MONCKTON CHAMBERS

SKYSCANNER LIMITED v COMPETITION AND MARKETS AUTHORITY

First CAT judgment on "commitments" to the CMA in response to a statement of objections that a practice restricted competition

Daisy Mackersie Monckton Chambers
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In its judgment of 26 September 2014, the Competition Appeals Tribunal considered the lawfulness of a decision by the Competition and Markets Authority to accept commitments under section 31A of the Competition Act 1998. The CAT emphasised that they would give the CMA a large margin of appreciation in cases of this kind, acknowledging that overly-intrusive judicial oversight would not be appropriate in an area in which the CMA is required to exercise judgment. Despite this, the CAT remitted the case to the CMA for further consideration, deciding in favour of the appellant in relation to two of its three grounds of challenge.

BACKGROUND

1. In September 2010, the Office of Fair Trading (now the Competition and Markets Authority and referred to throughout this note as the CMA) began an investigation into the online supply of hotel accommodation by certain online travel agents ('OTAs').

2. In a Statement of Objections published in July 2012, the CMA alleged that each of Booking.com and Expedia ('the OTAs') had entered into agreements with the IHG hotel group ('IHG') to restrict the OTAs' ability to discount the rate for hotel accommodation in an IHG hotel. The CMA provisionally concluded that the agreements infringed Chapter I of the *Competition Act 1998* (**'the Act'**) and Article 101 TFEU. In addition to these discounting restrictions, the CMA also identified rate parity clauses – or "most favoured nation" (**'MFN'**) clauses – in the agreements. The MFN clauses ensured that the OTAs could not be undercut by other online distribution outlets. However, the Statement of Objection did not raise any distinct concerns in relation to these MFN clauses.

3. In response to the Statement of Objections, the parties (**'the Commitment Parties'**) offered commitments which would allow the OTAs to offer discounted rates to members of closed groups or 'clubs' (**'the Commitments'**). The OTAs could advertise generally the fact that discounted rates were available, but the amount of the discount could only be seen by those who had joined the club. Club members could then take advantage of the discounted rate once they had made one prior booking.

4. The CMA consulted on the Commitments in August 2013 (**'the First Consultation'**) and in December 2013 (**'the Second Consultation'**). The Decision to accept the Commitments was published on 31 January 2014.[1]

THE CHALLENGE

5. The Decision was challenged by Skyscanner, the operator of a price comparison or "meta-search" website. The Skyscanner site allows consumers to search for and compare the prices of flights, hotel bookings and car hire around the world. Skyscanner contracts with hotels and OTAs for the inclusion of their prices in Skyscanner's meta-search results.

6. Skyscanner had responded to the Second Consultation, expressing the concern that the Commitments could have a negative effect on inter-brand competition – i.e. competition between different hotels. Consumers would not be able to use meta-search sites to compare the actual prices offered by different hotels because, although metasearch sites could make clear that discounted rates might be available through some OTAs, these rates would only be visible to consumers once they had joined the OTA's club.

7. To a large extent, Skyscanner's appeal concerned this same issue. It put forward three grounds:

> 1. The Decision was ultra vires because the Commitments had the effect of requiring third parties to act in line with them, even though those third parties had not offered commitments and the CMA had not accepted commitments from them (**'Ground 1'**)
>
> 2. In reaching the Decision, the CMA failed to take into account the representations that Skyscanner made to it about the effect of the Decision on the meta-search sector and inter-brand competition (**'Ground 2'**).
>
> 3. By putting in place the Commitments without considering the potential anti-competitive consequences that they may have on inter-brand competition, the CMA had acted contrary to the policy and objects of the Act and/or irrationally (**'Ground 3'**).

8. Skoosh, an online travel agent and the complainant who prompted the original CMA investigation, intervened in support of Skyscanner. The main Commitment Parties – Booking.com, Expedia and IHG group – intervened in support of the CMA.

THE POWER TO ACCEPT COMMITMENTS AND THE STANDARD OF REVIEW

9. Under section 31A(1) of the Act, the CMA has the power to accept such commitments as it considers appropriate "for the purposes of addressing the competition concerns it

1 The Commitments were amended following the First Consultation, including to limit the period of the Commitments from three years to two years. These amendments were not material to the Tribunal's judgment.

has identified". The Competition Appeals Tribunal (**'the Tribunal'**) noted that the purpose of the power to accept commitments is to allow the CMA "to resolve cases more quickly and efficiently by avoiding the need for a full investigation, thereby enabling the CMA to use its limited resources for a broader range of enforcement purposes".

10. Under section 47 of the Act, a third party with "sufficient interest" may appeal to the Tribunal in respect of a decision to accept commitments under section 31A. Pursuant to paragraph 3A of schedule 8, such an appeal must be determined by the Tribunal applying the same principles as would be applied by a court on an application for judicial review. The Tribunal applied its previous case law on this standard of review, with particular emphasis on the judgment in *BAA v Competition Commission* (No. 2) [2012] CAT 3.

11. The Tribunal noted the similarities between the CMA's power to accept commitments under the Act and the European Commission's power to accept commitments pursuant to Article 9 of Regulation 1/2003. In this connection, the Tribunal considered the judgment of the Court of Justice in Case C-441/07 P *Alrosa* [2010] ECR I-5949. While noting that *Alrosa* involved a number of issues which did not arise in the present case, the Tribunal nonetheless derived the following "useful and relevant" principles from it (particularly from the Opinion of Advocate-General Kokott):

> (i) commitments play an important role in competition enforcement by providing a more rapid solution to competition problems without formal infringement findings;
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> (ii) commitments will be easy to assess and have an obvious likely impact;
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> (iii) the appropriateness of commitments to address the competition concerns should be clear or "manifest"; and will not require great investigation and assessment; and
>
> (iv) commitments may go further in their scope that could be established by an infringement decision because they are offered voluntarily by the parties.

GROUND 1

12. The Tribunal dealt with Skyscanner's first ground last and in quick order. It concluded that the Commitments did not bind third parties in any meaningful sense. Third parties who deal with the Commitment Parties may be affected by the Commitments because they cannot enter into agreements which breach the Commitments but there is, the Tribunal said, nothing unusual about that. It was not ultra vires for the CMA to accept commitments which could have this effect.

GROUND 2

13. Under its second ground, Skyscanner argued that the CMA had failed to take into

account its representations on the potential effect of the Commitments on inter-brand competition. The Tribunal noted that the CMA was under an express statutory duty to consider representations made in response to the consultation pursuant to paragraph 2(1) of Schedule 6A to the Act.

14. In response, the CMA said that it had considered Skyscanner's concerns carefully and had held a meeting with Skyscanner to explore the point. The CMA considered, however, that it could not take the concerns any further without evidence of possible harm to meta-search sites.

15. After reviewing the consultations and the Decision, the Tribunal concluded that the CMA had "failed conscientiously to address" Skyscanner's representations on price transparency and meta-search sites.[2] The CMA's response, it said, was "quite unsatisfactory":

> "… it is not acceptable for [the CMA] to say that when an interested party, operating in the market under consideration, raises a point that puts in question an essential feature of proposed commitments, the authority will not act on it without supporting material provided by the party raising the point. Of course the objection cannot be fanciful or frivolous, but the [CMA] accepted Skyscanner's point as plausible."

16. The necessary evidence would, the Tribunal said, have been difficult for Skyscanner to obtain given that its objection was to possible Commitments which had not yet been implemented. It suggested, however, that if the CMA had considered that additional evidence was required, it could have obtained this itself relatively easily.

17. The Tribunal noted that the question of how much *weight* to attach to Skyscanner's objections was an area in which the CMA had a wide discretion. This complaint was not about *weight*, however. Instead, it was about of the *manner* in which the CMA had taken the objections into account. The Tribunal concluded was that the objections had not been properly considered or conscientiously taken into account and, therefore, that the CMA had acted unfairly.

GROUND 3

18. Skyscanner's third ground of appeal was closely related to its second ground because it too concerned the allegation that the CMA had failed to consider the potentially anti-competitive consequences of the Commitments. Skyscanner claimed that the CMA had (i) acted contrary to the policy and objective of the Act to promote competition for the benefit of consumers and/or (ii) acted irrationality in making the Decision.

2 The Tribunal also noted that a similar point had been made by two respondents to the First Consultation. For the same reasons, the Tribunal also held that the CMA had failed properly to take these responses into account.

19. In relation to the policy and objectives of the Act, the Tribunal concluded that it could not be sure that the restriction on disclosure of discounted prices under the Commitments would damage the consumer. The Tribunal considered that the restriction on disclosure of prices would harm Skyscanner's business, and appeared likely to harm the consumer, but:

> a) assessing whether or not the restriction on disclosure of discounted prices would harm consumers was a matter of appreciation and expert judgment for the CMA, and the Tribunal could not substitute its own judgment in a judicial review; and
>
> b) there was some doubt about the precise scope and definition of the CMA's duty to protect consumers.

20. Turning to Skyscanner's irrationality argument, the Tribunal accepted that, by coming to a decision that "effectively ignored the point Skyscanner … had raised in relation to the potential impact of [the restricted disclosure of discounted rates]", the CMA had acted unreasonably. The CMA had, the Tribunal said, failed to acquaint itself with the information needed to answer the relevant statutory questions and had, therefore, failed properly to take into account matters which it ought to have taken into account.

21. In reaching this conclusion, the Tribunal rejected an argument by the CMA that, whether or not a point required further investigation, or whether commitments addressed its competition concerns, were not matters susceptible to judicial review. Its intervention was, it said, appropriate in circumstances where the CMA had made a decision which raised competition concerns which had, by its own admission, not been fully addressed. This was consistent, the Tribunal suggested, with the approach of Advocate-General Kokott to the scope of review in the *Alrosa* case.

22. Under the banner of Skyscanner's third ground, Skoosh put forward two further arguments: (i) that the CMA used the wrong counterfactual; and (ii) that the CMA failed to consider whether the "residual restrictions" on discounting[3] were – as a form of pricing restriction – contrary to Article 101(3) TFEU. The Tribunal dismissed the first argument, and concluded that it did not need to decide the second point because it had not been made by Skyscanner.

CONCLUSION

23. The judgment in this case is notable primarily because it is the first occasion on which the Tribunal has considered a decision by the CMA to accept commitments pursuant to section 31A of the Act. As a result, it is likely to be an important point of reference in

3 This referred to the fact that some restrictions on discounting were still allowed under the Commitments.

subsequent commitments cases. In this regard, it is worth noting the Tribunal's repeated statements that the question of whether commitments are appropriate is essentially a matter of judgment for the CMA in respect of which it will be accorded a large margin of appreciation. The Tribunal's decision to quash the commitments decision was, the Tribunal seems keen to suggest, strictly limited to its facts.

24. The judgment is also noteworthy for its treatment of the question of when the CMA's consideration of consultation responses will satisfy the requirements of procedural fairness. It appears that, where a respondent raises a plausible point, it may not be sufficient for the CMA to decide that the respondent has provided insufficient evidence to support his position. Rather, the CMA must take steps itself to gather evidence and then consider the respondent's case in the light of that evidence.

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com