

Panel Purpose

Discussion Document

V2.5



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1 Executive Summary

Market Governance

The Market Arrangements Code, the Wholesale-Retail Code and the documents created under them govern how Wholesalers, Retailers and others (including Ofwat and the Market Operator) operate and may drive amendments to the Non-Household water market rules. Through the Panel and its committees and sub-groups, industry expertise is a cornerstone of decision-making. However, market governance is seen as slow, opaque and lacking a clear focus on delivering the best customer outcomes. Ofwat perceives a need for greater independence and customer insight in decision-making and trading parties desire greater agility in considering proposals for code change.

Ofwat's [Review of Incumbent Support for Effective Markets \(project RISE\)](#) highlighted that the industry-led approach to market governance could be improved, in particular to further strengthen the customer voice and better facilitate innovation. The RISE report highlighted concerns around companies actively opposing or delaying initiatives that are aimed at improving the effectiveness of markets and of trading parties (both Wholesalers and Retailers) appearing to pursue commercial interests at Panel and Panel Committee meetings despite the requirement of acting independently. It found that to help the market deliver improved outcomes for customers, the environment and society more generally, the governance that underpins the market needs to support real change, rather than focusing on minor amendments that reinforce or merely tinker with the status quo.

A Review of Panel Effectiveness and Panel Purpose

An [independent review of Panel effectiveness](#) conducted by Satori Board Review on behalf of the Panel and MOSL and completed in January 2021 highlighted "considerable variation as to what stakeholders expect of the Panel. As the market has evolved so too have expectations about the role of the Panel".

This document considers what should be the overarching purpose of a Panel. It explores the options for a Panel going forward, while recognising the art of the possible. It is intended as a starting point for discussion on the future direction of travel for market governance. It takes account of feedback gathered from trading parties in autumn 2020, prior to the publication of the Panel effectiveness review findings, and initial discussions with Panel Members, Defra, Ofwat and CCW. It now seeks to widen the constituency of interests from whom views are invited.

Key considerations regarding Panel purpose include:

- Defra and Ofwat are the custodians of the market vision, setting the policy direction (Strategic Policy Statement) and vision and strategy for the market (strategic outcomes).
- A potential gap exists between Defra and Ofwat's policy direction, vision and strategy for the market, and the strategic action taken to deliver these outcomes across the market.
- Code Panels and committees provide a mechanism for supporting self-governance.
- There is a need to maintain an efficient mechanism for designing and developing robust technical solutions for market rules changes.
- There is also a need for maintaining a mechanism to assess whether changes should be implemented (based on whether they will help drive desired market outcomes).



- Rather than being *industry led*, governance should be *market led*: by encompassing wider stakeholder voices and needs – in addition to Wholesalers and Retailers.
- A market code Panel may therefore be needed to:
 - ensure the market delivers against defined outcomes (drawing on the strategic direction set by Defra and Ofwat)
 - enable market self-governance
 - provide a check and balance on industry self-interest
 - do this with minimal need for regulatory intervention
- Such a Panel may need powers to:
 - Raise, prioritise, recommend and make changes to market rules as set out in codes (or subsidiary documents)
 - hold other participants to account by monitoring their performance against and/or compliance with market rules (and in some cases, deploying incentive or corrective mechanisms) to resolve issues arising
 - resolve disagreements between participants.
- A Panel that is considering the wider context of the market and priorities in respect of defined strategic outcomes should have a range of stakeholders in mind including:
 - End-Customers
 - Trading Parties
 - Regulators
 - Government
 - Other Market Groups (e.g. Strategic User Forum and the Retailer Wholesaler Group)
 - The Market Operator
- Whether a strategic Panel should encompass a strategic, i.e. not an ad hoc, approach to the management of the Codes, or a strategy for the Non-Household market as a whole. How far should a panel, as a creature of the Codes, play a role in matters that potentially stretch beyond that scope. Therefore, should the Panel approach to the Codes be:
 - to ensure the Codes provide for an efficient and effective settlement system serving the interests of trading parties and customers, within the stated policy aims of Government and regulators; or
 - in and of itself to provide a means, and be a vehicle for, developing and ultimately executing those broader policy and regulatory aims through the Codes; or
 - a combination of the above?



Candidate Models for the Future

There are a number of possible models for the constitution of a Panel going forward. The following are presented purely illustratively to prompt discussion, and do not limit consideration of combinations or alternatives to them, with the ultimate choice depending on the overarching purpose that is settled upon. They include:

1. The current Panel
2. A Panel as an Open Voting Forum
3. A Panel as a reactive Change Board
4. A strategic, directive Panel

The composition of a future Panel could be refined as follows:

- Membership could be widened (e.g. under an Open Voting Forum model) – however, a mechanism may be needed to guard against decision-making being dominated by those parties with the size and scope to support such a Panel. The scope for wider Trading Party influence might need to be balanced against the role of independent membership in achieving even-handed decision-making.
- Membership could be reduced to reduce costs and support focused decision-making on prioritisation and strategic outcomes. But it would be important for such a Panel to ensure that it engaged effectively with stakeholders to support evidence-based decision-making.
- Membership could be re-balanced to increase the proportion of non-industry and customer experience and so be more consistent with the impartiality and independence referenced in Trading Party feedback. It is also an important part of balancing wider stakeholder voices as part of effective market self-governance.
- Distinctions between Associated and Unassociated Retailers could be removed as they appear less relevant as the market has evolved.
- Current provisions for nominating, electing and appointing Panel and committee members could be revised to focus on appropriate skills, knowledge, experience and competencies. This might be through revised election or selection provisions. It might be that trade bodies (e.g. Water UK or the UK Water Retail Council) have a role in selecting, nominating or appointing Wholesaler or Retailer Panel Members based on defined requirements. Alternatively, some form of interview-based selection process may be appropriate.



Evaluation Factors

Taking account of the considerations in this document, the overarching purpose of the Panel and the models (or combinations, variations or alternative models) need careful thought and further development. It will be important in any model to avoid building in additional cost or complexity without removing some elsewhere.

It is proposed that the purpose and models are evaluated in relation to whether they provide for governance that:

1. Places the **customer at the heart** of market governance and decision making.
2. Provides for **market-led self-governance** with an appropriate blend of trading party experience and other market stakeholder/customer voices.
3. Provides for clear, **outcome-focused, evidence-based decision-making** against defined market outcomes.
4. Enables appropriate prioritisation, ensuring **customer outcomes and strategic changes are prioritised** in decision-making, including supporting innovation in the market and is clear on how actions/changes should be assessed (i.e. **objectives/principles** for decision-making are aligned to vision/outcomes).
5. Provides for **transparency** in decision-making.
6. Provides **appropriate opportunity for all stakeholders to input** to and engage in the consideration of change in a proportionate way – recognising that a one-size fits all approach may not be optimum to provide for all voices to be heard.
7. Ensures the **Panel is accountable to its stakeholders** and provides for the **performance of the Panel** to be measured.
8. Enables **efficient consideration of changes** to rules/systems.
9. Provides for **Trading Parties to be appropriately held to account** for their performance and delivery against market outcomes.
10. Is **demonstrably cost effective** and its costs transparent.



2 Questions

The following questions are embedded throughout this document.

Responses are invited to be submitted into the review of Panel Purpose being undertaken by the Panel and MOSL, in consultation with Trading Parties, Defra, Ofwat and CCW, as well as the wider community of interested parties.

This consultation is part of the [Governance Review consultations](#). The consultation is open between **24 May and 18 June 2021**. Responses should be provided using the [Panel Purpose Online Response](#) form on the MOSL website.

QUESTION 1: Does there continue to be a need for some form of Panel as part of market-led governance? (please explain your answer).

QUESTION 2: Section 4 of this document outlines a hypothesis that a Panel exists to ensure that the market delivers against defined outcomes, enable market self-governance, provide a check and balance on industry self-interest and do so with minimal need for regulatory intervention.

- a) Do you agree with this hypothesis? (please explain your answer)
- b) What do you consider the core purpose of a Panel to be if different to the hypothesis outlined above?

QUESTION 3: Regarding the strategic nature of a Panel:

- a) Do you think there is a distinction between a strategy for the market as a whole and a strategic approach to maintaining, operating and amending the codes? (Please explain your answer)
- b) If you draw such a distinction, who do you consider is responsible for each element, and who should be responsible in future, if different?
- c) How would a strategic approach to code development differ, if at all, from the current arrangements? (Please explain how this approach would fit with the progressing of individual code change proposals).

QUESTION 4: Should a Panel have powers and responsibilities to (i) develop and govern market rules; (ii) hold participants to account for compliance and performance and drive improvement; (iii) resolve disagreements between participants? Please explain:

- a) how far, and how (by considering what success looks like), each of the functions in 4(i), 4(ii) and 4(iii) should be carried out by a Panel
- b) how far, and how, each of these functions should be carried out by other bodies or organisations
- c) any other powers or responsibilities you feel a Panel should have.

QUESTION 5: Do you agree with the list of Panel stakeholders as outlined in section 7? (please explain your answer and identify any missing stakeholders).

QUESTION 6: Please consider the illustrative models presented in section 8, describe what you consider to be the advantages and disadvantages of the various elements of them, and how you would adopt or adapt them and any other attributes in a preferred model?

QUESTION 7: What weight should be attached to each of the Panel composition considerations outlined in section 8, or to other considerations not outlined there, in developing your preferred model? (please explain your answer)



QUESTION 8: What are your views on the current arrangements for nominating and appointing / electing Panel members and Panel Sub-Group / Committee members? If you would change these, why and in what way?

QUESTION 9: Do you agree with the evaluation factors outlined in section 8? (If not, please explain why and suggest, with reasons, any additions, deletions, variants or alternatives.)

QUESTION 10: Do you have any other comments?



3 Introduction

Project RISE

Ofwat's [Review of Incumbent Support for Effective Markets \(project RISE\)](#) highlighted that the industry-led approach to market governance could be improved, in particular to further strengthen the customer voice and better facilitate innovation. The RISE report highlighted concerns around companies actively opposing or delaying initiatives that are aimed at improving the effectiveness of markets and of trading parties (both Wholesalers and Retailers) appearing to pursue commercial interests at Panel and Panel Committee meetings despite the requirement of acting independently. It found that to help the market deliver improved outcomes for customers, the environment and society more generally, the governance that underpins the market needs to support real change, rather than focusing on minor amendments that reinforce the status quo.

Review of Panel Effectiveness

Last autumn, working with MOSL, the Panel commissioned an independent consultant (Satori Board Review) to review Panel effectiveness. Satori's work covered Panel stakeholders, purpose, strategy, structure, operations, meetings, decision making, and development. As part of the review, Satori surveyed Wholesalers and Retailers, observed a meeting of the Panel and the Market Performance Committee and conducted detailed interviews with Panel members and key stakeholders. Satori presented their [Final Report](#) to the Panel in February 2021.

Satori noted Panel members' commitment and aspiration for progress, in addition to their day jobs. However, they also observed differences of opinion, both within the Panel and across the industry, on the role and purpose of the Panel. These differences appear to drive different assessments of Panel performance.

Satori's findings report made 42 separate recommendations. In particular, the report highlighted the need for a well-constructed understanding of the Panel's purpose, noting that there is, "considerable variation as to what stakeholders expect of the Panel. As the market has evolved so too have expectations about the role of the Panel."

The Panel in Context

The Non-Household (NHH) business water retail market comprises a complex ecosystem of rules, legislation, organisations and bodies. Core NHH market rules are set out in the Market Arrangements Code (MAC) and the Wholesale Retail Code (WRC) – the market codes. The Panel is a creature of these codes and its remit relates to market code matters (particularly performance and change).

However, the NHH market (and adjacent markets) are defined and impacted by other provisions ranging from the Water Industry Act, through the regulatory licencing regime, price controls, associated regulatory documents such as the Customer Protection Code of Practice and other, bilateral, contracts that may be struck between market participants. There is a question as to the extent to which the Panel should have regard to these wider aspects, including potential spill-over benefits or impacts on the household market when considering matters and making decisions or recommendations in relation to the NHH market.

Clarifying the role and purpose of a market code Panel in the context of this complex ecosystem is the first step in a strategic programme of work to improve the efficiency and effectiveness of market code governance.



Looking to the Future

This work does not seek to assess the performance of the Panel against the current provisions set out in the MAC and WRC. Feedback in this regard informed the independent review and identified the need to revisit the core purpose of a market code Panel. A summary of the current code provisions relating to the Panel are outlined in Appendix A for reference.

This work explores the options for a Panel going forward, having regard to the art of the possible. It takes account of feedback gathered from trading parties in autumn 2020 and initial discussions with Panel Members, Defra, Ofwat and CCW.

The initial considerations presented in this document assume that the market purpose is clear and that the desired outcomes are clear (see boxout).

The matters considered regarding Panel purpose relate to fundamental questions:

1. Why have a Panel?
2. What is the role of a Panel with respect to strategy?
3. What responsibilities, tools or powers should a Panel have?
4. What does this mean for a Panel's relationship with other stakeholders?

Answering these questions will drive decisions on any future Panel and Panel Committee structure and composition and, in due course, enable consideration of the objectives that the Panel should have and its priority areas of focus in order to deliver against its purpose in the context of delivering the defined market outcomes.

Panel Purpose vs Market Purpose

A basic tenet of the market is that it should be governed in a way that furthers the market code-defined 'Objectives and Principles'. These effectively articulate the outcomes that the market should deliver or support.

Further clarity on market outcomes could be delivered by refining the 'Code Objectives and Code Principles' which are set out in the MAC and the WRC. It is anticipated that this is an area for improvement that may be considered in parallel with this work, but this is outside the scope of this document. While defining market outcomes is separate and distinct to the purpose of the Panel one would expect the decisions of a Panel to support these market outcomes and its purpose to take account of the them.



4 Why have a Panel?

Lessons from Other Markets

Academic studies¹ and recent thinking in other markets (particularly the gas and power markets) have identified three key elements that should underpin effective market governance.

- **Strategic direction:** ensure the regulatory framework is forward looking and is informed by the Government's vision for the market.
- **Empowered and accountable code management:** ensure the strategic direction is delivered through appropriate changes to codes and that changes are progressed in a clear and logical manner.
- **Independent decision-making:** rebalance decision-making away from industry control, to arrangements that are agile and responsive to change and work in the interests of existing and future end-customers.

Work conducted by Ofgem and BEIS² has concluded that this requires:

- A function to translate a high-level vision into a strategic direction for codes that promotes the interests of end-customers.
- An empowered code manager with the right expertise, resources and powers to oversee the change process; monitor compliance with code obligations and decide on measures in the event of non-compliance.
- The right incentives to drive the design of rules and systems, while continuing to draw on industry input and expertise.

Market Self-Governance

It might therefore be asked: what benefit does a Panel confer over other forms of governance? For example, compared to top-down regulation alone, or regulation with a market operator/code manager alone?

Code Panels and committees provide a mechanism for supporting self-governance. It could be said that the current Panel's responsibilities encompass self-governance and self-regulation³. That is, where market participants themselves play a role in ensuring that they and their peers are able to shape and evolve the market and hold each other to account for performance and compliance.

¹ Paper on the governance of industry rules and energy system innovation in Great Britain:

<http://sro.sussex.ac.uk/id/eprint/80909/3/1-s2.0-S0957178716301266-main.pdf>

² Ofgem-BEIS work on reforming the energy industry codes governance: <https://www.gov.uk/government/consultations/reforming-the-energy-industry-codes>

³ The Organisation for Economic Co-operation and Development (OECD) outlines the role that industry self-regulation can play in addressing consumer issues, particularly where business code of conduct and standards are involved: *OECD (2015), "Industry Self Regulation: Role and Use in Supporting Consumer Interests", OECD Digital Economy Papers, No. 247, OECD Publishing, Paris.*

<https://doi.org/10.1787/5js4k1fjqkwh-en>



Industry self-regulation concerns firms in a particular industry that agree to act in prescribed ways, according to a set of rules or principles. Participation by firms in the groups may be voluntary or could be legally required. The groups can be wholly responsible for developing the self-regulatory instruments, monitoring compliance and ensuring enforcement, or they can work with government entities, regulators and other stakeholders in these areas, in a co-regulatory capacity.

Typical self-governance and self-regulation mechanisms might include the ability for market stakeholders to:

- Raise, prioritise, recommend and make changes to market rules as set out in codes (or subsidiary documents)
- hold other participants to account by monitoring their performance against and/or compliance with market rules (and in some cases, deploying incentive or corrective mechanisms) to resolve issues arising
- resolve disagreements between participants.

Self-regulatory schemes entailing some degree of government/regulatory involvement are common. The level of involvement of the market, however, can vary significantly among schemes. Market self-governance and self-regulation can be an advantageous complement to government or regulatory policies.

Risk of Capture and Self-Interest

One of the challenges of self-regulation relates to the risk of capture or industry self-interest. This could occur when a self-regulatory body is overly “close” to the businesses that it oversees.

It has been suggested that, rather than being *industry led*, governance should be *market led*: by encompassing wider stakeholder voices and needs – both in addition to and among Wholesalers and Retailers.

This raises questions about how these wider views (particularly customer views) can be captured and taken into account. A code Panel may act as a check and balance on Wholesaler and Retailer interests and play a key role by involving wider stakeholders. Ensuring independence and impartiality on the part of Panel Members is likely to be important in this regard.

Panel Purpose - Hypothesis

Given the above, the market may need a Panel for four things:

1. To ensure the market delivers against defined outcomes?

These outcomes need to be defined and may draw from the strategic direction set by Defra and Ofwat but might be expected to include, for example:

- To ensure that the market operates for the benefit of end-customers/the environment?
- To ensure that the market evolves for the benefit of end-customers/the environment?
- To foster efficiency, competition and innovation?

2. To enable market self-governance?

By providing mechanisms for the market to:

- raise, prioritise, recommend and make changes to market rules
- hold participants to account for compliance and performance and drive improvement
- resolve disagreements between participants.

3. To provide a check and balance on industry self-interest?

4. To do this with minimal need for regulatory intervention?

QUESTION 1: Does there continue to be a need for some form of Panel as part of market-led governance? (please explain your answer).

QUESTION 2: Section 4 of this document outlines a hypothesis that a Panel exists to ensure that the market delivers against defined outcomes, enable market self-governance, provide a check and balance on industry self-interest and do so with minimal need for regulatory intervention.

- a) Do you agree with this hypothesis? (please explain your answer)
- b) What do you consider the core purpose of a Panel to be if different to the hypothesis outlined above?

5 What is the role of a Panel with respect to strategy?

Strategic Change – Prioritising Outcomes

It may be that there is a potential gap between the policy direction, vision and strategy for the market (strategic outcomes⁴) defined by Defra and Ofwat, and the strategic action taken to deliver these outcomes across the market. Responses on the questions of Panel Purpose provided in the MOSL survey of trading parties views on the Panel and market change are set out in Appendix B. Some respondents felt that the Panel was already obliged to take a strategic approach, others felt that the Panel should be taking such an approach in future. Some responses felt the Panel should be limited to a more reactive role, reviewing changes as they are put to it. Some modulations or permutations of these approaches are clearly possible.

In discussing the Satori report findings and the question of Panel Purpose, Panel Members agreed that establishing a vision and strategy were matters for Defra and Ofwat. However, it was felt that:

- Vision-setting should be collaborative and be cyclical – i.e. kept under review and that a Panel could be the market voice in this. That is - Defra/Ofwat as the custodians of the market vision with a Panel acting as the market conscience.
- A market code Panel should organise and execute its work within the above framework, but interact with Ofwat regarding strategic market outcomes, provide a view on the direction of travel and support collaboration, ensuring all voices can be heard, including existing trading parties, prospective trading parties and end-customers.
- Delivering some market outcomes may need external agency and addressing through regulatory constructs (e.g. licences, other codes or legislation). While these might be highlighted by a market code Panel, decisions would remain outside its scope. But a strategic Panel might engage with the regulator on these matters as well as the potential for impacts and spill-over benefits.

Ad Hoc Change

Any Trading Party can raise changes to the market rules. It might be expected that many of these changes are reactions to specific experiences a party has had with the processes laid out in the codes. Such amendments are reactive and look to address a specific issue.

This approach works for some changes where the rules need minor amendment. However, it may be that changes are raised according to the priorities of the individual proposers, rather than in relation to a set of wider market outcomes.

The provision for any Trading Party to raise a change to the codes is an important factor in market self-governance but there may be opportunities to prioritise and batch work on changes for efficiency. A Panel can play a role by behaving more strategically by prioritising this programme of change, having regard to wider market interests and the need to minimise so far as possible any potential waste of resource.

In providing for change it is important to maintain:

⁴ For example, the government's [2017 strategic priorities and objectives for Ofwat](#) and Ofwat's strategy: [Time to Act Together](#).

- an efficient mechanism for designing, and developing robust technical solutions for market rules changes
- a mechanism for assessing whether changes should be implemented (based on whether they will help drive desired market outcomes).

The programme of change needs to be efficient and able to run on a continuous basis.

Overall

As a creature of the market codes, a NHH market Panel's remit is limited to actions and decisions in relation to the market codes. A strategic approach would see a Panel considering the wider ecosystem in which the market codes sit when making decisions – i.e. considering impacts on (and arising from) the wider legal and regulatory frameworks that comprise the NHH market and adjacent markets. This could result in a layered approach with Defra/Ofwat setting the strategy for the market and a Panel translating this into action under the market codes and driving changes to fulfil the strategy (see box-out).

It is felt unlikely that a group preoccupied with considering the detailed mechanics of change solutions would readily be able to switch to considering longer-term programmes of action on a strategic basis – both in terms of time for these activities and the types of skills, knowledge and competencies required.

Given the need for a technical change function – might this lead to a 'two chambers' approach. For example, with a technical group considering lower materiality changes and a Panel as a second chamber scrutinising changes against a market strategy and clearly defined market outcomes.

One strength of a market code Panel is enabling a blend of industry knowledge and independent, non-industry perspectives and insight to be brought to bear.

QUESTION 3: Regarding the strategic nature of a Panel:

- a) Do you think there is a distinction between a strategy for the market as a whole and a strategic approach to maintaining, operating and amending the codes? (Please explain your answer)
- b) If you draw such a distinction, who do you consider is responsible for each element, and who should be responsible in future, if different?
- c) How would a strategic approach to code development differ, if at all, from the current arrangements? (Please explain how this approach would fit with the progressing of individual code change proposals).

Strategic Gap

A potential gap exists between Defra and Ofwat's policy direction, vision and strategy for the market, and the strategic action taken to deliver these outcomes across the market.

A strategic Panel (or another body by another name) could fill such a gap and improve the likelihood of delivering against market visions and defined market outcomes. Trading party input in a strategic Panel is valuable however, and such a Panel or body would need to delegate effectively and may need to be much more outward looking with a re-balanced and wider composition. The customer voice may also need to be strengthened in delivering strategic market changes.

More information on how this might work is set out in section 8 of this document under illustrative model 4 – a strategic Panel.



6 What responsibilities, tools or powers should a Panel have?

In considering existing responsibilities, Panel Members have observed that some current responsibilities may potentially be open to interpretation. For example, is it clear what is meant (or what might be encompassed) by the general responsibility to ‘keep the [market codes] under review’? Further, it was felt by some existing Panel Members that market performance responsibilities and processes were fragmented and complex with potential overlaps or duplication in responsibilities falling across the current Panel, the Market Performance Committee and the Market Operator, with the escalation process lacking. Conversely, some responsibilities are very low-level. A strategic Panel that provides input / directs priorities around code change creates an opportunity to reduce costs or simplify work by taking some responsibilities currently attributed to the Panel and giving these to the Market Operator. This might include, for example, the Market Operator making recommendations on low-materiality or housekeeping changes directly to Ofwat⁵.

In other respects, there may be some responsibilities or powers that need to be clearly provided for. While Trading Parties must always be able to raise changes, it may be that a strategic Panel should be able to prioritise, stop or defer change that would otherwise progress through the day to day change mechanism. This might be directly through reasoned decision-making or via the establishment of a clear prioritisation policy to be used in managing the change pipeline. Appropriate and proportionate checks and balances on such provisions would need to be in place to support such mechanisms.

While the number of responsibilities should not necessarily be seen as a problem, these should be clear with focused and defined outcomes that can be measured and reported. This is an important consideration in measuring and reporting on the success and value that a code Panel brings to its stakeholders.

It was suggested that any review of responsibilities consider the following principles:

- Reduce these where possible (particularly where a Panel may add little value)
- Sharpen up and deduplicate any nebulous or diffuse responsibilities
- Add only where something is clearly missing.

With the above in mind, it might be that the responsibilities attributed to a Panel might enable market self-governance by providing the powers in Table 1.

⁵ For example, Change Proposal CPW102/CPM030 ‘[Gender Neutrality in the Market Codes](#)’ which made housekeeping revisions to the WRC and MAC to replace gender-specific terms with gender-neutral terms.

Table 1- Panel Powers

| Developing and governing market rules | Hold participants to account for compliance / performance and drive improvement | Resolve disagreements between participants |
|---|--|---|
| <p><i>For example, by providing powers for a Panel to:</i></p> <ul style="list-style-type: none"> ○ Raise code changes – or investigate potential code changes - where change is needed to deliver key strategic outcomes ○ Set priorities (or a scheme of prioritisation) for the assessment of changes that are raised ○ Assess⁶ proposed changes against defined market outcomes⁷ ○ Commission expert external advice and support as necessary ○ Recommend changes to market rules to Ofwat ○ Make changes to market rules (where provided for) ○ Feedback on what may not be working in the market but could not be addressed by action under the market codes | <p><i>For example, by providing powers for a Panel to:</i></p> <ul style="list-style-type: none"> ○ Identify and assess risks to the proper and efficient operation of the Codes ○ Propose action to mitigate such risks ○ Review market participant performance against defined standards ○ Review market participant compliance with market rules ○ Make determinations in respect of code breaches ○ Require participants to remedy underperformance / non-compliance | <p><i>For example, by providing powers for a Panel to:</i></p> <ul style="list-style-type: none"> ○ Require the submission of evidence from disputing parties ○ Commission expert advice and support in respect of disputes raised ○ Make determinations in respect of potential code breaches ○ Determine resolution actions to be taken by Trading Parties to correct upheld disputes |

A distinction should be drawn between accountability and responsibility. There may be generic responsibilities afforded to a Panel regarding delegation. Where a Panel delegates responsibilities any further oversight (e.g. in relation to a Panel seeking assurance over such work) must be proportionate and not create undue cost or complexity with additional sign-off processes.

In this context, it is envisaged that responsibilities in relation to holding participants to account would be focused on compliance with the market codes and performance against these code provisions. However, an important question may be how far a strategic approach might encompass a Panel or its Committees (supported by MOSL) becoming engaged in ancillary activities of a more regulatory character – such as assessing aspects of market participants’ performance outside strict compliance with the Codes, and devising therapeutic or corrective actions, plans or targets. Regulatory ‘creep’ should be avoided. If a

⁶ This should include provisions to engage with stakeholders to identify impacts of issues and solution options

⁷ Further clarity on market outcomes could be delivered by refining the ‘Code Objectives and Code Principles’ which are set out in the MAC and the WRC.



potential need for such measures is identified, then it might be considered whether specific provision should be sought via the Panel's Terms of Reference, or a recommendation made to another authority. In considering Panel responsibilities (and those delegated to Panel committees) it is important to consider whether there are appropriate mechanisms in place to ensure that members have the right knowledge, expertise and competencies to discharge these responsibilities.

QUESTION 4: Should a Panel have powers and responsibilities to (i) develop and govern market rules; (ii) hold participants to account for compliance and performance and drive improvement; (iii) resolve disagreements between participants? Please explain:

- a) how far, and how (by considering what success looks like), each of the functions in 4(i), 4(ii) and 4(iii) should be carried out by a Panel
- b) how far, and how, each of these functions should be carried out by other bodies or organisations
- c) any other powers or responsibilities you feel a Panel should have.



7 What does this mean for a Panel's relationship with other stakeholders?

A market code Panel that is considering the wider context of the market and priorities in respect of defined strategic outcomes should have a range of stakeholders in mind. This might include:

End-Customers

It might be reasonable to consider that customer needs and benefits should be prioritised in making changes or taking action with respect to driving market outcomes. However, not all customers are the same – they have different needs and wants from a NHH water market, compared with Retailers and Wholesalers.

- There may be different ways to capture the customer voice in addition to CCW.
- It should be easier for customers (or customer representatives) to interact with the Panel, contribute to Panel deliberations (and perhaps participate in some way in proceedings) and raise changes. This would also benefit small Trading Parties and CCW.

Trading Parties

A market code Panel is not a trade body, but it should engage with all formal voices in the market.

Like end-customers, not all Trading Parties are the same – they have different needs and wants from a NHH water market with differing commercial drivers and strategies. In general, efficiency and value for money are key and, wherever possible, Panel decisions and prioritisation should take account of the funding cycles of Trading Parties.

While all Trading Parties are different, the following matters might be common considerations regarding a Panel:

- A desire for efficiency and effectiveness, because a Panel and its committees are funded by Trading Parties⁸ (and therefore, end-customers).
- Trading Parties need to have the opportunity to be appropriately engaged and have an input to and influence on decisions taken by a Panel.
- Trading Parties may look to a Panel for comfort that other Trading Parties are held to account to promote competition and a level playing field.

In addition to individual Trading Parties, it might be expected that a Panel consider:

- Views from Trading Party organisations (Water UK, UKWRC, etc) – each will have different aspirations and motivations and act as “voices”.
- Where the market has established groups (e.g. RWG), a Panel should be mindful of the work of these groups.

⁸ Trading Parties fund the current Panel and associated governance either through lending resources and expertise, or through a proportion of Market Operator charges. The [cost of the current Panel](#) is outlined in MOSL's most recent business plan.



- New (and prospective) entrants and small parties should be engaged/better represented in Panel decision-making.

Openness, transparency and ease of engagement with the Panel will be important factors in serving stakeholders.

Regulatory Framework

A market code Panel established in service of market-led governance forms an important part of the overall framework. Defra establishes the market and policy direction and Ofwat establishes a strategy for the market in consultation with stakeholders – this may include the Panel.

Any revised model should consider the need for engagement and provide a feedback loop between a code Panel and Defra and Ofwat. In particular, the link between Ofwat and a market code Panel could be strengthened to ensure clear understanding of Ofwat vision and strategic direction to support Panel decision-making as a vehicle for delivering strategic outcomes. This would also enable feedback on what may not be working in the market but could not be addressed by action under the market codes.

Other market groups

There are many groups already existing in the market.

Some fall directly under the remit of the market codes and comprise part of the current, code-defined governance. This includes the Panel, the Panel's various committees (including the Market Performance Committee and the Disputes Committee) plus sub-groups established by the Panel and its Committees (including the Metering Committee, the Market Audit Sub-Committee and the Market Performance Framework Sub-Group). Some of these groups are decision-making, others make recommendations.

Other, non-Panel, groups include the User Forum, the Strategic User Forum and many wider groups established by Trading Parties and other stakeholders outside the code framework, for example, the Retailer Wholesaler Group (RWG).

While there are many groups operating in the industry, decision making appears to rest in only a small number. There appears to be a need for greater clarity on the role, powers and remit of groups and an opportunity to better co-ordinate their work and interactions.

A code Panel should be mindful of, and take account of work being undertaken elsewhere, it is not for such a Panel to co-ordinate or manage groups outside its remit. In this regard mechanisms to enable such factors to be taken into account will be important. But a code Panel should limit its directive action to the co-ordination, prioritisation and delegation of work to specified Panel committees.

It is not currently clear how a market code Panel might relate to the Strategic User Forum (SUF) and how the SUF could input into a strategy or improvement programme for the market. This would need clarification.

The Market Operator (MO)

As the market has evolved since the market opened in 2017, so has the role of the Market Operator. MOSL has set out a company purpose, vision and strategy and outlined a range of market improvement programmes in its most recent business plan across a three-year planning horizon. In drawing the plan together, MOSL took specific account of feedback from Trading Parties and input from the current Panel. Aspects of the Market Operator's work that are key to its relationship with a market code Panel include:



- Provision of a secretariat service
- Provision of information and insight in relation to market performance and change (i.e. where the Market Operator is collating or generating content to support Panel or Panel Committee decision-making)
- A strategic role as a market operator that is supporting and helping shape the future evolution of the market.

Given the above, it might be expected that a Market Operator and a Panel should work together as critical friends – with each providing the other with critical challenge and support in relation to the delivery of strategic market outcomes set by Ofwat.

Further, it is important to distinguish the difference between the role of the Market Operator Board and a market code Panel. In particular, the Market Operator Board carries the responsibilities and fiduciary duties of a company board and is responsible for ensuring that the Market Operator meets its various corporate and code-defined obligations.

With this in mind, Panel Members have observed that:

- The separation of the Chair roles of the Market Operator and the Panel has been a positive development that supported this distinction.
- The secretariat and technical support to the Panel from the Market Operator is improving.
- A code Panel should avoid duplication in considering recommendations from its own subgroups and committees and/or the Market Operator through proportionate assurance of such work.
- Communication is essential to success – there should be a good level of interaction between the Market Operator senior leadership and any market code Panel.

QUESTION 5: Do you agree with the list of Panel stakeholders as outlined in section 7? (please explain your answer and identify any missing stakeholders).

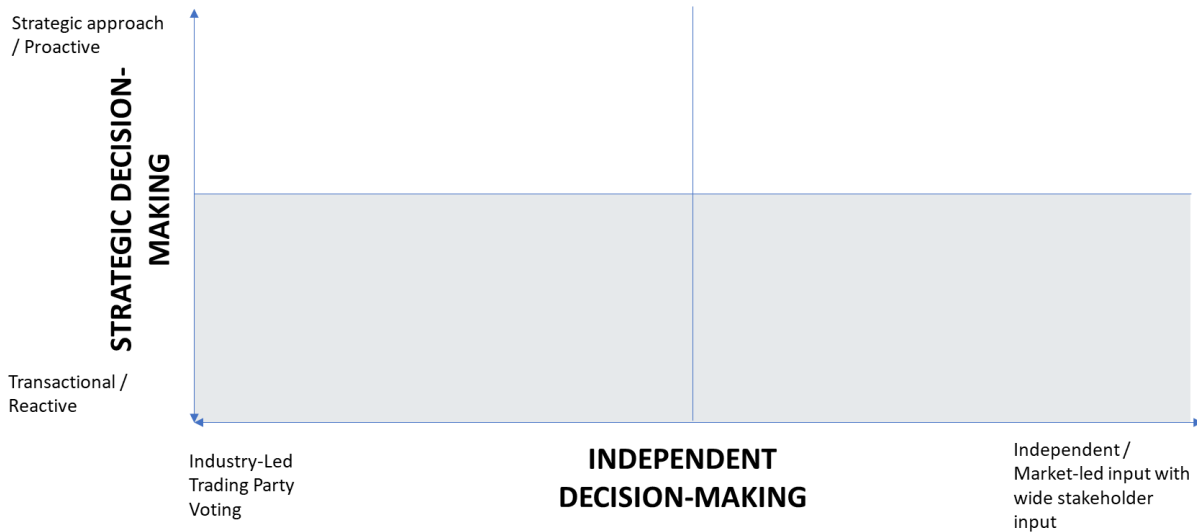
8 Illustrative Models

The hypothesis regarding Panel purpose in section 4 of this document identifies four potential reasons for establishing a Panel. Within these considerations are a set of possible Panel responsibilities (as explored in section 5 and 6 of this document).

The sub-sections below set out a non-exhaustive range of illustrative options for a Panel model. These, and any other options or permutations, will need further exploration and testing against the desired Panel purpose. Some models may better support certain combinations of each of the elements of the potential Panel purpose and possible responsibilities. They are intended to prompt thinking on possible approaches and stimulate debate. Some elements could be combined, or synthesized with others, into alternative structures on which consultees' suggestions are invited.

As noted earlier in this document, it has been suggested that, rather than being *industry led*, governance should be *market led*: by encompassing wider stakeholder voices and needs – both in addition to and among Wholesalers and Retailers. Any Panel model should address how these wider views (particularly customer views) can be captured and taken into account and how it provides a check and balance on Wholesaler and Retailer interests while involving wider stakeholders.

For illustrative purposes, each model has been described in relation to its position on a strategic spectrum and an independence spectrum:

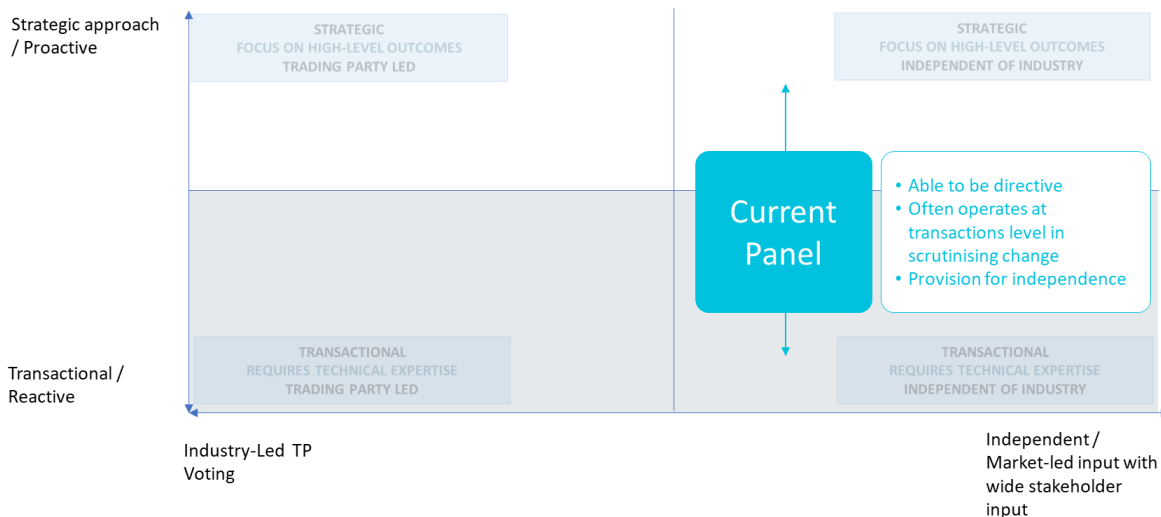


Candidate options include:

- 1. The current Panel**
- 2. A Panel as an Open Voting Forum**
- 3. A Panel as a reactive Change Board**
- 4. A strategic, directive Panel**

In each case the options have a bearing on a Panel's composition, its responsibilities, powers and relationships with other stakeholders and groups including any Market Performance Committee (MPC), Disputes Committee (DC) and other, non-Panel groups such as the Strategic User Forum and the Retailer Wholesaler Group (RWG).

Model 1 – The Current Panel



In this model, individuals from Trading Parties and other organisations (from outside the industry) participate on the basis that all are impartial. They may be elected or appointed onto such a Panel. Voting rules provide for decision-making (most decisions require a simple majority + one vote to pass).

The current Panel comprises the following voting Members:

- An independent Panel Chair
- three Associated Retailer Panel Members
- three Unassociated Retailer Panel Members
- three Wholesaler Panel Members
- three Independent Panel Members
- one Customer Representative Panel Member.

Affiliated Members are entitled to attend and speak, but not vote, at any Panel meeting. These include:

- The CEO of the Market Operator
- A representative of Ofwat
- A Representative of the Water Industry Commission for Scotland.

Observers are entitled to attend Panel Meetings.

The responsibilities of the current Panel are set out in Appendix A of this document. More information on the Panel composition and operation is set out in the current Panel's [Terms of Reference](#).

The Market Arrangements Code enables the Panel to prioritise its work by determining the assessment approach for changes that are put before it. However, while the Panel can prioritise and defer work, the current Panel cannot discontinue work on a proposed change. Once a change is raised, the Panel must assess that change and ensure it can be implemented in order to make a recommendation to Ofwat.

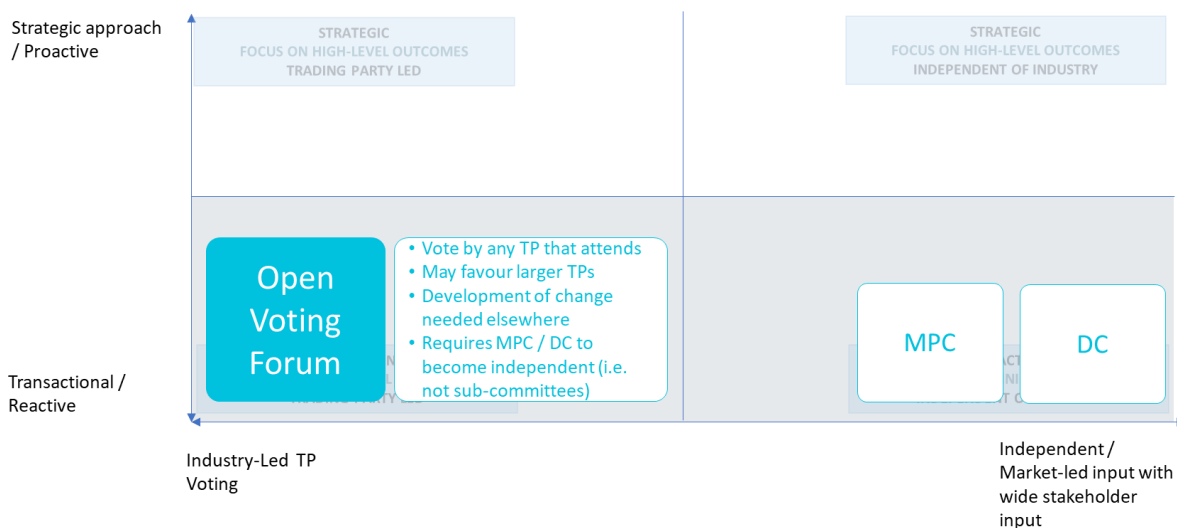
Many of the Panel's responsibilities are delegated to Panel Committees, in particular the Market Performance Committee and the Disputes Committee. There is flexibility in the existing provisions that enable both a more strategic, directive approach or a more transactional approach to be taken by the

current Panel. However, while the Panel has the ability to delegate, it is accountable for scrutinising and recommending all changes to Ofwat.

The challenges in achieving balance in this regard (i.e. between a strategic approach and dealing with the programme of ad-hoc change) are explored in this discussion paper and might mean that, in future, it will remain important for the Panel to delegate the development of technical solutions in change proposals (either left with the proposer, or the Market Operator either directly or with input from industry experts via workshop sessions or similar).

The current Panel has some responsibilities relating to holding market participants to account (e.g. in relation to performance and compliance) and these are delegated to its sub-committees⁹. All Panel members are required to act impartially and be bound by appropriate conflict and confidentiality provisions. In certain areas, such a Panel may act as an escalation point for its committees. Consequently, the Market Performance Committee and the Disputes Committee might be expected to remain established as sub-committees of such a Panel.

Model 2 – Open Voting Forum



In this model, each Trading Party would be entitled to participate in Open Voting Forum Panel meetings to discuss code changes. Each Trading Party has one vote and the recommendation to Ofwat regarding implementation or rejection of a change would be based on the voting of attendees. Elections for Panel members would no longer be required. It may be that non-Trading Party stakeholders are invited to attend meetings but would not have a vote.

The forum would assess whether changes that are put forward would better deliver against defined outcomes, providing observations and input on technical content before voting.

⁹ Currently Panel Committees are comprised mainly of members drawn from Trading Parties with some provision (in some cases) for other members being drawn from elsewhere (e.g. CCW or with independent, non-industry chairs). Considerations regarding Panel composition may need to be reflected in the composition of its committees and may depend on the extent to which these committees carry responsibilities for holding market participants to account.



This approach may encourage attendance by any Trading Party affected, including both large and small participants and those who do not currently participate (whether from contentment, lack of subject interest or active disengagement).

The heavy lifting in developing the detail of change proposals may need, as now, to fall elsewhere (either left with the proposer, or the Market Operator to develop the change directly or with input from industry experts via workshop sessions or similar).

Consideration would need to be given as to the extent to which such an open forum might provide consistency in determining or driving actions to deliver against strategic outcomes.

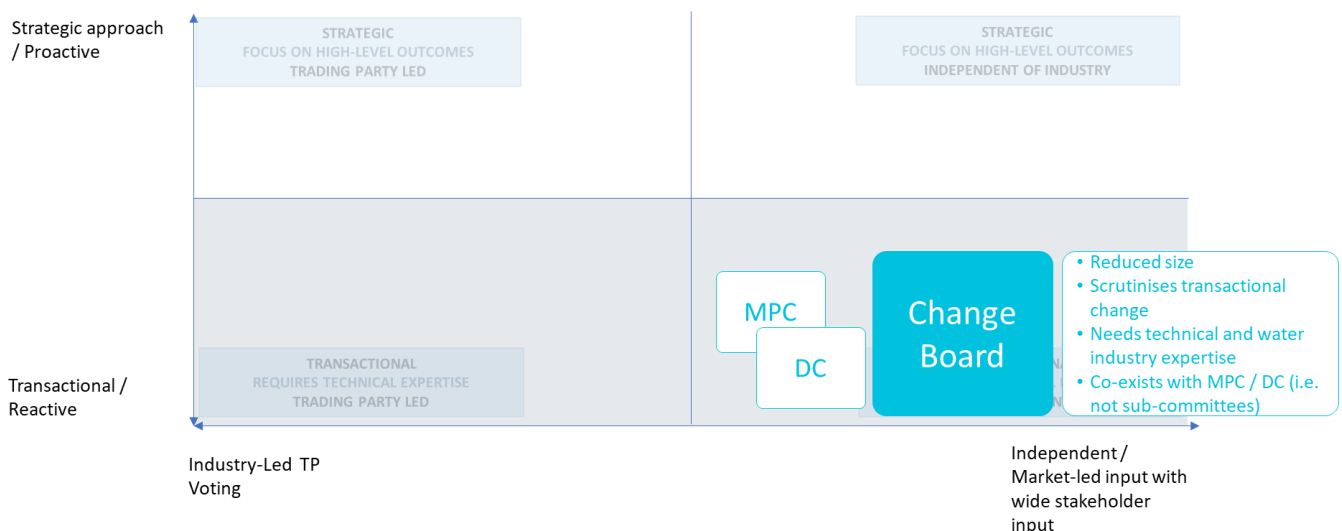
Operationally it would need to be considered how a Panel of potentially 70 members would work together and how it might impact on smaller participants, or whether this would be self-limiting.

It is likely that responsibilities relating to holding market participants to account (e.g. in relation to performance and compliance) would need to sit apart from this forum to be considered by groups whose members were required to act impartially and be bound by appropriate conflict and confidentiality provisions. Consequently, the Market Performance Committee and the Disputes Committee might not be established as sub-committees of the Open Forum. Rules would need to be developed for the selection/election/appointment of members to these committees.

It might be that the User Forum is no longer required in this model as its responsibilities with respect to market change might overlap with the Open Voting Forum.

As part of a composite solution, such as a two-chamber or other variant model, the role of a trading party open forum might differ from the above, either by being subsumed within one or other chamber, or in another formal engagement capacity. In that context, note that it could be for consideration whether and how any voting element might play a role. See the Consultation on [Panel Composition \(Change Proposals CPM021 and CPM039\)](#) for discussion of these options.

Model 3 – Change Board



In this model, individuals from Trading Parties and other organisations (from outside the industry) participate as impartial experts. They may be elected or appointed onto such a Change Board. Voting rules would provide for decision-making.

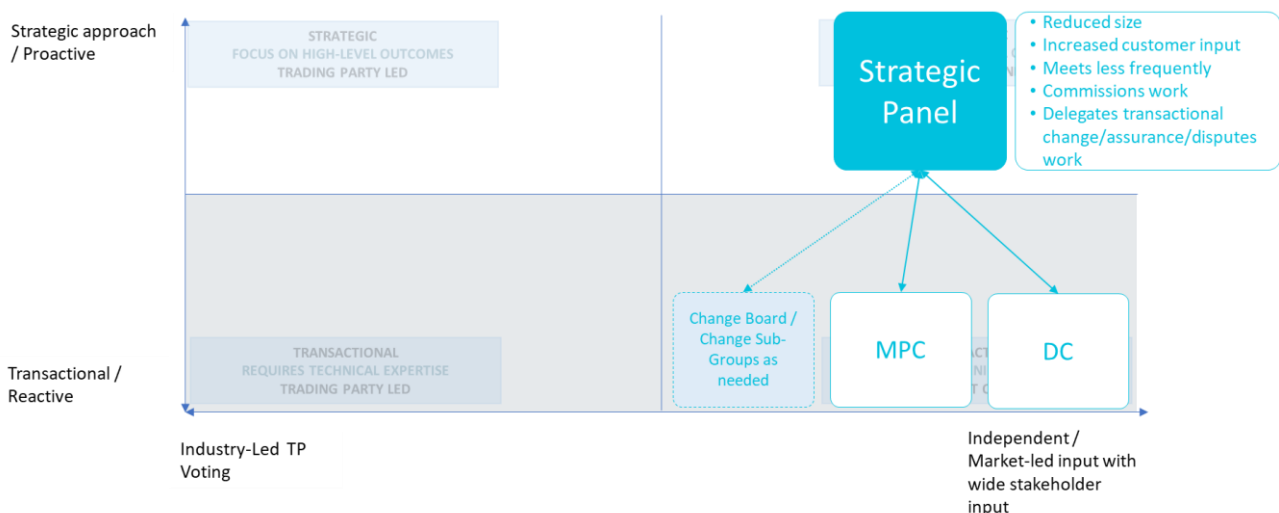
The purpose of the Change Board might be anticipated to be assessing whether changes that are put forward would better deliver against defined outcomes, providing observations and input on technical content before voting. However, the heavy lifting in developing the detail of change proposals may need to fall elsewhere (either left with the proposer, or the Market Operator to develop the change directly or with input from industry experts in trading parties via workshop sessions or similar). Alternatively, it might be that the Change Board seeks to act as the technical workshop – however, it is difficult to envisage how sufficiently wide expertise might be available in such a group to cover changes to the rules which might range from complex commercial, credit and contract matters, through technical process and metering issues and detailed system design considerations.

Under this model, such a Change Board would not have responsibility for determining or driving actions to deliver against strategic outcomes.

It is likely that responsibilities relating to holding market participants to account (e.g. in relation to performance and compliance) would need to sit apart from this Change Board to enable the Change Board to focus on the changes that are put before it. Consequently, the Market Performance Committee and the Disputes Committee might not be established as sub-committees of the Change Board. Rules would need to be developed for the selection/election/appointment of members to these committees.

As part of a composite solution, such as a two-chamber or other variant model, the role of a Change Board might differ from the above, for example by operating under the guidance of either a form of open forum or ‘strategic Panel’. See the Consultation on [Panel Composition \(Change Proposals CPM021 and CPM039\)](#) for discussion of these options.

Model 4 – A Strategic Panel



In this model, individuals from Trading Parties and other organisations (from outside the industry) participate as impartial experts. They may be elected or appointed onto such a Strategic Panel. Voting rules would provide for decision-making.

The focus of a Strategic Panel’s work might be expected to be on determining actions to deliver against strategic outcomes (as defined by Ofwat and Defra) and establishing priorities for such actions or change programmes. Such action would be informed by a Panel that was outward looking and taking input from



stakeholders as outlined elsewhere in this discussion document, taking account of the wider ecosystem in which the market codes sit.

Given its directive nature, a strategic Panel may meet less frequently – for example, on a quarterly basis.

In such a model, there may be a need for a Change Board (or equivalent) similar to that described in model 3 that meets on a more frequent, or agile, basis to make recommendations on changes to the regulator. In this way, changes would not be artificially slowed by the cycle of Panel meetings. Such recommendations from a Change Board would be on the basis of changes delivering against defined market outcomes. It would be important to ensure this overall approach was cost effective.

Members of a Strategic Panel would be required to act impartially and be bound by appropriate conflict and confidentiality provisions. In certain areas, such a Panel may act as an escalation point for its committees. Consequently, the Market Performance Committee and the Disputes Committee might be expected to remain established as sub-committees of the Panel.

Responsibility for progressing change or improvement programmes may fall to the Market Operator – who would need to work with industry experts in trading parties via workshop sessions (or similar) to design and deliver changes to meet these outcomes. Alternatively, this may be with committees such as the Market Performance Committee.

The need for a Strategic User Forum should be given careful consideration in this model. It may be that the Strategic User Forum has clear views on the achievement of a market vision or strategy as outlined by Ofwat. This might set up a healthy dialogue between a Strategic Code Panel with a wide composition that includes customers and stakeholders and the Strategic User Forum only consisting of Trading Parties. However, it could lead to duplication and therefore additional complexity and cost.

The Consultation on [Panel Composition \(Change Proposals CPM021 and CPM039\)](#) explores detailed variations on this model.

QUESTION 6: Please consider the illustrative models presented in section 8, describe what you consider to be the advantages and disadvantages of the various elements of them, and how you would adopt or adapt them and any other attributes in a preferred model?

Composition Considerations

In each of the models (or variations of such models), thought should be given to the composition of a Panel. Composition considerations should be informed by the reason for establishing a Panel – i.e. its purpose. Areas for consideration include:

- ***Terms of Appointment:*** Panel and Panel Committee members' term of appointment is currently two years. There is a question of whether this should remain as is or whether the term of appointment could be extended to, for instance, three years with this being a common question across all models. There could be a limit on the number of terms of office for each Panel Member consistent with corporate good governance.
- ***Selection of Panel and Panel Committee Members:*** Consideration should be given as to the skills, knowledge, experience and competencies needed of Panel members and Panel committee members depending on the purpose and accountabilities and responsibilities of such a Panel or committee and



the behaviours which may be required. The current provisions for nominating, electing and appointing members may need revising to ensure a Panel and its committees have the appropriate skills, knowledge, experience and competencies. This might be through revised election or selection provisions. It might be that trade bodies (e.g. Water UK and the UK Water Retail Council) have a role in selecting and nominating or appointing Wholesaler or Retailer Panel Members based on defined requirements. Alternatively, some form of interview-based selection process may be appropriate. In such a model, the selection criteria must be transparent and responsibility for the ultimate decision be clear.

- *Voting Panel Members:* There are currently 14 voting members on the existing Panel. All Panel Members are required to act impartially and not represent their employers or the class of parties that nominated/elected/appointed them. The current composition¹⁰ reflects a weighting of 65:35 in favour of trading party expertise over non-industry expertise. Considerations for voting member composition may include:
 - If Trading Party membership is widened (e.g. under an Open Voting Forum model) – a mechanism may be needed to guard against decision-making being dominated by those parties with the size and scope to support such a Panel.
 - A smaller Panel might reduce costs and support focused decision-making on prioritisation and strategic outcomes. But it would be important for such a Panel to ensure that it engaged effectively with stakeholders to support evidence-based decision-making.
 - Re-balancing membership of a Panel might be more consistent with the impartiality and independence referenced extensively in Trading Party feedback. It is also an important part of balancing wider stakeholder voices as part of effective market self-governance.
 - Distinctions between Associated and Unassociated Retailers appear less relevant as the market has evolved.
 - There are many options that may be considered regarding a reduced Panel size. A summary of other market code panels is set out in Appendix C. For illustrative purposes a spectrum of examples might include:

¹⁰ Six Panel Members elected from Retailers, three elected from Wholesalers, four independent members comprising one independent chair and three non-industry members appointed by the chair and a customer representative member appointed by CCW.



EXAMPLE A

11 Members (~20% reduction)
54:46 split (industry/non-industry)

Industry Panel Members occupy defined seats

- 1 Independent Chair
- 2 Elected Retailers
- 2 Elected Wholesalers
- 1 Elected NAV seat
- 1 Elected Self Supply seat
- 2 Customer (CCW + another customer representative)
- 2 Independents

EXAMPLE B

10 Members (~28% reduction)
50:50 split (industry/non-industry)

Industry Panel Members may be elected and filled regardless of role with an option for the chair to appoint another member seat if it is felt any particular area of expertise is missing.

- 1 Independent Chair
- 4 Elected Industry (any type)
- 1 Chair Appointed Industry Member (to fill any gaps)
- 2 Customer (CCW + another customer representative)
- 2 Independents

EXAMPLE C

8 Members (~43% reduction)
37:63 split (industry/non-industry)
Members appointed for specific and particular expertise.

- 1 independent Chair
- 1 Wholesaler expert (may not have to be from a wholesaler)
- 1 Retailer expert (may not have to be from a retailer)
- 1 Self-Supply retailer expert (may not have to be from a Self-Supply retailer)
- 1 independent Finance / Economic expert
- 1 independent Competition / Regulatory expert
- 1 independent customer service expert e.g. CCW
- 1 independent customer expert from outside the water industry

- **Affiliated (non-voting) Panel Members:** The Market Operator and Ofwat are currently affiliate Panel Members, this appears to align with considerations in this document regarding the need for an engaged regulator and a feedback loop with the Panel. It also aligns with the Market Operator's role as a provider of services and critical friend to the Panel, each providing the other with critical challenge and support in relation to the delivery of strategic market outcomes set by Ofwat. Thought should be given to whether Defra should be an affiliated Panel Member to provide for the feedback and engagement loop noted in this document. Further, the current position of the Water Industry Commission for Scotland as an Affiliated Member might be questioned.
- **Quorum:** Any change in the composition of the Panel would need to be reflected in quorum provisions.
- **Observers:** All models would allow for meetings to be open to observers. The role of observers overall would require clarification as to whether they should be active participants in meetings.

QUESTION 7: What weight should be attached to each of the Panel composition considerations outlined in section 8, or to other considerations not outlined there, in developing your preferred model? (please explain your answer)

QUESTION 8: What are your views on the current arrangements for nominating and appointing / electing Panel members and Panel Sub-Group / Committee members? If you would change these, why and in what way?



Evaluation Factors

Taking account of the considerations in this document, the models (or variations of the models) set out above would need careful thought and further development. It will be important in any model to avoid building in additional cost or complexity without removing some elsewhere.

In developing and refining such models, each might be evaluated in relation to whether it provides for governance that:

1. Places the **customer at the heart** of market governance and decision making.
2. Provides for **market-led self-governance** with an appropriate blend of trading party experience and other market stakeholder/customer voices.
3. Provides for clear, **outcome-focused, evidence-based decision-making** against defined market outcomes.
4. Enables appropriate prioritisation, ensuring **customer outcomes and strategic changes are prioritised** in decision-making, including supporting innovation in the market and is clear on how actions/changes should be assessed (i.e. **objectives/principles** for decision-making are aligned to vision/outcomes).
5. Provides for **transparency** in decision-making.
6. Provides **appropriate opportunity for all stakeholders to input** to and engage in the consideration of change in a proportionate way – recognising that a one-size fits all approach may not be optimum to provide for all voices to be heard.
7. Ensures the **Panel is accountable to its stakeholders** and provides for the **performance of the Panel** to be measured.
8. Enables **efficient consideration of changes** to rules/systems.
9. Provides for **Trading Parties to be appropriately held to account** for their performance and delivery against market outcomes.
10. Is **demonstrably cost effective** and its costs transparent.

QUESTION 9: Do you agree with the evaluation factors outlined in section 8? (If not, please explain why and suggest, with reasons, any additions, deletions, variants or alternatives.)

QUESTION 10: Do you have any other comments?



Appendix A – Outline of current code provisions regarding Panel

The market codes do not define a Panel purpose, rather, they lay out a range of Panel responsibilities. In some cases the codes define that these responsibilities are delegated to Panel Committees (e.g. the Market Performance Committee).

Panel responsibilities

There are 17 primary responsibilities set out for the Panel. They are defined in the Market Arrangements Code (MAC) and broadly encompass:

- Market Design
- Market Performance
- Disputes
- MOSL Delivery
- Other aspects of Delegation and Oversight

The specific MAC provisions are:

Market Design

- a) keep the contents of the Wholesale-Retail Code under review to ensure that they continue to reflect the Objectives and Principles;
- b) keep the contents of the Market Arrangements Code under review;
- h) consider, vote on and, make recommendations to the Authority in respect of any Change Proposal and Charging Change Proposal;

Disputes

- k) establish a Disputes Committee on a standing basis to investigate and resolve Trading and non-trading Disputes;
- l) perform the role and functions of the Panel in relation to a Trading or non-trading Dispute;

MOSL Delivery

- g) consider and comment on the draft Market Operator Budget and Market Operator Charges, list of Additional Services and Additional Services Charges;
- i) approve all forms and supporting documents that the Market Operator is required to produce under the Code Subsidiary Documents from time to time;

Market Performance

- c) work with the Market Operator to develop the scope and audit plan for each market audit;
- d) review and comment on any Market Audit Reports;
- e) provide advice, recommendations and support to the Market Operator on request in order to assist a Trading Party in successfully carrying out and satisfactorily completing the relevant Market Entry Assurance processes or the Market Re-assurance processes;
- f) comment or provide advice to the Market Operator on request in relation to any Market Entry Assurance Plan or Market Re-assurance Plan;
- j) receive and consider Reports from the Market Operator on performance by Trading Parties or any other matters;
- m) establish a Market Performance Committee on a standing basis in accordance and delegate such of its role and functions to the Market Performance Committee as required in order to give effect to the market performance processes and methods;
- n) oversee the administration of the Market Performance Framework;

Other Areas of Delegation / Oversight

- o) establish Additional Panel Committees, delegate any of the Panel's role and functions to any such Additional Panel Committee and decide that such Additional Panel Committee shall cease to be established from time to time;
- p) report to the Authority on the activities of the Panel, the Disputes Committee, the Market Performance, maintain and implement a governance framework for the use of any Market Performance Standard Charges Committee and any Additional Panel Committee; and
- q) establish and Operational Performance Standard Charges collected to fund other activities.

Panel Purpose

While the codes do not define a purpose for the Panel, the Panel sought to establish a purpose to guide it in its approach. In 2019 the Panel articulated its purpose as:

“The Panel exists to promote, challenge and lead the operation and evolution of the market for the benefit of business water customers.”



Appendix B – Trading Party Survey Responses Regarding Panel Purpose

MOSL undertook a survey of Trading Parties seeking feedback on the performance of the Panel in autumn 2020. This survey focused on the overall change service that MOSL provides. Two questions, in particular sought feedback in relation to the purpose of the Panel.

| Resp | Q10 What do you understand the role of the Panel to be...? | Q11 What do you think the Panel's role <i>should</i> be...? |
|------|--|--|
| 1 | To review Code Changes | To challenge and review code changes |
| 2 | We agree with the statement in the Panel Plan that the purpose of the Panel is, "To promote, challenge and lead the operation and evolution of the market for the benefit of business water customers". It is vital that the Panel monitors the market and facilitates change in order to deliver a positive experience for business customers and give them the confidence to be active in the market. | See our response to Question 10 above. |
| 3 | To act impartially as a group or member in the governance of the market codes. To facilitate and recommend on change / improvement to OFWAT in the best interests of customers and the market. | See response to question 10 |
| 4 | The role of the Panel is clearly defined in its Terms of References which are consistent with section 5.2 Role of the Panel of the Market Arrangement Code (MAC): "To promote, challenge and lead the operation and evolution of the market for the benefit of business water customers". | The role of the Panel as set out seems still to be valid and needed. |
| 5 | To make decisions as to whether proposed changes to the market codes should be approved. To recommend where further work is needed to develop change proposals or articulate the benefits or where additional engagement may be required. | As above |
| 6 | The MAC sets out the role of the Panel | The Panel has expressed a desire to become more strategic. I am supportive of this but it must be seen in the context of the wider market and the interests of stakeholders. For example the recent introduction of the Strategic User Forum could be a more relevant group for making strategic decisions/code changes. Perhaps the two could work together on a "lower and upper chamber" basis. |
| 7 | We believe the role of the Panel to independently: <ul style="list-style-type: none"> • Govern the market and the Market Codes, ensuring that the Market Codes meet the principles and objectives of the market. • Independently interject where appropriate to resolve disputes and provide clarity of meaning. • Make strategic decisions to ensure the objectives of bringing competition to Non-household customers are met. • Set objectives for market improvements. • Review the Market Codes to ensure that they are operating efficiently and effectively in a way that promotes competition and benefits customers. | We feel that the role of the Panel should be as stated above in question 10. In addition to this the Panel should guide and shape the market to ensure the intended benefits to the end customer are delivered. However, we feel that currently the Panel lacks a body which owns a Vision and is able to orchestrate and direct the various stakeholders in that direction. |
| 8 | My understanding of the role of the panel is a group of wholesalers and retailers as well as other industry members who oversee and support market governance as well as providing advice to the market. | I think the panel fulfils its role as intended. The panel reviews the codes to ensure that the market is operating effectively. |



| | | |
|----|--|---|
| 9 | Provides an independent strategic governance of the market and ensuring the market codes are working effectively. | We feel the Panels role should be as we have described in our answer to question 10. |
| 10 | We understand the role of the Panel is to provide an independent strategic governance of the market. This keeps the market codes under review, making sure that they are operating effectively and that they evolve in a way that improves the efficiency and effectiveness of the market, promotes competition, benefit end customers and make regulatory intervention a last resort. | We agree the role of the Panel is still relevant to providing necessary market governance, particularly as the Non-Household market is still evolving. Panel members need to independently challenge and lead the operation and evolution of the Retail market for the benefit of business customers while overseeing the strategic direction of the market. |
| 11 | Consider and recommend code changes for Ofwat’s approval. | The above but also to identify where the market is not working and recommend areas to be improved. |
| 12 | The Panel is a decision making body representing trading parties and recommends changes be considered by the authority. | The Panel is a decision making body representing trading parties and recommends changes be considered by the authority. |
| 13 | Not really sure but I think it’s to deliberate on code changes and make decisions that then have to be passed to Ofwat | to make decisions on the code and the operation of the market, without any need to refer them to Ofwat |
| 14 | To act as a custodian of the market codes and assess proposed changes so that the codes better meet with the objectives and principles of the market. | As above, with additional focus on encouraging innovation and bring forward future strategies to evolve the code so that the objectives and principles continue to be ambitious and exceed customer benefits. There may be opportunity to have a more tactical and technical approach to low level technical and house keeping changes so that these free up the Panel for strategic change and future providing the market codes. |
| 15 | The Panel exists as a key piece in the jigsaw of the overall Governance of the Market. Its purpose is well encapsulated within the Panel purpose statement. "To promote, challenge and lead the operation and evolution of the market for the benefit of business water customers" | It should be as described above. |
| 16 | NA | NA |
| 17 | We understand the role of the Panel to be a senior industry group, composed of key stakeholders from each of the trading party categories, that oversees the effective operation and development of the non-household retail market. This includes keeping the market codes under review to ensure they are fit for purpose and promoting the principles and objectives set out for the market, as well as providing oversight on audits, market performance and disputes etc. | Whilst we agree with the role of the Panel as codified, we would note that there are currently certain structural issues that prevent the Panel from operating or achieving its aims as effectively as would be desired by the market. In particular, as even a unanimous decision from the Market Panel on a smaller change proposal must still receive approval from Ofwat (a process that can take a considerable amount of time) the ability of the Panel to deliver effective change can be significantly delayed and unresponsive to evolving conditions in the market. We believe that the balance of authority on decision making could be better considered in the market, which could further promote the aim of the panel to ‘make regulatory intervention a last resort.’ |



| | | |
|-----------|---|--|
| <p>18</p> | <p>The Panel supports the market aims of improving efficiency, customer service and prices by providing governance and overseeing code changes to ensure the market codes continue to operate effectively.</p> | <p>We believe that the Panel should also review the way that competition is promoted in the market. The non-household water market was opened as a competitive market and competition benefits both Trading Parties and customers. We feel it is a key part of a well-functioning market and encourage the Panel to make this a focus in the future.</p> |
| <p>19</p> | <p>The role of the Panel is set out in its Terms of Reference. In many respects these are, however, not properly observed and prioritized - for example in relation to the priority that should be accorded to customer benefits over benefits to particular industry participants or participant groups; and compliance with the Market Arrangements Code (MAC), Wholesale Retail Code (WRC) and the Objectives and Principles of the Codes.</p> <p>In particular, many decisions of the Panel:</p> <ul style="list-style-type: none"> (1) Fail to have sufficient regard to the efficient operation of the market, and to recognise the WRC as a bilateral commercial contract (rather than a regulatory instrument), in particular by reference to the treatment of commercial parameters such as credit. (2) Apply disproportionate resource to matters such as market performance charges and enforcement whilst deprioritising. (3) Allow the Codes to continue failing to concise, clearly expressed, well- structured or readily accessible, and to worsen in this respect. (4) Pay inadequate attention to the demands of transparency. (5) Create barriers to entry, and thus effective competition, through these failures. (6) Breach the principle of non-discrimination in enforcing certain aspects of the Codes whilst ignoring the lack of enforceability of other elements. (7) Do little, as noted above, by way of encouraging customer participation, still less achieving it. <p>[We have] raised these points many times in relation to particular aspects of the Codes and their stewardship, and does not repeat them here. Such examples can be supplied on request.</p> | <p>As a minimum, its role should be as set out in its current ToR, properly construed, and applied.</p> |



Appendix C – Overview of Other Market Code Panels

In developing illustrative examples of a possible Panel and associated composition, it may be helpful to consider other industries where code panels are utilised. The following summaries have been drawn from a desktop review of code bodies and interviews with the following organisations:

- The Central Market Agency (CMA) – **The Market Code** - (Water)
- Elexon – **Balancing and Settlement Code** (BSC) - (Electricity)
- The Joint Office of Gas Transporters – **The Uniform Network Code** (UNC) - (Gas)
- Gemserv – **The Smart Energy Code** (SEC) - (Electricity and Gas)
- REC Company – **The Retail Energy Code** (REC) - (Electricity and Gas)

| | Panel | Panel Role | Engagement | Code Management |
|-----|---|---|--|---|
| CMA | All Trading Parties may attend and vote: Independent Chair 1 Wholesaler 25+ Retailers | Code Change – Recommend to WICs or determine (under Self Governance) <ul style="list-style-type: none"> • Technical Code Change – delegated to sub committee | Trading Parties propose changes and attend committees and groups Standing Market Participants committee to assess changes at a technical level <ul style="list-style-type: none"> • Consultation if proposer determines | End-to-End (rules and systems) Expert, impartial support – leads on work on behalf of Panel and committees <ul style="list-style-type: none"> • Not empowered (CMA can only raise housekeeping/functional changes) |
| BSC | 12 Impartial Members: Independent Chair 5 Industry 1 Networks 1 System Operator 2 Independent (non-industry) 2 Customer Reps (Citizens Advice) (58:42 Industry/Non Industry split) | Code Change – Recommend to Ofgem or determine (under Self Governance) Technical Code change – delegated sub-committees Performance Assurance – delegated to sub-committee Disputes – | Trading Parties propose changes and sit on committees and groups Workgroups on major changes Consultations on all changes Escalations for underperformance | End-to-End (rules and systems) Expert, impartial support – leads on work on behalf of Panel and committees Not empowered (ELEXON can only raise housekeeping changes) |



| | | delegated to sub-committee | | |
|-----|---|---|---|---|
| UNC | <p>15 Impartial Members:</p> <p>Independent Chair</p> <p>6 Transporters</p> <p>6 Shippers</p> <p>1 consumer representatives (Citizens Advice)</p> <p>1 Non domestic consumer representative (Appointed by Ofgem)</p> <p>(80:20 Industry/Non Industry split)</p> | <p>Code Change – Recommend to Ofgem or determine (under Self Governance)</p> <p>Technical Code change – delegated sub-committees</p> <p>Performance Assurance – delegated to sub-committee</p> | <p>Trading Parties propose changes and sit on committees and groups</p> <p>Workgroups on major changes</p> <p>Consultations on all changes</p> | <p>Rules governance only (systems are overseen by Xoserve)</p> <p>Impartial, administrative support – relies on committee members and TPs to undertake analysis / draft legal text</p> <p>Not empowered</p> |
| SEC | <p>13 Impartial Members:</p> <p>Independent Chair</p> <p>2 Large supplier reps</p> <p>2 small supplier reps</p> <p>1 Electricity Network party rep</p> <p>1 Gas Network party</p> <p>2 Other SEC parties</p> <p>2 Consumer Parties</p> <p>1 Data Communications Company</p> <p>One Member appointed by Chair if an area is underrepresented.</p> <p>(69:31 Industry/Non Industry split)</p> | <p>Code Change – Recommend to Ofgem or determine (under Self Governance)</p> <p>Technical Code Change – delegated to sub-committee, moving away from dedicated work groups</p> <p>Performance Assurance – delegated to sub-committee</p> <p>Disputes – can elevate to regulator</p> | <p>Trading Parties propose changes and sit on committees and groups</p> <p>The Data Communications Code Company (DCC) may raise change</p> <p>Workgroups on major changes</p> <p>Consultations on all changes</p> | <p>End-to-End (rules and systems)</p> <p>Expert, impartial support – leads on work on behalf of Panel and committees</p> <p>Empowered (DCC may raise changes)</p> |



| | | | | |
|------------|--|--|--|--|
| <p>REC</p> | <p>Enduring membership has yet to be established (as at autumn 2020). Will be appointed by a nomination committee and expected to be made up of a high number of independents and at least one consumer/customer representative.</p> | <p>Code Change – Recommend to Ofgem or determine (under Self Governance) Technical Code change – delegated to Change Panel. Performance Assurance – Separate committee chaired by Recco but not reporting to the Change Panel.</p> | <p>Trading Parties propose changes and will sit on change panel. Consultation approach currently not established</p> | <p>End-to-End (rules and systems) bought together from three streams beneath (assurance, professional services, technical services. Approach is for code management than administration. Empowered Recco can raise all types of changes/direct them to be raised. Code Manager responsible to Recco.</p> |
|------------|--|--|--|--|