EXPLANATORY MEMORANDUM TO

THE COMPETITION APPEAL TRIBUNAL (CORONAVIRUS) (RECORDING AND BROADCASTING) ORDER 2020

2020 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

The instrument sets out the conditions under which visual and sound recording and broadcast of proceedings in the Competition Appeal Tribunal may take place. This Order is being made to support the Competition Appeal Tribunal's activities as a specialist judicial body established under the Enterprise Act 2002 to continue to conduct hearings in public notwithstanding the restrictions on travel and gatherings as a result of the coronavirus pandemic.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 This entire instrument applies to England and Wales for the purposes of Standing Order No. 83T of the Standing Orders of the House of Commons relating to Public Business.

3.3 In the view of the Department, for the purposes of House of Commons Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this instrument would not be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament or the National Assembly for Wales if equivalent provision in relation to the relevant territory were included in an Act of the relevant devolved legislature.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 The Lord Chancellor has made the following statement regarding Human Rights:

"In my view the provisions of the Competition Appeal Tribunal (Coronavirus) (Recording and Broadcasting) Order 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 The Coronavirus Act 2020 made provisions for the use of video and audio technology in courts (including the High Court) and some tribunals. However, these do not apply to the Competition Appeal Tribunal. This instrument will bring the Competition Appeal Tribunal, as far as broadcasting of its proceedings is concerned, in line with the High Court and some tribunals for which similar provisions were made in the Coronavirus Act 2020.

6.2 Section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act impose statutory prohibitions on the visual and sound recording and broadcast of court proceedings.

6.3 Section 32 of the Crime and Courts Act 2013 provides that the Lord Chancellor, with the concurrence of the Lord Chief Justice, may make an order to disapply the statutory prohibitions if prescribed conditions are met.

6.4 This instrument prescribes the conditions under which visual and sound recording and broadcast of proceedings in the Court of Appeal are permitted.

7. Policy background

What is being done and why?

7.1 Unless there is a statutory exception, the publication of video and sound recording from courts in England and Wales is prohibited by certain provisions of the Criminal Justice Act 1925 and the Contempt of Court Act 1981.

7.2 In March 2020, the Government advised that large gatherings of people should not take place during coronavirus pandemic. The Competition Appeal Tribunal does not currently have statutory authorisation to record or broadcast public hearings by video or audio link and no provision was made in the Coronavirus Act for it to do so unlike the High Court and other tribunals.

7.3 As a result, remote hearings using video link arrangements are proceeding in the CAT effectively on a closed basis. Access to a remote hearing is only available by way of invitation to the parties and other persons who have notified an interest in attending the remote hearing. It could be argued that the closed nature of the present arrangement is contrary to Rule 99(1) of the CAT's Rules of Procedure (set out in Statutory Instrument 2015 No. 1648) which stipulates that "Every hearing is to be in public [except where confidential information within the meaning of the Enterprise Act 2002 is being considered]". This is in contrast to tribunals governed by the Tribunals Courts and Enforcement Act 2007 (i.e. the First-tier and Upper Tribunals) where the tribunal has always had a broader discretion to direct that a hearing or part of it may be held in private (see e.g. rule 37 of the Tribunal Procedure (Upper Tribunal) Rules 2008) which power has now been enlarged by the Tribunal Procedure (Coronavirus) (Amendments) Rules 2020 (S.I. 2020 No. 416). Therefore, there is a present risk of challenge to CAT proceedings on the grounds that they have not been conducted in accordance with the CAT's Rules of Procedure and if such a challenge occurs then delay, increased financial cost and sub-optimal enforcement of competition law are inevitable knock-on effects. That risk can be eliminated by granting the CAT the power to broadcast its proceedings (which will take place through its website).

7.4 This instrument is being made to enable the Competition Appeal Tribunal to continue to carry out its statutory functions and conduct its proceedings in accordance with its statutory duty in Rule 99 of the Competition Appeal Tribunal to hold all proceedings in public, unless directed otherwise by the Tribunal.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 No consolidation is taking place.

10. Consultation outcome

10.1 This instrument has not been subject to any formal consultation in light of the urgency with which it needed to be made and its temporary nature – it will expire on 25th March 2022, the same day as the Coronavirus Act 2020 expires.

10.2 We have consulted extensively with the Competition Appeal Tribunal. The Tribunal has explained that it is reasonably common for their larger cases to attract 100 or more attendees including multiple parties to the appeal as well as members of the public and journalists.

11. Guidance

11.1 This Order does not attract the need for guidance but general information about the Competition Appeal Tribunal can be found on the following website:

https://www.gov.uk/government/organisations/competition-appeal-tribunal

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because the impact of this SI is small (confidently below <+/-£5m annually to businesses and more broadly). This instrument ensures that proceedings that are currently taking place at the CAT by video or audio link due to the disruption caused by coronavirus can be done so in a way which is compliant with the CAT's existing Rules of Procedure which specifies that hearings must be held in public. Accordingly, this measure is not politically sensitive. A de minimis assessment has been carried out to demonstrate that the impact of this measure is small.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This Order is being made in response to the restrictions imposed on public gatherings due to the coronavirus pandemic and will expire on 25th March 2020.

15. Contact

15.1 Rebecca Walbank at the Ministry of Justice Telephone: 07840 008773 or email: rebecca.walbank@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Kate Gregory-Smith, Deputy Director for Courts and Transparency Policy at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under-Secretary of State Chris Philp MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.