

**IN RE: FEDERATION OF HOTEL & RESTAURANT ASSOCIATIONS OF INDIA (FHRAI)
(INFORMANT) AND MAKEMYTRIP INDIA PVT. LTD. (MMT) OPPOSITE PARTY I, IBIBO
GROUP PRIVATE LIMITED (IBIBO) (OPPOSITE PARTY II), ORAVEL STAYS PRIVATE
LIMITED (OYO) (OPPOSITE PARTY III)**

Decision date: 28/10/2019

Keywords: abuse of dominant position, Online Travel Agencies, unilateral abusive conduct

Rule: Sec. 3(4) and 4 of the Competition Act, 2002.

The Informant had alleged that various actions of the Opposite Parties were contrary to the provisions of the Act. The Informant had alleged that the Opposite Parties have abused their respective dominant positions, they have cartelized and further, they have entered into anti-competitive arrangements/agreements.

The Informant submitted that MMT-Go, OYO, booking.com, yatra.com, cleartrip.com, expedia.com *etc.* were operating as Online Travel Agencies (OTAs) in India, alternatively known as the domestic OTAs. While referring to the order dated 18.01.2017 of the Commission with respect to approval of merger/combination of MMT and GoIbibo, it was submitted that the said merger had led to their dominance in the relevant market of OTA(s), which had empowered MMT-Go to operate independently of the competitive forces prevailing in the relevant market.

It was alleged that the Opposite Parties charge excessive commissions from the hotel partners and provide deep discounts which have led to the destruction of competitive pricing in the market. MMT-Go have also been alleged to be charging a Performance Linked Bonus (PLB) from hotels *i.e.* for every ten rooms of a particular hotel booked through their platform, they pay the hotel only for 9 rooms. Thus, the price of the tenth room was in effect part of the commission/brokerage which MMT-Go was otherwise charging from such hotels. Such commission turns out to be around 22-40% (from standalone hotels) which was grossly disproportionate to the commission charged by other OTAs like booking.com and yatra.com which charge a standard 15% commission. This was alleged to be in violation of Section 4 of the Act.

It was further alleged that MMT-Go have imposed a price parity in their agreement/contract with hotel partners whereby the hotel partners were not allowed to sell their rooms at any other

platform or on its own online portal at a price below the price at which it was being offered on MMT-Go's platform. However, MMT-Go in its own discretion can fluctuate the prices of such hotel rooms. Further, the hotel partners were mandated to observe room parity whereby they cannot refuse to provide rooms on MMT-Go at any given point of time if the rooms were being provided on any other platform. These restrictions were alleged to be in violation of Section 4 of the Act.

The Opposite Parties have also been alleged to be indulging in predatory pricing in contravention of Section 4 of the Act. It was alleged that MMT-Go have taken over many small OTAs to eliminate competition which had led to tipping of the market in their favor and also resulted in rapid erosion of the revenue of the members of the Informant. Further, MMT-Go have been offering deep discounts to the customers which had further led to expansion of their network and retention of customers. Due to such conduct, the smaller players in the OTA market were being forced to exit. It was further alleged that MMT-Go was competing on discounts, rather than prices, and thus their market performance was not based on efficiency, but on deep-pockets. With regard to OYO also, it was stated that it resorts to predatory pricing wherein budget hotels in micro (small) markets were targeted. These budget hotels were promised a minimum guaranteed sale and then low prices were fixed to achieve that minimum assurance. Such prices fixed by OYO were approximately 30% lower than the price of the hotels rooms that were not listed on its platform, due to which OYO hotels command higher occupancy. For this reason, the non-OYO Hotels were compelled to join OYO's platform as they were unable to withstand OYO's anti-competitive strategies in the market.

Further, it was alleged that chain hotels/ hotel aggregators namely Treebo and Fab Hotels have been denied market access. They have been allegedly removed from the platform of MMT-Go as they did not agree to pay the exorbitant commission brokerage charged by the latter. Further, it had also been alleged that MMT and OYO have entered into confidential commercial agreements wherein MMT had agreed to give preferential treatment to OYO on its platform, further leading to a denial of market access to Treebo and Fab Hotels in contravention of Section 3 as well as Section 4 of the Act.

Besides, the Informant had also made some miscellaneous allegations of abuse.

Apart from the allegations under Section 4 of the Act, the Opposite Parties were alleged to have cartelized for charging a commission higher as compared to the usual commissions charged by other OTAs.

Analysis of the Commission

On perusal of the facts and allegations, the Commission observes that the Informant had alleged

abuse of dominant position by the Opposite Parties collectively as well as individually. With regard to the allegation of collective abuse of dominant position by these Opposite Parties, it was noted that Section 4 of the Act currently envisages prohibiting only unilateral abusive conduct by a dominant player. The Act did not provide for the concept of collective dominance *i.e.* the Opposite Parties cannot be considered to hold a dominant position collectively. This issue was dealt with in detail by the Commission in *M/s Fast Track Call Cabs and Another v. ANI Technologies Pvt. Ltd.* wherein the allegation was that of two cab aggregators holding a dominant position collectively in the market. Based on a comprehensive assessment of extant provisions of the Act, the Commission concluded that the Act did not envisage abuse by more than one entity holding dominant position within the meaning of Section 4 of the Act. Thus, based on the decision of the Commission in the *Fast Track Call Cabs* matter, the contention of the Informant regarding abuse of dominant position by the Opposite Parties collectively was liable to be rejected, as being beyond the legal framework of Section 4 of the Act.

With respect to alleged unilateral abusive conduct of MMT-Go and OYO, relevant market(s) needs to be delineated, before assessing their respective dominance and eventually, the abuse of such dominance.

Relevant market

The Commission relied on *RKG Hospitalities Pvt. Ltd. vs. Oravel Stays Pvt. Ltd.* to identify the relevant market for OYO which was stated to be ‘market for franchising services for budget hotels in India’.

As regards MMT and GoIbibo (or MMT-Go), it was noted that pursuant to the acquisition of GoIbibo by MMT, both these players constitute part of the same group. In view of the increased popularity and use of OTAs by a large segment of consumers in India, hotel operators now perceive them as a distinct mode of distribution which cannot be simply replaced or substituted by other offline modes or direct sale without losing out significantly on consumer reach. Moreover, the online mode of distribution through third party platforms, which provide the facility to search, compare and book at the same place, was characteristically distinct from the services that the offline mode such as travel agents provide. The predominant nature of their services, at this stage, appears to be that of intermediation and thus, the Commission was of the view that the relevant market for MMT-Go would be ‘market for online intermediation services for booking of hotels in India’.

Assessment of Dominance

In the online intermediation market for booking of hotels, MMT-Go as a group held 63% of domestic hotel online market share in 2017, as per its own investor presentation. Though

MMT-Go had vehemently argued that such investor presentation ought not to be considered as the number of suppliers providing substitutable product/service was much larger and goes beyond the OTAs, the Commission did not find much merit in such an argument. The Commission was not convinced that direct suppliers qualify to be a part of the same relevant market, given that no intermediation was involved in such transactions. Further, other players e.g. PayTM, HappyEasyGo, Thomas Cook, who have been claimed by MMT-Go to have been posing competitive constraints on them, also do not appear to have any significant market presence in the relevant market. In the relevant market delineated by the Commission, MMT-Go *prima facie* appears to be dominant.

As regards the dominance of OYO, the Commission referred *RKG Hospitality Pvt. Ltd. V. Oravel Travels Pvt. Ltd. (OYO)*. The Commission was of the view that though OYO ‘was a significant player in the relevant market, presently it cannot be unambiguously concluded that it holds a dominant position in the relevant market’. Accordingly, *prima facie* OYO was not found to hold a dominant position, despite being a significant player in the ‘market for franchising services for budget hotels in India’.

Abuse of Dominant Position

The various allegations and the analysis by the Commission was as follows:

- Room and Price Parity Impositions:

It was alleged that MMT-Go had imposed a term in the contract with hotels whereby the latter was not allowed to sell its room at any other platform or on its own online portal at a price below which it was being offered on MMT-Go’s platforms. Further, there was a room parity arrangement also which allegedly restricts the inventory made available to other OTAs *vis-à-vis* MMT-Go.

Across Platform Parity Agreements (APPAs), popularly referred to as ‘retail Most-Favoured Nation (MFN) clauses’, were stipulations where the sellers guarantee an online selling platform terms, price and/or non-price, that were at least as favourable as those granted to any other platform thus ensuring the former a competitive advantage 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.

The room and price parity restriction envisaged in Clause 1.3 of the agreement between hotelier and MMT-Go were broad/wide in nature as the hotel partners were obliged to maintain room as well as price parity between platform and any other sale channel (other OTAs, channels of the third parties and the hotel itself).

Broadly defined APPAs may result in removal of the incentive for platforms to compete on the

commission they charge to hoteliers, may inflate the commissions and the final prices paid by consumers and may also prevent entry from new low cost platforms. Though the magnitude of the anticompetitive effects of these agreements *inter alia* will depend on the market power of the platform, given the *prima facie* dominance of MMT-Go, such parity restriction needs to be investigated to gauge its impact under Section 3(4) as well as Section 4 of the Act.

- Denial of Market Access:

The Informant had alleged that Treebo and Fab Hotel have been removed from the platform of MMT-Go as they both did not agree to pay the exorbitant commission brokerage charged by them. This, according to the Informant, was a denial of market access. Further, the Informant had argued that pursuant to the commercial agreement between OYO and MMT, MMT gives preferential treatment to OYO on its portal, whereby the hotels of OYO were given preference, which leads to further denial of market access.

In *RKG Hospitality Pvt. Ltd. V. Oravel Travels Pvt. Ltd. (OYO)*, the Commission had observed that Treebo and Fab Hotel operate in the same relevant market and were thus, competitors. From the search results presented by MMT on random queries for hotels across different locations, it appears that Fab Hotel and Treebo were indeed not present on this platform, while they earlier used to be. If this was a consequence of an agreement between OYO and MMT, which was also reported by media, to not list the closest competitors of OYO on the platform, it may potentially contravene the provisions of Section 3(4) of the Act.

Thus, whether the commercial agreement between OYO and MMT entails preferential treatment to OYO and consequent exclusion of Treebo, Fab hotel and any other hotel chain and if so, the effect of the same on competition merits investigation.

- Predatory Pricing:

According to the Informant, the Opposite Parties were indulging in deep discounting and predatory practices by charging below the average room rate. Deep discounts were often offered in platform markets to establish network effects. Since MMT-Go was *prima facie* found to be in a dominant position in the relevant market, the Commission opined that such practice by them did not appear to be introductory or aimed at building the network. Thus, the Commission thought this issue may need to be investigated.

- Exorbitant/Unfair Commissions:

The Informant had also raised issues like charging of excessive commission by the Opposite Parties from the hotels. The Commission notes that the term ‘*excessive*’ was ambiguous to the extent that there were no clear standards to determine what price was excessive or fair. The

Informant had alleged that the Opposite Parties charged excessive commission as compared to its competitors. A competitor's price may, however, not be a correct benchmark for ascertaining the price charged by a player. Even otherwise, at this stage the Commission did not find it appropriate to return a finding on this issue especially when the market structure, entry conditions, cost structure of platforms *etc.* remain to be investigated.

- Misrepresentation of Information:

With regard to the misrepresentation due to delayed delisting and manipulation of market dynamics, the MMT-Go have cited certain justifications. The Commission was of the view that showing non-availability of rooms on the portal, instead of delisting them, even when the hotels have specifically requested for severing of ties with MMT-Go raises concerns. By showing such misleading information and creating information asymmetry in the market, the conduct of MMT-Go had the potential to deny market access to the concerned hotels.

The Informants have also alleged that MMT-Go artificially create demand-supply gap on its platform and accordingly fluctuates prices. The Commission finds such issues to be potentially abusive and since MMT-Go was found to be dominant, they need to be investigated. Though the Commission had taken note of the justifications offered by MMT-Go, given its market power owing to the dominant position, the Commission finds it appropriate to test the veracity of the justifications offered by them.

As regards the allegation of fake bookings against OYO, the Commission refrains from returning any *prima facie* finding given that OYO had not been found to be *prima facie* dominant in the relevant market in which it operates.

- Hotel Service Fee:

It was pointed out that MMT charges a service fee from the consumer at the time of booking the rooms in the name of the hotels, which was pocketed by MMT. Further, the charging of service fee by MMT was alleged to be discriminatory as such fee was levied on certain hotels and allegedly not levied on high-end of chain hotels. Since MMT was *prima facie* found to be dominant, this conduct of MMT merits investigation.

Conclusion

Based on the aforesaid discussion, the Commission was of the view that there exists a *prima facie* case for investigation against MMT-Go and OYO for alleged violation of the provisions of Section 3(4) of the Act. Further, a *prima facie* case for investigation under Section 4 of the Act was made out against MMT-Go, as elucidated in the earlier parts of this order. The DG

was, thus, directed to carry out a detailed investigation into the matter, in terms of Section 26(1) of the Act.