**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. 1226/2/12/14

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28th July 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 BV**
**SKOOSH INTERNATIONAL LTD**
**INTERCONTINENTAL HOTELS GROUP PLC**
**EXPEDIA, INC.** — Interveners

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# H E A R I N G

# D A Y O N E

## APPEARANCES

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

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

Mr Alistair Lindsay (instructed by Slaughter and May) appeared on behalf of the Intervener Booking.com B.V.

Mr Duncan Sinclair and Samar Abbas (instructed by Shoosmiths) appeared on behalf of the Intervener Skoosh.

Mr Tim Ward QC and Miss Jessica Boyd (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Intervener IHG.

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

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THE CHAIRMAN: Good morning. Just before you start, we have reasons for a ruling from Wednesday to hand down, so can that be done. I am sure you will read it and consider it in the fullness of time, I do not want it to interrupt the proceedings now, but we just want to get it off our desks and on to yours.

MISS SMITH: Thank you, sir.

THE CHAIRMAN: The second thing, we have a statement to make if I may make it. All three of us have, as a matter of our ordinary activity, accessed, used, and on occasions made bookings through one or more of the online services provided by one or more of the interveners, and indeed of the applicant. We do not regard this as in any way impairing our objectivity in the present dispute, or giving rise to any perception of impairment, but if any party objects to our continuing to hear this case we should like to know it now, and we shall take silence as consent. If that is out of the way, on you go.

MISS SMITH: Sir, thank you. I appear for Skyscanner, the appellant in this case, in this challenge to the Competition and Market Authority's Decision of 31st January 2014 to accept the various commitments from Booking.com, Expedia and Inter-Continental Hotels Group. Miss Kelyn Bacon QC and David Bailey appear at the other end of the table for the CMA, Duncan Sinclair appears for Skoosh supporting my application, and Tim Ward QC, Alistair Lindsay, Josh Holmes and Jessica Boyd appear for the interveners, Booking.com, Expedia and IHG, supporting the CMA.

Sir, you should have a number of bundles in front of you, three main authorities bundles, which are lever files, two lever arch files which are called core 1 and core 2, but, in fact, they are the full bundles of all the documents in the case. I think in front of you there is a small bundle of additional authorities that has been prepared by the CMA for today containing three additional authorities.

THE CHAIRMAN: What do you want us to do with these?

MISS SMITH: Those I have in a separate bundle, but if you want to put those ----

THE CHAIRMAN: I do not want to spend the next half an hour clicking open files, but equally I do not want to lose the authorities.

MISS BACON: Sir, there should be a small black file with three additional authorities, and in addition to those on your desk you should have three things. The first is a full judgment in the *Bolton* case. We noticed that only the headnote had been included in tab 21, so *Bolton* should go in tab 21. The second is the court judgment in the *Pierre Fabre* case, because the current bundles only contain the Advocate-General, and we thought it would be useful for you to have, if you wanted to refer to it, the court as well. That should go behind what is

currently in tab 51. The third thing is the actual commitments given in *E-Books*, and those can go behind the *E-Books* decision in tab 55.

THE CHAIRMAN: Can you give us some idea of how you are going to plan out the next two days, please?

MISS SMITH: Sir, we have had discussions between counsel on that, and we anticipate that this side of the court, that is me and Mr Sinclair, will be finished by, at the latest 3.30, so that the CMA can get started on their submissions this afternoon for perhaps another 45 minutes or so.

THE CHAIRMAN: We want to finish at 4.15 today. We are quite happy to go on tomorrow.

MISS SMITH: The CMA and the interveners on the other side of the room have agreed that they will be finished by 3.30 tomorrow, which gives them essentially the same time as we will have, and then there will be time for replies for the last 45 minutes or so. We hope that this will work.

THE CHAIRMAN: If nothing goes wrong, that seems fine.

MISS SMITH: We are ever hopeful, sir. The structure of my submissions, just to outline where we are going today, I propose, first, to make some brief introductory remarks about the nature and importance of the metasearch model in the online hotel booking market. Secondly, I want to address in a little more detail the decision making process engaged in by the CMA leading to the acceptance of the commitments on 31st January of this year. Then finally, I will address against that background, although I will have covered a lot of the substance of the submissions I want to make in that second tranche of my submissions, to address the Grounds of challenge. I am going to do that backwards, starting with Ground 3, then Ground 2 and finally Ground 1.

THE CHAIRMAN: A sort of countdown. Half way through the morning there will be a convenient pause.

MISS SMITH: For the transcribers, yes, I will keep an eye on the time.

THE CHAIRMAN: The transcribers and for us, I think!

MISS SMITH: And for us! So, sir, the brief introduction, the metasearch model: as you say, you and your colleagues have used this model, and so you are familiar with it.

THE CHAIRMAN: We did not say that.

MISS SMITH: The model is simply, if one looks at Skyscanner, for example, there are a number of operators, price comparison sites or metasearch sites out there in the market. What one does is click on to the site and search in the hotels for a hotel - they also do flights. For a hotel you would put in the place where you want your hotel and the dates and the search engine will search across all online travel agents, and will provide details of all the offers of

hotel rooms for that date in that particular town, comparison between the prices and hotels offered by all the online travel agents.

Could I ask you, first, just to give a bit of the background of what the market was like at the time or shortly before the OFT made its decision, to look at core bundle 1, tab 2, the witness statement sworn by Miss Jameson for Skyscanner in support of our application, and the first exhibit to that statement at CJ1 is a report entitled "European Consumer Travel Report Fourth Edition", by a body called PhoCusWright. That report was published, you will see on the second page, p.32 of the bundle, in September 2013, so at about the time between the OFT's first consultation on the commitments and its second consultation on the commitments. This sets out a survey of the European trave9l market. Could I ask you to turn to p.40 of the bundle, this comes under the heading, p.38, Research Highlights. The first bullet point on p.40, "Meta muscles in":

> "Travel metasearch engines command a lot of attention in the online shopping process, possibly at the expense of online travel agencies (OTAs), which lost a bit of consumer reach during 2013. Well over a third of online travel shoppers in all markets already use metasearch sites to compare flights, hotels and other travel products."

I would emphasise there that over a third of online shoppers use metasearch sites, so it is obviously an important element of the market for online hotel booking. We will look at the specific figures for hotel booking in a moment.

The second bullet point under the heading "Fewer shopping on supplier.com", just towards the end of that paragraph:

> "Price-sensitive travelers looking for the best deals on flights and hotels often appreciate the breadth of content available on OTAs and travel search engines, compared to the relatively limited content found on hotel and airline websites."

Of course, the whole point about metasearch particularly is that they provide a comparison of all the offers available across the whole market.

If you could then turn to p.67 of the bundle, the third paragraph on that page:

> "While brand name OTAs like Booking.com, Hotels.com, and Odigeohave been at the heart of Europe's dynamic online travel market, online travel agencies have lost a bit of consumer reach over the past year. The drop was consistent across markets but strongest in Germany, where the number of online travel shoppers who visited an OTA fell [and you see the figures]. Much like in the US, European OTAs are encountering stiff competition from the rising stars in metasearch",

and then there is reference to Easyvoyage and Trivago. And the point here made in the summary:

> "Well over a third of travelers in all markets already use metasearch sites to compare flights, hotels and other travel products and a strong growth in metasearch use is expected to continue".

And then the example is given of Kayak.com and then at the end of that paragraph:

> "European travel shoppers gladly welcome any website that can serve up more of this content in one place".

And that is the point, it is in one place. Then, towards the end of the next paragraph:

> "Price-sensitive travelers looking for the best deals on flights and hotels tend to appreciate the breadth of content available on OTAs and travel search engines, compared to the relatively limited content found on hotel and airline websites".

And then finally on p.75, figure 43 gives the specific figures for typical purchase methods for lodging. So, that is for hotels, and there it is broken down for France, Germany and the UK. And if you look at the third set of results "Using a travel search engine", this is along the bottom line of the graph, using a travel search engine you see the figures for France, Germany and UK for 2011, 2012 and 2013. And in the UK about 20 per cent of consumers use a travel search engine specifically for hotel bookings.

So, we say that the benefits of metasearch sites or price comparison sites are obvious. They enable consumers to compare prices in one place which increases price transparency and reduces search costs, and there are self-evident benefits to competition arising from this model.

So that is just the brief – to set the scene, as it were – for the decision making process then carried out by the OFT.

THE CHAIRMAN: Miss Smith, would it be reasonable for us to use the term "price comparison website" and "metasearch" interchangeably?

MISS SMITH: Yes, sir. My understanding is they are essentially the same.

THE CHAIRMAN: Right.

MISS SMITH: So, sir, the Decision that is at issue here is of course the Decision by the OFT to accept commitments, which is a Decision they made under s.31A of the Competition Act. I will take you to the specific section in due course but, just by way of introduction, that applies in a case, as we know, where the OFT has begun an investigation under s.25 of the Act but has not yet made a decision. The OFT will have identified competition concerns and it is allowed under s.31A to accept commitments which address those concerns. The wording of the section is "address those concerns", but the OFT accepts that what that

means is the commitments have to fully address those concerns. The OFT accepts that that is the test that has to be fulfilled in para.13 of their defence. They say there:

> "The CMA does not contend that it is entitled to accept commitments that only partially address its competition concerns".

So there is agreement between the parties on that point.

Now, the process of accepting commitments under s.31A and the European law equivalent contained in Article 9 of Regulation 1, 2003, is said to be justified by considerations of procedural economy, and what does that mean? The CMA recognises, and this is para.53 of its skeleton:

> "… that this does not entitle the OFT to adopt a Decision accepting commitments that are restrictions of competition".

Well, one would obviously hope not, but also the CMA says that:

> "… it is permissible for it [for the OFT] to accept commitments that address its competition concerns without it having to carry out a detailed analysis of every other competition issue that might potentially arise from the conduct under investigation".

Quite apart from whether that is the same as "fully addressing" the competition concerns, we say that submission is not really to the point. Our case is – our issue is – with the fact that we say the commitments that were accepted by the OFT in the present case themselves had a consequence of introducing a potential restriction on competition, which is quite a different matter.

THE CHAIRMAN: So, you are saying that it is permissible to start an investigation covering a number of issues and then focus on one and accept commitments in relation to that. That will be all right. What you are saying is that the commitments themselves cannot raise competition issues that -----

MISS SMITH: We are saying our case in this instance, we do not need to go that far, Skyscanner's case is that the commitments that were accepted by the OFT – and I will go on to develop this point – but they first of all left in place what were known as "residual restrictions" on price competition; but they also, and this is Skyscanner's particular objection, introduced a new restriction on the advertising of prices. And our objection, Skoosh comes at this from a slightly different angle because they are a classic online travel agent, although a small market participant, we are a metasearch site, our concern is with transparency and the ability to advertise the actual prices available with discounts. But there are, and I will take you through this, the OFT identified in its statement of objections which, sir, you have now, ordered should be disclosed, a number of competition concerns. They then accepted commitments which left in place residual restrictions on discounting.

You can only discount into a closed group. You can only offer discounts after a first full price sale has been made, and you can only offer discounts to the extent of – an online travel agent can only offer discounts to the extent of their commission, they cannot offer any deeper discounting. So, those are what are described by the OFT as "residual restrictions" in its Decision.

The commitments, however, also introduced what we say was an additional restriction on advertising. So, I will come back to develop those points, but at the moment, looking at what is the role of commitments in the competition landscape, obviously if a Regulator such as the OFT or the Commission accepts commitments, that Regulator and the parties being investigated do not have to go through the detailed decision making process and detailed determination of remedies. The *quid pro quo* for that, we submit is that higher demands are made as to the appropriateness of the commitments to address the competition concerns identified. And in this regard I would ask you to look briefly at the Advocate General's opinion and then the judgment in the case of *Alrosa*, and that is in authorities bundle 2, tab.44. This was the appeal from a Decision by the European Commission to accept commitments by De Beers after an investigation under Article 82 in De Beers' sale and purchase of rough diamonds. I just want to take you to the Advocate General's opinion on p.144 of the Advocate General's opinion of the bundle. Just for a little bit of background, *Alrosa* was objecting to the commitments on the basis that the commitments that had been accepted effectively stopped it, *Alrosa*, entering into agreements with De Beers, and *Alrosa* said that there were less onerous commitments that could have been accepted by the Commission which could have had the same impact on competition, or would have had the same beneficial effect, and the Commission should have considered those less onerous alternatives, therefore it's decision to accept the particular commitments in this case was disproportionate.

The AG made some useful, and we say interesting, comments on the role of commitments in the competition landscape and at para 51 of her opinion she talks about Article 9 of Regulation 1/2003, which is the European equivalent of s.31A. She says:

> "Article 9 of Regulation 1/2003 is characterised by a concern for procedural economy."

She then explains that it cuts down effectively the extent of the investigation. She compares that with a decision under Article 7, which is a full decision (an infringement decision) leading to the imposition of remedies.

In para. 52 she says the distinctive features of Article 9 of Regulation 1/2003 affect the examination of proportionality of decisions on commitments adopted under that provision in two ways.

Then we would underline what she says in para. 53:

> "First, higher demands are to be made in the context of Article 9 of Regulation 1/2003 as regards the *appropriateness* of the commitments which have been made binding. If such commitments are not *manifestly appropriate* for eliminating the competition problems identified by the Commission,the Commission is entitled to reject them."

Then she goes on to say this is the only way possible to meet the objective of Article 9 to ensure a quick and efficient resolution of the competition problems while avoiding the considerable investigation and assessment.

Then, over the page, in para. 57 she is addressing the question of proportionality.

> "However, in this connection, the Commission is required to take into consideration only alternatives which are *equally appropriate* as the commitments offered to it with a view to resolving the competition problems identified. Both the commitments actually offered and any alternatives to those commitments must therefore be *manifestly* appropriate for resolving the competition problems."

And I would ask you also, I am not going to read them out but for your note, sir, to look in due course at paras. 60 and 61 of the AG's opinion.

For completeness, I can take you to the Judgment in *Alrosa* which appears in a separate tab of the authorities bundle, authorities bundle 3, tab 48. It is true the Judgment does not use the words "manifestly appropriate" but, in our submission, its decision is consistent with the approach of the Advocate General. If you look at para. 41 of the Judgment, which is at p.1675 of the bundle. Paragraph 41:

> "Application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No.1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately."

Then, over the page, para. 48:

> "Undertakings which offer commitments on the basis of Article 9 of Regulation 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Article 7 of the regulation after a thorough examination. On the other hand, the closure of the

infringement proceedings brought against those undertakings allows them to avoid a finding of an infringement of competition law and a possible fine."

So we say that is consistent with the AG's approach, but the *quid pro quo* for avoiding a full investigation is that, as the AG put it, the commitments must be manifestly appropriate for addressing the competition concerns identified.

THE CHAIRMAN: But you are not making any argument on proportionality?

MISS SMITH: Not in this case, no. It is just that, in assessing that question of proportionality the AG made what we say are useful comments about the approach that should be taken to the acceptance of commitments.

THE CHAIRMAN: But you have already said that the CMA accepts that the commitments must fully address the concerns.

MISS SMITH: Yes.

THE CHAIRMAN: Is there any difference between manifest appropriateness and full addressing?

MISS SMITH: I think there is. First, and this again I will come back to, is the difference that I've highlighted between sufficient and appropriate. You have to accept commitments that fully address the competition concerns but that are also appropriate to address those competition concerns. Now, we say, there may be a case and this case probably is not it, because of the residual restrictions that are left in place, but there may be a case where commitments fully address the competition concerns that I have identified, but are not appropriate because they introduce further and different impacts on competition.

THE CHAIRMAN: But there is nothing of that in *Alrosa*?

MISS SMITH: That particular factual situation is not ----

THE CHAIRMAN: *Alrosa* is a case where the commitments arguably went too far, and the Advocate General is discussing proportionality in that context.

MISS SMITH: Yes, but she is also making the point that the *quid pro quo* for the parties and the regulator of being able to avoid an infringement decision and the process that leads to an infringement decision is that commitments must be manifestly appropriate and the court accepts that that means they may go further than what might be imposed as a result of an infringement decision.

THE CHAIRMAN: I think that is what I am saying. When the Advocate General says that proportionality is affected in the commitments context in two ways, the first is that the commitments must be manifestly appropriate, is not what she is meaning there that compared to the remedies part of a final decision, which may be more finely tuned, the commitments might be a bit broad brush and a bit crude and go further than is justified?

MISS SMITH: Well, she certainly was not considering the factual situation that we are considering here, and I do not think there are any cases that I have been able to find that consider the factual consideration we are considering here, which is that ----

THE CHAIRMAN: I think you are right, I think we have not found any either.

MISS SMITH: Commitments that not only, we say – and we leave to one side that they leave in place residual restrictions – but they go further in that they introduce a new and different restriction and we are saying that what one gets from the language of the Act and the approach that the courts have taken, of course they have not addressed the particular factual circumstance that we have here, but the language of appropriateness brings with it not just a concept of sufficiency, are they sufficient to address what they have identified as competition concerns, but are they appropriate and, in considering whether commitments are appropriate one has to consider the role that commitments play in the competition regime as a whole. We say that commitments that introduce a new and different restriction on competition plainly cannot be appropriate.

THE CHAIRMAN: Do you think there are any relevant differences between the EU commitments regime and the UK commitments regime?

MISS SMITH: Off the top of my head I am not sure I can answer that one way or the other. Generally, I have not identified, and I do not want to rely on any differences for the purposes of this case.

THE CHAIRMAN: It would affect the weight we attached to Judgments and Advocates General's opinions in cases like *Alrosa* if there were relevant differences.

MISS SMITH: Well, sir, I am certainly not arguing that there are such that you cannot attach weight to that Judgment. I accept that that Judgment does not deal with the factual situation that is on all fours with this case, but I accept that you can get some guidance from what the AG says in that case which, in fact, is echoed by the language of s.31A which talks about being appropriate to address the competition concerns, and I take it no further than that. And, yes, of course, this also, in fact, is a response to the CMA's reliance on procedural economy in their skeleton argument. In their defence they put procedural economy up front as their defence, as saying that this gives them, as I understand it, a margin of appreciation and a margin of discretion and we say: No, procedural economy, as considered by European Courts brings with it this *quid pro quo*, that if you are going to do it quickly you have got to make sure that what you put in place is manifestly appropriate.

THE CHAIRMAN: I am sure the CMA will enlighten us as to what they think we should make of *Alrosa*. Do my colleagues have anything on this point? No. Please go on.

MISS SMITH: If I can then go to the process leading to the Decision, and I hope you and your colleagues have a copy of the Statement of Objections that was disclosed finally to the Tribunal and to Skyscanner last week. I have it in a separate file. It looks like you also have it in a separate file, so let us deal with it on that basis. By way of introduction, this Statement of Objections, which is dated 31st July 2012, of course, we fully accept, contains only provisional findings by the OFT, but what it does do is it sets out the competition concerns found by the OFT in response to which the interveners then offered the commitments. So this sets out the OFT's position and it is this document and these findings in response to which the interveners offered their commitments. I will take you to various particular paragraphs in the SO that we say are relevant, but in summary the points that we take from the Statement of Objections are threefold. First, it is clear that the OFT provisionally held that the prohibitions on discounting between the parties were hardcore restrictions under Article 4A of the Vertical Block Exemption Regulation. The OFT held that they were hardcore restrictions on the basis that "they restricted the OTAs' ability to determine the sale price of hotel rooms".

The arrangements between the parties putting in place those restrictions were therefore presumed to fall within Article 101(1), presumed to infringe competition law and were held to be unlikely to fulfil the conditions of Article 101(3), the exemption, the possibility for an individual exemption. That is the first point we make.

The second point that we make is that the OFT provisionally found that there was "a commercial link" between the agreements that restricted price discounts and Rate Parity Agreements, also known as Most Favoured Nation clauses, which were agreements between the parties that "I will not offer a price lower than that which you offer". Those were also widespread in the market, the OFT found, and the OFT found that those Rate Parity Agreements were monitored and enforced by the parties.

The third point I want to take from the Statement of Objections is that the OFT found that there were real benefits arising from the price transparency and the low cost of searching that was enabled by online sales of hotel rooms. Those were seen as a potential driver for discounting: if there is price transparency and low search costs a consumer is able to look at all options and that drives discounting of price in the market, but the OFT found that those benefits were being explicitly countered by/ responded to, by the parties with the combination of restrictions on discounting agreements and Price Parity Agreements.

Those were the competition concerns identified on a provisional basis by the OFT and the SO.

Having now seen that SO and comparing it, looking at it, against the commitments that were accepted by the OFT, which supposedly addressed the OFT's competition concerns, we say a number of immediate questions arise. First, the OFT indicated in the SO that the restrictions on discounting, as I have said, were a hardcore restriction, but the commitments leave in place restrictions on the OTAs' ability to determine the sale price of hotel rooms - what I have already said the OTA described as "residual restrictions". Those are the fact that discounts can only be made to members of a closed group after an initial full price purchase and for no more than the extent of the OTAs' commission.

I will come back to this point, but the OFT accepts explicitly in the Decision that it reached no conclusion on the efficiencies relied on by the interveners. Those efficiencies are summarised in annexe 2 to the Decision, yield management arguments, etc. The OFT explicitly accepts in the Decision that those efficiencies provided no justification for the residual restrictions, so you may ask yourself, "What did?" and we will look at the Decision in that regard. That is the first question that arises.

The second question, and for the purposes of Skyscanner, perhaps even more importantly, as I have said, the commitments introduced these additional restrictions on the advertising of discounts. That is OTAs are prevented from publicising what is defined as "specific information" about reductions on hotel rooms to consumers who are not closed group members. So they cannot put the actual discounted prices on offer to closed group members on their own websites or on price comparison or metasearch sites. So that is, in effect, a prohibition on advertising the actual discounted price that might be available.

We say that restriction self-evidently reduces price transparency and increases search costs, and therefore we say that it was at least incumbent on the OFT to justify this effect of the commitments, or at least to properly consider it.

As I will, I hope, make good, the OFT did not do that. The OFT provided, we say, absolutely no justification for the introduction of this restriction.

Sir, if I can look at the Statement of Objections itself, can I take you to internal page numbering 6, and this is under the heading "Relevant price agreements constitute hardcore restrictions", para.1.7:

> "In the OFT's view, restrictions on the ability of OTAs to determine the sale price for Room-Only hotel accommodation, for instance …"

so that is just an example -

> "… by restricting OTAs from sharing their commission with the customer, or within the scope of Chapter I prohibition and constitute 'hardcore' restrictions."

Paragraph 1.8 rejects an argument that appears to have been made of Expedia and Booking.com that they were agents. The reasoning on that is much fully redacted from the SO, but this appears to be an argument that was made by Expedia and Booking.com and was rejected by the OFT. They give reasons for that in para.1.9.

Paragraph 1.11 on p.7:

> "Given that the Relevant Price Agreements constitute 'hardcore' restrictions, they are presumed to fall within the Chapter I prohibition and Article 101(1), and it also presumed that they are unlikely to fulfil the conditions of section 9 or Article 101(3)."

However, the OFT then goes on for the purposes of the statement to say that it has not considered the extent to which the exemption criteria might be met, and it is for the parties to put forward any arguments on that. That is, of course, correct, the burden is on the parties to justify an exemption under Article 101(3).

Could you then go to the background to these agreements, para.1.13 on p.8. At 1.12 the OFT explains the complaint that they received, in fact we now know from Skoosh. At 1.13:

> "The OFT understands that to the extent that these vertical agreements have been adopted, sale prices for Room-Only hotel accommodation at any given individual hotel do not vary across third party distribution channels. The industry generally refers to such limited intra-brand price competition as 'rate parity' or 'price parity'."

Then 1.14:

> "The OFT understands that, historically, rate or price parity became increasingly prevalent in response to the growing importance of the internet generally and online distribution models more specifically. The internet brought about price transparency across the market, enabling consumers to identify the best deal, i.e. the lowest price … at very low search costs."

So this is finding that the benefits of the internet are countered by a combination of restrictions on discounting and Price Parity Agreements.

Paragraph 1.15 is also important. This deals with the point that eventually was brought up by the OFT about alternative ways of introducing discounting, for example, through membership arrangements. The OFT there, at 1.15:

> "As a result of vertical agreements between hotels and OTAs, there is limited variation of sale prices for Room-Only hotel accommodation, largely depriving customers of the ability to identify and obtain a better, discounted deal by shopping around. Any discounting of hotel accommodation, for instance by allowing OTAs to

share their commission with the customer, can (and does) take place only through much smaller, niche distribution channels – hidden/opaque, membership or package - which do not allow for room only price comparison".

So the OFT notes that:

"… in that sense, the distribution arrangements resulting in rate or price parity undermine the benefits of transparency and enhanced search functions brought about by the internet and the possibilities offered by e-commerce".

So this is a point that we now see is actually consistent with the submission that Skyscanner subsequently made, that before the commitments were introduced, the use of closed groups or membership arrangements was very small scale and "niche" as described here. It was definitely limited. That is supported by (if you could perhaps keep a finger in that page at p.9 and flick forward to the submission)submissions that are made by Skoosh at para.2.59, p.43, there is a quotation from a submission that Skoosh made, and the third paragraph of that quotation at the page:

"There are some niche opportunities still available such as members' sites and flash sales … However, these opportunities are relatively limited and are created by necessity from an artificially restricted environment" etcetera.

So the evidence, clearly, before the OFT was that these membership groups in so far as they did exist before the commitments were introduced, were very small scale.

THE CHAIRMAN: A membership group is a closed group on your part.

MISS SMITH: That is my understanding.

THE CHAIRMAN: And this is hotels, not any -----

MISS SMITH: This is simply hotels we are talking about here, the OFT's investigation was limited to hotel booking. So, if I can then take you to some of the points that we wish to highlight in the SO about the state of the market at the time – if I could ask you to turn, this is in chapter 2 which is called "Background information or facts" and we will go straight, if we can, to para.2.41 which is on p.36. This says:

"However, both independent and branded hotels acknowledge the increasing significance of the OTA distribution channel and use OTAs to target audiences they would otherwise hardly reach. In this regard, it is notable that certain customers appear to have developed a degree of brand-loyalty to particular OTAs, which, from the OTA's perspective, is vital for the purposes of being recognised as a relevant business partner by hotels, for example".

I draw your attention to that point just to emphasise the brand loyalty towards large online travel agents. And that is borne out by what is said in para.2.44. I am not going to read that

out, but what that essentially says, and it is borne out by the figure that follows, para.2.44 is that there are a couple of very large or possibly three very large players in this market, Expedia, Booking.com and Travelocity, and they have a relatively stable combined share of supply, but "the OFT notes", and this is the end of para.2.44, "… in contrast a number of smaller OTAs have exited the market in recent years".

So the market is characterised by a small number of large OTAs with brand loyalty, and a number of small OTAs who have been seen to exit the market.

Paragraph 2.42 considers online advertising, and there is an interesting contrast here between the quotation from Expedia which talks about the importance of – and you will see about halfway through that quotation – search engines and metasearch engines as well as the use of internet search engines such as Google, which is not a specific travel search engine but simply you put in a hotel name or something like that through Google and you will get results.

THE CHAIRMAN: This is a quote from a Form 10K submission. Just remind us of what a Form 10K is.

MISS SMITH: Good question! I may have to come back to you on that one, I am afraid. I think it may be an internal annual report.

THE CHAIRMAN: Yes.

MISS SMITH: Something like that.

MR LINDSAY: The US SEC filing that is akin to an annual report but has more details.

MISS SMITH: Thank you.

THE CHAIRMAN: I thought that was right, and so that is emphasising dangers and threats to your business.

MISS SMITH: Yes.

THE CHAIRMAN: So that you are not misleading the market.

MISS SMITH: Yes. So Expedia certainly see not only the Google type of advertising but the specific search engines and metasearch engines as an important player in the market. But what I said the interesting contrast is is that the OFT in its commentary at para.2.42 only picks up search engines like Google. And this is a consistent strangeness in the OFT's approach to this issue, because if you look, for example, at the diagram in para.2.82 which is on p.51, the diagram is on p.52, the OFT has constructed a diagram which shows how when a customer goes about booking a hotel in Intercontinental Hotel London. There are only two routes identified there for the customer to reach an online travel agent site, either by typing in the actual address of the online travel agent, "www.expedia.co.uk" or by searching for "luxury hotels London" on Google, because Google have an agreement with

Expedia, the AdWord agreement, it clicks through to the website. What the OFT does not recognise there, despite the fact that we have seen this is a substantial proportion of the market, is the role that price comparison metasearch sites play.

So if we then go on to the OFT's theory of harm which is on p.67 of the SO, and the OFT makes the point there in para.2.116, "There is a restriction on the buyer's ability to determine its sale price", a broad definition of what the restriction is, and then the example given, for instance by restricting the buyer from sharing its commission, "This is an object infringement and a hardcore restriction", and again makes the point it is not necessary for the OFT to demonstrate anti-competitive effects. And then you will see that there are three aspects to that theory of harm. The first heading, just above para.2.118, "Restrictions on discounting limit price competition and increase barriers to entry", and the explanation is given in those subsequent paragraphs.

And if I can – for your note, I am not going to read them out – ask you to look in due course at para.2.119 which is about the importance of price transparency and low search costs, paras.2.120 and 2.122. Then the second aspect of the theory of harm is the heading below para.2.123:

> "Rate Parity obligations are capable of reinforcing and exacerbating any prevention, restriction or distortion of competition arising from discounting restrictions",

and that is considered in the following paragraphs 2.126, "Rate Parity obligations reduce the incentive to negotiate lower rates"; 2.127, Less incentive for OTAs to lower their margins or commission; 2.128, "However, the OFT has not investigated the extent to which Rate Parity obligations are capable of reinforcing…". Then the third aspect of the theory of harm is the heading under para.2.128:

> "To the extent that similar discounting restrictions and Rate Parity obligations are replicated in the market, then any prevention, restriction or distortion of competition is further reinforced and exacerbated",

and the point is essentially made in para.2.131:

> "A market in which both discounting restrictions and Rate Parity obligations are prevalent is likely to be characterised by significant limits to price competition and barriers to entry"

Then 2.132:

> "The OFT has also seen evidence of Rate Parity obligations being imposed on a number of hotel chains. This evidence indicates that such obligations may be replicated in the market alongside discounting restrictions, although this is not an issue the OFT has investigated, and the OFT makes no findings in this respect."

THE CHAIRMAN: This is just saying that this is a case against these two groups but other people may be at it.

MISS SMITH: Sir, yes. The legal framework is in s.3, I am not going to take you through that.

MR WILKS: Can I just raise one other question before you leave the theory of harm?

MISS SMITH: Yes.

MR WILKS: The introduction to the theory of harm 2.116, as you say talks about hardcore restrictions and infringement by object, and it goes on to say the OFT does not need to demonstrate that the agreements did, in fact, have an anti-competitive effect. Are you comfortable with that objects approach?

MISS SMITH: That is the approach the OFT took to the restrictions. We do not challenge that approach, no. If you go to chapter 4, which starts on p.113. This is the analysis of the relevant price agreements, it is quite extensively redacted, but if you look at what is actually p.192 you can see about 70 or 80 pages appear to have been redacted. Page 191, the heading is "The Expedia Price Agreement", and the OFT heading is: "does not benefit from the Exemption in the Vertical Block Exemption Regulation". Paragraphs 4.157 to 4.161, which is on p. 193, sets out the finding of the Expedia Price Agreement, essentially the points we have already made; it is a hardcore restriction within the meaning of Article 4A of Vertical Block Exemption Regulation andcannot benefit from the exemption. It is a hardcore restriction because – this is para. 4.159 – it involves a restriction on the ability of the agent to determine the sales price, and therefore, 4.161 it's presumed to restrict competition or fall within Article 101(1), also presumed unlikely to fulfil the conditions of Article 101(3).

There's the conclusion set out in para. 4.166 and the same conclusions you'll see in the following pages for the Booking.com agreement.

The proposed decisions are on p.262. As regards the Expedia Price Agreement, para. 6.4: "Strong and compelling evidence to find that Expedia IH London IHG infringed the Chapter 1 prohibition. The proposed decision relates to the Expedia Price Agreement, which restricted Expedia's ability to determine its sale price, for instance by restricting its share in the commission, and the OFT proposes to find that the alleged infringement lasted from 17th October 2007 to 21st September 2010. So that arrangement has finished. The Booking.com agreement, is in the same Decision in para. 6.5, but you will see over the page, on p.263, that the Booking.com price agreement is ongoing. So therefore, in para. 6.9 the OFT proposes that Booking.com and other parties to that agreement should be ordered to take action to bring the alleged infringement to an end, and proposes to direct the parties to bring the alleged infringement to an end, such that Booking.com's ability to determine its sale

price is no longer restricted. So the proposed direction is effectively to remove the restrictions completely.

THE CHAIRMAN: No residual restrictions?

MISS SMITH: No. That is the position as of 31st July 2012 as set out in the SO, but despite what we say are those strong provisional determinations the OFT, as you are aware, does not proceed to make an infringement decision or impose a remedy requiring the parties to put the infringements to an end. Instead, it is persuaded to accept the commitments proposed by the parties, reaching the view, apparently, that those commitments fully address its competition concerns.

THE CHAIRMAN: Miss Smith, do you attach any significance to the apparent intention to impose a fine?

MISS SMITH: Well, there is a provisional finding there that this was intentional or negligent behaviour and therefore a fine should be imposed.

THE CHAIRMAN: Going back to our discussion about relevant differences between this and the EU regime, am I correct that, under EU practice, if a fine was being imposed commitments would not normally be considered to be appropriate – or, am I wrong?

MISS SMITH: I will have to double check, sir, but I believe that is the position.

THE CHAIRMAN: Perhaps somebody will confirm that for us in due course.

MISS SMITH: The OFT guidance, certainly does not say that.

THE CHAIRMAN: No, I am aware of that.

MISS SMITH: The OFT guidance identifies other situations where commitments are unlikely to be appropriate.

THE CHAIRMAN: I think the EU Best Practice Notice might be relevant.

MISS SMITH: I think that is the case, sir, but I will double check.

THE CHAIRMAN: Well, I am asking whether you attach any significance to it and you are saying you do not.

MISS SMITH: Sir, it may be significant but it is another point to put into the mix.

THE CHAIRMAN: All right.

MR WILKS: You have highlighted the fact that the Expedia agreement had ended in September 2010 when the Booking.com had continued. Are you drawing some conclusions from that? Is that significant in some way?

MISS SMITH: I do not know why that was the case. I do not know why and I cannot speculate. All I am saying is that for the agreement that was ongoing the OFT proposed to make a general order that they should stop the infringing behaviour without any continuing restrictions, completely stop the behaviour, and I will – at a later stage in my submissions –

come back to that point when we look at the commitments that have been accepted generally in the European Union. Generally, where there are agreements involved the commitments that have been entered into by the parties have involved complete removal of the infringing behaviour.

THE CHAIRMAN: It is the reverse of the *Alrosa* case, just to note.

MISS SMITH: Sir, that is where we are in July 2012, as I have said, but the OFT does not proceed to this infringement Decision that it has proposed, it is persuaded to accept commitments.

THE CHAIRMAN: Have we finished with the Statement of Objections?

MISS SMITH: We have, sir, you can put that away. So, how does the OFT get to that decision? If I could ask you to open core bundle 2 and look at the OFT's evidence in this regard from Mr Rasmussen at tab 13. Tab 13 is the first witness statement of Mr Rasmussen, put in with the CMA's defence. He tells you who he is, and what his role was. He was project director of this investigation.

He sets out the factual background at p.582 of the bundle. Paragraph 11 – the Statement of Objections is issued on 31st July 2012, that is just what we have been looking at, and on 9th August 2013, just over a year later, he says at para. 12, the OFT announced a public consultation on commitments that had been offered by each of the parties in order to address the OFT's competition concerns.

Then, at para. 13, a second public consultation on 2nd December 2013. So we have the SO, we have a year of behind the scenes discussions, we have the first public consultation on the commitments on 9th August 2013; the second public consultation on 20th December 2013.

The first public consultation is addressed in paras. 19 and onwards of Mr Rasmussen's statement at p.585 – I am not going to read it out but he gives you details of the publication of the first notice. Then in para.23 he says:

> "… the OFT proactively contacted various interested parties …"

The last sentence of that paragraph:

> "The OFT also tried to contact Skyscanner by completing an enquiry form on its website, in response to which it received an automated reply."

I do not think any real emphasis is given to this point any more by the CMA, but I will be corrected if I am wrong, but it has been addressed - sir, for your note, if I may - in paras.4.3 and 4.4 of Miss Jameson's second witness statement, which is at core bundle 2, tab 22. The point is that it would appear that the OFT clicked on a link "Contact our commercial team", but did not go back the next step, which you might have thought was reasonable, to look at the details of the legal team which were on the website, including the contact details of,

among others, Miss Jameson, and the legal team on Skyscanner's website. Then when the OFT received a standard form automated reply from the button they pressed saying, "Contact our commercial team", they took it no further.

We do not make a big play of this. It is just that in the OFT's defence and skeleton they make the point, "We tried to contact you in the first consultation, you did not take part in the first consultation", and we have a response to that evidence.

THE CHAIRMAN: I have no idea what we are to make of this. It is ironic, Skyscanner is an online organisation, you contact it online, the online contact does not work for the purposes of contact. It is slightly curious.

MISS SMITH: We would say you chose to press the button. You pressed a button to the commercial team when you could have contacted the legal team. In so far as in the OFT seeks to put any weight on this point, we have responded to it in those paragraphs, and I would ask you to have a look at those paragraphs if the OFT proceeds with this point.

THE CHAIRMAN: In hindsight, it is a pity.

MISS SMITH: Sir, I am not sure that it is. The point is that Skyscanner did take part in this consultation process. We say the representations it made were not properly considered by the OFT.

There is also the point that at this stage Skyscanner's business in hotel online booking was relatively under-developed. Skyscanner bought a Spanish hotel online booking company in September 2013.

THE CHAIRMAN: So they might have replied, "This is of no concern to us".

MISS SMITH: I am not going to speculate, sir, but it is simply to respond to that point made in Mr Rasmussen's statement. I would ask that you do not take it at face value, have a look at Miss Jameson's statement at 4.3 and 4.4.

At para.25 of Mr Rasmussen's he says that the OFT commissioned a market research agency Opinion Leader to carry out qualitative research on consumer's views about the initial commitments. I would like, if I may, to take you to that, which is exhibited to Mr Rasmussen's statement at exhibit KTGR9. You have there "Online hotel bookings Qualitative research report", dated 12th September 2013. So this was being done in line with the first consultation, and it is some consumer work on market research on the proposed commitments. In the Executive Summary on p.760, the second bullet point:

> "The main objective of the research was to understand consumers' views around the concept of joining an OTA's closed group in order to receive discounts on hotel room bookings."

Then bullet point 3 explains what the research consisted of, four 90 minute focus groups with consumers. Then bullet point 5:

"The majority …"

it does not say how many, or what proportion -

"… of consumers were open to the proposed changes and saw themselves as likely to join a closed discounting group. They felt that there were no significant downsides to joining and that it made sense to make the most of potential cost savings."

The next bullet point:

"Most …"

again, we do not know how many or what proportion of those who took part in the four 90 minute focus groups that covers -

"… were also open to joining multiple groups. Although they expected to try to stay loyal to one group initially, they did not want to find themselves tied to one OTA and wanted to be able to continue to shop around. Those who were booking hotels more frequently were more likely to expect to join multiple groups …"

The next bullet point:

"There was some concern that there would be restrictions placed on discount offers, such as time limits or minimum bookings - consumers sought reassurance that any such caveats would be minimal …"

Then on p.763 we get a bit more detail of what this consumer research consisted of. Under the heading "Methodology":

"A total of four 90 minute focus groups were conducted in London on Tuesday 20 and Thursday 22 August 2013. 30 consumers took part overall."

So that is 30 people split between four groups. I do not need to make the point, that is pretty minimal.

Then we see at the bottom of that page:

"… consumers were taken through a slideshow (prepared by the OFT) that outlined the current situation and proposed changes. Participants could then conduct informed discussions …"

So there were slides prepared by the OFT.

Just before we leave this document, could I take you to p.768. This is under the heading at the top of the page, "Using multiple OTAs", and this is effectively the possibility of what has become known as "multi-homing", joining more than one proposed group: