

Competition Enforcement in India: Fresh take on Interim Measures in the Digital Sector

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On 9 March 2021, the Competition Commission of India ('CCI') granted two hotel franchisees (*Treebo and Fab Hotels*) ('Complainants') interim relief against the hotel aggregator, MakeMyTrip India Pvt. Ltd. and the Ibibo Group Private Limited ('MMT-GO') ('Interim Order').^[1] CCI directed MMT-GO to re-list Treebo and Fab Hotels on its website. Two things make the order noteworthy – *the evidentiary standard for interim relief and the conflation between platforms and aggregators.*

Recap of Events

- In October 2019, the CCI passed the first of the multiple investigation orders against MMT-GO and OravStays Private Limited ('OYO Rooms'). The complainants alleged that MMT-GO and OYO Rooms (a budget hotel franchise group) had entered into an exclusive agreement, which resulted in delisting Complainants' hotels from MMT-GO's website. This led to a subsequent loss of revenue, loss of investor confidence, both of which threatened the Complainants' ability to sustain themselves in the market.
- CCI took a *prima facie* view that MMT-GO was dominant in the market for online intermediation services for booking hotels in India. It also noted that OYO Rooms also had substantial market power. The investigation will determine if the exclusive arrangement between MMT-GO and OYO Rooms could cause harm to competition in India.
- After a year into the investigation, Complainants filed an application for interim relief^[2] requesting re-listing on the website of MMT-GO. This led to the Interim Order.

The Plot Thickens During the Pandemic

The Interim Order is backed by CCI's conviction that loss in revenue, loss of investor confidence and inability to garner sustained investments by Complainants is attributable directly to one event i.e. **the delisting from MMT-GO's aggregation website as a result of the exclusive agreement with OYO Rooms.**^[3] CCI also accepted that if the hotel aggregators are not re-listed pending the investigation, they would have to shut shop (thereby irretrievably losing competitors). Some lip service is paid to the economic impact of the pandemic on the hotel industry in India.^[4] However, especially given the parallel timelines^[5] of the pandemic and the revenue losses, **the Interim Order does not explain its conclusion for stating that the delisting should be perceived as the major contributor.** Rather, the CCI rationalizes its decision by stating that *re-listing is likely to reverse the catalyst effect of delisting during a pandemic.*^[6] Despite the above, Fab Hotels reported annual revenue growth of 34% post the delisting.^[7]

In adopting the above line of reasoning, the CCI seems to have shifted the burden of proof on MMT-GO. The CCI seems to expect MMT-GO to prove that slow growth experienced by the Complainants was not a result of delisting. While assessing the balance of convenience, the CCI appears to have undermined the cost incurred by the aggregator while adding hotel franchisees. For instance, the order does not explain why promotional budget constraints and decisional fatigue would not inconvenience MMT-GO during the pandemic.

MMT-GO: A very mysterious suspect (aggregator or platform?)

According to the CCI, the relisting request is urgent because the Complainants depend on the MMT-GO 'platform'. The CCI's predilection appears to come from its concern that platforms play a gatekeeper role.^[8] While the CCI cites reports that have highlighted the exclusionary conduct adopted by 'gatekeepers', these reports don't seem to be specific to MMT-GO. However, the reports are used to justify urgent action on behalf of the CCI.

MMT-GO appears to be mischaracterized as a platform, even though the CCI makes passing remarks on its aggregator business model.^[9] The demystification of MMT-GO as an aggregator may have changed the CCI's

analysis. Platforms offer infrastructure for the construction and operation of a product or service^[10] and bring choice to the consumer. Access to a platform is necessary for the operation of the product/service itself. In contrast, aggregation is an effective marketing and distribution channel.

It must be acknowledged that on completion of the investigation, the evidence may show that the actions of MMT and OYO Rooms (collectively or individually) did cause foreclosure concerns. However, the decision to grant an interim order must be hedged on evidence that proves that the market is likely to be harmed by the time the investigation is concluded. It is easier to accept that this is likely to be the case for a 'platform', where the operation and development of the product/service depends on access to the platform. The consumer harm in the case of platform acting as exclusionary is the decrease in the number of choices. However, in the case of an aggregator, the efficiency comes from the aggregator exercising its judgment for the consumer and offering limited choices. Decision fatigue can cause harm to the consumer as information overload may cause the consumer to impulsively pick a product to end the mentally gruelling task of weighing options. This distinction may seem trite but is game-changing in competition analysis.

The hotel aggregator in this case chose to present the listings offered by one prominent hotel franchise over other hotel franchisees. Consumers go to an aggregator to avoid decision fatigue. Aggregators compete with one another based on their curation. This casual conflation between the two has made a hotel aggregator subject to a remedy that would be more appropriate for a platform at an interim stage. Listing the Complainants would add 1000+ more choices that consumers need to swift through.^[11] Pending the results of a detailed inquiry and absent economic evidence directly linking market foreclosure to the aggregator, such an interim order to re-list may be premature.

Concluding Remarks on the New Approach – Interim or Final?

CCI's drive to preserve industry during such trying times is laudable. The Interim Order marks the emergence of a new approach between *ex-ante* and *ex-post* regulation where remedies are issued as a pre-emptive measure, pending investigation. That said, there is a need to tighten the evidentiary standard for granting interim relief in the digital sector.^[12] Not every aggregator or platform is a gatekeeper. Although, the CCI's extensive interpretation of denial of market^[13] appears to transform all online intermediaries into gatekeepers.

Interim measures have usually been awarded to maintain the *status quo*. The CCI appears to have used the interim relief as an *ex-ante* measure i.e. to prevent potential harm.^[14] This is an innovative way to use the competition toolbox. However, even *ex-ante* measures need to be supported by evidence of plausible harm that can be directly correlated to the alleged conduct.^[15] Drop-in revenue in the hotel industry during a pandemic arguably offers a stronger justification for the Complainants' loss in revenue and stingy investor sentiment.

Further, a reduction in the number of choices on an aggregator's website could be pro-competitive, as it reduces decision fatigue and fuels competition between aggregators. Therefore, there is a need to align intervention measures with the underlying competition policy objective. Meanwhile, companies in the digital markets are advised to review their commercial agreements for exclusivity clauses more closely.

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^[1] http://cci.gov.in/sites/default/files/Interim_Order_14-of-2019and01-of-2020.pdf>http://cci.gov.in/sites/default/files/Interim_Order_14-of-2019and01-of-2020.pdf

^[2] Principles for grant of interim relief: (a) a prima facie case exists (this is higher than the standard required to order an investigation), (b) balance of convenience lies in the applicant's favour and (c) not granting the interim relief would result in irreparable harm to the applicant/cause harm to competition.

^[3] *Supra* Note 2, para 100

^[4] *Id*, paras 10, 28

^[5] FabHotels and Treebo were delisted from MMT-GO's online portals in June and April 2018, respectively. The complainants claim that the slow growth could be observed 24 months post the delisting (i.e., around the same time as the pandemic and ensuing Indian government lockdown).

^[6] *Supra* Note 2, para 115

^[7] *Id*, para 15

^[8] *Id*, para 113.

^[9] *Id*, para 100

[10] <https://leconcurrentialiste.com/not-platforms/>

[11] *Supra Note 2*, para 107.

[12] Although the CCI seems to have made a self-declaration that it does not intend to tie itself down to the higher burden of proofs for mandatory/positive injunctions followed by civil courts. *Id*, para 104.

[13] 'The Commission observes that denial of market access need not be complete and absolute in nature, denial of market access in any manner that takes away the freedom of a substitute to compete effectively and on the merits in the relevant market can amount to the denial of market access under the provisions of the Act.' *Id*, para 113.

[14] *Id*, paras 116-117

[15] The CCI's attempt here appears to be maintaining a level playing field rather than prevention of foreclosure. At para 102, the CCI states that interim relief is warranted because 'an exclusivity arrangement between a dominant player and another player with a significant market power in the vertical chain can possibly allow such players to bolster their respective strengths which may not augur well for the market or other market participants.