



Monthly Newsletter

# State of Antitrust

April 2021; Volume 8 Issue 4



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## CCI grants interim relief by directing MakeMyTrip to relist FabHotels and Treebo on its platform

On 9<sup>th</sup> March 2021, the Competition Commission of India (the 'CCI'), in one of the rare moves, had granted interim relief to companies viz. FabHotels and Treebo, victims of vertical restraint, *inter alia*, imposed upon them by MakeMyTrip (MMT), Ibibio (collectively referred to as 'MMT-Go') and OYO.

It all started when OYO shifted its business model, from being an aggregator to franchisor, somewhere in the second half of 2017. This shift in the business model made OYO a direct competitor of FabHotels and Treebo who were also engaged in providing franchising services to budget hotels in India.

In order to eliminate the competition, MMT-Go and OYO entered into a confidential commercial agreement which mandated MMT-Go to give preferential treatment to OYO and delist all properties of FabHotels and Treebo from MMT platform.

The delisting of properties of FabHotels and Treebo from the MMT platform, which was a dominant platform in the '*market for intermediation services for booking of hotels in India*', led to denial of market access to FabHotels and Treebo who could not access the end consumers due to non-visibility of their properties on one of the prominent distribution channels.

In second half of 2019, the CCI was informed about the conduct of MMT-Go and OYO which, finding it to be violative of section 4 and 3(4) of the Competition Act, 2002 (the Act), directed the Director General to cause investigation into the matter. Delisting of properties from MMT platform had a severe impact on the revenue stream of FabHotels and Treebo. As a result, FabHotels and Treebo, through separate applications, approached the CCI to seek interim relief by way of relisting of their branded properties/hotels on the MMT-Go's online portal/platform.

The CCI, while deciding the applications seeking interim relief, heavily relied on the conditions enumerated by the Hon'ble Supreme Court in its judgment in *Competition Commission of India vs. Steel Authority of India Ltd* i.e. a) recording of satisfaction that an act in contravention of the provisions has been committed and continues to be committed or is about to be committed; b) it is necessary to issue order of restraint; and c) there is every likelihood that the party to the *lis* would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market.

With regard the *first condition i.e.*, contravention of the provisions of the Act, the CCI noted that, pursuant to its agreement with OYO, MMT-Go delisted Treebo and FabHotels, from its online portals, in April and June 2018 respectively, MMT-Go portal had a position of dominance in the '*market for online intermediation services for booking of hotels in India*' and delisting of the properties of FabHotels and Treebo resulted in denial of market access hence, the abuse of market power leading to violation of section 4 of the Act.

With regard the *second condition i.e.*, necessary to issue order of restraint or balance of convenience condition, the CCI observed that MMT-Go was a gateway for online hotel booking which constituted an important access route for independent hotels to reach end-consumers. The non-accessibility to the MMT platform significantly hampered the online visibility of FabHotels and Treebo but, at the same time, it also affected the visibility of those associated budget hotels that were availing franchise services from FabHotels and Treebo. The CCI further noted that providing access to FabHotels and Treebo on MMT platform would not cause any significant hardship to MMT-Go as such. Additionally, MMT-Go would likely earn revenue in the form of commission on booking of FabHotels or Treebo branded property through its platform, without incurring any significant costs for allowing such access. Resultantly, the CCI unhesitatingly held that the balance of convenience was in favour of FabHotels and Treebo.

Regarding the *third condition i.e.*, likelihood of irreparable/irretrievable damage to party or definite apprehension of appreciable adverse effect on competition (AAEC), the CCI analysed whether the conduct of MMT-Go in delisting the properties of FabHotels and Treebo caused AAEC or not.

The CCI noted that the exclusion/delisting not only affected FabHotels and Treebo branded hotels, but also affected those budget hotels which were availing some logistic support from FabHotels and Treebo, while operating as independent hotels. The CCI opined that the exclusion of FabHotels and Treebo from the MMT portal may leave these budget hotels with no option but to necessarily engage with OYO for availing franchisee services or any other logistics support. This, according to CCI, had a dangerous probability of irreversibly altering the competitive landscape by tipping the market in favour of OYO causing irreparable harm to competition.

The CCI opined that, due to change in consumer preferences to online booking of hotels, it was critical, more than ever before, for the budget hotels and those as franchisee service providers to get visibility on Online Travel Agency (OTAs) to effectively survive. Thus, the CCI held that lack of access to the largest and dominant OTA was likely to cause severe competitive injury particularly in the wake of the pandemic.

On the basis of these reasonings, the CCI unhesitatingly allowed the applications and directed MMT-Go to relist FabHotels and Treebo on its online platform.

(Case No. 14 of 2019 and 1 of 2020, order dated 9<sup>th</sup> March 2021)



### ***CMA publishes updated guidelines for merger assessment; UK***

The Competition and Market Authority ('CMA') has updated its Merger Assessment Guidelines for analysing mergers in U.K.

CMA's previous Merger Assessment Guidelines were published in 2010 and, since then, markets evolved and changed at a rapid pace.

Consequently, the type of mergers that the CMA used to review also changed.

The previous Merger Assessment Guidelines lacked new theories of harm or economic principles that have come up in the present digital markets. The updated Merger Assessment Guidelines are built on recommendations made by Furman's Report on 'Unlocking digital competition' and Lear's Report on 'Ex-post Assessment of the Merger Control Decisions in Digital Market'. The theme of these reports was to ascertain the risk of under-enforcement in digital markets by competition authorities, including the loss of potential competition in these markets.

The Furman's Report noted that over the last 10 years i.e., from 2008 till 2018, the five largest digital firms had collectively made over 400 merger & acquisitions globally.

None of those acquisitions were blocked in the UK or elsewhere, or even went under scrutiny before competition authorities.

The updated guidelines will have an increased focus on the potential for future competition. The updated guidelines will enable the CMA to consider innovation, and other non-price related effects at the time of assessing a merger. *(Press Release 18<sup>th</sup> March, 2021)*

### ***FTC announces multilateral working group to build new approach for analysing pharmaceutical mergers***

The Federal Trade Commission (FTC) and its counterpart competition enforcement agencies in the U.S. and abroad are launching a working group to update their approach to analysing the effects of pharmaceutical mergers.

Initiated by the FTC, the working group will include the Canadian Competition Bureau, the European Commission's Directorate General for Competition, the U.K.'s Competition and Markets Authority, the U.S. Department of Justice Antitrust Division, and Offices of State Attorneys General.

The goal of this initiative is to identify concrete and actionable steps to review and update the analysis of pharmaceutical mergers.

The working group will explore issues including current theories of harm and whether they should be expanded, the full impact of pharmaceutical mergers on innovation and the types of remedies needed to address any competition concerns.

In line with the international trend, the Competition Commission of India ('CCI') had also earlier announced 'Market Study on the Pharmaceutical Sector in India' with a view to develop a better understanding of the competition landscape in the sector.

*(Press Release 16<sup>th</sup> March 2021)*

### ***CMA proceeds for director disqualification after CAT upholds its decision on pharma collusion; UK***

Last year, the Competition and Markets Authority (CMA) concluded its investigation into the supply of nortriptyline, a drug relied on by thousands of patients daily to relieve symptoms of depression.

The CMA found that from 2015 to 2017, when the cost of the drug was falling, the 3 pharmaceutical firm viz. Lexon, along with King Pharmaceuticals Ltd and Alissa Healthcare Research Ltd, shared commercially sensitive information to keep the prices of nortriptyline up.

Lexon, who was fined a total of £1,220,383 maintained that it did not break the law and so appealed against the decision and the fine.

On 25<sup>th</sup> February, Competition Appeal Tribunal (CAT) unanimously dismissed all of Lexon's grounds of appeal and upheld the decision of CMA.



## **Heard at the BAR**

*Legal news from India and the world*

The dismissal of appeal cleared way for the CMA to continue its director disqualification application against Mr Pritesh Sonpal, a Lexon director, who was directly involved in the information exchange.

*(Press Release 25<sup>th</sup> February 2021)*

### ***CCI initiates suo moto probe against WhatsApp and Facebook over Updated Terms of Service and Privacy Policy; India***

On 24<sup>th</sup> March 2021, the Competition Commission of India (CCI) initiated suo moto investigation against the WhatsApp and Facebook.

The CCI was of a prima facie opinion that 'the 'take-it-or-leave-it' nature of privacy policy and terms of service of WhatsApp and the information sharing stipulations mentioned therein, merit a detailed investigation in view of the market position and market power enjoyed by WhatsApp.'

The CCI further opined that the 'users, as owners of their personalised data, are entitled to be informed about the extent, scope and precise purpose of sharing of such data by WhatsApp with other Facebook Companies'.

The CCI was of the opinion that the Updated Terms of Service and Privacy Policy for WhatsApp Users could be violative of section 4 of the Competition Act, 2002.

The detailed analysis of the order to be continued in the next newsletter....

*(Suo Moto Case No. 01 of 2021)*



**KK SHARMA**  
LAW OFFICES

## ***CCI finds FPBAI guilty of price fixing and controlling the supply of books and journals in India***

# Between The Lines...

*Comments  
& Analysis*

The Federation of Publishers' and Booksellers' Association in India ('FPBAI'), along with 2 officer bearers have been penalised with ₹2 lacs and ₹1lac each, respectively, by the Competition Commission of India ('CCI') for fixing price, limiting and controlling the supply of books and journals in India.

The information against the FPBAI was filed by one of the members of the FPBAI who alleged that FPBAI was acting beyond its mandate. It was alleged that the FPBAI issued directions to all its members who dealt in print journals and e-resources, to not give discounts on the publishers' prices to the Indian subscribers. The Informant alleged that FPBAI threatened to take coercive actions against those members, who refused to comply with its direction, by expelling them from FPBAI. As per the Informant, most members of FPBAI were willing to extend discount to their clients as the nature of business was such that it made necessary for the contracting parties to negotiate discounts.

On the basis of the allegations of the Informant, the CCI formed a prima facie opinion of violation of section 3(3)(a) of the Competition Act, 2002 (the 'Act') and directed the Director General (DG) to cause an investigation into the matter.

The DG conducted his investigation and concluded that by restricting discounts, the FPBAI indulged in price fixing of books and journals sold by its member. In addition to this, the DG also concluded that FPBAI also issued 'Advisories' to its members refraining them from participating in procurement advertisement which resulted in indirect control over the supply of books and journals by FPBAI in violation 3(3)(b) of the Act.

The CCI forwarded the investigation report of the DG to the FPBAI and Informant for objections and suggestions. The FPBAI in its objections submitted that the discount policy under investigation was recommendatory in nature and was never imposed on the members. As per the FPBAI, discount policy was introduced with an objective to prevent suppliers from offering heavy discounts, through malpractices and illegal activities, and to hold those suppliers providing heavy discounts causing considerable commercial harm to other members of FPBAI, accountable. With respect to 'Advisories', the FPBAI submitted that such Advisories were non-binding on the members and members continued to participate in procurement of advertisements and compete against one another.

Lastly, the FPBAI argued that membership of FPBAI was not a mandatory criterion to be able to supply books/ journals, etc. to most institutional buyers and merely 800 out of over 4000 booksellers, publishers, subscription agents registered across India, are members of FPBAI. Therefore, any such alleged activity on part of FPBAI could not have caused any Appreciable Adverse Effect on Competition (AAEC) in the India.

The CCI noted that the evidence collected by the DG during the investigation pointed to the contrary. The CCI observed that the notices were, in fact, issued by FPBAI to its members, including to the Informant, for non-compliance with FPBAI's discount policy. The investigation revealed that the discount policy of FPBAI was not merely recommendatory but rather coercive in nature. The CCI noted that FPBAI could not "satisfy as to how the control of discount will control the illegal and malpractice of supplying pirated books and journals".

With regard to the 'Advisories' issued for non-participation in certain procurement advertisements, the CCI noted from the DG Report that FPBAI, from time to time, issued letters to its members, directing them to not participate in certain procurement of advertisements, conditions of which were not in accordance with FPBAI Guidelines.

With regard to the membership, the CCI noted submission of Mr. S.C. Sethi, President of FPBAI, which revealed that the FPBAI indirectly had membership of all 4000 booksellers, publishers and subscription agents, who were members of 13 state associations affiliated by FPBAI. Further, there were some of the renowned institutions like IIT, AIMS, NIT etc, which mandated membership of either FPBAI, or of some national/ state level association/ federation of publishers/ booksellers, indirectly affiliated with FPBAI, for participation.

The above findings confirmed that the FPBAI, through discount policy and Advisories, fixed price and controlled supply of books and journals which caused AAEC in India. Consequently, the CCI held that FPBAI contravened the provision of section 3(3)(a) & (b) of the Act and imposed penalties. **(Case No. 33 of 2019, order dated 23<sup>rd</sup> February 2021)**

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