

PARITY OBLIGATIONS IN THE ONLINE HOTEL BOOKING INDUSTRY:**CRITICALLY ANALYZING CCI'S ORDER AGAINST MMT-GO**

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ABSTRACT: *On 19th October 2022, a Competition Commission of India ('CCI') bench headed by Chairperson Ashok Kumar Gupta levied hefty monetary and non-monetary penalties against MakeMyTrip ('MMT') and Oravel Stays Private Limited ('OYO'). This contribution comprehensively analyses the order passed by the CCI and proceeds to comment on its implications. The order has forced MMT to abandon parity obligations with their hotel partners, which calls for a review on the judicial and economic application of mind by the CCI bench. The economic justifications for imposing parity obligations are central to our critique on the said order. In a growing economy where market players have emerged by virtue of their digital databases, their algorithms, and their unique business models, we argue that it is only economically efficient and pro-competitive to protect the interest of these platforms. Additionally, this contribution highlights several other concerns that arise out of this order, such as the 'special responsibility' on dominant firms in relevant markets. Altogether, we conclude that the CCI has erred in their judgement against MMT and OYO, which calls for them to reconsider their said assessment.*

KEYWORDS: - *Parity Agreements, Competition Commission of India, MakeMyTrip – OYO dispute, Competition Laws, Online Hotel Booking Industry.*

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I. INTRODUCTION

Recently, an order¹ by the CCI has directed MMT and Goibibo to abandon their parity obligations with hotel partners, which can have a lasting impact on the entire online hotel booking industry and the competition jurisprudence in India. This contribution carefully analyses the order passed by the CCI and comments on the relevant concerns and questions arising out of this order. It goes on to provide the economic justifications for imposing such parity obligations and discusses the potential impact of this ruling on the relevant market.

Parity obligations, derived from Across Platform Parity Agreements² (APPAs), are defined as impositions on suppliers that restrict them from selling a product or a service, at a price lower than what is being offered on any other sales channel. Parity clauses hence essentially mandate suppliers to offer goods at the same prices as their competitors, so there remains 'parity' with regard to prices in the market. Such parity clauses are extremely prevalent with Online Travel Agencies and is presently an industry standard. MMT is a well-established Online Travel Agency ('OTA') which is engaged in the business of providing tourism related services across India, and more particularly facilitates the hotel bookings online via its platform. Goibibo (also engaged in the same business) was merged with MMT in 2017³, and has since been a part of the same business group (herein after referred to as 'MMT-Go').

This case was initially filed by the FHRAI, which is a representative body of the hospitality industry in India, after which FabHotels and Treebo were also included as Informants. The said inclusion of the parties was necessitated by the substantial interest they have in the outcome of this proceeding. The following order⁴ was passed by the CCI under Section 27 of the Competition Act 2002⁵, which empowers the CCI to levy penalties on organizations that are observed to abuse

¹ Federation of Hotel & Restaurant Associations of India (FHRAI) and Anr. v. MakeMyTrip India Pvt. Ltd. (MMT) and Ors., (2022) Case 14 of 2019 & 01 of 2020 (CCI).

² Simon Constantine, "OECD Hearing on 'Across Platform Parity Agreements', Competition Committee (28 Oct. 2015): *Written Contribution from the Competition and Markets Authority*", 15 COMPETITION L.J. 33 (2016).

³ Biswarup Gooptu, *Online travel portals MakeMyTrip and Goibibo announce merger*, THE ECONOMIC TIMES (Oct. 18, 2016) <https://economictimes.indiatimes.com/small-biz/startups/online-travel-portals-makemytrip-and-ibibo-announce-merger/articleshow/54921415.cms?from=mdr>.

⁴ Federation of Hotel & Restaurant Associations of India (FHRAI) and Anr. v. MakeMyTrip India Pvt. Ltd. (MMT) and Ors., (2022) Case 14 of 2019 & 01 of 2020 (CCI).

⁵ Competition Act, 2002, § 27, No. 12, Acts of Parliament, 2003 (India).

whilst dominating the said market. On 28th October 2019, the Commission had ordered an investigation, against MMT, GoIbibo and OYO for contravening Section 3⁶ and 4⁷ of the Act. A CCI Bench headed by Chairperson Ashok Kumar Gupta delivered its order on 19th October 2022, after careful consideration of the Director General's ('DG') investigation report and objections/suggestions of the involved parties to said report.

II. ALLEGATIONS LEVIED AGAINST MMT-GO-OYO

The first allegation against MMT-Goibibo was that they had imposed parity obligations with their hotel partners, whereby these partners could not sell their rooms at any other platforms, for prices lower than what MMT was offering. In addition to such obligations, MMT reserved the discretion to fluctuate the prices for each room and that the parties i.e., the hotels, could not deny rooms, at a time when they were being offered on some other OTA. It has been further alleged that MMT-Go has been offering deep discounts, and hence their market performance is based upon their deep pockets, which consequently pushes the smaller OTAs out of the market. Lastly, an allegation has been levied against MMT-Go and OYO for having entered into a confidential commercial agreement, which denied Treebo and FabHotels of market access. Other miscellaneous allegations against MMT also included the misrepresentation of information across the relevant market.

III. DG'S INVESTIGATION REPORT

The Director General commenced his investigation report with observing the current post pandemic situation along with the increase in internet penetration across the country. He noted that the dependence of consumers on OTAs is bound to increase in the coming years. He has analyzed the ability of MMT-Go to create a distortion in the supply side of the market, through their deep discounts. Since smaller players in the OTA market are not as dominant as MMT-Go, they cannot compete with comparable discount offers which further restrains new competitors in the same market. MMT-Go also possesses larger inventory data combined with a high customer outreach, which in turn creates network effects and gives them a competitive advantage. This essentially means that MMT-Go has been competing on deep pockets, which has enabled them to create entry barriers in the market. With regard to allegations surrounding the parity obligations, the DG has

⁶ *Id.*, § 3, at 3.

⁷ *Id.*, § 4.

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relied on international cases and foreign jurisprudence to observe that such obligations have been found to be anti-competitive. He nonetheless observed that imposing parity clauses is an industry practice, and that it is carried out by all OTAs in India. However, owing to MMT-Go's dominant position in the market, the anti-competitive impact of parity clauses is exacerbated. Consequently, the DG has found the parity clauses to have been violated Section 4(2)(a)(i) of the Act.⁸ He has also observed MMT's deep discounting strategies to be contravening Section 4(2)(a)(iii) of the Act.⁹

The commercial agreement between MMT and OYO was examined, as part of the DG's investigation report. The agreement contained a delisting clause, through which MMT-Go had removed FabHotels and Treebo Hotels from their platform. As concluded by the DG in his report, FabHotels and Treebo were driven out of the business of budget franchising hotels only as a consequence of such delisting. This commercial agreement restricted market access and did not let FabHotels and Treebo effectively compete with OYO, thereby hindering entry into the market. Observing that this agreement led to an appreciable adverse effect on competition, the DG held it to be violative of Section 3(4)(d)¹⁰ read along with Sec 3(1)¹¹ of the Act. With regard to the misrepresentation of information allegations, MMT had labelled hotels to be 'sold out' on their platform, when in actuality they had been delisted. This had led to the creation of information asymmetry in the market, and that MMT's conduct had the potential to deny market access to those hotels.

IV. CCI'S FINDINGS

A. ON RELEVANT MARKET

The delineation of a relevant market is necessary to ascertain dominance in the present case, along with examining the conduct of MMT-Go for allegations pertaining to Section 4 of the Act¹². The commission noted that all parties in this matter agree on the relevant geographic market being

⁸ *Id.*, § 4(2)(a)(i), at 3.

⁹ *Id.*, § 4(2)(a)(iii).

¹⁰ *Id.*, § 3(4)(d).

¹¹ *Id.*, § 3(1).

¹² *Supra* Note, 7.

India. It further held that the online and offline hotel booking segment is not part of the same market, and even within the former segment, OTAs constitute a separate relevant product market. Hence, the commission held the “market for online intermediation services for booking of hotels in India” to be the relevant market in the present case.

B. ON DOMINANCE

The scheme of the Act dictates that provisions under Section 4¹³ are only attracted when the entity holds a position of dominance in the market delineated above. MMT-Go is alleged to be engaging in abusive conduct in contravention of Section 4 of the Act¹⁴, and hence determining whether the MMT holds the dominant position in the said market is a key consideration in the present case. In the present circumstances, both consumers and hotels positively value the presence of more users on either side of the OTA platform, as it brings along wider consumer choices and higher visibility which transforms into sales for hotels. There is no doubt that network effects are essential in assessing the dominance of an entity, as they also have the potential to create entry barriers. The Commission has adjudged that the said contract between MMT and OYO has further increased the dominant position of MMT, as a huge amount of customer’s book hotels on their OTA platform which consequently brings along a huge number of hotels willing to list themselves on the OTA. Considering the fact that MMT-Go has a market share of 63% in the online intermediation services for hotel booking, the CCI concluded that MMT-Go held a position of dominance in the abovementioned market.

C. ON THE ABUSE OF THEIR DOMINANT POSITION

The CCI has held that the price parity impositions, whereby hotel partners are restrained from offering lower prices to other OTAs possess the ability to limit price competition and create entry barriers for potential and existing players and are hence anti-competitive in nature. These obligations, in combination with the exclusivity conditions that MMT-Go has maintained with

¹³ *Supra* Note, 7.

¹⁴ *Id.*

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OYO, are violative of Section 4(2)(a)(i)¹⁵ read along with 4(2)(c)¹⁶, read with Section 4(1)¹⁷ of the Act.

With regard to the allegation for misrepresentation of information, the CCI noted that consumers are strongly dependent on the results displayed on MMT-Go's platform as it dominates the OTA market. Once the consumer assumes that a hotel is 'sold out', however it is not the case in actuality, they are dissuaded from looking for rooms on alternative channels which consequently lowers the number of hotel bookings on other OTAs. The CCI concluded that such misrepresentation of information will eventually reduce competition among budget hotels registered on other OTAs, thereby leading to the exclusion of such hotels from the market.

The CCI as a market regulator is cast with a duty to ensure fair and healthy competition, and it is bound to ensure that all stakeholders get the opportunity to compete on a level playing field and get an equal chance to be part of digital commerce. The commission observed that the consequent impact that flowed from the exclusion of FabHotels and Treebo Hotels from MMT-Go's platform, has had a negative impact on competition and consequently on consumer welfare. Such delisting has gone on to create an artificial advantage for OYO's hotel partners, and hence the CCI held that this impugned commercial arrangement between MMT-Go and OYO has led to a denial of market access to aggrieved parties. The commission declared the abovementioned contract between MMT-Go and OYO to be anticompetitive, as under Section 3(4)(d)¹⁸ read with Section 3(1)¹⁹ of the Act.

V. CCI'S ORDER

Given the present circumstances, the CCI found MMT-Go's conduct to be in contravention of provisions mentioned under Section 4(2)(a)(i)²⁰ and Section 4(2)(c)²¹ read along with Section

¹⁵ *Supra* Note 8.

¹⁶ *Id.*, § 4(2)(c).

¹⁷ *Id.*, § 4(1).

¹⁸ *Id.*, § 3(4)(d).

¹⁹ *Supra* Note 11.

²⁰ *Supra* Note 8.

²¹ *Supra* Note 16

4(1)²² of the Act. Furthermore, the CCI held that the commercial arrangement between MMT-Go and OYO is in violation of Section 3(4)(d)²³ read along with Section 3(1)²⁴ of the Act. It is in this regard, that the CCI levied monetary penalties on MMT-Go and OYO worth Rs. 223.48 Crores and Rs. 168.88 Crores respectively. Apart from the said monetary penalties, the CCI held that it is imperative to establish a business environment with fair competition between the OTAs which in the long run will benefit the consumers and hotels. Toward this end, the CCI, inter alia, gave the below mentioned directions:

1. *MMT-Go is directed to modify its agreements with hotel partners to remove and abandon the parity obligations imposed with respect to other OTAs.*
2. *MMT-Go is directed to modify its agreements with hotel partners to remove and abandon all exclusivity conditions.*
3. *MMT-Go is directed to provide fair, transparent, and non-discriminatory access to its platform for all existing and potential hotel partners, through formulating listing conditions in an objective manner.*

This order passed by the CCI has however recently been stayed by a ruling passed by the Hon'ble Delhi High Court. In the case of *MakeMyTrip (P) Ltd. v. Competition Commission of India*²⁵, the Hon'ble Delhi High Court through a Single Judge Bench decision passed by Justice Prathiba Singh, has stayed such penalty mentioned above. Moreover, it has also directed that there shall be no recovery of Rs. 223.48 Crores of penalty amount which was supposed to be paid by MMT.

VI. CONCERNS ARISING OUT OF THE ORDER

There are several concerns and questions arising out of this order passed by the CCI. Firstly, it is important to note that for the brief period where hotel partners of FabHotels and Treebo were delisted from the MMT-Go platform, the economic performance of both entities displayed

²² *Supra* Note 17.

²³ *Supra* Note 18.

²⁴ *Supra* Note 11.

²⁵ *MakeMyTrip (P) Ltd. v. Competition Commission of India*, 2022 SCC OnLine Del 4440.

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consistent growth²⁶ and increased revenues²⁷. Parity obligations are an industry standard and the only reason why MMT-Go was penalized is due to the 'special responsibility' it has owing to its dominant position in the market. This special responsibility principle has often come under scrutiny of various economists and legal scholars, and regarded as a "burden on dominant firms, a political choice, and an unhelpful and unclear concept which prevents competition on merit."²⁸ Secondly, the CCI in the present case has failed to analyse the nature of conduct by MMT-Go, wherein the end consumer only benefited from the commercial agreement with OYO, as it expanded the inventory of hotels being offered on the platform leading to greater network effects. Moreover, this order encroaches upon the MMT-Go group's fundamental freedom to contract and commercial wisdom. They have also submitted to the commission that preferring OYO over its competitors was purely a commercial decision and condition precedent to forging a business relationship with OYO. Lastly, the Commission has ignored the fact that Booking.com and Expedia Inc. are global giants in terms of revenues and finances²⁹, which are also MMT-Go's direct competitors in the Indian OTA industry. These hefty penalties levied on MMT-Go would send a chilling effect on their ability to compete against such huge global conglomerates and further concentrate the industry.

VII. THE ECONOMIC JUSTIFICATIONS FOR PARITY OBLIGATIONS

The CCI observes that the available literature on parity clauses indicate that it harms competition, however, the imposition of such clauses also possesses the ability to generate economic

²⁶ ET Bureau, *Budget hotel chain FabHotels eyeing 30% revenue growth*, THE ECONOMIC TIMES, (Aug. 14, 2018) <https://economictimes.indiatimes.com/industry/services/hotels/-/restaurants/budget-hotel-chain-fabhotels-eyeing-30-revenue-growth-through-loyalty-program/articleshow/65404866.cms?from=mdr>.

²⁷ Aarzo Mittal, *Treebo revenues surge 64% in FY19; closes fresh round from BCCL at Rs 580 Cr valuation*, DAILYHUNT, (Jan. 2, 2020) <https://m.dailyhunt.in/news/india/english/entrackrpaperdha0c45e177cb249ba912e81e32e331e54/treebo+revenues+surge+64+in+fy19+closes+fresh+round+from+bccl+at+rs+580+cr+valuation-newsid-n156832294>.

²⁸ Phumudzo S. Munyai, *A Critical Review of the Treatment of Dominant Firms in Competition Law - A Comparative Study*, (Doctoral Thesis, University of South Africa 2016) https://uir.unisa.ac.za/bitstream/handle/10500/21908/thesis_munyai_ps.pdf?isAllowed=y&sequence=1

²⁹ Inti Pacheco, *Two Travel Giants Raised \$4 Billion to Ride Out the Pandemic. Only One Needed It*, THE WALL STREET JOURNAL (Nov. 21, 2021) <https://www.wsj.com/articles/two-travel-giants-raised-4-billion-to-ride-out-the-pandemic-only-one-needed-it-11605954601>.

efficiencies under the right circumstances³⁰, such as the Indian OTA market. These clauses have been justified in specifically safeguarding investments and prevent ‘free riding’ or ‘showrooming’ actions.³¹ Parity obligations have been the standard industry practice in both domestic and international OTA markets, and the impositions of such clauses have been exercised by all competitors in the Indian OTA market including Booking.com, Expedia, Cleartrip and Agoda. Such clauses are economically justified for the protecting the investment sustained by the OTA platform in furtherance of establishing a reliable database and prevent instances of ‘free riding’.³² Consumers could make use of the OTA platform and extract information hotels, but subsequently conduct a transaction via a channel which offers a lower price for the same hotel. Without imposing such parity obligations, the OTA platform will find it difficult to recover their investments or improve the quality of their services, which is better known as the ‘hold-up problem’.³³ This is all the more necessitated owing to the price sensitivity and the nascent stage of the Indian market. Furthermore, there is also a significant reduction in transaction costs involved in bargaining and searching for the availability of lower prices on other distribution channels. In fact, the antitrust jurisprudence in the United States of America considers such parity clauses as pro-competitive.³⁴ Moreover, the Competition and Markets Authority (the competition regulator for the United Kingdom) concluded that parity obligations are necessary to safeguard the credibility of price comparison websites and prevent free riding by consumers.³⁵

VIII. CONCLUSION

Consumer databases and algorithms are the very essence of business models of platforms that connect consumers to hotel owners. This ruling seems to be a landmark decision taken by the CCI and will contribute to the evolution of the competition jurisprudence in India. By holding MMT-Go’s conduct and commercial arrangement with OYO to be in contravention of Section 3 and 4 of

³⁰ Jonathan B. Baker & Fiona Scott Morton, “Antitrust Enforcement against Platform MFNs”, 127 YALE L. J. 2176 (2018).

³¹ *Id.*

³² MARGHERITA COLANGELO, *Competition Law and Most Favoured Nation Clauses in Online Markets*, in “NEW DEVELOPMENTS IN COMPETITION LAW & ECONOMICS, ECONOMIC ANALYSIS OF LAW IN EUROPEAN LEGAL SCHOLARSHIP” (Springer 2018).

³³ *Id.*

³⁴ *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, (1995) 65 F.3d 1406.

³⁵ Competition and Market Authority, *Private motor insurance market investigation*, (Sep. 24, 2014) https://assets.publishing.service.gov.uk/media/5421c2ade5274a1314000001/Final_report.pdf.

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the Act, it will go on to adversely influence their dominant position in the relevant market for providing such online intermediation services for the booking of hotels in India. In light of this order, OTA players in the relevant market will restrain themselves from entering into similar commercial agreements with hotel chains and possibly update their policies regarding parity obligations. This ruling must be critically examined from an economic perspective as it lacks sufficient reasoning to depart from international standard practice and antitrust norms of major economies like USA and UK. It is imminent that the abandonment of parity clauses will have a negative impact on the economic efficiencies that MMT-Go previously benefitted from, however, its impact on the competition in OTA markets remains a test of time. In this respect, the recent Delhi High Court ruling has corrected the erroneous interpretation made by the CCI, which has only strengthened the economic justifications for parity obligations.