EXPLANATORY MEMORANDUM TO

THE COMPETITION APPEAL TRIBUNAL (AMENDMENT) RULES 2024

2024 No. 1233

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business and Trade and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Justin Madders, Parliamentary Under-Secretary of State (Minister for Employment Rights, Competition and Markets), at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

2.2 Sarah Adcock, Director for Consumer and Competition Policy, at the Department for Business and Trade, confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Nicholas Linfoot at the Department for Business and Trade a Telephone: 07751732671 or email nicholas.linfoot@businessandtrade.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument amends the Competition Appeal Tribunal Rules 2015 ("the CAT Rules") to make provision in relation to reviews of certain decisions of, and appeals of penalties imposed by, the Competition and Markets Authority ("the CMA"), in order to take account of provision made by the Digital Markets, Competition and Consumers Act 2024 ("the 2024 Act"). Such provision concerns new rights of review and appeal under the 2024 Act, as well as amendment of existing rights of review and appeal in the Competition Act 1998 ("the 1998 Act") and the Enterprise Act 2002 ("the 2002 Act"). This instrument also makes a minor amendment to the CAT Rules consequential to the Competition (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/93) ("the EU Exit Regulations").

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England, Wales, Scotland and Northern Ireland.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England, Wales, Scotland and Northern Ireland.

5. Policy Context

What is being done and why?

5.1 References in this document to numbered Rules, are to those numbered Rules in the CAT Rules.

5.2 Previous competition laws were not designed to address the unique barriers to competition in digital markets. To rectify this, Part 1 of the 2024 Act establishes a new digital markets regime which provides the CMA with new, faster, more effective tools to address such barriers to competition in digital markets.

5.3 Under section 103 of the 2024 Act, certain decisions of the CMA under Part 1 of the 2024 Act can be reviewed on application to the Competition Appeals Tribunal ("CAT") by a person with a sufficient interest in that decision. The decisions concerned are any decision made in connection with the CMA's digital markets functions with the exception of a decision made by the CMA in connection with certain of its functions under Chapter 5 (mergers) or a decision about the imposition of a penalty imposed under section 85 (penalties for failure to comply with competition requirements) or section 87 (penalties for failure to comply with investigative requirements) of the 2024 Act.

5.4 By section 66 (of the 2024 Act), section 120 of the 2002 Act (reviews of decisions) is applied in relation to decisions made by the CMA in connection with its merger functions in Chapter 5 of Part 1 of the 2024 Act, other than a decision about the imposition of a penalty under section 85 or 87, 2024 Act. Section 120 of the 2002 Act gives the right to apply to the CAT for a review of the decision to any person aggrieved by that decision.

5.5 By section 89 (of the 2024 Act), certain provisions of the 2002 Act concerning penalties are applied to penalties imposed under section 85 or 87 of the 2024 Act, including section 114 of the 2002 Act (appeals). Section 114 of the 2002 Act gives to a person on whom a penalty is imposed the right to appeal to the CAT in relation to the imposition of penalties.

5.6 The 2024 Act further amends the 2002 Act to include within the scope of decisions subject to CAT review under section 120, certain decisions of the CMA under Part 2 of the 2024 Act.

5.7 Section 130 and Schedule 7 of the 2024 Act introduced Chapter 3A (mergers involving newspaper enterprises and foreign powers) to the 2002 Act. CMA decisions in relation to foreign state newspaper mergers are subject to CAT review by application from an aggrieved person by virtue of section 120 of the 2002 Act (as amended by paragraphs 4(8) of Schedule 7 to the 2024 Act).

5.8 Chapter 2 of Part 5 of the 2024 makes provisions in relation to the provision of investigative assistance to an overseas regulator who have corresponding functions to those of the CMA. By paragraph 4(2) of Schedule 28 of the 2024 Act, decisions of the CMA are included within the remit of section 120 of the 2002 Act – i.e. subject to CAT review by application from an aggrieved person.

5.9 Pursuant to Article 95(2) of the EU Withdrawal Agreement (Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019), the European Commission agreed to transfer to the CMA monitoring and enforcement commitments in relation to an airline merger decision (see Commission Decision (EU) 2024/1665). Section 120 of the 2002 Act has been amended by the EU Exit Regulations to include

within the scope of CAT review, decisions in connection with transferred EU merger commitments.

5.10 Schedules 10 and 11 of the 2024 Act incorporate new provisions into the 1998 Act empowering the CMA to issue civil penalties for failure to comply with certain investigative requirements and breaches of competition law. The 2024 Act provides that section 114 of the 2002 Act applies to such decisions of the CMA, allowing aggrieved persons to appeal to the CAT.

5.11 The relevant provisions are sections 35B and 40ZE (1998 Act) which allow provisions in relation to penalty appeals to apply to penalty decisions under s. 35A or 40ZE respectively.

5.12 Finally, sections 311 and 312 of the 2024 Act provide the CMA with powers to obtain specified information relevant to the retail of motor fuel and allow it to impose penalties for failure to comply with such requirements. By section 313 (2024 Act), such penalty decisions may be appealed to the CAT by an aggrieved party under section 114 of the 2002 Act.

5.13 Amendments are needed to the CAT Rules to enable Part 3 of the Rules to apply to the new and amended rights of review and appeal. By amending the CAT rules, the CAT is able to manage appeals of decisions fairly, efficiently and consistently so that they operate when challenges to the CMA's decisions are brought before the CAT.

What was the previous policy, how is this different?

5.14 This is an amending instrument, which applies existing procedures for CAT reviews and appeals with appropriate modifications to reviews and appeals under Parts 1 and 2 of the 2024 Act and include a minor amendment consequential to the EU Exit Regulations

5.15 Changes are made to Rule 25 concerning the time for commencing proceedings for a review under section 120 of the 2002 Act: firstly, to include all the decisions now subject to review under that section (see substituted paragraph (1) of Rule 25), and secondly, to make provision for reviews under section 103 of the 2024 Act (see new paragraph (2A) of Rule 25).

5.16 The time for commencing proceedings for a review under section 120 of the 2002 Act remains as within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication of the decision (whichever is earlier), while the time for commencing proceedings for review under section 103 of the 2024 Act is set as within 6 weeks of the date on which the applicant was notified of the disputed decision, or the date of publication of the decision (whichever is earlier). The 6-week period was chosen for reviews under section 103 of the 2024 Act as opposed to the time limit of 2 months (see Rule 25 (2)) for review of decisions under market investigation references ("MIRs") under Part 4 of the 2002 Act is because shorter timescales are proportionate to firm-specific investigations under the 2024 Act which are narrower than market-wide MIRs. This ensures that the regime is responsive to fast moving digital markets.

5.17 Rule 26 previously applied Rules 9 to 16, with modifications, to reviews under sections 120 and 179 of the 2002 Act, and is now amended to apply those rules to reviews under section 103 of the 2024 Act. The CAT's ability to strike out an application for a review under Rule 11 is modified so as to apply in respect of reviews under section 120 or 179 of the 2002 Act.

5.18 Rule 27 contains provisions relating to the use of expert evidence in proceedings for a review under section 120 or 179 of the 2002 Act, and this is amended so that it also applies to a review under section 103 of the 2024 Act.

5.19 Rule 28 concerns appeals in relation to penalties under section 114 of the 2002 Act. Paragraph (1)(a) is amended to list the other provisions to which section 114 now applies by virtue of provisions of the 2024 Act, for the purpose of identifying when the 28-day period for filing notice of an appeal begins (being the day on which a copy of the notice of the penalty was served on the person concerned). Paragraph (2) is amended to change the time allowed for filing a defence from three weeks to four to maintain consistency with the appeals for decisions on competition requirements under the 2024 Act.

6. Legislative and Legal Context

How has the law changed?

6.1 This instrument amends the Competition Appeal Tribunal Rules 2015 (S.I. 2015/1648) which replace the Competition Appeal Tribunal Rules 2003 (S.I. 2003/1372) and the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (S.I.2004/2068) (both revoked). As set out in more detail in the preceding section, this instrument makes the following changes to the CAT Rules:

6.2 Amendments to Rules 25 to 27 to include provisions for the CMA's decisions that are subject to review as a result of the 2024 Act, either by operation of section 120 of the 2002 Act (as amended by the EU Exit Regulations to refer to a CMA decision in connection with transferred EU merger commitments) as amended or applied by the 2024 Act, or by operation of section 103 of the 2024 Act;

6.3 Amendments to Rule 28 to ensure that the provisions contained in that rule apply to procedures for appeals concerning CMA's penalties imposed under its digital markets functions (see sections 85 and 87 of the 2024 Act), competition regime (see Schedules 10 and 11 of the 2024 Act which amend the 1998 Act), and motor fuel competition (section 312 of the 2024 Act). See further sections 89 and 313 of the 2024 Act, and sections 35B and 40ZE of the 1998 Act, which provide for certain provisions relating to appeals in the 2002 Act to apply.

6.4 Technical consequential amendments to Rules 2, 3 and 25 to refer to the 2024 Act (in definition and headings).

Why was this approach taken to change the law?

6.5 The 2024 Act created and amended rights of review and appeal against certain CMA decisions on application to the CAT. This amending instrument was needed to ensure relevant CAT procedures apply.

7. Consultation

Summary of consultation outcome and methodology

7.1 Section 15(1) of the 2002 Act requires the President of the Competition Appeal Tribunal to be consulted in advance of making this instrument. Due to the incumbent President's long- term leave of absence, the Secretary of State has consulted the acting President duly appointed by the Lord Chancellor on 11 September 2024 pursuant to section 13(2) of the 2002 Act.

7.2 In addition, the Competition Appeal Tribunal User Group, representing a range of users of the CAT User Group were consulted in advance of making this instrument.

8. Applicable Guidance

8.1 Guidance in relation to the CAT Rules can be found in the Guide to CAT Proceedings, published on the CAT website: https://www.catribunal.org.uk/rules-and-guidance.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because these regulations set out technical provisions to facilitate appeals under the 2024 Act. Estimates of the impact of the entire regime are set out in the Impact Assessment for the 2024 Act: https://publications.parliament.uk/pa/bills/cbill/58-03/0294/ImpactAssessmentSummary.pdf.

Impact on businesses, charities and voluntary bodies

9.2 The impact on business is neutral, since it does not create new impacts beyond those made by the 2024 Act. These impacts can be found in the Impact Assessments cited in section 9.1 above. There is no impact on charities or voluntary bodies.

9.3 The impact on small or micro businesses is neutral as the secondary legislation does not create new impacts.

9.4 The impact on the public sector is neutral because the regulations are set within the implementation of the 2024 Act and establishment of the Digital Markets Unit within the Competition and Markets Authority which will oversee the new digital markets regime.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 This instrument makes amendments to the CAT Rules which are subject to review and reporting from time to time and at intervals not exceeding five years, pursuant to Rule 120.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts"). It does however relate to the withdrawal of the United Kingdom from the European Union because it makes a minor and technical amendment to the CAT Rules to refer to decisions on certain EU merger commitments transferred to the CMA (see section 5.9 above). This is only for the purpose of reflecting amendments previously made to section 120 of the 2002 Act under a separate instrument (the EU Exit Regulations 2019 (see section 4 above).