the MAC established the Panel to oversee the operation and evolution of the market. The Panel's duties include making recommendations to Ofwat on Change Proposals.

The Final Report details that at a Panel strategy workshop in January 2019, Panel Members discussed learning best practice for code administration from the energy sector. One of the learning points was to introduce Panel self-governance to facilitate the efficient progression of minor, non-material Change Proposals. As such, the Panel established a governance sub-group to develop a solution.

The governance sub-group developed two options:

1. Pre-Approval Change Process (the proposed solution), and
2. Expedited Change Process (not pursued)².

The issue

The MAC stipulates that all Change Proposals considered by the Panel must be put to Ofwat for final decision, irrespective of the materiality of the change.

¹ Unless otherwise stated, the terms used in this document are those defined in the drafting of the Market Arrangements Code and the Wholesale Retail Code as proposed by the CPW071 and CPM015.

² The expedited change process was not pursued as it included proposals of self-governance which were not compatible with the Water Industry Act 1991.

Once a Change Proposal has been recommended by the Panel to Ofwat, Ofwat will consider the Panel's Final Report, including supporting evidence, and will publish its decision.

The Proposer considered that the time between the Panel's recommendation and the Authority's decision results in uncertainty for Trading Parties whilst they await the decision. In addition, it is noted in the Final Report that implementation work should only commence following approval of a change, therefore the requirement to await the Authority's decision can increase the time between a change being raised and being implemented.

The Change Proposal³

The proposed solution sought to expedite the change process for Change Proposals that the Panel had assessed to meet 'Pre-Approval Criteria'.

It was recommended that the Panel would determine whether a Change Proposal met 'Pre-Approval Criteria'. The Authority may however, at any time determine that the Change Proposal must proceed in accordance with the standard process. The proposal additionally included provision for Trading Parties, the Customer Representative and the Market Operator (MOSL) to disagree with the Change Proposal being progressed on the Pre-Approval Change Process by submitting a representation to MOSL, who would forward this to the Authority for consideration as part of its decision. If a representation were to be made after Ofwat had given a Change Proposal Pre-Approved Status, it would fall back into the standard change process and Ofwat would make a final decision in the usual way. The Final Report highlights that in practical terms, this would have enabled any market participant to 'veto' a Change Proposal progressing through the Pre-Approval route.

In summary, CPM015 and CPW071 seek to:

1. Set out the Pre-Approval Criteria;
2. Set out the Pre-Approval Change Process, which would include:
 - (i) That the Panel may publish a statement where it believes a Change Proposal meets the Pre-Approval Criteria;
 - (ii) Where Ofwat agrees with this statement, it may grant the Change Proposal 'Pre-Approved' status and no further determination is required by Ofwat if the Panel approves the Change Proposal under consideration (representations may be made by Trading Parties, the Customer Representative and the Market Operator during the Pre-Approval process); and

³ The proposal and accompanying documentation is available on the MOSL website at <https://www.mosl.co.uk/market-codes/change#scroll-track-a-change>

- (iii) Ofwat must make a final determination on Change Proposals in the usual way, if in the 15 business days after publication of the Panel's Final Report of a Pre-Approved change:
 - (a) A market participant 'vetoes' the Pre-Approved status; or
 - (b) Ofwat revokes the Pre-Approved status.

The Pre-Approval Criteria were proposed to be:

- (a) That any change to be pre-approved would not have a material effect on:
 - (i) existing or future customers;
 - (ii) competition in the non-household retail market or any commercial activities connected with the non-household retail market;
 - (iii) operational matters including those relating to the environment, safety, security or supply or network emergencies; or
 - (iv) matters relating to the Market Performance Framework;
- (b) That any change to be pre-approved does not relate to the Wholesale-Retail Code or the Market Arrangements Code governance or change processes; and
- (c) That any change to be pre-approved does not discriminate between different classes of Trading Party.

Industry consultation and assessment

An industry consultation was carried out between 8 and 29 August 2020 on the initial solution. In total 15 responses were received from 10 Wholesalers and five Retailers.

Due to the similarities between the original solution ('the expedited change process') and the Pre-Approval Change Process, the governance sub-group determined that the original consultation responses were sufficient and relevant to the revised Pre-Approval solution.

Views on the case for introducing Panel self-governance

All 15 respondents agreed that a Panel self-governance change process would speed up the time taken to implement code changes.

Views on the self-governance criteria

The self-governance criteria that were consulted on were nearly identical to the Pre-Approval Criteria being proposed by CPM015 and CPW071.

In total, 13 respondents (eight Wholesalers and five Retailers) supported the criteria. Rationale cited by respondents included the criteria had gone as far as it could reasonably go, that the criteria allowed a degree of interpretation and to some extent it

will not be possible to assess the suitability of the criteria until actual experience of their operation is fully understood. One Wholesaler also suggested a further criterion be included: “(change is) unlikely to discriminate between different classes of customers” (household and non-household customers).”

Two Wholesalers did not support the criteria. One Wholesaler stated that it expected to see some form of Trading Party consultation to have taken place prior to a change being considered by the Panel, with the exception of Change Proposals to address typographical errors. The Wholesaler stated that they would be happy for a consultation to be fairly informal such as direct communication from a MOSL colleague, possibly to an agreed list of people per Trading Party with a defined response window. The Wholesaler also noted that where a Change Proposal is considered to have a material impact on one or more Trading Parties affecting the principle of proportionality, any such change should be excluded from the self-governance route.

Another Wholesaler stated that the majority of Change Proposals are of a technical and/or operational nature (such as technical functionality or administration of the operation of the market). Uncontroversial technical changes are by their nature unlikely to create uncertainty. The Wholesaler disagreed that a number of changes would qualify for the self-governance route, and cited CPW031 – Extending the new connection suspension period, because this was a considerable change.

The Wholesaler further stated that 79% of Change Proposals to-date met the self-governance criteria, and therefore it raised question on whether the Panel should be spending time on items that do not have an impact on material matters to the market.

The Wholesaler made a suggestion that it may be appropriate for a technical change sub-group to be formed and have delegated authority to oversee changes of a purely technical nature. The Wholesaler also suggested that Ofwat review its approval process and whether this could be streamlined, although noting that this is out of the Panel's remit and self-governance will likely support more timely decision making.

Proposer's and sub-group's response

In response to a Wholesalers' comment on proportionality, the Proposer's view is that the concept of proportionality is closely aligned to the concept of “materiality”, and as such has been accounted for in the criteria.

The Proposer noted a Wholesaler's suggestion to form a technical sub-group of the Panel and have delegated authority to oversee changes of a purely technical nature but noted that this should be considered as a separate Change Proposal and is therefore outside the scope of this proposal.

Views on the process for self-governance

All but one respondent (14 out of 15) supported the process for progressing self-governance Change Proposals. The Retailer that disagreed said that while they agreed with the majority of the process, they were concerned about the decision to go down the self-governance route being taken before the solution had been fully developed, as they felt the final solution, which had been fully developed, could change the materiality impact. As such, they suggested that the self-governance route decision should be taken after the development stage when the impact will be better understood.

Proposer's and sub-group's response

The issue highlighted above has been resolved in the Pre-Approval Change Process. The Panel would assess the final solution against the Pre-Approval Criteria before it issues the Final Recommendation Report.

Views on whether the proposed change better facilitates the Objectives and Principle of the MAC

All but one respondent agreed that a self-governance Change Process would improve efficiency of the market code change process. The respondent that disagreed was a Wholesaler who stated that whilst they are supportive of the Change Proposal, they do not feel that the Proposal is significant enough to better facilitate the Objectives and Principles of the MAC. No justification was provided by the Wholesaler on this comment.

Proposer's views

The Proposer noted that the industry was generally supportive that the Self-governance Change Process would better facilitate the Objectives and Principles of the MAC.

Sub-group's views

A sub-group member felt that a greater degree of self-governance could be afforded to the Panel, more than what the Pre-Approval Change Process allows for, if going forward there are a large number of non-material Change Proposals. However, this can be considered for review in a year's time.

View of the Customer Representative

The Final Report details that in principle, the Customer Representative supported the implementation of a Pre-Approval Change Process. It noted that this should help to reduce the timeline for code changes, which have been identified as having no material effect on existing and future customers. However, the Customer

Representative wanted to see further scrutiny on the term ‘material effect’ and considers Guidance on Materiality to be important. From this perspective, the Customer Representative has seen a number of recommendations that failed to state the customer impact and have the potential to have adverse consequences for customers. It advised that it is important for customer impacts to be accurately and effectively identified, firstly by the Proposer. Therefore, the Customer Representative welcomed the safeguards proposed through additional provisions introduced by CPM015 and CPW071, giving the Customer Representative the ability to object to a change going through the Pre-Approved process if the Customer Representative considered it to be in correct.

Panel recommendation

The Panel considered this Change Proposal at its meeting on 28 January 2020. It recommended, by unanimous decision, that the Authority approve CPM015 and CPW071. This recommendation was made on the basis of improving the principle(s) of efficiency, proportionality and transparency⁴. The recommended date of implementation was 15 May 2020.

One Panel Member noted that it would be a better solution to remove the technical obligations from the code but agreed with other Panel Members that would be a big change and would require a holistic view on all code components, which itself would be a more strategic exercise.

A Panel Member said that CPM015 and CPW071 represent a pragmatic approach to move the industry towards self-governance principle. Another Panel Member said that the biggest risk in this solution is when Trading Parties abuse the right to object.

Our decision and reasons for our decision

These Change Proposals were recommended to the Authority in February 2020 and were originally placed on hold whilst we considered higher priority Change Proposals (including proposals raised in response to Covid-19). We had also highlighted that industry (including Panel) governance should be reviewed further in our Review of Incumbent Support for Effective Markets (project RISE). CPW071 and CPM015 therefore remained on hold pending further work to review Panel governance. Revised governance arrangements were introduced in September 2021, and we have now considered these Change Proposals and the supporting documentation provided in the Panel’s Final Report.

⁴ Note that the Panel's recommendation was made prior to implementation of [CPW040/CPW0121](#) on 1 September 2021 which introduced revised principles of the MAC and WRC.

We have decided to reject CPM015 and CPM071. We do not consider that these Change Proposals would further the primary principle of the WRC and MAC.

Reasons for our decision

The proposed amendments would not promote the primary principle of the WRC and MAC or the supporting principle of proportionality in light of our approval of the proposed solution under [CPM039 / CPW124 – revisions to Panel composition](#). CPM039 / CPW124 fundamentally revised the purpose, structure and composition of the Panel, which will be replaced by the new strategic panel and a Code Change Committee from March 2022.

Under the new arrangements the strategic panel will develop priorities, areas of focus and actions or programmes required for the operation, maintenance, and development of the market to support the delivery of strategic outcomes set out by Ofwat and Defra. To enable the strategic panel to maintain its strategic focus, such actions and programmes of work it identifies can be delegated to its Committees, sub-groups or MOSL for analysis and development, as appropriate.

MOSL will also be permitted under the revised arrangements to make recommendations on housekeeping and 'non-substantive' changes directly to the Authority where it has delegated authority from the Code Change Committee to do so. The Code Change Committee is also expected to develop a process for triaging and prioritising Change Proposals in line with the strategic panel's priorities.

We anticipate that these amendments to governance should help ensure that future proposed changes to the market Codes deliver improved outcomes for existing and future customers, as well as drive efficiencies in the Change Process. However, due to the more fundamental changes to Panel governance that are being delivered by approval and implementation of CPM039 / CPW124, the amendments to the change process proposed by CPM015 and CPW071 would not now be proportionate or best advance the primary principle of the WRC and MAC. That said, we would still encourage the Strategic Panel and/or Code Change Committee to explore how the Change Process could be further improved under the new governance arrangements to apply from March 2022.

Decision notice

In accordance with section 7.2.9 and 6.3.7 of the Market Arrangements Code, the Authority rejects these Change Proposals.

Georgina Mills
Director, Business Retail Market