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2023

Sarvada Legal

COMPETITION LAW JURISPRUDENCE IN
PLATFORM MARKETS

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Recently, the Competition Commission of India (CCI) has passed crucial decisions with respect to competition in the platform markets, where it has demystified certain ambiguities pertaining to the approach to regulating the conduct of the platforms. The CCI has laid down the approach of defining the 'relevant market' for the multisided platforms. The CCI also discusses, at length, the interplay between all the users of a platform, and the role of the platform in ensuring non-discriminatory and fair treatment of all the user sides. The CCI has also recognized the concept of 'gatekeeper' and has bestowed a special responsibility on the gatekeeper platforms (which are crucial for the business users to approach the end consumers) to act in a fair, reasonable and non-discriminatory manner. While giving corrective measures to ensure competition, the CCI has not gone into business decisions but has focused on unlocking the market at every value chain. Here, while analysing the order of the CCI in the MakeMyTrip & Go-Ibibo and Google Play Store judgments, we shall discuss the trends in the approach of the CCI with respect platform markets."

FHRAI & Anr. v. MMT & Ors.¹ (MMT-OYO Judgment)

1. MakeMyTrip-Golbibo (MMT-Go) is an Online Travel Agent (OTA), an intermediation platform, and Oravel Styas Pvt. Ltd. (OYO) is engaged in providing franchising services to budget hotels in India.

2. MMT & OYO entered in an agreement with inter alia following terms-

i) MMT-Go was required to delist the other competing budget hotel franchising chains- Treebo and Fab Hotels from its portal.

ii) OYO agreed for D-minus clauses, as per which OYO rooms were not to be made available on the competing OTAs such as Yatra, Booking.com, PayTM etc. during the last days before the booking days. For example, in case of D-minus 5 clause, rooms were not available 5 days before the booking day.

3. MMT-Go also entered in agreement with various hotels with Price parity clauses, which ensured that the rates offered on MMT-Go is lower than competing OTAs. MMT-Go also imposed "wide" parity clauses on Fab Hotels and Treebo.

4. The Informants also alleged that MMT-Go, owing to its deep pockets, was entering into predatory pricing. It gave excessive discounts compared to its competitors and hence, their market power was not based on efficiency. Due to this, competing OTAs were exiting the market.

¹ Case No. 14 of 2019 clubbed with Case No. 01 of 2020.



Online vs Offline

End-consumers, who use online mode of transacting and making payments, those having a preference towards online channels, constitute a distinct user base



OTAs: Separate Market

SCB: Search, Compare & Booking



OTAs & Meta Search Engines Non-Substituteable

Metasearch engines like Google are primarily advertising/marketing channels which is different from the visibility/discoverability offered by OTAs, which are distribution channels.

The Competition Commission of India (“CCI”) vide its order under Section 27 of the Competition Act, 2002 (“Act”) dated 19 th October 2022 imposed a cumulative penalty amounting to Rs. 392.36 crores on MakeMyTrip, Goibibo (“MMT-Go”) and Oravel Stays Private Limited (“OYO”) for violating Sections 3 and 4 of the Act. The key takeaways of the decision and their rationale has been explained ahead.



Market Share

In the online intermediation services for hotel booking, MMT-Go as a group is the market leader with 63% of domestic hotel online market share in 2017 as per MMT-Go’s own investor presentation.



Metric: Stayed Room Nights

CCI affirmed the metric of ‘stayed Room Nights’ as the right metric to assess MMT-Go’s market position



Entry & Expansion Barriers

The last entry in the market was in 2017 by HappyEasyGo, whose market share was merely 0.2% in 2019-20 of the aggregate stayed Room Nights in the OTA segment. Thereafter, despite the market size growing manifold, there has not been a new entry.

01

02

03

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Abuse of Dominant Position

Parity Obligations (APPAs)

Across Platform Parity Agreements (“APPAs”) are stipulations where the sellers guarantee online selling platform terms that are 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/or terms for a given product to its final consumers. The Commission noted specifically that wide parity agreements are problematic.

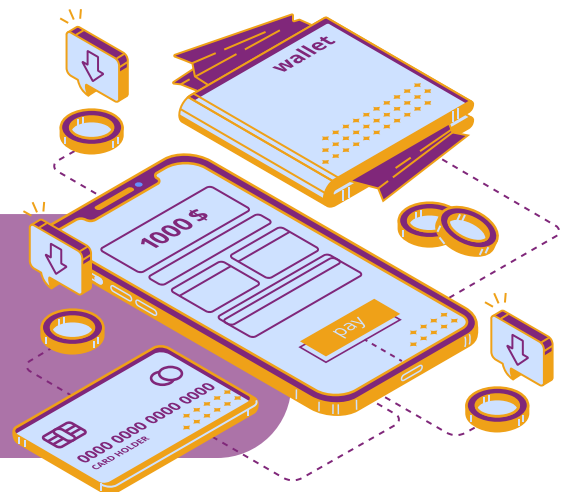


Predation

Predatory pricing is charging of prices below firm's own cost typically below the average variable cost. MMT-Go was found to have incurred a net variable loss on per room night basis. CCI noted that often platforms engage in losses to build network effects to attract both sides of the platform to interact. Thus, CCI did not find a case of predatory pricing based on data and evidence.

Cease to List

The agreement between OYO and MMT-Go required MMT-Go to 'cease to list' any accommodation, directly or indirectly, by or through FabHotels and Treebo. As a consequence of this clause, MMT-Go delisted FabHotels and Treebo.



XYZ v. Alphabet & Ors.² (“Google Judgment”)

1. Google has its own billing system namely Google Play Billing System (GBPS). Google’s payment policy provided that the developers charging for apps and downloads from Google Play must use GBPS. This also includes all kinds of in-app purchases (IAPs)- such as ad free version of app, virtual game products within the game, etc. Therefore, the app developers were prohibited by Google to deal directly with the payment processors under the policy.

2. Google directed mandatory usage of GBPS over any other payment solutions for app developers in India for listing their apps on Google’s Play Store. Developers in India were given time till October 31, 2022, to comply with the said policy.

3. The commission charged for payments through GBPS is 15% for the first 1 million USD revenue each developer earns every year and thereafter, 30% on each transaction. The said commission, when compared with other payment processors was significantly higher, which charged anywhere between 1% to 3% commission on each transaction.

4. The Information were filed before the CCI alleging that Google abused its dominant position in the app store market for android OS and market for licensable mobile OS for smart mobile devices

The Informant alleged that Google is removing choices from the market and then, charging excessively for the same services, which is abuse of its dominant position.

² Case No. 07 of 2020 clubbed with Case No. 14 of 2021 and 35 of 2021.



No substitutability between app stores for non-licensable OS and App Store for Android OS

01



No substitutability between sideloading of an app and downloading on Android OS app stores

02



No substitutability between web apps and apps downloadable from app stores for Android OS

03



No substitutability between pre-installed apps and apps downloaded from app stores

04

CCI ordered an investigation into Google’s conduct, it was alleged that Google was abusing its dominant position in the market for licensable mobile Operating System (“OS”) for smart mobile devices, market for app stores for Android OS by inter alia:

i. mandating apps to use Play Store’s payment system and Google Play In-App Billing System (“GPBS”) for charging their users for purchase of apps on Play Store and In-App purchases (“IAPs”)

ii. charging unfair and excessive 15-30% commission in the name of service fees from app developers for processing IAPs on mandatory GPBS.



No substitutability between the OS for basic feature phones and for smart mobile devices

05



No substitutability between mobile OS for smart mobile devices and desktop/ computer OS

06



No substitutability between licensable and non-licensable mobile OS for smart mobile devices

07

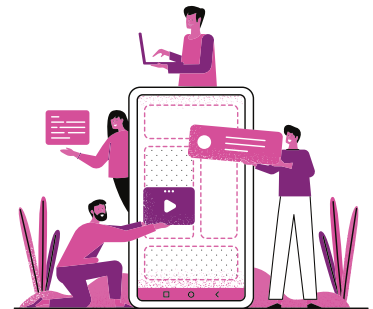


A. Market for app stores for android OS in India

1

No substitutability between app stores for non-licensable OS and App Store for Android OS

Apps are written/ developed for a particular OS and cannot be automatically ported to another OS due to various platforms' differentiating features which includes programming language, APIs and other technical parameters.



2

No substitutability between sideloading of an app and downloading on Android OS app stores

Apps downloaded from the app stores get automatically updated and the users/ app developers are not required to undertake any significant efforts to achieve the same. Such features are not available on sideloading.



3

No substitutability between web apps and apps downloadable from app stores for Android OS

Compared to web apps, native apps are better in performance and user experience. Further, web apps do not have centralised distribution and discoverability as native apps.



4

No substitutability between pre-installed apps and apps downloaded from app stores

Given the limited space on the devices, OEMs generally prefer to pre-install only popular apps or its own apps or apps with which it has revenue sharing arrangements.





B. Market for licensable OS for smart mobile devices in India:

1

No substitutability between the OS for basic feature phones and for smart mobile devices

From a demand side perspective, a user buying a smart mobile device requires a smart mobile OS to activate the various enhanced functions of the device and Android based device manufacturers ("OEMs") cannot substitute a smart mobile OS with a feature phone OS, as they neither have the same characteristics (like touchscreen) nor do they serve the same intended use



2

No substitutability between mobile OS for smart mobile devices and desktop/ computer OS

Smart mobile OSs, also require functionalities that are specific to smart mobile devices and are different from those of PC/ laptop OSs viz. in terms of touchscreen, processing capabilities, smaller screen sizes, memory, display, and power management, wireless functions, and apps that are better suited for simpler mobile devices rather than PC OSs



3

No substitutability between licensable and non-licensable mobile OS for smart mobile devices

Even from the app developer perspective also, there are multiple technical differences between Android and iOS viz. programming languages, development tool kits, testing and interface requirements, etc. The app developer cannot simply port the app developed for one OS onto another OS due to these technical differences.



Abuse of Dominant Position

Unfair Condition

CCI noted that the practice of imposing mandating obligation to use of GPBS is anti-competitive since it takes away the choice from the app developers to deal with payment processors of their choice, who may offer better terms and conditions. In addition to imposing a mandatory obligation to use GPBS, Google also restricts the ability of app developers to inform consumers within an app of the ability to purchase in-app content elsewhere, such as on a website ('Anti-steering Provisions'). Thus, app developers do not have the freedom to choose their communication channel to interact with their users to promote and offer their services. This is an unfair imposition as it impedes the ability of app developers to increase their usage/ membership.

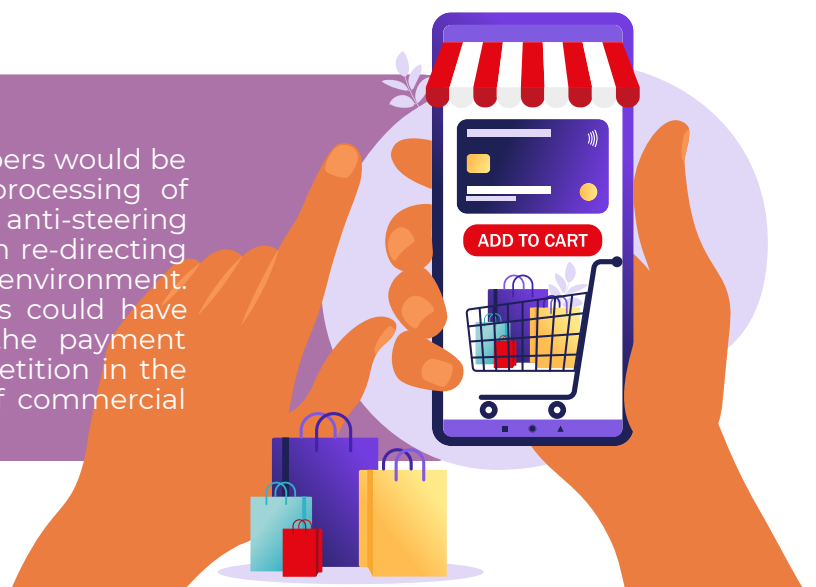


Settlement Period

Google takes significantly more time for settlement of payment to app developers i.e., 15-45 days from the transaction as opposed to the settlement period followed by other payment processors which take only 1-3 days to remit the payment to app developers. Google's delay is also in blatant violation of RBI norms that necessitate settlement within 1-3 days of the transaction.

Denial of market access

By virtue of imposition of GPBS, the app developers would be mandated to use Google's services for the processing of payment for paid apps and IAPs. Further, the anti-steering provisions of Google, forbid app developers from re-directing users to websites for payment outside the app environment. Absence these stipulations, the app developers could have negotiated the terms and conditions with the payment service providers and benefitted through competition in the market. Hence, app developers are deprived of commercial freedom.



A. Defining the relevant market in the platform markets- the basics remain the same

The CCI has made some important observations in respect of approach to define the relevant market in the platform markets. The CCI noted that on the multi-sided platforms, there are multiple sets of users (For instance, MMT-Go is a multi-sided platform which serves the hotel partners as well as the end consumers). The CCI noted that the question is to identify which products or services sufficiently 'compete' with each other, and gauge competitive constraints. Taking this traditional principle as the basis, the CCI has emphasized heavily on the context and the 'user'. It noted that as the platform market is diverse and specificity of each platform difference. Therefore, one size fit all approach may lead to absurd conclusions³.

B. The relevant market in multi-sided platforms is to be defined from the perspective of the aggrieved user

The starting point of the assessment of relevant market is that 'who is the user'? The CCI has observed that while in a multi-sided market due to interactions among the different sets of users, interdependencies arise- the same is limited to understanding the impact on the substitutability analyzed from the "aggrieved user side"⁴. For instance, in the MMT-Go case, Treebo and Fab Hotel were delisted from MMT-Go platform, and hence, were the aggrieved users. MMT-Go argued that OTAs were only one mode of hotel room distribution and hence, other channels such as offline mode, meta search platforms and advertising platforms, and direct distribution such as through hotel website were substitutable, as the end-consumers viewed these markets substitutable. The CCI noted that in this case, the hotel partners are the primary aggrieved users, and hence, it has to be seen that whether from their perspective, OTA is substitutable from other channels or not. The CCI observed that though there are

³ Para 191, MMT-OYO order.

⁴ Para 194, MMT-OYO order.

certain 'interdependencies' and 'interlinkages'⁵, but substitutability from the perspective of the consumers would not be relevant for market analysis. In the Google Play Store judgment as well, the CCI laid emphasis on the app developers' perspective.⁶ The CCI noted that substitutability analysis on the one side of the platform cannot be automatically transposed to the other side. Hence, the CCI, primarily focused on the hotels' side of the market.⁷

C. Multi-homing may not always indicate broader relevant market; there is a difference between substitutability and complimentary:

The CCI has recognized the fact that multi-homing by itself would not indicate substitutability.⁸ The channels can be seen as complements rather than substitutes. There may be a situation where the user cannot ignore any of the channels⁹. For instance, app developers cannot ignore the entire user base of the Android or iOS and must necessarily ensure presence on both. Hence, iOS and Android OS are not substitutable from the perspective of the app developers, but are merely complements.¹⁰ Similarly, the CCI observed that the hotel partners cannot ignore the entire user base on the OTA and use only other channel for selling rooms. Hence, OTAs and other modes of hotel distribution, such as offline, direct booking from hotel website etc. were complementary from the perspective of hotel partners.

D. There is a difference between online presence and online visibility:

The CCI has emphasized that online presence and visibility are two separate things, and mere presence is not sufficient. In the MMT-Go order, the CCI observed that the hotel owners opt for channels like OTA for visibility and discoverability, which is different from mere online presence, which may be through advertising channels like Google. The CCI noted that the 'fair market opportunity' is the hallmark of competition,

⁵Para 194, MMT-OYO order.

⁶Para 82, Google Play Store order.

⁷Para 191, MMT-OYO order.

⁸Para 190, MMT-OYO order.

⁹Para 190, MMT-OYO order.

¹⁰Para 110, Google Play Store order.

and an online intermediation platform should provide fair terms to businesses which rely on such platforms to each to end consumers.¹¹ Accordingly, the CCI has laid down great emphasis on transparency and fairness.¹²

E. Profile of the consumer is important:

While the CCI observed that the market has to be assessed from the perspective of the aggrieved user, for the sake of completeness, the CCI in the MMT-Go judgment, went on to examine substitutability from the standpoint of the end consumers. Interestingly, the CCI has created a distinction among the end-consumers as well.¹³ While dealing with the contention of MMT-Go that consumers in India use a wide range of distribution channels for hotels, and that there is a strong substitutability between online and offline, the CCI noted that there may be consumers still using traditional modes of booking, but the same would be mutually exclusive from those using online channels of booking.¹⁴ Likewise, in the Play Store judgment, the CCI also observed that the end consumer using Apple iOS is different from the consumer using Android OS.¹⁵

F. Network effect plays a huge role in the market definition

The CCI has categorically noted the importance of network effect in substitutability. In the Play Store order, the CCI explained the reason for demand of Android OS. The demand is link with the richness of apps compared to other OS, and likewise number of users gives incentive to app developers to write more apps. Such demand, consequently, will result in more OEMs opting for Android OS. The CCI termed this as 'positive feedback loop'.



¹¹ Para 308, MMT-OYO order

¹² Para 308, MMT-OYO order

¹³ Para 198, MMT-OYO order.

¹⁴ Para 198, MMT-OYO order.

¹⁵ Para 107, Google Play Store order.

G. The CCI has recognized the concept of gatekeeper-

The CCI has recognized the concept of “gatekeeper” in India as well. In the Play Store decision, the CCI noted that the Google’s Play Store acts as a “gatekeeper” between app store and the smart device user.¹⁶ It further noted that Google has a strong bargaining position vis-à-vis app developers, and the developer has no choice but to agree to the terms and conditions unilaterally decided by Google, otherwise they will not be able to access a vast pool of potential Android users in India. Consequently, the CCI bestowed a special responsibility of gatekeepers¹⁷ like a dominant enterprise.

H. CCI emphasized on unlocking the market for competition, and refrained from acting as a price regulator

The CCI refrained itself from acting as a price regulator or regulating the commercial wisdom of the enterprises. Rather, the CCI has focused on freeing the market at every value chain and remove bottlenecks, to promote dynamic efficiency, which as noted in the SAIL judgment,¹⁸ promotes innovative practices. In the Google judgment, the CCI did not hold that the commission charged by Google for transaction through Google Play Billing System was excessive¹⁹, but held that the app developers should be free to use services of other payment processors. Similarly, the CCI has refrained from giving any finding on deep discounting by MMT-Go in the MMT-OYO decision, and held that lack of profitability itself does not imply predatory pricing²⁰ The stand taken by the CCI is pro-innovation where the idea is to unlock the market and increase competition at every value chain. The CCI has refrained itself from going into business decision.

¹⁶ Para 268, Play Store order.

¹⁷ Para 268, Play Store order.

¹⁸ CCI v. SAIL, (2010) 10 SCC 744.

¹⁹ Para 325, Play Store order.

²⁰ Para 274, MMT-OYO order.

I. More freedom to users in the manner of conducting their business on the platform

The CCI has removed the restrictions on the users of the platform. In the Play Store decision, the CCI has removed the restrictions imposed in form of 'anti-steering provisions' and has given freedom to the app developers to communicate to the users.²¹ The app developers may promote their services through alternate channels on the app. For instance, the app developers can redirect the end consumers to a different payment processing channel and give additional discounts. Similarly, in the MMT-Go decision, the CCI has held that wide price parity clauses imposed by MMT-Go on the hotel partners are abusive in nature. Hence, the users have increased freedom in the manner of conducting their business. The CCI has emphasized that the industry practices cannot be the defence for the abusive conducts of the platforms.²²

H. CCI emphasized on unlocking the market for competition, and refrained from acting as a price regulator

The CCI observed that a platform has to deal with its own verticals on an arm's length basis. The CCI in the Play Store judgment noted that while Google was imposing the condition of mandatory usage of GBPS on the app developers, its own vertical, like YouTube was being given liberty to use third party billing system. Similarly, Google also restricted access to data generated by the apps to such app developers,²³ which led to competitive disadvantages. The CCI showed concerns that such data would result in competitive advantages to Google's own services.²⁴ The CCI held that such practices are discriminatory, and platforms need to maintain a level playing field. Interestingly, on the aspect of data, the CCI also made an observation that app developers are not a third party, and that end users have already decided to transact with such apps. Hence, the CCI made it clear that once a user decides to transact on a platform, the ownership of the data does not solely lie with the platform.

²¹ Para 255, Play Store decision.

²² Para 264, MMT-OYO.

²³ Para 281, Play Store order.

²⁴ Para 283, Play Store order.

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