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CCI IMPOSES PENALTIES ON INDIAN OTA MAKEMYTRIP AND BUDGET HOTEL FRANCHISE OYO

28 October 2022 On 19 October 2022, the Competition Commission of India (**CCI**) imposed penalties of INR 223.48 crore and INR 168.88 crore on MakeMyTrip, Goibibo (**MMT-Go**) and Oravel Stays Private Limited (**OYO**), respectively.¹ These penalties were based on the conclusion that OYO had contravened Section 3(4) of the Competition Act, 2002 (**Act**) while MMT-Go additionally contravened Section 4. The CCI also directed MMT-Go to modify its agreements and conduct as an online travel agency (**OTA**)

Background

The Federation of Hotel & Restaurant Associations of India (**FHRAI**) filed an information against MMT-Go and OYO alleging price parity, deep discounting and other exclusionary conduct amounting to violation of Sections 3 and 4 of the Act. Subsequently, Casa2 Stays Private Limited (**FabHotels**) requested and was impleaded as an informant in the matter.² Ruptub Solutions Private Limited (**Treebo**) separately filed an information against the same parties with similar allegations, which was clubbed with the matter.³ For the sake of brevity, FHRAI, FabHotels, and Treebo are collectively referred to as the "**Informants**".

The Informants *inter alia* claimed that MMT-Go imposed "price parity" and "room parity" clauses on hotel partners, whereby the hotel partners (i) were not allowed to sell rooms at any OTA or their own online portal at a price below than the price offered on MMT-Go's platform and (ii) could not refuse rooms on MMT-Go's platform if rooms were accessible on any other OTA. It was additionally argued that MMT-Go offered deep discounts and indulged in predatory pricing practices. The Informants submitted that MMT-Go denied market access to FabHotels and Treebo by (i) charging excessive commission and (ii) giving preferential treatment to OYO through confidential commercial agreements. MMT-Go was also allegedly charging a service fee from customers at the behest of its hotel partners but not paying up to its partners. The Informants further argued that if a hotel partner wished to remove itself from MMT-Go's platform, MMT-Go would, instead of removing the hotel partner's name, indicate "sold out" or "no rooms available" for that hotel, thereby severely affecting the hotel's business.

After considering these allegations, the CCI opined that MMT-Go and OYO had *prima facie* violated the Act and directed the Director General (**DG**) to investigate contraventions of Sections 3(4) and 4 of the Act.

¹ *Federation of Hotel & Restaurant Associations of India and Another v. MakeMyTrip India Private Limited and Others*, Order dated 19 October 2022 in Case No. 14 of 2019.

² Casa2 Stays Private Limited filed an application dated 23 January 2020, under Regulation 25 of the Competition Commission of India (General) Regulations, 2009 seeking that it be impleaded, which the CCI permitted through order dated 5 May 2020.

³ Case No. 01 of 2020 – which was clubbed vide order dated 24 February 2020.

Findings of the DG

Relevant market

After considering that online hotel booking channels could not be considered substitutable with offline channels, due to (i) increased visibility and (ii) significantly less pricing offered by OTAs, the DG delineated the relevant market for MMT-Go as “the market for online intermediation services for booking of hotels in India”. The DG took into account the one stop solution of “Search, Compare and Booking” (**SCB**) provided by OTAs. Separately, with respect to OYO, the DG found that it had significant presence in the “market for franchising services for budget hotels in India”.

Abuse of dominance

The DG analysed multiple factors including market share, customer base, lack of competitive constraints on MMT-Go, size and resources, preferences of hotels for online booking, number of properties listed, benefits and features offered by MMT-Go, network effects and the deep discounts provided by MMT-Go to conclude that MMT-Go was a dominant player in the relevant market.

The DG observed that the price parity and room parity clauses imposed by MMT-Go were (i) creating barriers to new entrants in the market and (ii) driving existing competitors out of the market, leading to erosion of the client base of hotels and restricting customer choice. It accordingly concluded that such clauses violated Section 4 of the Act. Further, the DG noted, among other factors, that MMT-Go’s average room revenue was less than its average variable cost evidencing deep discounting and predatory pricing. The DG also recorded that MMT-Go’s misrepresentation of a hotel as “sold out” could adversely impact the hotel’s business and restrict a consumer’s fair choice to choose hotels. The DG opined that such conduct had the potential to deny market access to hotels. On the allegations of (i) exorbitant commission being charged by MMT-Go and (ii) service fee charged at the behest of hotels being pocketed by MMT-Go, the DG found that these remained unsubstantiated.

Vertical restraints – refusal to deal

The DG observed that delisting of FabHotels and Treebo from MMT-Go’s platform pursuant to an exclusionary agreement between MMT-Go and OYO, foreclosed them from effectively competing with OYO. Accordingly, the DG concluded that the MMT-Go/OYO agreement violated Section 3(4) of the Act.

CCI’s Analysis

Relevant market

The CCI observed that MMT-Go offered two distinct services (i) SCB services to end users and (ii) inventory listing, potential customer tracking and sale services to hotels. In light of the distinct services provided to distinct consumers (being the end-consumers and hotel partners), the CCI rejected MMT-Go’s submissions to define markets based on accessibility of hotels to end consumers.

From the end-consumer perspective, the CCI observed that the seamless integration of SCB functions on OTA platforms was a unique feature. Further, even where rooms were booked through other channels and not OTAs (walk-in, offline travel agents, metasearch services, etc.), the CCI observed that the presence of OTAs was key for hotels to develop overall demand since OTAs help in bettering visibility and discoverability. Therefore, the CCI held that online mode of distribution is distinct from offline distribution.

Further sub-segmenting online distribution, the CCI held that even within the online segment, OTAs constituted a distinct relevant market. Accordingly, the CCI, concurred

with the DG's market definition of the "market for online intermediation services for booking of hotels in India".

Abuse of dominance

The CCI agreed with the factors relied upon by the DG and concluded that MMT-Go held a dominant position in the relevant market. Importantly, the CCI considered "stayed room nights" to be the appropriate metric to measure an OTA's market power as opposed to revenue. Among other factors, the CCI considered the lack of any effective competitive constraints on MMT-Go and the dependence of hotels on MMT-Go for their survival and growth while holding it dominant.

The CCI observed that the deep discounts, exclusivity conditions and parity conditions by MMT-Go, (i) helped it retain and further increase its user network, (ii) impeded the competitive process between OTAs by limiting the competitive instruments at the disposal of other OTAs, (iii) adversely affected the sale of rooms through other platforms/channels further accentuating the dependence of hotels on MMT-Go and (iv) potentially allowed MMT-Go to adversely impact prices by charging higher commissions based on increased sales on its platform. Accordingly, the CCI concluded that MMT-Go abused its dominant position. The CCI rejected MMT-Go's justification that imposition of parity terms was an industry practice, emphasising on the need to differentiate the effect and implications of a dominant entity's conduct on users and competition on the one hand from the actions of a smaller insignificant player on the other hand. Interestingly, the CCI differentiated "wide" and "narrow" price parity obligations, considering the latter to be justifiable in certain circumstances.

The CCI rejected the DG's conclusions on predatory pricing by MMT-Go since it found that the DG did not correctly apply the costs applicable to determination of average variable cost. However, the CCI agreed with the DG's conclusions regarding misrepresentation of information on MMT-Go's platform resulting in denial of market access to hotels.

Vertical restraints - refusal to deal

The CCI concluded that the nature and consequence of the agreement between MMT-Go and OYO to delist Treebo and FabHotels from MMT-Go was itself in the nature of refusal to deal. Further, the CCI observed that the agreement was a mutually beneficial arrangement between two vertically related entities to foreclose competitors in their respective markets. The CCI also considered factors such as (a) adverse impact of the delisting on Treebo and FabHotels (b) dependence of independent budget hotels on OYO and (c) the artificial advantage created for OYO and its franchisee hotels because of the delisting. The CCI noted that the agreement resulted in lesser choice to consumers and the creation of entry barriers in the market. On these grounds, the CCI finally concluded that there was a refusal to deal emanating from the exclusionary and mutually beneficial agreement between MMT-Go and OYO, in contravention of Section 3(4)(d) of the Act.

Penalty

The CCI found MMT-Go to have violated Sections 4(2)(a)(i), 4(2)(c) read with Section 4(1) of the Act. Further, it held that the vertical arrangement between MMT-Go and OYO was in contravention of Section 3(4)(d) read with Section 3(1) of the Act.

Accordingly, the CCI imposed monetary penalties on MMT-Go and OYO at 5% of their relevant turnover. The CCI also directed MMT-Go to modify its agreements and behaviour, including:

- (i) removing/abandoning the (a) price and room availability parity obligations with respect to other OTAs, and (b) exclusivity conditions from the agreement between MMT-Go and hotel/chain hotels,

- (ii) providing access to the MMT-Go platform on a fair, transparent and non-discriminatory basis to hotels/chain hotels by formulating appropriate platform listing terms and conditions in an objective manner, and
- (iii) providing transparent disclosures on its platform surrounding properties not available thereon, either on account of the termination of the contractual agreement or by virtue of exhaustion of the allocated quota.

Comment

The fast-paced technology driven innovations and solutions have brought about new-age questions on competition harm before the CCI. In line with previous experience in dealing with digital markets and platforms, the CCI continues to deep dive into business models to ascertain their impact on competition.

In this decision, the CCI has scrutinised certain complex issues and provided clarity on (i) the difference between transaction and non-transaction platforms, (ii) the underlying importance of conducting a substitutability analysis for all sides of multi-sided markets, irrespective of the interdependence between sets, (iii) the distinction between “narrow” and “wide” price parity clauses and a potential defence for narrow price parity clauses despite a position of dominance in certain circumstances.

The CCI’s extensive analysis and appreciation of the nuances surrounding the delineation of the relevant market, distinct nature of offerings and conduct in the digital business space is a positive sign indicative of its intent to understand and continue close scrutiny of digital markets going forward.

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