

# Minutes of Panel Meeting 52a

4 March 2021 | 14:00 – 15:30

Videoconference

Status of the Minutes: **FINAL**

## MEMBERS PRESENT

Trisha McAuley OBE	TM	Chair	Helyn Mensah	HM	Panel Member (Independent)
Richard Barton	RB	Panel Member (Associated Retailer)	Fallon Wilkinson	FW	Panel Member (Associated Retailer)
Trevor Nelson	TN	Panel Member (Unassociated Retailer)	John Vinson	JV	Alternate - Panel Member (Independent)
Michael Rathbone	MR	Panel Member (Wholesaler)	Pamela Taylor	PT	Panel Member (Independent)
Claire Yeates	CY	Panel Member (Unassociated Retailer)	Christina Blackwell	CB	Alternate - Panel Member (Customer Representative)
Mark Holloway	MH	Panel Member (Wholesaler)	Sarah McMath	SM	Affiliated Panel Member (MOSL)
Martin Mavin	MM	Panel Member (Wholesaler)	Dan Mason	DM	Affiliated Panel Member (Ofwat)
Nicola Smith	NS	Panel Member (Unassociated Retailer)	Adam Richardson	AR	Panel Secretary

## OTHER ATTENDEES

Stuart Boyle	SB	MOSL Observer	Ethan Fleming	EF	MOSL Secretariat
Antoine Schmidt	AS	Thames Water Observer	Christopher Wright	CW	Castle Water Proposer item 2
Oli Robins	OR	MOSL Presenter item 2			

## APOLOGIES

Mike Keil	MK	Panel Member (Customer Representative)	Charlotte Glass	CG	Panel Member (Associated Retailer)
Elsa Wye	EW	Panel Member (Independent)			

## Welcome

- 1.1. Apologies had been received from MK who had nominated CB as their alternate.
- 1.2. Apologies had been received from EW who had nominated JV as their alternate.
- 1.3. Apologies had been received from CG.
- 1.4. The Chair reminded Panel Members that in line with section 5.7 of the MAC they were to act impartially and not in the interest or as a representative of any particular body or individual. If Panel Members believed they had an actual or perceived conflict they should declare this at the

start of the meeting or before an agenda item. Items discussed in closed sessions were confidential and should not be discussed with individuals outside of the Panel or confidential papers shared.

## 2. Draft Recommendation Report: CPW115 – Amending and updating the definition of Insolvency Event to remove the ‘negative net assets’ criterion

- 2.1. The Panel considered Change Proposal [‘CPW115 – Amending and updating the definition of Insolvency Event to remove the ‘negative net assets’ criterion’](#). This Change Proposal sought to amend the definition of “Insolvency Event” in order to ensure consistency with insolvency law and practice and mitigate against a Retailer with negative net assets being automatically classed as a “Defaulting Trading Party”, or being defaulted by another Trading Party on that basis alone.
- 2.2. The Proposer explained that they felt the negative net assets test on its own caused uncertainty and risk to the stability of the market and Retailers who may already be in this position.
- 2.3. A Panel Member expressed concern that the solution would enshrine the courts in the code rather than allowing resolution within the market. This could add significant timescales in the event of possible insolvency. Another Panel member noted the inclusion of the courts in the process would be inconsistent with industry self-governance.
- 2.4. A Panel Member noted that allowing Retailers to continue to trade with negative net assets could enable them to acquire more customers creating more of a customer impact if the Retailer went into default. Negative net assets could be an important indicator to a company incurring financial difficulties leading up to default.
- 2.5. It was noted that nothing in the code prevented trading parties from accessing public accounts, but the filing of audited accounts could take place up to nine months after the financial year end. In the meantime, the Trading Party would be aware of the negative net assets without other parties knowing.
- 2.6. The Proposer noted that the negative net assets test was taken directly from the Scottish Water Industry and believed this was due to the Scottish Government requiring stringent protections for Scottish Water and to act as a commercial driver.
- 2.7. The Proposer clarified that currently if a company had negative net assets they were classed as insolvent immediately and not when another party claimed they were which presented a risk to the market. The courts currently did not have a role and it was not possible to negotiate or discuss resolution.
- 2.8. It was noted that many well-known international corporations traded with negative net assets.
- 2.9. A Panel Member reported that they felt there were other indicators that should protect the market against defaulting parties. However, if the test remained they viewed it unlikely a Wholesaler would act on it if they were still receiving payment.
- 2.10. A Panel Member expressed concerns around the proportionality of the solution. From consultation feedback it appeared Wholesalers would be unlikely to use the negative net asset test without supporting evidence. They had concerns around inducting the courts into the market codes. The timing was also of concern due to increasing financial pressures and Retailers asking for additional credit.

- 2.11. A Panel Member noted that Retailers could trade with negative net assets but the key issue was cash flow and ability to make payments.
- 2.12. A Panel Member believed that the change did not follow the spirit of the code and was disproportionate. It would not be in any Trading Parties' interest to enact the provision as it currently was, and the market would look to collaborate to find resolution to concerns. Due to this there appeared to be little risk of the current negative net asset test being relied upon.
- 2.13. A Panel Member expressed disappointment that the solution did not include a staged process to increase the burden of proof on Trading Parties to demonstrate if there was an issue.
- 2.14. MOSL noted the comments that, in general, companies can trade and be considered as going concerns while having negative net assets. It was observed that under the current code provisions, a company with negative net assets would automatically qualify as meeting the conditions of an Insolvency Event. This, in turn, meant that the Wholesaler could place limitations on the ability of that company to acquire new supply points. In addition, that company would be in default of the code which meant that their Wholesale Contract could be terminated. This created audit issues and disincentivised investment both of which may have a negative impact on the customer. The change removed the trigger to make a party default but not the ability to assess financial positions through scrutiny of published accounts. The current provisions might also be a barrier to new entrants.
- 2.15. It was noted that Trading Parties had not acted yet where negative net assets had been reported.
- 2.16. Several Panel Members expressed concerns about possible negative impacts to customers by removing the provision. MOSL responded that if a party was in genuine difficulty there would be a number of other indicators covered by the code and the Insolvency Act.
- 2.17. A Panel Member noted that a Retailer may take advance payments from customers, leaving them out of pocket on Retailer insolvency. A Panel Member responded that by leaving the provision in, the customer could be exposed to the greater risk of an interim supply arrangement.
- 2.18. MOSL reported there were a range of reasons a Trading Party could be found to be in default, and these were laid out in the Business Terms. Criteria included non-payment of primary charges, not supplying enough credit and material breaches of the Wholesaler Retailer Code (WRC), along with the Insolvency Act provisions. If any of these occurred then a Trading Party was in default of the code and their contract could be terminated. Negative net assets would likely only become apparent on the publishing of accounts whereas the other criteria such as non-payment of primary charges may have happened a considerable time before. Conversely non-primary charges may still be being paid and the Trading Party a going concern in spite of having had net negative assets.

The Panel:

- **AGREED** (by majority) to recommend the implementation of the proposed solution in CPW115 to Ofwat for approval (seven in favour, two against, four abstain);
- **AGREED** to recommend an implementation date of;
  - 31 March 2021, if Ofwat's decision is received by 29 March 2021.

### 3. Market Performance Committee Membership

- 3.1. The Panel considered the MPC Membership Update proposal, which proposed extending MPC members tenure by one day to 1st April 2021. This was due to the March MPC meeting being delayed to 1<sup>st</sup> April and the new MPC due to be appointed at the 30<sup>th</sup> March Panel not having sufficient time to prepare for their first meeting.

The Panel:

- **AGREED** (unanimous) to extend the tenure to the 1 April 2021 (13 in favour).

### 4. Any Other Business

- 4.1. MOSL would be circulating the Governance Sub-Group Terms of Reference via email and asked for a swift response from members.
- 4.2. CY and CB would not be attending the closed session due to potential conflicts of interest.

### 5. Closed Session: Metering Committee Nominations

- 5.1. The Panel considered nominations received for the metering committee.
- 5.2. CCW had confirmed their appointed voting member which did not require Panel approval.

The Panel:

- **AGREED** (by majority) to appoint Claire Yeates, Mark Doherty, Ben Kershaw, Claire Stanness and Paul Heron as voting retailer members (seven in favour, two against, two abstain)<sup>1</sup>.
- **AGREED** (by majority) to appoint Heidi Knapton, Mitchell Yeoman-Boldry, Kat Grimley, Angela Brown and Emma Birch as voting wholesaler members (nine in favour, one against, one abstain).

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<sup>1</sup> Two Panel members did not attend the closed session viewing that they were conflicted in relation to the agenda item.