



Neutral citation [2014] CAT 7

IN THE COMPETITION
APPEAL TRIBUNAL

Case No.: 1226/2/12/14

19 May 2014

B E T W E E N:

SKYSCANNER LIMITED

Appellant

-v-

COMPETITION AND MARKETS AUTHORITY

Respondent

-and-

BOOKING.COM B.V.
SKOOSH INTERNATIONAL LTD
EXPEDIA, INC.
INTERCONTINENTAL HOTELS GROUP PLC

Interveners

ORDER (SCOPE OF INTERVENTION)

UPON reading the statement of intervention filed by Skoosh International Ltd (“Skoosh”) on 13 May 2014 (the “Statement”)

AND UPON considering the application by the Competition and Markets Authority (“CMA”) dated 15 May 2014 (the “Application”) for directions that Skoosh withdraw the Statement and resubmit a revised statement of intervention that is confined to arguments in support of the three grounds of review raised by Skyscanner Limited (“Skyscanner”) in its notice of appeal (the “Notice”)

AND UPON considering the observations filed by Skoosh and the other Interveners in relation to the Application

IT IS ORDERED THAT:

1. The Application be dismissed

REASONS:

1. The Application essentially asks the Tribunal to decide whether the Statement filed by Skoosh raises new grounds of appeal rather than merely supporting, as it claims to do, Ground 3 of Skyscanner’s appeal.
2. In the Notice, Skyscanner titles its third ground of review “The OFT has acted *ultra vires* by accepting commitments which potentially harm competition”.
3. Skyscanner’s appeal under this ground has already been the subject of clarification by Skyscanner at the request of the CMA (see paragraph 3(a) of the Tribunal’s Order of 1 May 2014) and, by its letter of 6 May 2014, Skyscanner stated as follows:-

“...the legal error in the OFT’s approach remains that pleaded in paragraph 64 of Skyscanner’s Notice of Appeal, i.e. that, by putting in place the Final Commitments without considering adequately or at all the potential anti-competitive consequences that they may have, the OFT acted contrary to the policy and objects of the CA98 to promote competition to the benefit of consumers and/or has acted irrationally.”

4. The CMA submits that Skoosh has raised “at least one, if not two new issues that go beyond Skyscanner’s pleaded case”. The CMA submits first that Skoosh is contending that the Office of Fair Trading (“OFT”) applied an incorrect “counterfactual” when assessing whether or not to accept the proposed commitments, whereas Skyscanner said nothing about counterfactuals in the Notice. The CMA submits secondly that Skoosh is contending

that the OFT should have carried out a full analysis of the efficiencies arising from the proposed commitments to see whether the commitments would satisfy the requirements of Article 101(3) of the Treaty on the Functioning of the European Union (“TFEU”) before accepting them, whereas Skyscanner has made clear that it does not claim the OFT should have done this specifically. Skoosh, in its subsequent observations filed at the Tribunal, rejects these claims and argues that its intervention raises no new grounds of appeal but “supports the contention in Ground 3 by reference to the legislative architecture”.

5. We do not accept the CMA’s submissions in this instance, and do not propose to make the direction requested. From the point of view of speed and economy of process, we have had one clarification by Skyscanner of Ground 3, and a further submission by Skoosh seeking to place its intervention within the boundaries of this ground. Whilst we are very aware of the need to avoid the case expanding outside its proper limits, we do not think that a re-submission of the Skoosh statement of intervention would secure the just, expeditious and economical conduct of the proceedings.
6. In any case, we do not think that the CMA’s contentions in relation to the scope of the Statement are correct. Ground 3 of Skyscanner’s appeal, even as clarified, alleges in fairly broad terms (but not too broad to be inadmissible) illegality and/or irrationality arising from an alleged failure by the OFT to consider the possible anti-competitive consequences of the proposed commitments.
7. It seems clear to us that, in preparing arguments for trial, Skyscanner will inevitably consider what the commitments are intended to achieve, whether that result is in competition terms “better” than what was or would otherwise have been the case (which is all that is meant by “counterfactual”), and whether the commitments will have unforeseen (at least by the OFT) consequences that ought to have been considered. To contend, as the CMA does, that no mention has been made by Skyscanner of any “counterfactual” is not convincing at this stage of the case, as it is hard to see how any sensible assessment could be made of the effects of the commitments on competition without considering how things were or might otherwise have been.
8. As to whether it is alleged that the commitments must meet the requirements of Article 101(3) TFEU, again, we think this is an argument that will inevitably arise from considering whether or not the OFT acted rationally and legally in deciding to accept the commitments. On the assumption that the OFT believed that what it was doing improved the competitive situation for consumers, whether it informed its belief by reference to the

terms of the legislative provisions it was purporting to apply is, we believe, one of the issues that will be argued before us.

9. The difference between a new ground of appeal and an argument supporting and elaborating an existing ground has been considered in some detail by the Tribunal in *Floe Telecom Limited (in administration) v Office of Communications* [2004] CAT 7 and more recently in *Carphone Warehouse Group Plc v Office of Communications* [2009] CAT 30. In the latter case, the Tribunal noted as follows, at [6]:

“...the distinction between amendments which introduce new grounds and amendments which introduce new points in support of existing grounds is intended to be drawn at a fairly high level of abstraction”.

Although that case concerned an application to amend by the appellant, the essential point is the same.

10. We adopt the same approach here and, for the reasons set out above, we reject the CMA’s application.

Peter Freeman CBE QC (Hon)
Chairman of the Competition Appeal Tribunal

Made: 19 May 2014
Drawn: 19 May 2014