

Water Code Modification Appeal 2025 (Castle Water)

CASTLE WATER LIMITED

Appellant

- and -

THE WATER SERVICES REGULATION AUTHORITY ('OFWAT')

Respondent

**WATER CODE MODIFICATION APPEAL UNDER SECTION 207A OF
THE WATER INDUSTRY ACT 1991**

Decision on Permission to Appeal

1. On 26 February 2025, the CMA received an application for permission to appeal (the "**Appeal**") from the Appellant, pursuant to Section 207A of the Water Industry Act 1991 (the "**Act**") and Regulation 4 of the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017 (the "**Regulations**"), against the decision of the Respondent dated 5 February 2025 to reject the Appellant's proposed modification CPW132 to the Wholesale Retail Code issued under the Act (the "**Decision**").
2. The CMA received representations from Ofwat contesting the CMA's jurisdiction to hear the Appeal on 3 March 2025 (the "**Jurisdiction Submission**"), and responsive representations from Castle Water on 6 March 2025 (the "**Jurisdiction Response**"). The CMA heard further oral argument from Ofwat and Castle Water regarding the CMA's jurisdiction at a remote hearing held on 7 March 2025 (the "**Jurisdiction Hearing**").
3. The procedure in the Appeal is governed by the Act, the Regulations, and the Water Codes Appeals: Competition and Markets Authority Rules, 2017 (the

Water Code Modification Appeal 2025 (Castle Water)

“**Rules**”). Both the Regulations and the Rules were made pursuant to powers conferred by the Act.¹

4. I consider below first whether the CMA has jurisdiction over the Appeal, and second whether to grant permission.

Jurisdiction

5. Ofwat may issue (and, from time to time, revise) certain codes in respect of agreements between wholesalers and retailers regarding wholesale supply to retailers.² The Wholesale Retail Code is one such code.
6. There is an appeal regime under the Act and the Regulations allowing certain persons to appeal to the CMA in relation to certain Ofwat decisions about modifications to relevant codes. The scope of the CMA’s jurisdiction is set out in the following provisions:
 - a. S.207A(1) of the Act: *The Secretary of State may by regulations provide for an appeal to lie to the CMA from— (a) a decision by the Authority to make a revision to a designated code; (b) a decision by the Authority, following consultation under this Act about a proposed revision to a designated code, not to make the proposed revision.*
 - b. Regulation 4(1): An appeal against an Authority decision lies to the CMA. Regulation 2(1) defines ‘Authority decision’ as ‘*a decision taken by the Authority on or after the commencement date—(a) to revise a designated code; or (b) following consultation under the Act, not to revise a designated code.*’

Parties’ submissions

7. Ofwat submitted the CMA does not have jurisdiction to hear an appeal of the Decision because, in summary:
 - a. Ofwat ran a voluntary consultation on the Appellant’s modification proposal under its general, incidental powers contained in Schedule 1A of the Act, but did not consult ‘*under the Act*’. The wording in

¹ Sections 207A to 207C read with Schedule 16 of the Act

² Sections 66D and 66DA of the Act in relation to water supply, and sections 117E and 117F of the Act in relation to sewerage. Sections 66DA-DC/117F-H set out procedural requirements Ofwat must follow when issuing and revising such codes.

Water Code Modification Appeal 2025 (Castle Water)

s.207A(1)(b) of the Act which refers to a decision ‘... *following consultation under this Act*’ and the definition of ‘*Authority decision*’ in the Regulations which refers to ‘*consultation under the Act*’ refers to Ofwat’s power to issue and revise codes under ss.66DA/117F of the Act, and the duty to consult on a draft of the proposed code (or revision to a code) under ss.66DB and 117G before issuing a code or revised code. The reference in s.207A of the Act to a ‘*proposed revision*’ of the Code refers to amendments to relevant codes³ proposed by Ofwat under these provisions. Ofwat submitted that, as set out in the voluntary consultation, if after the consultation it had decided to propose to make changes to the relevant code, Ofwat would have then undertaken a statutory consultation as set out under ss.66DB/117G of the Act before making any changes.

- b. Ofwat’s construction supports a policy objective where the right to appeal where Ofwat decides not to make a change to a code is limited to the most significant changes, where Ofwat has accepted a proposed revision, which may be from an external stakeholder (such as Castle Water), consulted on a draft of the proposed code (or revision) in accordance with ss.66DB/117G of the Act, then decided following that consultation not to revise the code. The wording in s.207A(1)(b) of the Act and definition of ‘*Authority decision*’ in the Regulations that refer to ‘*consultation under the Act*’ was intended to permit the CMA to hear an appeal of a decision by Ofwat where it had proposed a modification under ss.66DA-DB/117F-G and subsequently decided not to make the change. Ofwat referred to secondary material including the Explanatory Memorandum to the Regulations which stated that designated codes were intended to be living documents that would be frequently amended,⁴ and for that reason the right of appeal is limited. Ofwat also highlighted a DEFRA consultation document from 2016 (preceding the preparation of the Regulations) which concerned the new regime for appeals to the CMA referred to in s.207A of the Act,⁵ and an example of

³ The relevant codes are designated in Regulation 3 and the Schedule to the Regulations and include the Wholesale Retail Code.

⁴ [The Water Industry Designated Codes \(Appeals to the Competition and Markets Authority\) Regulations 2017.](#)

⁵ [Water code appeals condoc November 2016.pdf](#)

Water Code Modification Appeal 2025 (Castle Water)

a statutory consultation undertaken by Ofwat under ss.66DB/117G on the Wholesale Retail Code.⁶

8. Castle Water submitted the CMA does have jurisdiction to hear an appeal of the Decision because, in summary.
 - a. Ofwat consulted on Castle Water's modification proposal under the Act. The wording '*under the Act*' includes and refers to Ofwat's exercise of its general powers and duties under the Act in connection with the Wholesale Retail Code (i.e. paragraph 12 of schedule 1A and s.2 to the Act, which refers at s.2(6) to ss.66DA-DC and 117F-H under which Ofwat can issue and revise the Wholesale Retail Code). In this context a consultation by Ofwat '*under the Act*' is to be distinguished from other industry level consultation(s) that may have taken place, including the Code Change Committee industry level consultation in respect of Castle Water's proposal that was carried out in July 2023. The wording in s.207A(1)(b) and definition of '*Authority decision*' under the Regs therefore both indicate that '*consultation under the Act*' should be construed as any consultation by Ofwat on any proposal to modify the WRC, whoever makes the proposed revisions.
 - b. Castle Water submitted that Ofwat's construction would represent an extreme narrowing of the right of appeal to the CMA, which would be objectionable as a matter of policy. Castle Water also referred to recent decisions by Ofwat not to conduct a ss.66DB/117G consultation before amending relevant codes where a statutory consultation is unnecessary under ss.66DC(1)(a)/117H(1)(a).
 - c. Castle Water referred to secondary material including DEFRA's 2016 consultation on the draft Regulations,⁷ DEFRA's response to the consultation,⁸ and the Explanatory Memorandum to the Regulations⁹ which it said supported its position that '*consultation under the Act*' refers to any consultation on any proposal to modify the WRC.

⁶ [Consultation on the Wholesale Retail Code.](#)

⁷ [Water code appeals condoc November 2016.pdf.](#)

⁸ [Code appeals for the WSSL regime: summary of responses and government response.](#)

⁹ [The Water Industry Designated Codes \(Appeals to the Competition and Markets Authority\) Regulations 2017.](#)

Water Code Modification Appeal 2025 (Castle Water)

- d. Castle Water's construction furthers the legislative intention to create a symmetrical appeal right that applies to decisions to make revisions and not to make (consulted on) revisions to designated codes, both in circumstances where Ofwat has supported the proposal and where it has not.

CMA's Assessment

9. I have found the question of whether the CMA has jurisdiction to hear the Appeal to be difficult and finely balanced.
10. In determining what Parliament intended to be the scope of the right of appeal against a decision not to revise a designated code, I have taken as my starting point the natural and ordinary meaning of the words used in the context in which they appear. I have also had regard to the purpose of the relevant provisions, considering the context and purpose of the legislative scheme as a whole, including the relevant provisions of the Act and Regulations.
11. As a starting point, I note that there is a material difference in the drafting of the two limbs of the definition of Authority decision under regulation 2(1). Under paragraph (a), there is a right of appeal against a decision to revise a designated code. Under paragraph (b), there is a right of appeal against a decision taken not to revise a designated code "*following consultation under the Act*". The legislation thus imposes an additional condition before an appeal can be pursued against a negative decision as distinct from a positive decision (the "**Condition**"). The central issue for the purposes of this decision is the meaning, effect and purpose of the Condition.
12. Starting with the language used, I regard both the interpretations advanced by the two parties as plausible, and find potential support for both interpretations in the language of the legislation.
13. On the one hand I accept Ofwat's submission that the language of a "*consultation under the Act*" appears most obviously to refer to a consultation that is specifically provided for in the Act. On the other hand, it is common ground that the consultation which occurred in this case took place under powers created by the Act (that is, Ofwat's general and supplementary powers under Schedule 1A paragraph 12). The legislation does not refer to

Water Code Modification Appeal 2025 (Castle Water)

consultation required or mandated by the Act, or to consultation under specific provisions of the Act, but to “*consultation under the Act*”. Thus, giving the language of the legislation its ordinary meaning, this case involved a “consultation under the Act.”

14. Castle Water submitted that the consultation also engaged Ofwat’s statutory duties under section 2 of the Act. I consider that point less relevant to the meaning of the phrase “*consultation under the Act*”.
15. There is force in Ofwat’s submission that the phrase “*proposed revision*” in section 207A refers back to the sorts of “*revisions*” that are expressly contemplated in section 66DA and following, that is revisions to the Code that are proposed by Ofwat. Nevertheless, and again giving the language of the legislation its ordinary meaning, the present case does involve a “*proposed revision*” to the Code, being a revision proposed by Castle Water rather than Ofwat, in the form of a Code Change Proposal with reference CPW132.¹⁰
16. I did not find the other materials to which the parties referred us to be of real assistance in construing the legislation. The Explanatory Memorandum to the Regulations appears generally to support Castle Water’s interpretation, but it does not directly address the question with which we are concerned, and so I gave it limited weight. I did not consider the Defra consultation document to which Ofwat drew our attention to be of assistance either. We note that this document post-dated the passage of section 207A and is not therefore a guide to the intention of the legislator in passing that section (noting that Ofwat placed substantial weight on section 207A as creating the vires for the Regulations).
17. On balance, I consider that on a straightforward reading of the Act and the Regulations, and giving the language its natural and ordinary meaning, the conditions for a right of appeal against a negative decision are satisfied in the present case: Ofwat made a decision not to revise a designated code (alternatively, a decision not to make a proposed revision to the Code) following a consultation that took place under the Act.

¹⁰ [Change Proposal Reference: CPW132](#)

Water Code Modification Appeal 2025 (Castle Water)

18. I gave careful consideration to whether this reading of the legislation gives meaning and purpose to the language of the Condition, and the evident intention that it should operate as a filter for the right of appeal. I noted that, on Castle Water's interpretation, any consultation carried out by Ofwat in relation to a relevant code would appear to be a "*consultation under the Act*", which might then suggest that the words "*under the Act*" are otiose. However, the Condition would not be satisfied by, for instance, an industry level consultation carried out by Market Operator Services Ltd. Castle Water's interpretation therefore gives meaning and purpose to the phrase "*under the Act*", in requiring that the relevant consultation is carried out by Ofwat, and not another body in the sector, using powers provided in the Act.
19. It may be the case that the legislation was drafted with a focus on consultations which take place under specific provisions of the Act, rather than the scenario that has occurred in the present case, being a detailed and careful process of consultation carried out under statutory powers in the absence of a specific statutory obligation to do so. However, in my view the language of the legislation is also broad enough to apply, on a natural reading, in the circumstances of the present case. Had the legislator intended to confine the right of appeal only to cases in which there has been a specific form of consultation under the Act, or a consultation under specific provisions, the legislation could have been drafted accordingly.
20. I also considered the policy or purpose of the Condition on the two interpretations advanced. Under Ofwat's interpretation, the right of appeal is confined to cases in which Ofwat proposed to make a change to the Code but then changed its mind after consultation. Although this would provide a clear filter for the right of appeal against negative decisions, I considered this to be a surprising and unlikely basis on which to limit the right of appeal, at least absent clear language, for two reasons. First, I did not consider it to be clear or obvious why the right of appeal to the CMA should be available (for decisions by Ofwat not to modify a code) in the scenario where Ofwat is minded to make a revision, consults on this basis, but then changes its mind about a modification, but not be available in a situation where Ofwat is not minded to make a revision, consults on this basis, and does not subsequently change its mind. Second, given that the purpose of the right of appeal is, following consultation on a proposed change, to subject Ofwat's decisions to scrutiny by a specialist appellate body, I regarded it as unsatisfactory - and

Water Code Modification Appeal 2025 (Castle Water)

therefore unlikely to have been the intention of the legislator - that the right of appeal should depend on Ofwat's own assessment of the substance of the proposed revision, and specifically, on a decision by Ofwat to change its mind about a revision it previously proposed should be made.

21. On Castle Water's interpretation, the requirement for consultation by Ofwat using its statutory powers provides a measure of the significance of the proposed revision. Although a voluntary consultation may be an inexact measure of the importance of a proposed revision, the facts of the present case demonstrate that a voluntary consultation can provide an indication that a proposal is of some significance and that it merits detailed and careful consideration, even if Ofwat decides to reject the proposal. In my view, this suggests that Castle Water's construction is consistent with the purpose of the legislative scheme, which is to identify and delineate cases in which it is appropriate to grant a right of appeal against negative decisions.

22. In my view therefore, Castle Water's interpretation is to be preferred, both on the basis that it is more consistent with the natural language of the statutory provisions, and on the basis that it gives rise to a more cogent appeal framework which is consistent with the purpose of the legislative scheme.

Permission

Requirement for permission to appeal

23. Under section 207A(7)(a) of the Water Industry Act and Regulation 4(3), the CMA's permission is required before such an appeal may be brought.

24. I make this decision on permission to appeal in my capacity as an authorised member of the CMA (see Regulations 2(1) and 6(5) of the Regulations).

25. In making this decision I have had regard to the NoA, Ofwat's Jurisdiction Submission, Castle Water's Jurisdiction Response, and the representations made by both parties at the Jurisdiction Hearing.

Decision on permission

26. The NoA was received by the CMA within the period prescribed by Regulation 6(1).

Water Code Modification Appeal 2025 (Castle Water)

27. Section 207A and Regulations 2(1) and 4(1)-(2) provide that an appeal against an Authority decision¹¹ may be brought by a water supply licensee, a sewerage licensee, or an undertaker, where their interests are materially affected by it.
28. Under sections 207A(7) of the Act and Regulation 6(8), the CMA may refuse permission to bring an appeal only on the grounds that the appeal is brought for reasons that are trivial or vexatious, or that the appeal has no reasonable prospect of success.
29. Castle Water seeks permission to appeal the Decision on the following grounds:
- a. Ground 1: Ofwat failed properly to have regard to, and/or failed to give the appropriate weight to, the objective to protect the interests of consumers, wherever appropriate by promoting effective competition.¹²
 - b. Ground 2: Ofwat was wrong in its findings about the response of financial institutions to wholesaler distress.¹³

Standing

Parties' submissions

30. Castle Water submitted it is a water supply and sewerage licensee.¹⁴ Castle Water stated in the Application that its interests are materially affected by the Decision to reject proposal CPW132 because the current credit security requirements of the Code have a disproportionate impact on independent non-integrated retailers, citing the challenges Castle Water has experienced in posting credit, and in securing finance and/or the terms on which it has been able to secure finance, where wholesalers are either in or perceived to be at risk of financial stress or distress, and the risk to effective competition between retailers that disparate impact poses.¹⁵
31. Ofwat did not address Castle Water's standing.

¹¹ For the reasons set out at paragraphs 10-22 above, I consider that the Decision is an 'Authority decision' within the meaning of the Regulations.

¹² NoA, paragraph 18.

¹³ NoA, paragraph 19.

¹⁴ NoA, paragraphs 1-2.

¹⁵ NoA, paragraph 2.

Water Code Modification Appeal 2025 (Castle Water)

CMA's assessment

32. I am satisfied that Castle Water has standing to bring the Appeal because it is a water supply and sewerage licensee, ¹⁶ and its interests are materially affected by the Decision.

Whether grounds exist for refusing permission

Parties' submissions

33. Castle Water referred in the NOA to the reasons set out there as to why the Decision was wrong, why the Decision has a material impact on it and other independent retailers and the water retail sector more generally, and stated that therefore the Appellant brings the Appeal for reasons that are neither trivial nor vexatious.

34. Ofwat did not address the grounds for refusing permission in the NoA.

CMA's assessment

35. I have reviewed the NoA. I am satisfied that each of the grounds of appeal summarised at paragraph 29 above is not brought for reasons that are trivial or vexatious. I am also satisfied that each ground raises arguable points of substance which will require detailed consideration. I am therefore unable to conclude that any of the grounds have no reasonable prospect of success.

Decision

36. For the reasons set out above, the CMA has jurisdiction to hear the Appeal, and I grant permission to Castle Water to bring the Appeal on the grounds set out in the NoA, pursuant to s.207A(7) of the Act and Regulation 4(3).

Cyrus Mehta

CMA authorized member

12 March 2025

¹⁶ <https://www.ofwat.gov.uk/publication/castle-water-water-licence-wssl/> and <https://www.ofwat.gov.uk/publication/castle-water-sewerage-licence-wssl/>.