

Federation of Hotel & Restaurant Associations of India Vs. MakeMyTrip India Pvt. Ltd. & Ors.¹

Through this quarterly publication, CUTS International intends to undertake an independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt with in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefits of consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

¹ CCI's Order u/S. 26(1) of the Act on October 28, 2019. Available at https://www.cci.gov.in/sites/default/files/14of2019_0.pdf. Accessed on January 07, 2020.

Introduction

Consumers' experience of renting hotel rooms has changed drastically after the tech-disruption of Online Travel Agencies (hereinafter OTAs) such as MakeMyTrip, OYO, GoIbibo, etc. Besides facilitating ease and convenience in booking, the OTAs have also made it more affordable for consumers with promotional discounting, thereby somewhat eliminating both the hassles and limiting businesses of brick and mortar travel operators. However, such success has not been without the issues raised against them of anticompetitive conduct, and the present case is a prime example of the same.

The Federation of Hotel and Restaurant Associations of India (FHRAI) is the apex representative of the hospitality industry in India.² FHRAI has been raising concerns with MakeMyTrip India Pvt. Ltd. (MMT), Ibibo Group Private Limited (GoIbibo), collectively referred to as MMT-Go³ and Oravel Stays Private Limited (OYO) regarding predatory pricing, charging of exorbitant commissions from hotels, registering and providing on its platform illegal and unlicensed bed and breakfast and misrepresentation since December 2012.⁴ In the same regard, the opposite parties (OPs) and FHRAI had several rounds of letter and e-mail exchanges and also meetings to end the dispute. However, the parties failed to mutually resolve issues.

This led to FHRAI filing a complaint with the Competition Commission of India (CCI) alleging violations of sections 3 and 4 of the Competition Act, 2002 (hereinafter the Act) by the OPs. The information alleged that OPs had abused their respective dominant positions, cartelised and entered into an anti-competitive arrangement(s). The allegation was also regarding the collective abuse of dominance by OPs. Notably, an interesting point in the information was that FHRAI also raised questions on CCI allowing the merger of MMT and GoIbibo in 2017, arguing that the merger had resulted in dominance in the relevant market.

Based on the information, CCI issued an order u/S. 26 (1) of the Act directing the Director General (DG) to investigate the matter. The Order defined separate relevant markets for both MMT-Go and OYO. The relevant market for MMT-Go was the

² FHRAI claims to be the third largest hotel and restaurant association in the world.

³ MMT acquired 100 percent shares of GoIbibo in 2017 vide Combination Registration No. C – 2016/10/451 dated January 18, 2017. See the Order [here](#).

⁴ Hereinafter collectively referred to as OPs (for Opposite Parties).

'market for intermediation services for booking of hotels in India' and for OYO, it was the *'market for franchising services for budget hotels in India'*. Two significant issues that CCI highlighted in its order were that MMT-Go appeared to be in a dominant position and OYO did not, as well as the need to investigate the commercial agreement between MMT-Go and OYO to see if it entailed a preferential treatment or not.

Issues & CCI's Findings

1. Are both the OPs in the same relevant market or are they in different relevant markets?

Earlier in 2019, the CCI investigated OYO and the relevant market in which it falls.⁵ Considering the franchisee model of OYO's operation whereby they connect the hotels to potential consumers, the CCI noted that the relevant market would be *'market for franchising services for budget hotels in India'*. Since not much time had passed between the two Orders, the Commission decided to go with the same definition of the relevant market.

As regards MMT-Go, the Commission held that all modes for booking hotels are not in competition as online booking platforms.⁶ This is because online booking platforms provide the facility to search, compare and book at the same place, services that are characteristically distinct from the services that the offline mode such as travel agents provide. In that light, it held that the relevant market for MMT-Go is the *'market for online intermediation services for booking of hotels in India'*.

2. Do the OPs enjoy the dominance in their respective relevant market?

Following the merger of MMT and GoIbibo in 2017,⁷ MMT-Go as a group held 63 percent of domestic hotel online market share in 2017, as per its own investor presentation. Countering MMT-Go's claim, CCI held that other players like PayTM, HappyEasyGo, Thomas Cook do not appear to have any significant market presence in the relevant market. Therefore, MMT-Go was found to be enjoying dominance in the relevant market.

⁵ RKG Hospitalities Pvt. Ltd. vs. Oravel Stays Pvt. Ltd., Case No. 03 of 2019, CCI.

⁶ *Supra* n. 3, paragraph 41.

⁷ *Supra* n. 3.

For OYO, the Commission again relied on its finding in the earlier Order from 2019⁸ to hold that OYO does not enjoy the dominance in the relevant market as defined. However, the Commission did recognise that it is a significant player in the relevant market.

3. Whether the commercial agreement between OYO and MMT entails preferential treatment to OYO and causes exclusion of other hotel chain franchisees?

The Commission held that OYO stands in competition with other franchisee chains like Treebo and FabHotels. The Commission further recognised that on a *prima facie* examination, Treebo and FabHotels did appear to have been removed from MMT's platform while they were present on the platform earlier. The Commission held that if this had been done due to the agreement between OYO and MMT, then it would be held as anticompetitive. Therefore, it was suggested to undertake further investigation in this matter. This is the most significant issue against both MMT-Go and OYO.

4. Are Across Platforms Parity Agreements between MMT-Go and hoteliers restrictive and abusive in nature?

Across Platform Parity Agreements (APPAs) are agreements where the sellers guarantee online selling platform terms, price and/or non-price, which are at least as favourable as those granted to any other platform aimed to ensure a competitive advantage to the platform over its competitors. By securing such favourable terms, the platforms attempt to guarantee the best available price and terms for a given product to its final consumers.

CCI held that APPAs may result in the removal of the incentive for platforms to compete on the commission they charge to hoteliers, may inflate the commissions and also the final prices paid by consumers and may also prevent entry from new low-cost platforms. Further, a *prima facie* need for an investigation into such parity restriction to gauge its impact under Section 3(4) as well as Section 4 of the Act was ordered, while also holding that the magnitude of the anticompetitive effects of these agreements will depend on the market power of the platform.

⁸ *Ibid*

5. Do OPs misrepresent information and create a demand-supply gap on its platform by resorting to tactics like fake bookings?

CCI held that showing non-availability of rooms on the portal, instead of delisting them, even when the hotels had specifically requested for the severing of ties with MMT-Go raises concerns. This leads to information asymmetry and also the denial of market access. Noting the allegations on artificially creating a demand-supply gap, CCI held that MMT-Go's market power and dominant position in the relevant market rendered a need to investigate these issues.

The allegation on fake bookings was leveled against OYO. CCI found it unnecessary to make any *prima facie* assessment on this since OYO has not been found to be dominant in the relevant market.

6. Is the service fee charged from consumers by MMT-Go applied discriminatorily on hotels and pocketed by MMT-Go?

In light of MMT's dominant position, the allegation on the charging of service fee, and that too, by discriminating between the size of the hotels, CCI held that this issue warranted further investigation.

Analysis

With this Order, the CCI seems to be demonstrating a shift in its approach towards digital platforms. The Order under 26(1) is only a preliminary assessment and CCI does mention in its Order that nothing in the Order would '*tantamount to an expression of final opinion on the merits of the case*' and that the DG is required to investigate the matter without any influence of CCI's observations. The shift can be further seen in the light of the augmented focus on technology firms, especially those engaged in a digital platform business model. US, EU, Germany and Australia, among many other countries, have expressed a need to regulate the tech-giants.⁹

⁹ In US, Big Tech is facing a slew of antitrust probes from Department of Justice, Federal Trade Commission, states' Attorney Generals, Securities and Exchange Commission etc. In EU, Margrethe Vestager has earned a name for blood hounding the Big Tech, and the spree of investigations continues. In Germany, the Federal Cartel Office or Bundeskartellamt has blocked Facebook from using user data without consent and is also undertaking an investigation against Amazon for competing with different players on its own platform. Australian Competition and Consumer Commission recently undertook an extensive, 18 months long, exercise to study the impact of digital platforms on competition in media and advertising services markets.

An important aspect of this judgement is that the Commission has recognised the multiplicity of markets in platforms and the need to identify different relevant markets for different consumer sets. A market platform caters to more than one set of consumers. Since the platform draws distinct terms and conditions for the different sets of consumers, it becomes necessary to view the market in which the platform is operating from the perspective of the specific consumer set.

The idea of identifying different relevant markets for different consumer sets has been under debate and discussion for a long time now.¹⁰ By noting that “*the relevant market analysis needs to be carried out from the perspective of hoteliers*” in this preliminary Order, the CCI has officially recognised the need to undertake market assessment from different consumer sets’ perspective.¹¹

The most significant charge that the DG would investigate is the denial of market access that may have been caused due to an agreement between MMT-Go and OYO. The Commission has expressly stated that any restrictive agreement which may lead to refusal to deal with some players or exclusive arrangement with some players may amount to an appreciable adverse effect on competition. Since CCI’s own *prima facie* assessment has suggested that the other franchisees have been removed from the platform, it increases the threat for MMT-Go.

Notably, CCI has had a history of stringent approach when it comes to denial of market access. Earlier, it has passed several Orders imposing hefty fines for contravention of the Act for abuse of dominance and denial of market access.¹² In the present case, MMT-Go has become an indispensable powerful player with a 63 percent market share.¹³ Failure to be present on their platform would simply mean a significant loss of business to hoteliers. In a way, MMT is becoming an essential facility in the online market for intermediation services for booking of hotels in India. The CCI has quite recently pronounced an Order penalising a firm with a maximum permissible penalty for abusing their dominance on essential facility and denial of

¹⁰ See for instance <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282017%2933/FI/NAL&docLanguage=En>. The issue has also been actively debated in academic circles and the pros and cons of acting upon different relevant markets in multi-sided markets are still being widely discussed and written about.

¹¹ *Supra* n. 1. Paragraph 35.

¹² A glaring example of this is the landmark judgement in *Shri Shamsher Kataria v Honda Siel Cars India Ltd & Ors* (2014) (Auto Parts case) where the CCI fined 14 Original Equipment Manufacturers.

¹³ *Supra* n. 47, paragraph 47.

market access,¹⁴ and the precedent is likely to hold if such a finding is established in the DG's report.

While MMT is under a bigger scanner of both anti-competitive agreements as well as abuse of dominance, OYO has been found not to be dominant in its own market. An important point that may be noted here is that while the Order highlighted the market share of MMT-Go¹⁵ when examining dominance, no such figures were placed in the Order for OYO. Since OYO has not been found to be in a dominant position, the investigation might be slightly relaxed for it even though OYO has a significant presence among the hospitality service aggregators.¹⁶ Although OYO has not been found to be dominant, its vertical agreements with MMT-Go, which is *prima facie* dominant, that are likely to be anti-competitive also make OYO equally liable.

A novel issue for the CCI, in this case, is APPAs as there has not been any decision on the same as yet.¹⁷ APPAs are considered problematic if the price or non-price restrictions in the agreement result in more concentration or enhanced entry barriers. In practice, APPAs generally operate as a form of vertical restraint on the supplier, and in case the platform is dominant, it can also result in unfair pricing. The issue has been debated and discussed for some time now and few jurisdictions have generated divergent approaches, particularly in the EU Member States.¹⁸ Although the trend has been in favour of such narrow price parity clauses lately,¹⁹ the favour has not been without criticism.²⁰

¹⁴ *In Re: East India Petroleum Pvt. Ltd. vs. South Asia LPG Company Pvt. Ltd. (SALPG)*, Case No. 76/2011, CCI. Order dated July 11, 2018 available [here](#). CCI imposed a penalty at the rate of 10 percent of the respondent's average annual turnover. Under Section 27 of the Act, the maximum penalty that the CCI can impose on any contravening party for abuse of dominance is 10 percent of the average turnover for the last three preceding financial years.

¹⁵ Based on their own investor presentation

¹⁶ OYO's own report card demonstrates its high valuation and divergent investment strategies of the firm, unlike its most other competitors. See www.oyorooms.com/officialoyoblog/2019/02/05/annual-report-card-2018-2. Accessed on January 08, 2020.

¹⁷ See <https://globalcompetitionreview.com/insight/e-commerce-competition-enforcement-guide/1177739/india>. Accessed on January 21, 2020.

¹⁸ Bundeskartellamt, in B9-66/10 – HRS, held in 2013 that wide parity clauses of hotel booking platform HRS, which holds over 30 percent market share, restrain competition as per Art. 101(1) TFEU and are not prevented by Art. 101(3), and the decision was also upheld by the Dusseldorf Court of Appeals. However, while dealing with Expedia, a firm holding less than 30 percent market share, the same court held that despite vertical restraints it would be permissible. These approaches were sharply different from the ruling of the Swedish Court of Appeals in similar cases. For a detailed discussion on parity clauses, see Mackenrodt, M. Price and Condition Parity Clauses in Contracts Between Hotel Booking Platforms and Hotels. IIC 50, 1131–1143 (2019) doi:10.1007/s40319-019-00886.

¹⁹ Two landmark judgements in EU have shaped this view: (i) Svea Hovrätt, May 09, 2019, PMT 7779-18 – booking, delivered by Swedish Patent and Market Court of Appeals in May 2019; and (ii) OLG Düsseldorf, 4

Given that CCI has stated that MMT-Go does *prima facie* appear to be dominant, a ruling on these lines may be anticipated. This case is, therefore, likely to generate jurisprudence on the issue of APPAs. In that light, it would be interesting to see how the CCI addresses the issue and if precedents from other jurisdictions are followed in its final Order.

June 2019, VI-Kart 2/16 (V) – booking delivered by German Düsseldorf Court of Appeals (Oberlandesgericht, OLG) overturning a decision by the German Competition Authority (Bundeskartellamt)

²⁰ *Supra* n. 19. While these decisions have touched upon the issues around APPAs, they have failed to discuss the ancillary restraints doctrine as well as Art. 101 (3), TFEU while pronouncing those decisions.

Annexure

Relevant Legal Provisions in the Order

Sl. No.	Law	Provision
1.	Section 3(4), Competition Act, 2002	Vertical collusion: Entities on different levels of production collude to hamper competition in a market. The collusion may be in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services
2.	Section 4, Competition Act, 2002	Abuse of dominant position. In any information u/S. 4 of the Act, the Commission has to be first satisfied that the concerned party enjoys a dominant position in the relevant market as may have been defined. Subsequently, the CCI examines whether such dominance has been abused by the concerned party as per the conditions of this provision.
3.	Section 19(1)(a), Competition Act, 2002	Power of the CCI to inquire into any alleged violation of Section 3 and/ or Section 4 of the Act <i>suo moto</i> or based on the information received from any person or Central or any State government.
4.	Section 26(1), Competition Act, 2002	Power of the CCI to direct the Director-General to investigate a matter on which information has been received or <i>suo moto</i> .

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