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Tribunal Forces UK Competition Authority to Rethink Hotel Bookings Settlement

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The UK Competition Appeal Tribunal (CAT) quashed the decision of the Office of Fair Trading (OFT), now the Competition and Markets Authority (CMA), to close its investigation into pricing arrangements entered into by Booking.com, Expedia, and InterContinental Hotels.¹ The OFT closed its investigation after the parties had offered behavioural commitments.

Skyscanner, an operator of a meta-search engine for hotel bookings, flights and car hires, appealed the OFT's decision because it was concerned that the commitments accepted by the OFT harmed Skyscanner's business.

Under section 31A of the Competition Act 1998, instead of issuing a prohibition decision, the OFT may accept commitments which address its concerns. When commitments are accepted, the investigation generally comes to an end. A decision to accept commitments can be appealed to the CAT by third parties but only on judicial review grounds.

Skyscanner's appeal was the first appeal brought against a UK commitment decision. Its success will encourage companies to closely monitor commitment negotiations taking place in their industry and to raise objections if they fear their business may be affected.

The judgment also shows that the settlement route is not a risk-free choice. For the parties, settlement may not represent a watertight early "exit" route from investigation. For the authority, it reminds the CMA that accepting commitments does not release the authority from its duty to build a robust case and to carefully examine the potential effects of any intervention.

¹ Skyscanner Ltd v CMA [2014] CAT 16, available at http://www.catribunal.org.uk/files/1226_Skyscanner_Judgment_CAT_16_260914.pdf (last visited: 7 October 2014).

The Investigation

In September 2010, the OFT opened an investigation into the online supply of room-only hotel accommodation bookings by online travel agents.

The OFT alleged that Booking.com, Expedia and InterContinental Hotels had infringed EU and UK competition rules by entering into arrangements which restricted Booking.com and Expedia's ability to discount the rate at which room-only hotel accommodation provided by InterContinental Hotels were offered to consumers. In particular, the parties agreed to offer bookings at a day-to-day room rate set and/or communicated by the hotel and not to offer room bookings at a lower rate, for instance by funding a promotion or discount from their own margin or commission.

To address the OFT's concerns, the parties offered commitments allowing Booking.com and Expedia to offer discounts from headline room-only rates. However, such discounts were only offered to members of closed groups, to which customers are admitted after one initial full-price purchase. Anyone outside those closed groups would only see the availability, but not the level, of discounts.

The appellant in this case, Skyscanner, had made objections during the OFT's consultation process. Skyscanner's website displays prices for flights, hotels and car hires available on third-party websites and thereby assists consumers to compare pricing. Since 2013, Skyscanner has been contracting with hotels and online travel agencies for the inclusion of their offerings in Skyscanner's meta-search results. Skyscanner argued that the commitment decision limited the availability of the kind of information used by meta-search and other price comparison websites to enable consumers to make direct and immediate comparisons of actual prices of available hotel rooms. In Skyscanner's view, the commitments disregarded the need to maintain price transparency, thereby creating a new market equilibrium which was potentially worse than the existing situation. In its discussions with Skyscanner, the OFT indicated that it could not take those concerns further without evidence of potential harm, which Skyscanner was unable to provide.

The Judgment

In the UK, third-party appeals against commitment decisions are subject to judicial review only, so the grounds on which the CAT could intervene against the OFT's decision were limited to points of law. In its judgment of 26 September, the CAT quashed the OFT's decision on the following grounds.

First, the CAT found that the OFT's consultation process was defective as it "failed conscientiously to address" the objections raised during the consultation process. The CAT held that if a consultation response raises an important and obvious point of principle, it is for the authority to examine it further, in particular where the commitment decision itself may generate its own economic effects within the market. In this context, the CAT held that it was not right to make such analysis dependant on Skyscanner providing evidence of potential harm.

Second, by effectively disregarding Skyscanner's argument in the commitment decision, the OFT acted irrationally as it failed to take account of a matter of which it ought to have taken account and acted as no reasonable authority should act. The CAT held that whilst the OFT enjoyed a substantial margin of appreciation in exercising its judgement, the CAT can and should intervene where the competition authority makes a decision that raises obvious competition concerns that have – on the authority's own admission – not been fully addressed.

The CAT remitted the decision to the OFT's successor, the CMA, with a direction to reconsider the matter in accordance with the judgment.

What's Next?

While the judgment was not on the merits and thus does not determine the outcome of the case, the CMA is likely to be influenced by the fact that the tribunal showed sympathy for Skyscanner's argument. In the judgment the CAT made clear that the OFT's decision to limit the availability of information used by price comparison websites "may be

seen as an obvious error” which, if the appeal had been on the merits, might well have led the CAT to quash the decision on these grounds. So there is a possibility that the parties eventually need to offer commitments which are free of restrictions on the availability of discount information to bring the investigation to an end.

While the judgment will be applauded by meta-search engines and price comparison websites, others will see the re-opening of the investigation as another source of uncertainty in a regulatory environment which is already extremely challenging. There are almost a dozen parallel antitrust investigations into the online distribution of hotel accommodation in Europe. The European Commission recently decided to leave those probes to the national regulators. The CAT judgment shows that it may be a very long way until companies will have certainty as to how EU antitrust rules are applied in the online travel market throughout Europe.

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