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**IN THE COMPETITION  
APPEAL TRIBUNAL**

Case Nos. 1226/2/12/14

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

1<sup>st</sup> May 2014

Before:

PETER FREEMAN CBE QC (Hon)  
(Chairman)  
BRIAN LANDERS  
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

**SKYSCANNER LIMITED**

Appellant

- and -

**COMPETITION AND MARKETS AUTHORITY**

Respondent

- and -

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

Proposed Interveners

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**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

Miss Kassie Smith QC (instructed by Maclay Murray & Spens LLP) appeared on behalf of the Appellant.

Miss Kelyn Bacon QC and Mr. David Bailey (instructed by the Office of the General Counsel) appeared on behalf of the Respondent.

Mr. Philippe Chappatte (of Slaughter & May) appeared on behalf of the Proposed Intervener Booking.com B.V.

Mr. Duncan Sinclair appeared on behalf of the Proposed Intervener Skoosh International Ltd.

Miss Dinah Rose QC and Miss Jessica Boyd (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Proposed Intervener InterContinental Hotels Group Plc.

Mr. Josh Holmes (instructed by King & Wood Mallesons LLP) appeared on behalf of the Proposed Intervener Expedia, Inc.

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1 THE CHAIRMAN: Good morning, and welcome on 1<sup>st</sup> May.

2 MISS SMITH: Sir, I appear for Skyscanner this morning, and it may assist if I start by  
3 introducing the array of others who are here for other parties and applicants. At the end we  
4 have Miss Kelyn Bacon, imminently to be a QC, and David Bailey for the Competition and  
5 Markets Authority. Then Dinah Rose QC and Jessica Boyd for IHG Inter-Continental  
6 Hotels, Mr. Philippe Chappatte for Booking.com, Josh Holmes for Expedia, and Duncan  
7 Sinclair for Skoosh.

8 THE CHAIRMAN: Thank you very much for that. This is a case management conference. I  
9 want to say a couple of general things before we begin. We are very conscious that this is  
10 an application under s.47(1)(c) of the Competition Act 1998 and it is a third party appeal,  
11 and it is to be decided by applying the judicial review principles. So we shall be  
12 approaching it very much on that basis.

13 Secondly, as the commitments are, we understand, already in force and they are running for  
14 two years, and I am not aware of any application to suspend them, therefore it is incumbent  
15 on everybody, I think, to get to a decision on this litigation as quickly as possible, otherwise  
16 it runs the risk of not being relevant or useful.

17 Those two considerations might have a bearing on how we do the housekeeping and  
18 approach the timetable today.

19 A third comment would be that this is one of those cases where everybody claims to be  
20 promoting competition. I think you have tried to discuss between Skyscanner and the new  
21 Authority (or the old Authority called now the new Authority) some resolution. We would  
22 encourage you to continue to do so, notwithstanding the existence of this litigation. If those  
23 efforts were successful we would be more than delighted.

24 I think on that basis, can you set out your stall?

25 MISS SMITH: Yes, sir, we take on board all those comments and we will continue to talk to the  
26 Authority, as we have done right up to almost the day before this application was issued.  
27 Sir, it might assist if we run through your draft agenda. A number of issues will not, I hope,  
28 take too much time. The appropriate forum for the proceedings, I think everyone is agreed  
29 on, is England and Wales.

30 THE CHAIRMAN: That is a relief, thank you for that.

31 MISS SMITH: As regards requests for permission to intervene, there are four applications to  
32 intervene - three in support of the Authority by IHG, Booking.com and Expedia, and one in  
33 support of the appellant, Skyscanner, from Skoosh.

34 Sir, you will have seen that, as regards IHG, Booking.com and Expedia, that they have set  
35 out in their applications to intervene their grounds. We do not oppose those applications to

1 intervene on the basis that they are very stringently policed, so that they do not add to the  
2 length of these proceedings and they do not duplicate anything that the Competition and  
3 Markets Authority will argue. As you said, sir, this is a judicial review, the grounds are  
4 relatively limited - I hope they are clear judicial review grounds - and although we accept  
5 that the interveners have an interest in these proceedings, we hope that their interventions  
6 can be carefully managed so that they do not add to the cost or time taken to deal with the  
7 appeal.

8 As regards Skoosh's application to intervene, sir, as to whether you want to hear anything  
9 further from any of the applicants to intervene. We support Skoosh's application to  
10 intervene, and slightly begrudgingly it also appears that the Authority do, from what they  
11 say in their skeleton. We are in your hands as to how you want to deal with those  
12 applications. I just outline the position.

13 THE CHAIRMAN: I suppose the first issue we ought to consider is this request for further  
14 clarification. Would you like to elaborate on that?

15 MISS BACON: Yes, sir, I can do so quite shortly. Perhaps it would be helpful for the Tribunal  
16 to turn up the notice of appeal in tab 1 of the bundle. Could you turn to p.19. Sir, I am  
17 working from the CMC bundle, but you have a separate notice of appeal bundle in any  
18 event. Paragraph 63 is the contested paragraph.

19 Perhaps I ought to step back a bit and take you, first, to the summary of the grounds of  
20 appeal, which is para.26, pp.10 to 11. At 26 it is said:

21 "Skyscanner contests the Decision on the following three Grounds ..."

22 1 and 2 are not in dispute. The Tribunal may have seen that we asked for a clarification of  
23 2, and that has been received and we do not pursue any application in that regard. Para.  
24 26.3:

25 "Third, by putting in place the Final Commitments without considering the  
26 potential anti-competitive consequences that they may have, the OFT has acted  
27 contrary to the policy and objects of the CA98..."

28 That is a summary. If you then go back to p.17 ----

29 THE CHAIRMAN: "And/or has acted irrationally".

30 MISS BACON: Exactly, "and/or has acted irrationally". Paragraph 64 essentially replicates the  
31 summary in 26.3, and it is those two paragraphs that my learned friend has referred to in the  
32 correspondence between us. She says our case is set out in paras.26.3 and 64, and we do  
33 not go beyond that case.

34 Pausing there, if the essential ground of appeal is simply that the OFT did not consider  
35 adequately or at all the potential anti-competitive consequences, the Tribunal will see that,

1 on its face, that is far too broad a ground of appeal. We need to know what anti-competitive  
2 consequences we did not consider. It then falls upon Skyscanner, the appellant, to specify  
3 which of the anti-competitive consequences we did not consider. We think we discern that  
4 in para.62. Paragraph 62 says that what the OFT did not do was to take account of the fact  
5 that the:

6 “... discounting to Closed Groups in a non-transparent way undermines an  
7 important market dynamic, which is that of meta-search sites and other price  
8 comparison websites.”

9 If that is the specific anti-competitive consequence that we did not take into account, we can  
10 plead to that and I do not have a problem with that paragraph.

11 My problem is with para.63, which sets out something quite different. In para.63 three  
12 things are said. Firstly, it is said that because the OFT characterised the restrictions as  
13 object infringements it did not properly analyse market dynamics and the effects of the  
14 existing discounting restrictions.

15 The second thing that is said is that the OFT was not in a position to strike a balance  
16 between the harm to competition caused by the final commitments and the benefits of those  
17 commitments.

18 The third thing that is said is that the OFT did not properly assess the alleged efficiencies  
19 put forward by the parties to justify the Closed Groups, which are restrictive of competition.  
20 So three fairly broad, and far broader than the allegations in 62, contentions are made  
21 concerning the nature of the OFT’s process and what the OFT did or did not do. The  
22 problem with that is that it goes beyond simply saying the OFT did not sufficiently consider  
23 the impact on meta-search sites and says something about the OFT’s balancing process, the  
24 OFT’s approach to efficiencies and whether the OFT carried out an effects analysis.

25 That was the reason, sir, for the question in our letter in which we asked, “Are you saying in  
26 para.63 that the OFT should have carried out an effects analysis? Are you saying that the  
27 OFT was required to carry out a balancing exercise? Are you saying that the OFT was  
28 required to fully assess and reach a definitive conclusion on the efficiencies?”

29 That letter is at tab 5 of the CMC bundle and on the second page you can see our request:

30 “Please confirm whether your client contends that, before the OFT could lawfully  
31 accept the Final Commitments, the OFT was required [to do] ...”

32 (i), (ii), (iii). The (i), (ii) and (iii) reflecting the first, second and third sentences of 63.

33 We are asking whether 63 is saying that the OFT was required to do something that it did  
34 not do and, therefore, that is an error?

1 The response from Skyscanner is at tab 8 of the CMC bundle on the second page. Under  
2 the heading “Ground 3 of the Notice” Skyscanner makes essentially two points. They say  
3 that their pleaded case is summarised in para. 26.3 and then they refer also to para. 64 two  
4 paragraphs down. I have taken you to that and made my point on it – that it is not good  
5 enough because we needed to know specifically what anti-competitive consequences we did  
6 not consider. It is simply not good enough to point to a general statement without  
7 particularising that further.

8 The second point that Skyscanner makes is in the middle paragraph of that section where  
9 they say that the points made in paragraph 63 support Skyscanner’s pleaded case and are  
10 clearly relevant. Again, sir, we are not saying it is not relevant, what we are saying is that  
11 we do not understand what is said. Is Skyscanner saying, as seems to be the case on the  
12 face of para. 63, that the OFT did not do something that it was required to do. The  
13 implication that it was required to do those things comes out clearly from the words “It did  
14 not properly analyse market dynamics”, “the OFT did not properly assess the alleged  
15 efficiencies”. That is the question that Skyscanner has not answered, and that is the  
16 question we need to know the answer to before we can actually plead to this paragraph. I  
17 think it is for my learned friend to explain what she intends by that paragraph, and we  
18 would be grateful for a clarification, whether in this hearing, or following the hearing in the  
19 course of correspondence as we have proposed in the directions that we suggest.

20 THE CHAIRMAN: Let us have a go in this hearing, shall we.

21 MISS SMITH: Sir, we say this application is misconceived and should be dismissed with costs.  
22 We say that because the Competition and Markets Authority’s request has already been  
23 answered. We say, first, the pleadings are absolutely clear and, in any event, they were  
24 clarified in our letter of 23<sup>rd</sup> April. I do not need to remind you of the requirements of Rule  
25 8 of the Tribunal’s Rules, which say that the notice of appeal contains a concise statement  
26 of facts, a summary of grounds for contesting the Decision. That is exactly what this does.  
27 If I can just take you to the Notice, back to the relevant paragraphs, internal numbering 16.  
28 Paragraph 16 sets out the legal basis for Ground 3, the classic judicial review ground. The  
29 classic judicial review argument, public law argument, that the OFT has to exercise its  
30 powers granted under legislation rationally and so as to promote the policy and objects of  
31 the legislation. That is the legal basis for Ground 3 clearly there set out.

32 THE CHAIRMAN: Do we know what the objects of the Competition Act are?

33 MISS SMITH: This is the argument we will have to make good in submissions, we say the  
34 objects in para. 64 are to promote competition to the benefit of consumers.

35 THE CHAIRMAN: And you get that from where?

1 MISS SMITH: We get that from the structure and substance of the Act, and we will no doubt  
2 develop that in our written submissions.

3 THE CHAIRMAN: There is not actually anything in the Act.

4 MISS SMITH: There is no particular section of the Act that says: “The purpose and objects of  
5 this Act are X, Y, Z”, no.

6 THE CHAIRMAN: Even as amended by the ERRA?

7 MISS SMITH: No, there is not, as far as I am aware, but that is not required under these public  
8 law grounds ----

9 THE CHAIRMAN: So you are saying we can work it out from the structure.

10 MISS SMITH: -- one can discern the purpose and object of the Act from a number of sources, as  
11 has been done in various public law cases, sources such as the legislation as a whole,  
12 statements of policy, and statements of the legislator. The legal basis is set out in para. 60.  
13 The argument is set out, as my learned friend identified, in para. 26.3 and para. 64. We say  
14 the OFT has acted contrary to the policy and objects of the Act to promote competition  
15 and/or has acted irrationally and in those paragraphs we explain why we say that, how they  
16 have acted contrary to the policy and objects by putting in place the final commitments  
17 without considering adequately or at all the potential anti-competitive consequences that  
18 they may have. That is our case, and that is the legal error that we have identified quite  
19 clearly, and set out on the pleadings.

20 My learned friend argues that they do not know what the anti-competitive effects they have  
21 not considered are, and that is absolutely wrong. The anti-competitive effects are clearly set  
22 out in paras. 61 and 62. Paragraph 61:

23 “As explained above, it is Skyscanner’s case that although the Final Commitments  
24 may encourage intra-brand competition by allowing OTAs to offer discounts, the  
25 Principle which allows Hotels to prevent OTAs from publicising Specific  
26 Information about Reductions to consumers who are not members of Closed  
27 Groups, including via meta-search sites, will have a negative effect on inter-brand  
28 competition and consumers.”

29 Then we go on to develop that point in the rest of para. 61 and para. 62. We have made  
30 absolutely clear what we say the potential anti-competitive effects are that were wrongly not  
31 taken into account by the OFT.

32 We have set out our case quite clearly there and it can be pleaded to by the Competition and  
33 Markets Authority.

34 Paragraph 63 sets out the approach that the OFT took in the Decision which may explain  
35 why they committed the legal error. They failed, we say, to balance the effects of the

1 restrictions on discounting versus the efficiencies pleaded by the parties, versus the alleged  
2 benefits and impacts of the final commitments. That may be why they committed the legal  
3 error that we say they have committed. But the legal error we say they committed is  
4 restricted to what is set out in paras. 64 and 26.3.

5 Paragraph 63 is clearly relevant, as we have said, to the third Ground, but the legal error is  
6 clearly set out in paras. 64 and 26.3. We say our case is clear enough from the pleadings, it  
7 certainly fulfils the requirements of Rule 8, but it was definitively clarified, insofar as that  
8 was necessary, by the letter of 23<sup>rd</sup> April, which you have been taken to at tab 8. The last  
9 but one paragraph of that letter:

10 “For the avoidance of doubt, Skyscanner does not seek to advance any grounds of  
11 appeal/review over and above those set out in its Notice to the effect that ...”

12 And then we quote para. 64 of the Notice.

13 We say that is absolutely clear, and it really is a waste of time and money by the  
14 Competition and Markets Authority to pursue this application this morning. We have  
15 clearly identified the legal error that we say exists in the Decision, and the Competition and  
16 Markets Authority can plead to that. They can say: “We did take into account those effects  
17 on competition that you have identified”. It is difficult to see how they say that, given what  
18 is said in the Decision, or they can say: “We did not, but we were not obliged to do so for  
19 the following reasons”. We do not yet know what they are going to say, we are not going to  
20 make their defence for them, but they can clearly identify what we say is the legal error and  
21 plead to that legal error. We say, therefore, that this application should not have been  
22 pursued this morning, it has already been dealt with on the correspondence and in the  
23 pleadings.

24 THE CHAIRMAN: Do you have anything to say further?

25 MISS BACON: I am not sure we are very much further forward. My learned friend says that  
26 para. 63 sets out a description of what the OFT did, rather than identifying legal errors, but  
27 that is not what para.63 says. Para.63 says, on its face, that the OFT did not properly  
28 analyse market dynamics. It says the OFT did not properly assess the alleged efficiencies  
29 that were put forward by the parties. Para.63, on its face, is alleging an error in the OFT’s  
30 process by which it reached the decision. Miss Smith may say that that is the reason why  
31 she says that there was a failure to identify or properly assess effects on competition. The  
32 fact remains that para.63 does allege errors in the OFT’s process. We asked essentially a  
33 binary question: “Do you allege 1, 2, 3?” That is the questions in our letter to Skyscanner.  
34 The answer to that is either yes or no. Either Skyscanner says that the OFT was required to



1 carry out a full effects analysis, to strike a balance and to make a definitive assessment of  
2 the efficiency arguments, or it does not say that the OFT was required to do those things.  
3 If the answer given by Miss Smith is that Skyscanner is not saying the OFT was required to  
4 do 1, 2, 3, but she is simply narrating what the OFT did do, then that is simply inconsistent  
5 with the wording of para.63 which refers to “properly analyse market dynamics”. This  
6 carries a clear inference that the OFT did not do something that it ought to have done. What  
7 I am concerned to avoid is a situation where we plead to the case, do not answer the implicit  
8 contention that we were required to do, these things and are then met at the hearing, or in  
9 the skeleton argument before the hearing, with a development of these arguments on the  
10 basis that it was all in the pleaded case.

11 THE CHAIRMAN: These are all matters that are in the Decision. The matters that are referred to  
12 in para.63 are all covered by the Decision.

13 MISS BACON: I am not sure that I understand ----

14 THE CHAIRMAN: They are all matters that the OFT Decision actually mentions for striking a  
15 balance.

16 MISS BACON: I am not saying that they are not relevant, and I am not saying that implicitly  
17 within here is a narration of what the OFT did. My problem is whether it actually alleges  
18 that the OFT did not do something that it ought to have done.

19 THE CHAIRMAN: If you say something was not done properly, that does not necessarily mean  
20 it was not done. It just did not produce the right result from their point of view.

21 MISS BACON: Sir, yes, but then it is a contention that there is an error because the OFT did not  
22 do something properly. She is saying that the only error is that set out in para.64, but  
23 para.63 is clearly setting out a number of different things which may or may not be errors.  
24 Our question was this: do you say that we were required to do this or do you not? If the  
25 answer is not, then we need to understand how “properly” fits in with that.

26 THE CHAIRMAN: Is your concern that you do not know how to cover this, or that it is the legal  
27 basis that you would have to address and you are not sure what legal basis it is?

28 MISS BACON: Yes, both of them, sir. If they say that they are not saying these things then there  
29 is a question as to how to interpret the pleading. If they are saying that the OFT was  
30 required to do those things as a matter of law then the legal basis is not set out there at all.  
31 That needs to be further specified. It is not sufficient for them to say, “This is a summary”,  
32 because rule 8 requires the parties to set out the arguments in support of their grounds of  
33 appeal. If the answer to any of our questions is “yes”, then we need a further expanded  
34 explanation of why they say the OFT was required to do these things. We have less of a  
35 problem if the answer to those questions is no.

1 As I said, sir, a minute ago, it is a binary question. Either they are saying what we asked or  
2 they are not saying it. The answer to the question set out in our letter is either yes or no.  
3 We can take it from there. If the answer is yes, then we need further particulars. If the  
4 answer is no, we can then discuss how this fits with the wording of the pleading.

5 THE CHAIRMAN: Irrationality would be a perfectly reasonable thing to complain about.

6 MISS BACON: Our argument is not that they cannot bring a challenge on grounds of rationality  
7 related to the assessment of meta-search. In a way, it is another way of putting their point  
8 that we did not carry out the assessment that we were required to do. As I have said, my  
9 problem is not with para.62. If para.62 is all that we are required to answer, we can meet  
10 that, whether it is put as an object under the Competition Act 1998 argument or whether it is  
11 put as a rationality argument. My question is how para.63 relates to paras.62 and 64.

12 THE CHAIRMAN: All right. I think our feeling is that we are not sure there is very much in  
13 this, but we might as well give Skyscanner a chance to write out Ground 3 again and clarify,  
14 but could you do that as quickly as possible, probably within the week?

15 MISS SMITH: I would hope within a day. We want this to ----

16 THE CHAIRMAN: Our concern is that it is not a good idea to have one party complaining that  
17 they do not understand what the appellant is saying, and you may say you have already  
18 explained it, but I think we would like to give them another chance.

19 MISS SMITH: We will do our best to do it again, but if they still do not understand then there is  
20 not much we can do.

21 THE CHAIRMAN: All right, are you happy with that?

22 MISS BACON: I am very grateful, sir.

23 THE CHAIRMAN: In terms of things we have to decide, it seems to us that there is no issue  
24 about admitting the interventions that have been applied for to date. We say yes to all of  
25 them, absolutely subject to everybody's commitments to keep the scale of intervention to  
26 the minimum to avoid duplication. With that in mind, obviously the interveners fall into  
27 two camps. There is Skoosh who are intervening to support the applicant, and then there  
28 are the others who are basically supporting the Competition and Markets Authority. We  
29 would like, if possible, that group to subscribe to a common view of what the effect of these  
30 commitments on the market is likely to be, and how you think competition works in the  
31 market. If you could give us a single submission on that, that would be much appreciated.  
32 If any of you believe that there is something particular extra from your business approach  
33 that you need to contribute, please add that as a supplement, but we would like to keep it as  
34 common as possible. We do not want four different versions of the same thing. Are we  
35 happy to proceed on that basis? Yes.

1 We have done venue, we have done interventions, we have done the application for  
2 directions. Is there anything else before we get on to timetable? Bearing in mind what I  
3 have said about timing and our general approach, I think our very strong preference is to get  
4 this case on for hearing before the long vacation. With that in mind, my approach to this is  
5 to work back from the week starting 28<sup>th</sup> July. Obviously we are very willing to hear what  
6 you have to say, but what I am proposing is that maybe, with that final date in mind, you  
7 might like five minutes to confer on what is possible. We will leave you to do that.  
8 Could I also say that there seems to be a wish to have perhaps more sets of paper than we  
9 think necessary. We are not sure that it is necessary for each party to respond separately to  
10 the statements of intervention. We think it may be that that could all be dealt with in  
11 skeleton arguments, which would cut out that line of paperwork altogether. With that in  
12 mind ----

13 MISS SMITH: The only concern we have as to parties responding to statements of intervention is  
14 that some of the applicants to intervene may wish to explain how competition works from  
15 their point of view in the market. There seems at the very least the possibility that the  
16 interveners will want to put in evidence. If that is the case we would like the opportunity to  
17 consider whether we need to reply to that evidence. We may not need to do so, but we  
18 would at least like the opportunity to consider whether we need to. That is why we are keen  
19 for us to be given the opportunity to respond to statements of intervention. We suggested  
20 that we reply to the defence and roll that up with our skeleton because we should be in a  
21 position to do that. The statements of intervention may raise other issues that we need to  
22 have at least the opportunity to consider and to respond to separately.

23 THE CHAIRMAN: Yes, but we have a generous timetable that will be allowed for, will it not?

24 MISS SMITH: Yes.

25 THE CHAIRMAN: Working back from 28<sup>th</sup> July, that does seem quite generous.

26 MISS SMITH: We have worked back from 28<sup>th</sup> July with our suggestions for the timetable, and  
27 there is plenty of room for that.

28 MISS ROSE: Sir, can I just address you on the question of a hearing date, first of all? The week  
29 of 28<sup>th</sup> July causes very serious difficulties for our legal team. I understand that we are not  
30 alone in having difficulties in that week. We could make ourselves available on 17<sup>th</sup> and  
31 18<sup>th</sup> July. I am concerned about a hearing being listed where a number of the parties may  
32 have difficulties with their representation simply because that was the date that was  
33 convenient for Miss Smith.

34 THE CHAIRMAN: It is convenient for us as well. If you are interveners, you are not the main  
35 parties.

1 MISS ROSE: That is true, we are interveners, but that is just because of the way the Decision  
2 came out. It was a Decision that we had signed up to. If you look at the matter in the round  
3 our commercial interests are very strongly affected by this appeal and the relief that is being  
4 sought in the appeal. Although we are in form interveners, in reality our interests are just as  
5 closely engaged as those of any other party.

6 THE CHAIRMAN: It is basically a dispute between the appellant and the Authority.

7 MISS ROSE: It is a dispute between the appellant and the Authority about the agreement which  
8 the Authority has made with us. Even though the form of it is a dispute between the  
9 applicant and the Authority, the substance of it is about our business and about the effects of  
10 these commitments on our business and the allegations being made that you have just been  
11 asked to look at about what the effects of those commitments might be in the market with  
12 which we strongly disagree.

13 THE CHAIRMAN: And I am still not clear how much that can be dealt with in writing and how  
14 much needs to be subject of oral argument and presentation.

15 MISS ROSE: We are obviously at some disadvantage here because we only received the  
16 evidence of the appellants last night, even though we had asked for it some time ago, so we  
17 are disadvantaged in responding on the detail of the substance.

18 THE CHAIRMAN: Are you disadvantaged because you do not yet know what you will have to  
19 do or are you disadvantaged because you feel you will have to do a lot and you are starting  
20 late.

21 MISS ROSE: Simply because we have only just received it and not had an opportunity yet to  
22 discuss the substance of it with our clients, but it is already clear that there will be matters  
23 on which we will wish to put in evidence, and there will also be matters on which we will  
24 wish to make submissions and, in particular, assertions that are made about the nature of our  
25 commercial relationships with OTAs, and the submissions that are being made about the  
26 effects of these commitments on the market.

27 We also wish to have the opportunity to explain the commercial significance for our clients  
28 and the justification for the closed groups system.

29 THE CHAIRMAN: I hear what you say, thank you. Does anybody else want to say anything  
30 before we let you confer?

31 MR. HOLMES: May I endorse the submissions of Miss Rose that this is a matter of profound  
32 commercial importance for the Interveners and, secondly, note that there are also difficulties  
33 for our legal team in the week of 28<sup>th</sup> July, but we would also be available on 17<sup>th</sup> and 18<sup>th</sup>.

34 THE CHAIRMAN: It is better than suggesting a date in October. It may be difficult for us.

1 MISS SMITH: Obviously the Tribunal has its own issues as to availability. All I would say is  
2 that on the dates of 17<sup>th</sup> and 18<sup>th</sup> July my client is not available, so we suggested the last  
3 week in July. As to Miss Rose's complaint that she has only just received the evidence,  
4 obviously the normal course of things is that Interveners do not get the evidence until they  
5 have been granted permission to intervene. But, in any event, Mr. Hunt from Freshfields,  
6 asked for the witness statement on Tuesday, and it was given to him yesterday, Wednesday.

7 THE CHAIRMAN: We had the slight impression that Skoosh had been given evidence that the  
8 other Interveners had not.

9 MISS SMITH: They were given a notice of appeal and the notice of appeal was given to the other  
10 parties with the bundle for the hearing on Monday, 28<sup>th</sup> April.

11 THE CHAIRMAN: A few days can make a difference.

12 MISS ROSE: Can I float a possible solution to the difficulty? Is there any possibility that we  
13 could have the hearing in early September?

14 THE CHAIRMAN: I am very reluctant to push it into September. Could I hear the Authority on  
15 the date of the hearing, please?

16 MISS BACON: Slight preference as to not the week of 28<sup>th</sup> July.

17 THE CHAIRMAN: Why not, because it is nearly August?

18 MISS BACON: No, my Junior has a hearing in another case so there will be problems about  
19 which case he is allowed to appear in. I would prefer to have my Junior with me and we are  
20 the respondents to the appeal. I am available during that week.

21 THE CHAIRMAN: This is all counsel convenience we are talking about.

22 MISS BACON: This is entirely counsel convenience. For the remainder of July I am available  
23 and he is available, including on the dates of 17<sup>th</sup> and 18<sup>th</sup> that have been floated. I was not  
24 sure whether Miss Smith was saying she was not available or it is simply that her client  
25 would not be able to attend the hearing.

26 THE CHAIRMAN: I was not sure either.

27 MISS SMITH: Just to clarify, I am available on 17<sup>th</sup> and 18<sup>th</sup>, but my client, and I would suggest  
28 it is very important she is present during the hearing to give me instructions, she is not  
29 available and not in the country on the 17<sup>th</sup> and 18<sup>th</sup>.

30 THE CHAIRMAN: We are going to withdraw and let you confer. We remain of the view that  
31 28<sup>th</sup> July is the date we should all go for.

32 (Short break)

33 THE CHAIRMAN: Has peace broken out?

34 MISS ROSE: Peace has broken out. The reason I am on my feet is I just want to put in a little  
35 plea in terms of the hearing date. I heard what the Tribunal said about the week of 28<sup>th</sup> July.

1 There is some possibility that I might be able to do the hearing if the days of that week that  
2 were selected were 30<sup>th</sup> and 31<sup>st</sup> July. Could I put in a plea for those two dates? If it is 28<sup>th</sup>  
3 and 29<sup>th</sup> it would be completely impossible because I am in the Court of Appeal those days.  
4 If I could just ‘beg’ really for those days – that is the Wednesday and Thursday.

5 THE CHAIRMAN: We cannot do the Wednesday, sorry. We can do the Monday and the  
6 Tuesday, we can also do the Thursday and the Friday. We are thinking two days for this.  
7 Somebody suggested three but we think two.

8 MISS SMITH: From our point of view, in order to try and be helpful, we could do  
9 Monday/Tuesday, or we could do Thursday/Friday. I do not know what Miss Rose’s  
10 availability is for the Thursday and Friday.

11 THE CHAIRMAN: Where does that leave us, I am sorry?

12 MISS ROSE: I cannot do the Friday, but if we were to do the Thursday/Friday and we are  
13 making an intervention, if it were possible to timetable our oral contribution for the  
14 Thursday that would be preferable to the Monday/Tuesday, because I certainly cannot be  
15 here on the Monday/Tuesday.

16 THE CHAIRMAN: I am just slightly uncomfortable about organising a hearing around the  
17 Interveners, I am sorry.

18 MISS ROSE: I understand that. The Interveners in this case are not, as it were, external  
19 Interveners, they are more accurately described as “interested parties”.

20 THE CHAIRMAN: I must say we prefer the Monday/Tuesday. Can we work back from that  
21 please?

22 MISS SMITH: We have, perhaps amazingly, been able to reach complete agreement, subject to  
23 one point of clarification, which is this: We have indicated that we will respond to the  
24 Authority’s request for clarification by Tuesday of next week, recalling that Monday is a  
25 bank holiday, so Tuesday, 6<sup>th</sup> May.

26 THE CHAIRMAN: I was going to give you Wednesday, but Tuesday will do very well.

27 MISS SMITH: We are happy with Tuesday. We had understood your direction to be that we  
28 respond to the request as set out in the skeleton. Miss Bacon suggested that you were  
29 ordering us to redraft our notice of appeal.

30 THE CHAIRMAN: I think that is a little bit loose. What I said was: “Have another go”.

31 MISS SMITH: Yes, which we understood simply to be to respond to the question that has been  
32 put to us, and on that basis we can do that by Tuesday. If you want us to redraft that is quite  
33 a different matter.

34 THE CHAIRMAN: No, I am not ordering you to redraft the way in which you present your  
35 application.

1 MISS SMITH: No.

2 THE CHAIRMAN: I am just asking that as much as possible be done to enable the respondent to  
3 respond.

4 MISS SMITH: We will respond to the question that has been put to us in as full a way as we can.

5 THE CHAIRMAN: Yes, I do not think we would be impressed by a repetition of the letter.

6 MISS SMITH: No, sir, that is clear. In that case we will respond by close on Tuesday, 6<sup>th</sup> May.  
7 The Authority will file their defence by close of play on Friday, 23<sup>rd</sup> May. The Interveners  
8 will lodge their common statement and any supplemental statements of intervention by  
9 close on 13<sup>th</sup> June. Just to explain, they have been given that much time because they  
10 indicate that sometimes it takes longer to agree a common submission than it does to draft  
11 separate submissions.

12 THE CHAIRMAN: You amaze me.

13 MISS SMITH: The response to statements of intervention to be filed by close of 27<sup>th</sup> June, which  
14 is again a Friday. We can put dates to these as you have now indicated – I cannot do it in  
15 my head, someone may be able to help me while I am on my feet. For the skeletons,  
16 Skyscanner to serve its reply to the defence, with its skeleton 21 days before the hearing  
17 which, if we are starting on 28<sup>th</sup> is Monday, 7<sup>th</sup> July. Skoosh to serve their skeleton 18 days  
18 before, which I think is Thursday, 10<sup>th</sup> July. The Authority to file its skeleton 10 days  
19 before the hearing, which is 17<sup>th</sup> July, and the Interveners seven days before the hearing,  
20 which is Monday, 21<sup>st</sup> July.

21 THE CHAIRMAN: Can I ask, when does the Skoosh statement of intervention appear?

22 MISS SMITH: All of them, I think, on 13<sup>th</sup> June.

23 THE CHAIRMAN: Is that before or after the defence?

24 MISS SMITH: That is after the defence.

25 THE CHAIRMAN: Is that not a bit odd? Where is Skoosh? Mr. Sinclair, good morning.

26 MR. SINCLAIR: We are happy with it. In what sense, sir, do you suggest that it may be odd?

27 THE CHAIRMAN: Could you not produce your statement of intervention a bit earlier?

28 MR. SINCLAIR: Certainly we could ----

29 THE CHAIRMAN: So that the Authority could include it in their Defence?

30 MR. SINCLAIR: If that is what the Authority are seeking.

31 THE CHAIRMAN: I am trying to help you.

32 MISS BACON: I am very grateful for any help you can give me in this regard. We had been  
33 content with the 13<sup>th</sup> on the basis of parity and we were then going to have another bite of  
34 the cherry because we were going to be filing responses to the statements of intervention,  
35 but I can see actually that it would minimise ----

1 THE CHAIRMAN: I am trying to cut down bites of the cherry, yes.

2 MISS BACON: -- paper and numbers of documents if we received Skoosh's statement of  
3 intervention earlier, and we combined this with our response in our defence. It depends  
4 when Skoosh is going to produce something, because at the moment we have our defence  
5 timetabled for 23<sup>rd</sup> May, which is 22 days away. If Skoosh can produce something in the  
6 next week then that is likely to be feasible.

7 THE CHAIRMAN: The next fortnight I would have thought would be reasonable.

8 MISS BACON: That might only give us a week to incorporate any response to that in our  
9 defence.

10 THE CHAIRMAN: Yes, that is not unreasonable.

11 MISS BACON: We will endeavour to do that. If necessary we will just have to come back. If  
12 Skoosh can produce its statement of intervention by ----

13 THE CHAIRMAN: So what are we talking about? How about 13<sup>th</sup> May, Mr. Sinclair?

14 MR. SINCLAIR: Sir, I would be happy with that.

15 THE CHAIRMAN: Tuesday, 13<sup>th</sup> May.

16 MISS BACON: That gives us 10 days, yes.

17 THE CHAIRMAN: That is commendably business-like, thank you for that. I suppose the other  
18 thing I need to ask, and I suppose this is to the interveners, what further evidence are you  
19 proposing to ask us to allow you to adduce?

20 MISS ROSE: Sir, it is difficult to say in any great detail, since we only received the witness  
21 statement last night, but we will be putting evidence in in response, we anticipate, to  
22 Grounds 1 and 3.

23 THE CHAIRMAN: Yes, could you perhaps indicate to us by next week, Wednesday, what  
24 further evidence, as opposed to argument you are planning to ----

25 MISS ROSE: Do you mean in terms of the topics?

26 THE CHAIRMAN: In terms of witnesses and statements and that sort of thing.

27 MISS ROSE: Do you mean in terms of who the witnesses are?

28 THE CHAIRMAN: The volume, I am concerned about the volume.

29 MISS ROSE: The number of statements.

30 THE CHAIRMAN: I am concerned about how much material we may have to deal with and what  
31 it will be directed towards.

32 MISS ROSE: What you are looking for is a summary of the topics that will be covered?

33 THE CHAIRMAN: We are trying to keep the amount of evidence within a reasonable compass  
34 in this case, particularly from the intervening parties, in circumstances where the Authority  
35 is limiting itself to a witness statement from the relevant official, this being judicial review.



1 MISS ROSE: Yes, I appreciate that. I am just trying to understand the exact nature of the  
2 information ----

3 THE CHAIRMAN: I want to know what evidence you are proposing to include in your statement  
4 of intervention.

5 MISS ROSE: Yes, in terms of how many statements and what topics?

6 THE CHAIRMAN: And how long they would be and what they would cover.

7 MISS ROSE: It is a bit difficult to say how long they will be before they have been drafted but  
8 we can give an indication of their likely scope.

9 THE CHAIRMAN: I would like to feel that you would have in mind how long they were likely  
10 to be when drafting them.

11 MISS ROSE: Yes, but we have not begun to draft them yet.

12 THE CHAIRMAN: Can we please keep it as short as possible.

13 MISS ROSE: Certainly.

14 THE CHAIRMAN: Do I make myself clear?

15 MISS ROSE: Yes, of course.

16 THE CHAIRMAN: Thank you, and could you please tell us by next Wednesday, as I requested.  
17 Is there anything else we need to deal with? Well, then I think we need trouble you no  
18 further. Thank you very much. We shall see you in due course.

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