

e-Competitions

Antitrust Case Laws e-Bulletin

Preview

The Indian Competition Authority grants interim relief to hotel franchisees in the online travel agents' market (*MakeMyTrip / Ibibo*)

DAMAGES, INTERIM MEASURES, HIGH MARKET SHARES, INDIA, INTERNET, ONLINE PLATFORMS, ALGORITHMS, GENERAL ANTITRUST

Indian Competition Authority, *MakeMyTrip / Ibibo*, Case No. 01 of 2020, 9 March 2021

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e-Competitions News Issue Preview

Although India's competition law has contained an interim measure provision since inception, two things stood about the Competition Commission's ("**Commission**") usage of interim measures – (i) the overall frequency (or lack) of its usage; and (ii) its limited usage in a low shelf-life Bollywood movies context. Changing course, on March 9, 2021, in an interim relief concerning the online travel agents' market, MakeMyTrip India Pvt. Ltd. and the Ibibo Group Private Limited ("**MMT-GO**") were directed by the Commission to relist two budget hotel franchisees, Treebo and FabHotels on their OTA platform. [1]

Thus, taking cue from the EU's interest in usage of interim measures in digital context, the Indian landscape is all set to change. In this article, we assess if this entails a "change in course" for digital market players when entering into alliance with their business partners.

A. Factual Background

As in case of any interim relief, in October 2019, [2] the Commission found tentative merit in the allegation of Treebo and FabHotels ("**Budget Hotels**") that the partnership of MMT-Go (an online travel agency platform) and Oravel Stays Private Limited (OYO) (which provides franchisee services for budget hotels in India) amounted to denial of market access. The claim of the Budget Hotels implied that as a result of the agreement, preferential treatment was given to OYO which resulted in their delisting from the MMT-Go platform.

Intriguingly, after more than a year, in November 2020, the Budget Hotels filed for an interim relief requesting the Commission to direct relisting while the investigation returns with a final finding. Having regard to the increasing importance accorded to digital markets by consumers and the decreasing market share of Budget Hotels, the

Commission was of the view that the franchisee chains must be relisted in the interim. In granting the interim relief, the Commission considered the following:

B. The three prong test!

According to the Commission, three conditions must be satisfied: [3]

- a. existence of a higher degree of a prima facie case that a contravention has taken place and continues to take place,
- b. balance of convenience; and
- c. irreparable damage would be caused to the claimant if interim relief is not provided.

C. Meeting the test and learnings

Existence of a higher degree prima-facie case: Exclusion of others What weighed with the Commission was the admission of MMT-Go that Budget Hotels were delisted “as a result” and a pre-condition of the agreement with OYO. Resultantly, a higher degree of satisfaction that the conduct was ensuing is present.

Interestingly, agreements enhancing synergies between vertical players could be procompetitive, a direct aim at competitors, seem to have weighed against MMT-Go. Therefore, parties need to adopt those agreement structures which enhances procompetitive impact and limits direct ousting of competitors. Such carve-outs could help demonstrate efficiencies.

Players holding significant market shares on both the sides also led the Commission to hold that the agreement could lead to bolstering their market positions. Thus, platforms need to undertake empirical economic analysis, especially when entering into agreements with large players on the opposite side.

Balance of convenience in favour of the claimants or competition?

This requires assessment of comparative inconvenience to the parties, if the interim relief is refused or granted. In substantiating this claim, Budget Hotels argued that MMT-Go currently lists about 72,000 hotels on its platform. An addition of 600 hotels on the OTA would not cause any inconvenience. If not granted, the Budget Hotels would be foreclosed from an important distribution channel.

Agreeing, Commission opined that the balance of convenience lied in favour of Budget Hotels. Interestingly, given that Commission focusses on benefit to competition, any such assessment must include analysis on the “effects”. Testing on the touchstone of innovation through such synergies between players which have proven to be pro-competitive in many instances, could also yield realistic results. Surprisingly, in spite of the fact that OYO was a party to the case, the order is silent on the objective rationale behind the delisting.

In the context of digital markets, the order could impact future synergies between digital platforms and vertical entities. To that extent, clearly stating rationale could help explaining the Commission at a later stage.

Irreparable damage

In this, Commission focussed on “there is definite apprehension that it would have adverse effect on competition”. To meet this condition, the Commission observed that:

- a. Recent trends suggest digital mode of distribution is becoming essential and absolute denial was “catastrophic”.
- b. Peculiarities of online markets (network effects) leads to accumulation of market power.

Interestingly, while holding this, the Commission was not moved by the argument of MMT – Go that less than 10% of the actual bookings took place through the OTA. This was in spite the argument of MMT-Go that Budget Hotels were able to grow despite the delisting.

The order may result in increased dependence of Budget Hotels on MMT-Go. But for the order, Budget Hotels may have looked out for synergies with other competing platforms. With evidence that Budget Hotels were able to attract investors, it could have been interesting to see whether hotel franchisee players could have drawn traffic on a competing platform.

D. Key takeaways

A final order is awaited but till such time MMT-GO would be forced to list the Budget Hotels during the operation of the interim measure.

Does this interim measure order entail that any platform having high market share is mandated to list every player? Not necessarily! MMT-Go partnered with OYO which also had a high market share which led the Commission to conclude that foreclosure in both the markets could be palpable.

This implies that if OYO were a smaller player or arguably comparable to the Budget Hotels, the Commission could have taken a different view owing to a different competitive landscape.

Further, the pre-condition of delisting of Fabhotels or Treebo as a condition by OYO further crystalised Commission’s view on the “harm to competition” by OYO. In case of such synergies, thus stringent pre-conditions may need to be better structured. Like a Bollywood potboiler, everything turns on an eye-catching plot!

[1] Interim Order Date: 9 March 2021, Case No. 14 of 2019, Available at: https://www.cci.gov.in/sites/default/files/Interim_Order_14-of-2019and01-of-2020.pdf

[2] In Re: Federation of Hotel & Restaurant Associations of India (FHRAI) and Ors vs. MakeMyTrip India Pvt. Ltd. (MMT) & Ors., Case No. 14 of 2019 and and Case No. 01 of 2020, Date: 28 October 2019

[3] As laid down in Competition Commission of India vs. Steel Authority of India Ltd (2010) 10 SCC 744