Neutral citation [2014] CAT 12 Case No: 1226/2/12/14

IN THE COMPETITION APPEAL TRIBUNAL

28 July 2014

Before:

PETER FREEMAN CBE Q.C. (HON)
(Chairman)
BRIAN LANDERS
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

SKYSCANNER LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

and

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

Interveners

RULING (APPLICATION FOR DISCLOSURE)

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1. Skyscanner Limited ("Skyscanner") has brought an appeal under section 47(1)(c) of the Competition Act 1998 against a decision of the Office of Fair Trading (the "OFT") dated 31 January 2014 to accept commitments to remove certain discounting restrictions for online travel agents (the "Decision"). The Decision to accept commitments was the culmination of an investigation into the online supply of room-only hotel accommodation by online travel agents. The OFT accepted commitments from Booking.com B.V ("Booking"), Expedia, Inc. ("Expedia") and InterContinental Hotels Group Plc ("IHG") - all of whom have intervened in these proceedings in support of the Respondent - as well as from Booking's ultimate parent company, priceline.com, and Hotel Inter-Continental London Limited (together, the "Commitment Parties"). The Competition and Markets Authority (the "CMA") has taken over functions previously carried out by the OFT and is therefore the proper Respondent in these proceedings.

2. This is the Tribunal's Ruling on an application brought by Skyscanner for disclosure of the non-confidential version of the Statement of Objections issued by the OFT on 31 July 2012 (the "SO") (the "Application"). The Application was made on 21 July 2014. On 22 July 2014, the CMA notified the Tribunal of its objections to the Application and Skoosh International Limited ("Skoosh"), which supports Skyscanner in these proceedings, indicated its support for the Application. On 23 July 2014, the Tribunal notified the parties by letter that it would grant the Application and required the CMA to provide a copy of the SO to Skyscanner and the Tribunal by 10am the following day. We indicated in that letter that we would provide reasons for our decision in due course, given the proximity of the hearing date. We set out those reasons in this Ruling.

3. The Tribunal has the power to order disclosure under rule 19 of the Competition Appeal Tribunal Rules 2003 (S.I. 1372 / 2003). In exercising its case management powers under rule 19, the Tribunal has in mind the need to secure the "just, expeditious and economical conduct of the proceedings". In this regard, we are particularly mindful of the need to ensure that the parties are on an equal footing, that expense is saved and that appeals are dealt with expeditiously and fairly (see the Tribunal's *Guide to Proceedings* at paragraph 3.1).

4. In relation to disclosure, the Tribunal encourages early disclosure where that disclosure is necessary, relevant and proportionate, having due regard to interests of confidentiality, in order that the issues in dispute may be properly and efficiently addressed. Indeed, early disclosure in writing is the first of the five main principles of the Tribunal Rules at paragraph 3.4 of the *Guide to Proceedings*.

5. Skyscanner's request for disclosure of the non-confidential version of the SO may have come rather late in the day (although it appears Skyscanner first asked for the SO on 10 June 2014 and repeated that request on 27 June 2014 and 16 July 2014), and though it would perhaps have been better for this matter to have been dealt with at the case management conference on 1 May 2014, we do not see that the Application is inherently too late to be considered.

6. Skyscanner relies on two grounds. First is the notion of equality of arms, in that Skyscanner is now the only party to this appeal not to have seen the SO. The OFT (now CMA) as its author, the Commitments Parties as the addressees and Skoosh as the original complainant to the OFT are all familiar with its contents. The second ground relied on by Skyscanner is that the SO is relevant to the identification of the OFT's competition concerns, which the commitments were intended to address. In relation to the first ground, there has been some correspondence between the parties as to the circumstances in which Skoosh was granted access to the SO. As the original complainant, Skoosh was provided with a copy during the investigation. However, Skoosh was also permitted by the CMA to share the SO with certain named legal representatives for the purposes of these proceedings, albeit on restrictive terms.

7. In contesting the Application, the CMA contends that Skyscanner has not been disadvantaged by not having seen the SO, that it is not relevant to Skyscanner's case and that Skyscanner does not need to see it. In their skeleton argument, the intervening Commitment Parties indicate that they also resist the Application on the basis that it is unnecessary.

8. There is no issue of confidentiality here as the request is limited to a non-confidential version of the SO.

9. In our view, it is difficult to deny that the SO may be relevant to the issues in dispute. The OFT's concerns about the potentially anti-competitive nature of the arrangements involving Booking, Expedia and IHG appear to be central to the dispute about the appropriateness or otherwise of the commitments. It is true that these concerns purport to be set out in the OFT's consultation documents and in the draft and final Decision. However, the SO is the first formal articulation of those competition concerns and may possibly assist Skyscanner and the Tribunal in appreciating the extent and nature of the OFT's concerns, and hence how the commitments addressed them.

10. The CMA states that sight of the SO is nonetheless not necessary because Skyscanner has so far managed to plead its case without it and claims that the request is a mere "fishing expedition" to attempt to find further grounds for appeal. To say Skyscanner has managed without the SO up to now is not a satisfactory state of affairs given the relevance of the document. In our view, the SO plausibly may contain material which relates to (either for or against) Skyscanner's appeal as presently formulated, and cannot at this stage be dismissed as unnecessary.

11. On the question of "equality of arms" or the need for the parties to be on an equal footing, we agree with Skyscanner that the hearing of the case, which is now imminent, will be fairer if all parties have seen the relevant documents. We understand the CMA's explanation that Skyscanner was not a party to the original investigation, whilst Skoosh was, and that it was not thereby entitled to see the SO as part of the investigation. However, that is an explanation of the formal position that prevailed in the investigation. In these proceedings, that cannot override the present need to conduct the hearing on a fair basis by ensuring that all parties have seen the relevant documents subject to considerations of confidentiality which, as already noted, do not apply in this case.

12. For those reasons, we unanimously agreed to grant the Application and for the Registrar to send the letter of 23 July 2014. As stated in that letter, we emphasise that this disclosure is ordered for the purpose of these proceedings only and for no other purpose.

Peter Freeman C.B.E., Q.C. (Hon)
(Chairman)

Charles Dhanowa O.B.E., Q.C. (Hon)
(Registrar)

Date: 28 July 2014