

In Re: Federation of Hotel & Restaurant Associations of India (FHRAI) and anr. v. MakeMyTrip India Pvt. Ltd. and Ors. with In Re: Rubtub Solutions Pvt. Ltd. v. MakeMyTrip India Pvt. Ltd. (MMT) and anr.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 *In Re: Federation of Hotel & Restaurant Associations of India (FHRAI) and Ors. v. MakeMyTrip India Pvt. Ltd. and Ors.*, (Case No. 14 of 2019) with *In Re: Rubtub Solutions Pvt. Ltd. v. MakeMyTrip India Pvt. Ltd. (MMT) and anr.* (Case No. 1 of 2020), http://cci.gov.in/sites/default/files/Interim_Order_14-of-2019and01-of-2020.pdf.

Background

With the rapid digitalisation of businesses, online platforms have become enablers to penetrate and survive in any market. The ongoing pandemic has exacerbated the need for businesses to have a robust and dynamic online presence. With traditional physical markets pushed over the edge, intermediary platforms have become the primary route for service providers to reach the end consumers. These intermediary platforms hold a significant consumer base, thus increasing the dependence of smaller businesses on such few online platforms. Such dependence is further intensified with the growing need to change and adapt to the changing consumer preferences and nature of transactions.

MakeMyTrip (MMT-Go) is one such intermediary digital platform, operating in a Business-to-Consumer (B2C) model that caters to the needs of hotel searching consumers on one hand, and hoteliers and hotel partners, on the other. It also provides services like ticket booking, metasearch, and more. It further provides platform services to both individual hotels and hotels working under an aggregator model such as OYO, FabHotels, Treebo Hotels, and more. Such aggregators provide budget accommodation to end consumers and are in the market for providing franchising services under a revenue model which is commission-based.

The Federation of Hotel & Restaurant Associations of India (FHRAI) is the main representative body for the hospitality industry in India. It alleged that MMT-Go, Golbibo and OYO, have formed a cartel by entering into anticompetitive agreements, and have abused their dominant positions in the market of '*online intermediation services for booking of hotels in India*' and '*market for franchising services for budget hotels in India*', respectively.²

FHRAI also alleged that MMT-Go and Golbibo are indulging in predatory pricing and deep discounting. The Competition Commission of India (CCI) found MMT-Go to be dominant in the relevant market. Being satisfied that there is a *prima facie* infringement, the CCI ordered a detailed investigation in the matter.³

² *In Re: Federation of Hotel & Restaurant Associations of India (FHRAI) and Ors. v. MakeMyTrip India Pvt. Ltd. and Ors.*, (Case No. 14 of 2019), https://www.cci.gov.in/sites/default/files/14of2019_0.pdf.

³ *Ibid.*

Later an application for impleadment was filed in the ongoing case by FabHotels, which was allowed by the CCI. Later, 'Treebo Hotels' filed new information against MMT-Go and OYO.⁴

As per FabHotels and Treebo Hotels, MMT-Go imposed arbitrary exclusivity conditions and demanded exorbitant commissions from them. Moreover, MMT-Go entered an anticompetitive arrangement with OYO, pursuant to which it delisted FabHotels and Treebo Hotels from its platform. Considering the similarity of the facts and issues, CCI clubbed this information with the ongoing investigation.

While the investigation was ongoing, the Applicants under the present case approached the CCI seeking interim relief, contending that the impugned exclusive arrangement between OYO and MMT-Go foreclosed the market, thus causing them irreparable harm. They stated that being delisted from the MMT-Go platform disables them to reach a large customer base, as MMT-Go is a gatekeeper in the relevant market. They further added that there had been a great downfall in their revenue since the delisting. Subsequently, on March 09, 2021, the CCI granted interim relief to FabHotels and Treebo Hotels by directing MMT-Go to relist both hotels on its online portals with immediate effect.

Interim Relief by the CCI

While granting the interim relief, the CCI relied on the three factors test provided by the Supreme Court (SC) in the case of *CCI v. Steel Authority of India Ltd.(SAIL)*:⁵

"SC has said that, the Commission, while recording a reasoned order, inter alia, should

(a) record its satisfaction (which has to be of much higher degree than the formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed;

(b) it is necessary to issue an order of restraint; and

(c) from the record before the Commission, there is every likelihood that the parties would suffer irreparable and irretrievable damage, or there is

⁴ *In Re: Rubtub Solutions Pvt. Ltd. v. MakeMyTrip India Pvt. Ltd. (MMT) and anr.*, (Case No. 1 of 2020), <https://www.cci.gov.in/sites/default/files/01-of-2020.pdf>.

⁵ (2010) 10 SCC 744.

definite apprehension that it would have an adverse effect on competition in the market.”

For the first factor, in the present case, the CCI stated that the degree of satisfaction for forming a *prima facie* view 'is a tentative view at that stage' as opposed to a 'definite expression of the satisfaction recorded by the Commission'.⁶ In other words, the CCI should be satisfied that the facts brought before it indicates the existence of certain allegations and there is a high likelihood of causing an adverse effect on the competition in the market. The CCI referred to the case of *FHRAI v. CCI* where it was held that MMT-Go holds a dominant position and OYO has a significant market share in the 'market for online intermediation services for booking of hotels in India' and 'market for franchising services for budget hotels in India', respectively. It was also held that the agreement between a dominant player (MMT-Go) and participant (OYO) having a significant market share at the vertical level in the same market will enable them to exploit the market and harm other players as well.⁷

The CCI, thus found, to its satisfaction, the act committed and continues to be committed, to be in contravention of the Competition Act, 2002 (hereinafter referred to as Act).⁸

Furthermore, the CCI did not find it necessary to determine the relevant market again, stating that it is the same as it was defined at the *prima facie* stage.⁹ The CCI also believed that given the market conditions have not changed, MMT-Go's dominance is certain and unchanged.

On the second factor, the CCI held that the removal of FabHotels and Treebo Hotels from MMT-Go would decrease their online visibility, leading to a decreased customer base. This would adversely impact the survival of such hotel aggregators, given that they would not adequately meet the shifts in consumer preferences towards online. The CCI further also held that listing these hotel aggregators will not have any major impact on MMT-Go, instead it will be advantageous as it will earn commission from them.¹⁰

⁶ Supra 1.

⁷ Ibid.

⁸ Ibid. para 93.

⁹ Ibid. para 98.

¹⁰ Ibid. para 105.

The CCI was also not persuaded by the argument that listing of these hotels will place a burden on the technical resources as there are more than 72,000 properties listed on MMT-Go, out of which FabHotels and Treebo Hotels combined constitute less than 1200 properties.¹¹ Thus, the balance of convenience lies in the favour of FabHotels and Treebo Hotels.

For the third factor, the CCI noted that there are two conditions, i.e., the party will suffer irreparable damage or an adverse effect on competition, either of which has to be fulfilled. The CCI placed reliance on reports and studies, which show that large platforms can significantly affect competition due to the accumulation of large sets of data and subsequent network effects. Thus, it opined that denial of access to a dominant online intermediary platform could be lethal to the functioning of smaller businesses who rely on such intermediaries to reach end consumers.¹²

Thus, the arrangement between MMT-Go and OYO causes restrictions to access the market by other players, with the only option left to be listed on the MMT-Go platform is through engaging with OYO. The *"agreement has the dangerous probability to irreversibly alter the competitive landscape, especially in the franchisee budget hotel downstream market and may tip the market in favour of OYO causing irreparable harm to competition."*¹³

The CCI also noted that if timely intervention is not made in such dynamic markets, then permanent distortion of competition is likely to happen. It also held that the argument of contractual freedom is not valid, as the agreement is exclusionary, thus causing anticompetitive effects.

Thus, the CCI found that the impugned *"agreement is causing anticompetitive effect by denying access to an important channel of distribution through foreclosure."*¹⁴ Thus, the CCI ordered an interim relief directing MMT-Go to relist FabHotels and Treebo Hotels on its platform.

¹¹ Ibid. para 107.

¹² Ibid. para 113.

¹³ Ibid. para 117.

¹⁴ Ibid.

Analysis

The CCI is empowered to grant interim relief under Section 33 of the Act. However, this provision is rarely used, and the current order is only the fifth since 2009, wherein the CCI has granted interim relief.¹⁵

In regard to the nature and extent of exercise of such power by the CCI in the present order, it shall be noted that it has not exceeded its power under Section 33 by obligating the party to do a positive action. In the present case, relisting of hotels, on the platform is not a separate act to be done, but rather restraining the continuation of the anticompetitive conduct. Thus, it should not be seen as a mandatory injunction, rather should be understood as an externality effect caused by prohibiting anticompetitive conduct.

In this particular case, no objective justification was established for such bi-party exclusionary agreement between MMT-Go and OYO. Rather, after assessing the structure and characteristics of the relevant market in question, the plausible rationale for such conduct by the opposite parties was inferred to be to limit access and foreclose the market. If such impugned conduct by the opposite parties had been allowed to continue, there would have been a high likelihood that the Applicants would have been eliminated from the market. Such impugned conduct, along with the dominant position and significant market share of MMT-Go and OYO, respectively, also reduces competition in the market, risking monopolisation. Thus, there was a pressing need to discontinue and prohibit such conduct of the opposite parties.

It is worth noting that, while granting the interim relief, the CCI recognised the architecture and dynamics of the platform markets. It noted that there is a need to act quickly in such markets which are “winner takes all”, *sans* which harm to the competitive landscape would be irreversible. This rationale is resonated by various competition agencies worldwide, especially now, when the conduct and functioning of Big Tech companies are under fire, more than ever before. The realisation that digital companies should have been regulated from the beginning is starting to creep in, with competition agencies furthering discourse on breaking up the Big

¹⁵ Anshuman Sakle, Kirithi Srinivas & Yash Lahoty, CCI issues interim order to relist FabHotels and Treebo, Competition Law, A Cyril Amarchand Mangaldas Blog, CAM, (Apr. 05. 2021). https://competition.cyrilamarchandblogs.com/2021/04/cci-issues-interim-order-to-relist-fabhotels-and-treebo/#_ftn4

Techs, in an attempt to correct their orders and directions, which led to mergers and acquisitions leading to the creation of big conglomerates.

The CCI's reasoning in the current order is thus in line with a similar pro-active approach taken by competition agencies worldwide. Recently, the European Union amended its legislation to prescribe an *ex-ante approach* to protect competition from irreparable damage.¹⁶ Similarly, France and Germany are also heading in the same direction as far as interim measures are concerned.¹⁷

In the present case, since the order obligates the party to take positive action, while the detailed investigation is still under process, the interim relief by the CCI may seem to come at an immature stage if seen from a critical lens on its pure adjudatory function. However, keeping in mind its position as a regulator, such pro-active action by the CCI is appreciable, which will help avoid irreparable harm to the competition in the market.

It is becoming increasingly important for dominant players like MMT-Go to be extra cautious in their conduct, as the slightest misuse of their position can harm the market to an unimaginable extent owing to the presence of high network effects in such markets.¹⁸

Thus, this order directing MMT-Go to mandatorily relist the hotel aggregator service providers on its platform shall not be interpreted as to interfere with the platform's commercial decisions to choose whom it wants to deal with, rather as a step to nullify the distortion caused in the market due to the dominant firm's conduct.

¹⁶ Toni Pitesa, Interim measures: A new enforcement pathway? Kluwer Competition Law Blog, (April 09, 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2020/04/09/interim-measures-a-new-enforcement-pathway/>

¹⁷ *Ibid.*

¹⁸ *Shri Neeraj Malhotra, Advocates v. North Delhi Power Ltd. and Ors.*, (Case no. 6 of 2009), https://www.cci.gov.in/sites/default/files/NeerajVsBSESMainOrder3050511_0.pdf.

Through this order, the CCI has taken a step towards broadly interpreting and achieving the objective and purpose envisaged under the Act to “*prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to promote the interests of consumers....*”. This approach by the CCI will enable fostering a pro-active competition regime, with a focus on precaution rather than cure.

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