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RECCo response to: Swifter and Simpler Competition Redress, Regulatory Appeals and Competition Enforcement

We welcome the opportunity to respond to the Government's consultation on proposals to make competition redress, regulatory appeals and competition enforcement swifter and simpler. Given RECCo's current and prospective functions, we have confined our response to Chapter 2 of the consultation concerning the regulatory appeals framework, and principally to its application to energy-code modification and Code Manager licence decisions.

RECCo is responding in its current capacity as Code Manager for the Retail Energy Code (REC); which will become a licensable role before the end of 2026. Although the REC is not currently a designated code for the purposes of the energy code modification appeal regime[1], the Government has previously decided that it should be added to the list of designated codes, and we therefore expect relevant REC decisions to fall within the appeal framework once the necessary designation has been made. RECCo is also progressing an application to become the licensed Code Manager for the forthcoming Electricity Commercial Code (ECC), which will bring together the Connection and Use of System Code (CUSC) and the Distribution Connection and Use of System Agreement (DCUSA), both of which are currently designated codes.

RECCo therefore has a direct interest in these proposals in two connected capacities. As the prospective holder of the Code Manager licences under which it will manage the REC and ECC, it may be materially affected by future Ofgem decisions to modify the licence conditions governing those activities. As Code Manager, RECCo will also be responsible for developing and assessing proposed modifications to those codes and making recommendations to Ofgem, whose resulting decisions may themselves be appealed. The design of the future appeals framework will therefore affect both RECCo's position as a regulated licensee and its ability to discharge its code management functions efficiently, while supporting effective accountability and timely regulatory certainty for market participants and consumers.

In the appendix attached we have provided a substantive response to each of the consultation questions from Chapter 2 which we consider to be relevant to RECCo and/or have a view, but would highlight the following points:

- **The reformed framework should make appeals faster, more consistent and less costly**: to the extent that consolidating regulatory appeals within the CAT could improve accessibility, certainty and proportionality, we are supportive. However, we consider that the existing four-month timetable for energy-code appeals (subject to a single one-month extension) should be preserved. Active case management focused written submissions, appropriate controls on new evidence and cross-

[1] The REC is not designated under the Electricity and Gas Appeals (Designation and Exclusion) Order 2014, but has long been expected to be as a successor to the designated SPAA and MRA.

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examination, and clear remittal arrangements would reduce unnecessary delay and duplication while providing timely regulatory certainty.

- **The right to appeal must remain practically accessible:** a proportionate permission stage can filter out speculative or tactical appeals without becoming a costly preliminary hearing. Existing rights for materially affected persons and representative bodies should be preserved, supported by early certainty over costs exposure, protective costs or costs-capping orders where appropriate, shared evidence bundles and predominantly written or remote procedures. These measures would reduce barriers to participation, particularly for consumer representatives and smaller organisations, while retaining effective sanctions for unreasonable conduct.

- **Greater clarity is needed about the role and costs of licensed Code Managers:** in an industry-code modification appeal, it is Ofgem's decision that is under challenge; the Code Manager is not the regulatory decision-maker. Nevertheless, it may be required to explain the modification record, its assessment and recommendation, the operation of the code, or the practical implications of the available outcomes. The framework should clarify whether Code Managers will be notified automatically, expected or required to intervene, or asked by the CAT to provide focused assistance, and how their reasonable costs will be treated. For RECCo, as a not-for-profit company operating under prescriptive annual budgeting requirements, unforeseen appeal activity could constitute a material cost shock, requiring reprioritisation of planned work or additional recovery from code parties.

We are happy to discuss any of the points raised in this response.

Yours sincerely,

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Appendix: RECCo response to consultation questions

Chapter 2 - Simplifying the regulatory appeals framework
Q44: Should Regulatory Appeals be transferred to the CAT? [Yes / No / Not sure] Please explain your views.
Not sure. RECCo supports the proposed transfer in principle. The CAT's judicial role, relevant expertise and active case management offer a reasonable basis for more consistent, timely and proportionate appeals, potentially reducing costs and barriers to participation. However, we are not best placed to assess the CAT's and CMA's relative institutional capabilities. The proposal to provide additional sector expertise where needed is welcome. We note that this migration of responsibilities is a change from the framework set out in the May 2025 DESNZ and Ofgem consultation on code modification appeals to the CMA, which was carried forward in their March 2026 response. If the transfer proceeds, it should preserve existing appeal rights as far as practicable. We address the separate question of which codes and rules should be appealable under Q64.
Q45: Should the CAT have jurisdiction to determine price control matters in Telecoms Appeals? [Yes / No / Not sure] Please explain your views.
[not currently intending to answer]
Q46: Would any amendments to the CAT Rules be necessary to ensure that Regulatory Appeals can be heard fairly and efficiently? [Yes / No / Not sure] Please explain your views.
Yes. We recognise that CAT proceedings have not generally been subject to a prescribed determination period. However, energy-code decisions often affect time-critical and interdependent industry programmes. In a sector undergoing significant transformation, prolonged uncertainty could delay beneficial change and increase costs. Consistent with the good-governance principles of efficiency, proportionality and timely decision-making, the transfer should preserve the existing statutory timetable for CMA energy-code appeals: four months from the deadline for GEMA's response, subject to one extension of no more than one month where there are good reasons. An equivalent or shorter period should therefore be established through the relevant legislation and CAT Rules, preserving flexibility for exceptional cases while providing the certainty needed to facilitate transformational change. We would also welcome clarity on the status of Ofgem's decision and associated implementation activity while an appeal is pending. Under Rule 7 of the current CMA Rules, an appeal does not automatically suspend the decision. Following the grant of permission to appeal, an applicant may make a separate application for suspension of all or part of Ofgem's decision, with the CMA considering matters including significant costs and the balance of convenience.

We consider that this approach should be retained under the CAT arrangements. Implementation should continue unless the appellant successfully demonstrates that suspension is justified. This would protect successful appellants where implementation could cause material harm, while strengthening the safeguards against appeals being used tactically simply to delay an otherwise effective modification.
Q47: Should Regulatory Appeals be determined in accordance with the standard of review set out in paragraph 204(a)? [Yes / No / Not sure] Please explain your views.
Yes, subject to further clarification. We recognise that the proposed standard would be more substantive than a judicial review, enabling the CAT to consider whether the regulator's decision was materially wrong while still respecting the regulator's role as the primary expert decision-maker. It would not, however, amount to a fresh determination of the matter. The current energy code appeal framework expressly permits consideration of whether Ofgem properly had regard, and gave appropriate weight, to its statutory duties and the purposes reflected in the relevant Code objectives. It is less clear how these code-specific grounds would be accommodated within the proposed grounds of error of fact, error of law or error in the exercise of discretion. We would welcome confirmation that the new framework would not narrow the existing scrutiny of Ofgem's application and balancing of the relevant objectives and statutory duties, and that a material error in that balancing could constitute an error in the exercise of discretion. This clarification will be important to RECCo in its future role as a licensed Code Manager. Although any appeal would concern Ofgem's decision, the Code Manager will undertake the preceding assessment and make a recommendation to Ofgem. A clear understanding of the review standard will therefore help Code Managers ensure that their assessment records appropriately address the evidence, competing arguments, relevant objectives and material trade-offs, without treating the Code Manager as the primary decision-maker or requiring it to anticipate and defend any subsequent regulatory appeal.
Q48: Should the notice of appeal set out the grounds of appeal and indicate whether the regulator's decision was based on an error of fact, an error of law, or an error in the exercise of the regulator's discretion, as set out in paragraph 204(b)? [Yes / No / Not sure] Please explain your views.
Yes. Requiring the notice of appeal to identify the alleged errors of fact, law or exercise of discretion should provide clarity for the regulator, the CAT and any interveners, and support a focused and efficient process. We would welcome confirmation that the CAT's review would ordinarily be confined to the grounds pleaded and the aspects of the decision challenged by the appellant, rather than extending to wider elements of the regulatory decision that have not themselves been put in issue. Any subsequent amendment or expansion of the grounds should require the CAT's permission and be permitted only where consistent with fairness and efficient case management.
Q49: Should parties be allowed to submit new evidence on appeal? [Yes / No / Not sure] Please explain your views.
Yes, subject to appropriate controls. The present energy code modification appeal framework already permits the CMA to receive evidence that was not before Ofgem. However, the appellant must provide its evidence with the notice of appeal, identify any facts not known to Ofgem and explain why they were not raised previously. Supplementary

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evidence submitted later generally requires the CMA's permission and an explanation of why it could not have been provided earlier. This appropriately recognises that an appeal should not become an unrestricted opportunity to reconstruct the case originally put to the regulator.

We therefore support the proposed application of CAT Rule 21(2), under which the CAT may admit or exclude new evidence where it is just and proportionate to do so. In exercising that discretion, the CAT should consider:

- whether the evidence is material to an identified ground of appeal;
- whether it was available, or could reasonably have been obtained, before the regulator's decision;
- why it was not submitted to the regulator or included with the notice of appeal;
- whether its admission would cause unfairness, prejudice or material delay; and
- whether the regulator and other affected parties have a fair opportunity to respond.

A distinction should also be maintained between new evidence that assists the CAT in determining whether the regulator's decision was materially wrong when taken and information concerning events that occurred only after the decision. A genuine supervening development does not necessarily demonstrate that the original decision was wrong. Such cases may be better addressed through a focused suspension and reconsideration mechanism of the kind described in our response to Question 64.

Clear procedural controls will be important. Evidence should be submitted as early as reasonably practicable, and the CAT should be able to exclude evidence that is cumulative, insufficiently material or submitted tactically. This would preserve fairness while avoiding delay, repeated additions to the evidential record or attempts to use an appeal as a fresh regulatory decision-making process.

Q50: Should the cross-examination of witnesses be permitted, in line with the CAT Rules? [Yes / No / Not sure] Please explain your views.

Yes, but cross-examination should be permitted only where the CAT considers it necessary and proportionate to resolve a material factual or expert dispute that cannot fairly be determined from the written evidence.

In an appeal concerning an energy code modification, the decision under review will be the Authority's decision. We would not therefore expect cross-examination ordinarily to extend to consultation respondents, contributors to the development or assessment of the modification, or other persons who did not participate in making the decision under appeal. This includes members of the Strategy Advisory Forum and the Code Manager responsible for assessing the proposal and making a recommendation to the Authority. Their involvement in the preceding code modification process should not, without more, make them witnesses in the subsequent appeal.

The relevant consultation responses, assessments, recommendations and supporting evidence should normally form part of the documentary record. Cross-examination should principally concern witnesses whose factual or expert evidence is relied upon by a party in the appeal. Any departure from this approach should be exceptional and subject to the CAT being satisfied that the person has material first-hand evidence that is necessary for the fair determination of the appeal. This would preserve an effective evidential safeguard without adding unnecessary cost, discouraging participation in code governance or inappropriately treating advisory contributors as responsible for the Authority's decision.

Q51: In case the CAT quashes the decision, should the matter be remitted to the regulator, as proposed in paragraph 204(d)? [Yes / No / Not sure] Please explain your views.
Yes. Under the current energy code modification appeal regime, the CMA must confirm Ofgem's decision if it does not allow the appeal. If it allows the appeal, it may do one or more of three things: quash the decision; remit the matter to Ofgem for reconsideration and determination in accordance with the CMA's directions; or, where it quashes a refusal of consent, direct Ofgem and other appropriate persons to secure that the relevant licence condition has effect as if consent had been given. The proposed CAT framework would allow the CAT to dismiss the appeal or quash the decision in whole or in part and, following quashing, remit the matter to the regulator with directions to reconsider and make a new decision in accordance with its ruling. It does not reproduce the CMA's further power to give directions securing that a refused modification takes effect. We support the proposal that the CAT should be able to remit a quashed decision. This is consistent with the current framework under sections 173-175 of the Energy Act 2004.[2] Energy code modifications are generally raised to address a particular industry issue for which there is rarely a single straightforward answer or a binary outcome. Quashing Ofgem's decision will therefore not ordinarily dispose of the underlying matter and could leave the industry uncertain about the way forward. Remittal allows Ofgem, as the regulator and primary decision-maker, to restore regulatory certainty in light of the CAT's findings. The directions accompanying remittal should be sufficiently clear to identify the effect of the CAT's ruling while preserving the respective roles of the CAT, Ofgem and the Code Manager. Where the decision was quashed because of an error in Ofgem's analysis, weighting or treatment of the evidence, Ofgem may be able to reconsider the same or a substantively similar modification using a differently framed assessment. Where the ruling concerns the merits of the proposal itself, a new approach to the underlying problem may be required. The CAT need not formulate an alternative solution, nor will Ofgem necessarily be able to provide one, but its ruling and any directions on remittal should help Ofgem and the Code Manager determine what further consideration is needed.
Q52: Would the proposed appeal parameters set out in paragraph 204 create any barriers or challenges for the parties seeking to appeal a regulator's decision? [Yes / No / Not sure] Please explain your views.
We have no view on this question.
Q53: Should the new appeal replacing Water Redeterminations be overseen by the CAT in accordance with the appeal parameters set out in paragraph 204? [Yes / No / Not sure] Please explain your views.
We have no view on this question.
Q54: Should Water Regulatory References be converted into an appeal process, overseen by the CAT in accordance with the appeal parameters set out in paragraph 204? [Yes / No / Not sure] Please explain your views.
We have no view on this question.

[2] as extended by the Energy Act 2023 reforms brought into force in 2024.

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Q55: Should Energy Regulatory References be removed to simplify the order-making process and ensure greater consistency with similar powers existing for other licensable activities? [Yes / No / Not sure] Please explain your views.
We have no view on this question.
Q56: Should eligibility criteria be harmonised across sectors? [Yes / No / Not sure] Please explain your views.
We have no view on this question.
Q57: In case of harmonised eligibility criteria for Regulatory Appeals and Telecoms Appeals, should the right to appeal be granted to (i) licence holders and companies holding an appointment, and (ii) persons whose interests are materially affected by the regulator's decision and bodies or associations representing such persons, including consumer bodies? [Yes / No / Not sure] Please explain your views.
Yes. We support the proposed eligibility criteria, provided they continue to allow bodies and associations representing persons whose interests are materially affected, including relevant consumer representative bodies, to bring an appeal. Standing and permission to appeal should remain distinct questions. The requirement to obtain the CAT's permission should apply consistently to every prospective appellant, regardless of whether its standing arises from being a licence or appointment holder, a materially affected person, or a representative body. Establishing standing should not, by itself, determine whether the proposed appeal meets the separate test for permission.
Q58: Should parties be required to seek the permission of the CAT to bring an appeal? [Yes / No / Not sure] Please explain your views.
Yes. Whilst we expect that appeals against regulatory decisions will continue to be a rare event, requiring permission to appeal will remain an important safeguard against trivial or vexatious appeals, including appeals pursued principally to delay the implementation of a modification that is contrary to a party's commercial interests. The existing CMA framework for energy code modification appeals already requires permission and provides a reasonable precedent for the CAT arrangements. The permission stage should, however, remain a proportionate and accessible screening process. It should establish whether the applicant has standing and has identified a properly arguable ground of appeal, without becoming a preliminary determination of the substantive case or requiring disproportionate cost and evidence. Clear criteria and prompt decisions will be important to ensure that permission does not become an unnecessary barrier to the effective exercise of legitimate appeal rights.
Q59: Should third parties be permitted to intervene in an appeal, subject to obtaining permission from the CAT? [Yes / No / Not sure] Please explain your views.
Yes. As a matter of principle, transferring responsibility for regulatory appeals from the CMA to the CAT should not of itself result in any diminution of existing rights, including the ability of appropriately interested third parties to intervene. Under the current CMA rules for energy code modification appeals, a person who would have been entitled to seek permission to appeal may apply for permission to intervene in support of or opposition to an appeal. In deciding whether to grant permission, the CMA considers all the circumstances,

including whether the intervention would assist it in meeting the overriding objective, its scope and relevance, the additional cost involved and whether it would be compatible with the statutory timetable. An intervener cannot introduce grounds of appeal that were not raised by the appellant, and permission may be limited to particular grounds. This appears to provide a reasonable and proportionate model to carry forward into the CAT arrangements. A licensed Code Manager may have a legitimate interest in intervening in an appeal concerning a modification to the code it manages. It will have been responsible for developing and assessing the proposal, consulting interested parties and making a recommendation to the Authority. It may also be responsible for implementing the eventual outcome and ensuring that it is coherent with the wider code, other modifications and its licence obligations. An intervention may therefore assist the CAT by explaining the relevant code arrangements, the assessment undertaken and the practical implications of the available outcomes. Any intervention should nevertheless remain consistent with the Code Manager's role in providing an independent assessment and recommendation to the Authority. It should not involve assuming responsibility for, or seeking retrospectively to supplement, the Authority's reasons for its decision. We would expect such an intervention ordinarily to be document-based, drawing upon the modification record and focused written submissions. Permission for the Code Manager to intervene should not of itself necessitate an oral hearing or the cross-examination of individual Code Manager personnel, Strategy Advisory Forum members, consultation respondents or other contributors to the modification process. We would welcome clarity on the status of the licensed Code Manager in an appeal concerning a modification to the code it manages. In our view, the Code Manager should be notified automatically and given an opportunity to identify whether it can assist the CAT, but should not be required routinely to intervene or to defend the Authority's decision. The CAT should instead be able to request focused assistance from the Code Manager on matters such as the modification record, its assessment and recommendation, the operation of the code and the practical implications of possible remedies. Formal intervention, subject to permission, should be necessary only where the Code Manager wishes to advance a distinct position going beyond that neutral assistance. Any participation should ordinarily be proportionate and document-based, should not require the Code Manager to defend or retrospectively supplement the Authority's reasons, and should remain consistent with its independent role. The framework should also clarify how the Code Manager's reasonable costs of providing such assistance would be treated. The treatment of the Code Manager's reasonable participation costs is addressed further in our response to Question 63.
Q60: What barriers to appeal exist for consumer groups or other groups (such as environmental groups) in regulated sectors? Please specify the sector you are referring to.
We have no view on this question.
Q61: In addition to existing CAT Rules on cost recovery, what cost arrangements or other aspects of the appeal process could help ensure fair participation by all eligible parties in Regulatory Appeals and Telecoms Appeals?
The principal requirement is that potential appellants and interveners should have reasonable certainty about their possible costs exposure at an early stage. The CAT should be able to make early costs-capping or protective costs orders, particularly for Citizens Advice, Consumer Scotland and other bodies representing consumer or wider public interests. An unsuccessful challenge should not automatically

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expose such bodies to the regulator's full costs where the case was reasonably brought and responsibly conducted. Fair participation could also be supported through proportionate case management, including streamlined pleadings, common evidence bundles, predominantly written procedures where appropriate, and remote participation. Interveners should be permitted to address matters on which they can provide distinct assistance without being required to duplicate the principal parties' submissions. These arrangements should remain subject to the CAT's discretion, with costs consequences available where a party acts unreasonably or materially increases the scope or cost of proceedings. This would improve practical access to appeal while discouraging speculative challenges and maintaining an efficient process.
Q62: Should costs be capped for certain parties, such as consumer groups? [Yes / No / Not sure] Please explain your views.
Yes, subject to CAT discretion and reasonable conduct.
Q63: Should specific cost arrangements exist in relation to the costs incurred by regulators in defending their decisions? [Yes / No / Not sure] Please explain your views.
Not sure. RECCo is not best placed to determine the appropriate arrangements for recovering the costs incurred by regulators in defending their decisions. Any arrangements should, however, avoid automatic or unrestricted recovery from an unsuccessful appellant where that would create a disproportionate barrier to a reasonably brought appeal. A related but distinct issue arises for a licensed Code Manager. The Code Manager is not the regulator whose decision is under appeal, but it may be required to provide the modification record, explain its assessment and recommendation, assist the CAT on the operation of the code, or advise on the practical implications of possible remedies. The future framework should clarify the basis on which such assistance may be requested and how the Code Manager's reasonable costs will be treated. A Code Manager should not ordinarily be exposed to an adverse costs order merely because it has provided proportionate assistance to the CAT. This is particularly important for RECCo as a not-for-profit company subject to prescriptive annual budgeting requirements. Unplanned participation in an appeal could create a material cost shock and require either the reprioritisation of planned activity or additional recovery from code parties. DBT, DESNZ and Ofgem should therefore ensure that the appeal framework and Code Manager funding arrangements operate coherently.
Q64: We welcome any further views on how to improve the effectiveness of Regulatory Appeals.
The transfer to the CAT provides an opportunity for DESNZ and Ofgem to review which energy code decisions can be appealed. Their March 2026 response retained the distinction between appealable "commercial" codes and excluded "technical" codes, while acknowledging that the distinction can be difficult to draw. One reason given for retaining it was the CMA's limited capacity to review technical matters. The proposed transfer to the CAT, with access to sector-specific expertise where needed, may change that particular consideration.

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A code's classification should not, by itself, determine whether a modification decision is appealable. Technical requirements can materially affect market access, participants' costs and the terms of competition. The Grid Code and SQSS, for example, include competition within their objectives; Ofgem's decisions on GC0173 and GSR031 illustrate that such effects arise in practice. We believe that DESNZ and Ofgem should consider an appeal route for decisions on modifications with material commercial or competitive implications, including decisions concerning the existing technical codes and the future Electricity Technical Code. Standing and permission requirements would remain safeguards against appeals with insufficient merit.

The scope review should also consider any new and emerging codes that were not in effect at the time of the original designation order; for instance, the Flexibility Market Rules and comparable new regulatory rulebooks. While Elexon's decisions on those rules can be appealed to Ofgem under the Market Facilitator Governance Framework, Ofgem's own determination does not currently attract an equivalent statutory code modification appeal. The rules may materially affect access to flexibility markets and the terms on which participants compete. There is therefore a reasonable case for considering whether Ofgem's determination should be capable of further appeal to the CAT, subject to appropriate standing, permission and procedural safeguards. The decision challenged would be Ofgem's determination, rather than Elexon's original rule-making decision. This would bring those rules more closely into line with comparable energy market governance.