



Neutral citation [2020] CAT 16

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1345/4/12/20

Salisbury Square House
Salisbury Square
London EC4Y 8AP

25 June 2020

Before:
THE HONOURABLE MR JUSTICE MORRIS
(Chairman)
MICHAEL CUTTING
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

BETWEEN:

SABRE CORPORATION

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard remotely on 16 June 2020

RULING (PERMISSION TO INTERVENE)

APPEARANCES

Mr Tim Ward QC, Mr Nikolaus Grubeck and Ms Alison Berridge (instructed by Skadden, Arps, Slate, Meagher & Flom (UK) LLP) appeared for the Applicant.

Mr Rob Williams QC (instructed by the Competition and Markets Authority) appeared for the Respondent.

Mr Richard Pike of Constantine Cannon LLP appeared for the proposed Intervener, the American Society of Travel Advisors, Inc.

A. INTRODUCTION

1. By its notice of application filed on 21 May 2020 (the “NoA”), the Applicant, Sabre Corporation (“Sabre”), challenges the decision of the Respondent, the Competition and Markets Authority (“CMA”), to prohibit Sabre’s proposed acquisition of Farelogix Inc (“Farelogix”) (the “Merger”) in its entirety (the “Decision”). The CMA’s Decision is set out in its Final Report dated 9 April 2020. On 8 June 2020, the American Society of Travel Advisors, Inc (“ASTA”) filed a request for permission to intervene in these proceedings (the “Application”), pursuant to Rule 16 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the “Tribunal Rules”). The Application was opposed by the CMA and supported by Sabre.
2. Having heard the parties and ASTA at a remote case management conference which took place on 16 June 2020, the Application was refused by the Tribunal. This ruling sets out the Tribunal’s reasons for refusing the Application.
3. By way of background, Sabre is a US technology and software provider to the global travel industry. It operates a global distribution system (“GDS”) which distributes airline content to travel agents for the purpose of booking airline tickets. In addition, Sabre provides IT solutions to airlines.
4. Farelogix is also a US technology and software provider. It supplies technology solutions for airlines, including merchandising modules and airline content distribution solutions.
5. In the Final Report, the CMA found, in summary and so far as relevant to the Application, that (i) it had jurisdiction over the Merger on the basis of the share of supply test set out in s. 23 Enterprise Act 2002; and (ii) the Merger may be expected to result in a substantial lessening of competition (“SLC”) within the supply of merchandising solutions on a worldwide basis and the supply of distribution solutions on a worldwide basis.

6. By its NoA, Sabre contends that the Decision was unlawful on six grounds. Four of those grounds relate to the CMA's assertion of jurisdiction over the Merger (Grounds 1-4). The other two grounds (Grounds 5-6) relate to the CMA's substantive findings that the Merger would lead to a SLC in each of merchandising and distribution. In particular, by its Ground 6 Sabre asserts that the CMA's SLC finding in relation to distribution was irrational and unsupported by the evidence. ASTA intended to support Sabre's case on the jurisdiction issues and on the SLC finding in relation to distribution.

B. THE TRIBUNAL RULES

7. Rule 16 of the Tribunal Rules provides for intervention in the following terms:

"(1) Any person with sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings.

[...]

(6) If the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit."

8. Thus, in order to be granted permission to intervene, an applicant must show a "sufficient interest in the outcome" of the proceedings. As explained by the Tribunal in *B&M European Value Retail S.A. v Competition and Markets Authority* [2019] CAT 8 ("*B&M*") at [9], this has been described as the "threshold question" which must be satisfied before the Tribunal may exercise its discretion to permit an intervention. The exercise of this discretion will be carried out in accordance with the Tribunal's governing principles set out in Rule 4 of the Tribunal Rules, in particular so as to ensure that the case is dealt with "justly and at proportionate cost".

C. THE APPLICATION

9. As set out in the Application, ASTA is the world's largest association of travel professionals. The majority of ASTA's members are travel agencies and its members represent 80% of all travel sold in the US through travel agencies.

Travel suppliers, such as airlines, hotels and Sabre itself, are also members of ASTA. ASTA's role includes promoting and representing the views and interests of travel agents in the US and overseas. Its membership includes dozens of travel professionals based in the UK.

10. ASTA contended as follows. On the threshold question of sufficient interest, its travel agent members would be directly affected by the outcome of the case. Travel agents are Sabre's direct customers. It would be difficult to imagine any parties, other than the merging parties themselves, that would be more directly affected by the Merger than the customers of the merging parties. Further, conclusions about the behaviour of travel agents were critical to the CMA's finding that the Merger would result in a SLC. ASTA would provide a different perspective from Sabre as it was a genuinely neutral party that had nothing to gain from the Merger unless it increased competition or delivered other efficiencies. The value of an intervener providing a different perspective had been acknowledged by the Tribunal in *Tesco Plc v Competition Commission* [2008] CAT 20 ("*Tesco*") (at [9]). As to the exercise of the Tribunal's discretion, ASTA's intervention would be limited and proportionate such that there would be no material impact on timing or costs. Although the Application referred to the prospect of ASTA presenting evidence from travel agents, its intervention was more likely to be confined to written submissions on the proper interpretation of, and weight to be afforded to, the evidence that was before the CMA.
11. The CMA opposed the Application. It contended that ASTA did not have a sufficient interest to intervene, or alternatively, that permission to intervene should be refused as a matter of the Tribunal's discretion. Whilst ASTA's members may have been affected if the Merger had gone ahead, that in itself did not justify ASTA's intervention. Sabre is a member of ASTA and could protect ASTA's interests. It was not enough for ASTA to say it would provide a different perspective. The question was whether ASTA would add value to the issues in the case. That was the approach taken by the Tribunal in *B&M* (at [18]) and in *Phenytoin (Costs)* [2019] CAT 2 (at [11]). There was no issue on which ASTA wished to make representations which could not fully and

properly be addressed by Sabre. Further, if ASTA had wanted its views to be taken into account by the CMA, it could have made submissions to the CMA at the administrative stage, but it did not do so. As to the basis of the intervention, it was neither necessary nor appropriate for ASTA to make submissions on jurisdiction in relation to international comity and legal certainty. As far as Ground 6 was concerned, the matters on which ASTA wished to make representations, including the views of travel agents, were addressed in the Final Report and could be assessed on public law principles (to the extent relevant to the grounds of challenge) without ASTA's involvement. If ASTA envisaged adducing new evidence that was not before the CMA, this was likely to be inadmissible in judicial review proceedings. Finally, ASTA's participation would likely prolong the timetable for the proceedings.

12. In brief oral submissions in support of the Application, Sabre echoed ASTA in submitting that a major international industry association for travel agents among others could not have a clearer sufficient interest in the outcome of the proceedings. The Tribunal should permit the intervention as it would be consistent with the just, expeditious and economical conduct of the proceedings. The filing by ASTA of a single written set of observations would not disrupt or extend the proceedings. As far as the substantive issues and Ground 6 were concerned, the critical issue was the CMA's theory of harm. This related to competitive pressure in distribution, in particular as regards GDSs which were precisely the products that travel agents consumed. Plainly this was an area where the industry body for travel agents may have something useful to say.

D. REASONS FOR REFUSING THE APPLICATION

13. So far as concerns the threshold question whether ASTA has a sufficient interest in the outcome of the proceedings pursuant to Rule 16(6) of the Tribunal Rules, we conclude that ASTA does have a sufficient interest. Its predominantly travel agent members are the object of the "relevant description of services" which formed the basis of the CMA's jurisdiction over the

Merger: they receive travel services information from airlines, who, for that purpose, are provided with IT solutions by the merging parties. Moreover those travel agents are directly affected by the Merger. On the CMA's case, if not prohibited, the Merger would have had a direct adverse effect upon travel agents; on ASTA's case, the prohibition of the Merger prevents them from benefiting from enhanced innovation which, it contends, would result from the Merger.

14. However, as regards the second stage, we are not persuaded that it would be right to exercise our discretion to permit ASTA to intervene in these proceedings. Applying the approach in *B & M* at [18] and *Phenytoin (Costs)* at [11], we do not consider that ASTA will provide “added value” to the issues in the case, or assist the Tribunal in resolving those issues.
15. First, as regards Sabre's jurisdiction grounds, ASTA accepted that it is not in a position materially to assist either on the legal question of interpretation of the UK legislation nor on the facts concerning the interline arrangements between British Airways and American Airlines. Sabre will be making submissions on these issues. As regards the issues of international comity, ASTA's desire is to make a “big picture” point, taking account of the fact that the US court found no reason to block the Merger. However it is not clear what this point is nor why such arguments will not be adequately covered by Sabre's case on comity, set out in some detail in the NoA. We consider that such arguments of principle can and will be sufficiently addressed by the main parties to the proceedings.
16. Secondly, as regards Ground 6 and the SLC finding in relation to the supply of distribution solutions, ASTA's initial written case for intervention was substantially based on its ability to present to the Tribunal “a broader evidence base” than that provided to the CMA by individual travel agents. However, it accepted in oral argument that it would be most unlikely to offer new evidence – not least because of the strict rules on admissibility of such evidence. Rather ASTA wishes to make submissions on the proper interpretation of the existing evidence that was before the CMA and on the weight the CMA had placed

upon it. ASTA contended that it would be in a position to represent the views of a much broader group of travel agents, from its different perspective. However ASTA has not articulated to us how that “different perspective” would affect the case and result in arguments (necessarily in support of Sabre’s identified grounds) that differed from those advanced by Sabre or from those advanced by travel agents before the CMA. In this latter regard, ASTA accepted that it was possible that its “different perspective” had in fact been placed before the CMA by travel agents. Beyond the suggestion of a different perspective, ASTA has not identified any specific argument which Sabre will not be making. In this regard, ASTA’s position stands in stark contrast to that of ACS in the *Tesco* case, a trade association which was taking a position contrary to that of the main parties and thus genuinely providing a different perspective.

17. Finally, we take into account the fact that ASTA did not participate in the administrative stage before the CMA. We consider this to be a relevant factor in the exercise of discretion. In the *Tesco* case, ACS, a trade association, was instrumental in the reference being made and heavily involved in the investigation itself.

E. CONCLUSION

18. For the reasons given above, ASTA’s application for permission to intervene is refused.

The Hon Mr Justice Morris
Chairman

Michael Cutting

Prof. Robin Mason

Charles Dhanowa OBE, QC (*Hon*)
Registrar

Date: 25 June 2020