



COMPETITION COMMISSION OF INDIA
Case No. 14 of 2019 and Case No. 1 of 2020

Case No. 14 of 2019

In Re:

Federation of Hotel & Restaurant Associations of India (FHRAI)

Informant No. 1

B-82, 8th Floor, Himalaya House,
23 Kasturba Gandhi Marg,
New Delhi-110001

Casa2 Stays Pvt. Ltd.

Informant No. 2

4th Floor, Rectangle No. 1
Behind Saket Sheraton Hotel,
Commercial Complex D4
New Delhi - 110017

And

MakeMyTrip India Pvt. Ltd. (MMT)

Opposite Party No. 1

DLF Building No. 5, Tower B,
DLF Cyber City, DLF Phase-2,
Sector-25, Gurugram, Haryana-122002

Ibibo Group Private Limited (Ibibo)

Opposite Party No. 2

5th Floor, Good Earth City Centre,
Sector-50, Gurugram,
Haryana-122002

Oravel Stays Private Limited (OYO)

Opposite Party No. 3

Unit-325, B-2 Tower,
Spaze I-Tech Park,



Sohna Road, Sector-49,
Gurugram-110049



With
Case No. 01 of 2020

In Re:

Rubtub Solutions Pvt. Ltd.

Informant

AMR Tech Park-I, 1st Floor,
IT Industry Nagarathpura,
Hosur Road, Bangalore- 560068

And

MakeMyTrip India Pvt. Ltd. (MMT)

Opposite Party No. 1

DLF Building No. 5, Tower B,
DLF Cyber City, DLF Phase-2,
Sector-25, Gurugram, Haryana-122002

Oravel Stays Private Limited (OYO)

Opposite Party No. 2

Unit-325, B-2 Tower,
Spaze I-Tech Park,
Sohna Road, Sector-49,
Gurugram-110049

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member



Appearances:

For Rubtub Solutions Pvt. Ltd.

Mr. Abir Roy, Advocate
Mr. Ishaan Chakrabarti, Advocate

For Casa2 Stays Pvt. Ltd. (Fab Hotels)

Mr. Sajan Poovayya, Sr. Advocate
Mr. Vaibhav Aggarwal, Co-Founder
Mr. Adarssh Mnpuria, Co-Founder
Ms. Raksha Agrawal, Advocate
Mr. Karan Chandhiok, Advocate
Mr. Pratibhanu Singh Kharola, Advocate
Ms. Lagna Panda, Advocate
Ms. Ruchi Khanna, Advocate

For MakeMyTrip India Pvt. Ltd. and GoIbibo

Mr. Arun Kathpalia, Senior Advocate
Ms. Sreemoyee Deb, Advocate
Ms. Modhulika Bose, Advocate
Mr. Saurabh Taneja, Advocate
Ms. Swati Sharma, Advocate
Mr. Shashank Gautam, Advocate
Mr. Kamal Kishore Avutapalli, Company Secretary

Order under Section 33 of the Competition Act, 2002

1. This order shall dispose of the prayer made by Casa2 Stays Pvt. Ltd. (hereinafter, ‘**FabHotels**’), and Rubtub Solutions Pvt. Ltd. (hereinafter, ‘**Treebo**’) *vide* their application dated 04.11.2020 and 23.11.2020 respectively, for grant of interim relief (hereinafter, the ‘**Interim Applications**’) under Section 33 of the Competition Act, 2002 (hereinafter, the ‘**Act**’). FabHotels and Treebo (hereinafter, collectively referred to as the ‘**Applicants**’) have primarily prayed for an order from the Commission directing MakeMyTrip India Pvt. Ltd. (hereinafter, ‘**MMT**’) and Ibibo Group Private Limited (hereinafter, ‘**Go-Ibibo**’) (hereinafter, collectively referred to as ‘**MMT-Go**’) to re-list properties of the Applicants on all of their portals.
2. The Commission, *vide* its order dated 28.10.2019, had *prima facie* found that there exists a *prima facie* case for investigation under Section 4 of the Act against MMT-Go



and that of Section 3(4) of the Act against MMT-Go and OYO. Subsequently, the Commission received an application dated 23.01.2020 under Regulation 25 of the Competition Commission of India (General) Regulations, 2009 (hereinafter, '**General Regulations**'), seeking impleadment of Casa2 Stays Private Limited (FabHotels) in Case No. 14 of 2019. The Commission, *vide* its order dated 05.02.2020, allowed Fab Hotels to be arrayed as a party in the matter. Furthermore, information in another case, *namely* Case No. 01 of 2020, was received which involved similar facts and allegations. Considering the similarity of facts and issues involved in both the cases, the Commission clubbed this fresh information with the ongoing investigation in terms of the proviso to Section 26(1) of the Act read with Regulation 27(1) of the General Regulations. The Office of Director General (hereinafter, the '**DG**') was accordingly directed to carry out detailed investigation and submit a joint investigation report.

3. Bereft of details, FHRAI, the Informant in Case No. 14 of 2019, as also Fab Hotels and Treebo, had alleged various practices of MMT-Go and Oravel Stays Private Limited (hereinafter, the '**OYO**') to be contrary to the provisions of the Act. Besides abuse of dominant position by MMT-Go, it was alleged that MMT and OYO have entered into a confidential commercial agreement wherein MMT had agreed to give preferential treatment to OYO on its platform, leading to a denial of market access to Treebo and FabHotels in contravention of Section 3(4) as well as Section 4 of the Act.
4. The Commission was of the view that OYO and MMT-Go operated in separate relevant markets and are vertically related to each other. While OYO was *prima facie* found to be a significant player, not dominant though, in the '*market for franchising services for budget hotels in India*', MMT-Go was *prima facie* found to be dominant in the '*market for online intermediation services for booking of hotels in India*'.
5. The Commission ordered investigation with regard to several practices adopted by MMT-Go, *vide* order passed under Section 26(1) of the Act dated 28.10.2019, which are not elucidated in detail here for the sake of brevity. *Inter alia*, the Commission



prima facie found the commercial arrangement between OYO and MMT-Go whereby MMT-Go agreed not to list the closest competitors of OYO on its platform, to be in contravention of the provisions of the Act. With regard to this allegation, Fab Hotels and Treebo have now approached the Commission seeking interim relief to get re-listed on the online platforms of MMT-Go.

6. The Commission has heard the parties in detail on their respective interim relief applications on 04.01.2021 and 05.01.2021 through video conferencing and have received their written submissions before as well as after the said hearings. The crux of the oral as well as written submissions made by the parties is captured in the ensuing paras.

FabHotels

7. At the outset, FabHotels has alleged that the conduct of MMT-Go in delisting its hotel partners from their portals has had significant adverse effect on FabHotels' growth. It was contended that for an order under Section 33 of the Act, there are three requirements that must be met in view of the Hon'ble Supreme Court's judgment in *Competition Commission of India vs. Steel Authority of India Ltd.*, (2010) 10 SCC 744 (hereinafter, 'SAIL judgment') (i) existence of a *prima facie* case; (ii) balance of convenience in favour of the claimant; and (iii) that irreparable damage would be caused to the claimant if the interim relief is not provided. FabHotels has submitted that all these three requirements are met in the present case as demonstrated below.
8. FabHotels submitted that there is a *prima facie* case made out in the present matter as MMT-Go is a dominant entity and has abused its dominance/ market power to (i) discriminate between similarly placed players in the market for franchising budget hotels in India; (ii) deny market access to FabHotels and cause market foreclosure; and (iii) enter into arrangements with OYO that contravenes Section 3(4) of the Act. This arrangement, as argued by FabHotels, has resulted in widening the gap between its



projected revenue growth and actual revenue growth. FabHotels has stated that in March 2018, when MMT-Go unilaterally terminated the Chain Agreement and the Exclusivity Agreement, FabHotels was generating more than fifty percent (50%) of its revenue through MMT-Go Portals. Specifically, 69% of FabHotels' revenue for the financial year 2017-18 was generated through MMT-Go. The unfair and arbitrary termination of the Agreements resulted in sudden loss of the most significant revenue stream of FabHotels.

9. FabHotels has stated that MMT-Go is a dominant player in the market for hotel bookings through OTAs in India and functions as “the gateway” for online services to “search, compare and book” hotel rooms. Existing market participants in the market for franchising budget hotels in India cannot compete effectively without having access to MMT-Go Portals. FabHotels has also submitted that dependence of players engaged in hotel franchising business can be seen from the growth that OYO experienced after its properties got listed on MMT-Go portals. Further, the preferential treatment extended to OYO by MMT-Go has foreclosed competition in the market as FabHotels and other similarly placed players do not have access to portals of the largest OTA in the country. There has also not been any new entry in the market for franchising services for budget hotels in India in the last two–three years. Eventually, existing competitors would also be forced to exit the market for franchising services for budget hotels in India.
10. FabHotels further submitted that they suffered exceptional circumstances resulting from limitations posed by the Covid-19 pandemic which has badly affected the hotel industry. Compared to the month of February 2020, FabHotels' revenue in the month of September 2020 was stated to be lower by approximately 85%. Nearly 40% of FabHotels' franchise hotels temporarily shut down their operations due to low occupancy and inability to even cover basic operational costs. Further, it had to downsize its workforce by approx. 65% through lay-offs and leave without pay. FabHotels has submitted that if the situation continues, it will have to exit from the



market for franchising budget category hotels in India soon which would result in loss of jobs for 6,500 direct and indirect employees and workers of FabHotels by the end of the year.

11. It was submitted that access to MMT-Go's portals is essential and necessary for survival and sustenance of the FabHotels and that listing on MMT-Go Portals will allow FabHotels to cater to the large online B2C hotel booking market that may act as a lifeline to FabHotels as well as its hotel partners. Listing on MMT-Go Portals would also give fresh grounds to existing investors of FabHotels to continue to fund its current business operations.
12. FabHotels has argued that MMT-Go constituted approximately 50% (₹ 12.5 crore) of FabHotels' monthly revenue at the time when FabHotels' was given notice of delisting in March 2018. To cope up with the resultant loss of revenue, FabHotels was constrained to invest high amounts of money into marketing leading to a sudden increase in its monthly losses from ₹ 4 crore to ₹ 10 crore which has now been relied upon by MMT-GO to argue that FabHotel could survive without OTA channels. This increase, as pleaded by FabHotels, was only a life-pumping mechanism to survive and should not be taken as a sign of sustainable growth.
13. As regards the second requirement, FabHotels has submitted that the balance of convenience lies in its favour as listing of its properties on MMT-Go Portals would not prejudice the rights or interests of MMT-Go in any manner, with an addition of 600 hotels on its portals which already list around 72000 hotels. Further, since MMT-Go would earn commissions from FabHotels for every booking consummated through its portal, balance of convenience lies in FabHotels favour, especially in the circumstances where MMT-Go has not produced any evidence to demonstrate that OYO would terminate the exclusivity arrangement with MMT-Go if MMT-Go lists FabHotels' properties.



14. On the third ingredient, *i.e.* irreparable harm and adverse effect on competition, FabHotels claimed that it would be forced to exit the market for franchising budget hotels without any interim measure. FabHotels stated that they have suffered significant loss of revenue and scale on account of delisting from MMT-Go Portals and will not be in a position to raise funds for running operations in the market for franchising budget hotels in India, if re-listing has not been done. FabHotels explained that without access to MMT-Go's platforms, FabHotels' exit from the market is real and imminent, given that almost 50% of its total revenue prior to delisting was coming through MMT-Go portals.
15. Comparing its relative growth, FabHotels submitted that there has been a significant decline in its growth after delisting. FabHotels' actual net revenue grew from INR 0.7 crore in July 2016 to ₹ 3.3 crore in June 2017 with a 370% annualised growth rate and from INR 2.2 crore in October 2017 to ₹ 3.2 crore in February 2018 with a 238% annualised growth rate. However, over 24 months after delisting, FabHotels' actual net revenue grew from ₹ 3.2 crore in February 2018 to ₹ 5.9 crore in February 2020 at a meagre 34% annualised growth rate.
16. If players like FabHotels are ousted from the market, this would increase market concentration in the market for franchising budget hotels in India and the market would end up with only one market participant *i.e.* OYO. The market for franchising budget hotels has not seen any new entry in the past 2-3 years after MMT-Go offered exclusivity to OYO.
17. FabHotels argued that without grant of interim relief it would be ousted from the market. In such a scenario, even if the Commission eventually arrives at a finding of contravention and passes a cease and desist order, harm due to MMT-Go's anti-competitive conduct would have already occurred and the harm to competition would be both irreparable and permanent. Given this, intervention by the Commission is the need of the hour.



18. FabHotels also claimed that loss of an effective player like FabHotels from the market of franchising budget hotels in India, the harm caused to competition, the harm to consumer choice and the harm to hotel partners, cannot be compensated at a later point. On the other hand, an ad-interim/ interim order directing MMT-Go to list FabHotels' properties on MMT-Go Portals, would not cause any harm to MMT-Go, as it would continue to receive commission from the FabHotels.
19. FabHotels also stated that its funding has dried up. Post delisting, FabHotels received US\$ 12 million in funding until January, 2020 which translates to approximately ₹ 85 crore or merely 5% of the revenue earned by MMT-Go from hotel accommodation segment. No new investor has invested in FabHotels post delisting from MMT-Go Portals. Further, existing investors had agreed to invest in FabHotels at an approximately 15% higher valuation after the *prima facie* order of the Hon'ble Commission was passed on 28.10.2019 but that valuation was later reset to July, 2017 valuation.

Treebo

20. Treebo has stated that MMT-Go which has a market share of more than 63% in the market for '*online intermediation services for booking of hotels in India*', has an arrangement with OYO, which possesses more than 89% in the '*market for franchising services for budget hotels in India*'. Their agreement dated 21.02.2018 (hereinafter, the 'Agreement') has a clause that requires MMT-Go to delist all Treebo properties, whether branded or otherwise on MMT-Go platforms, thus making out an *ex facie* case of denial of market access by a dominant Online Travel Agent (OTA) platform. Such arrangement allegedly creates barriers for Treebo to grow competitively in the market and foreclose competition, as competitors of OYO like Treebo will not have access to a dominant OTA platform (MMT-Go) and would ultimately not be able to compete with OYO in the long run. This also leads to a foreclosure of the market and creates a



hindrance to new entrants, which is evident from the fact that there has not been any credible entry in the market since 2015. It was further alleged that there are no pro-competitive effects of this Agreement as it limits the choice of consumers of budget hotels to only OYO and other unbranded budget hotels on MMT's platform. The appreciable adverse effects on competition (AAEC) of the Agreement are thus palpable in terms of factors under Section 19(3) of the Act.

21. Treebo further contended that the three conditions laid down by the Hon'ble Supreme Court in *SAIL* judgement for deciding a Section 33 application under the Act are fulfilled in the present matter and thus, a case for allowing interim relief has been made out.
22. On the *first* condition, *i.e.* existence of a stronger *prima facie* case, Treebo has submitted that at the *prima facie* stage, the Commission had noted that Treebo and FabHotels are not present on the MMT platform and if this is a consequence of the agreement between OYO and MMT, it may contravene Section 3(4) of the Act. However, now MMT-Go has admitted in unequivocal terms that it was primarily because of its arrangement with OYO that it delisted Treebo and Fab Hotels from its platforms. Further, such delisting by MMT-Go is continuing in nature.
23. Treebo highlighted that MMT has been writing to several independent hotels that since they are present on the platform of Treebo, they would be deactivated from the MMT platform. Consequently, hotels have been writing to Treebo to disassociate themselves from Treebo since they want to be listed on MMT-Go's platform. Treebo has submitted that 57.12% of the OTA bookings were immediately lost as a result of the delisting from the MMT's platform because of its arrangement with OYO and 216 properties ended their association with Treebo within a span of 6 to 8 months. Thus, there is a strong *prima facie* case of contravention against MMT-Go. FabHotels and Treebo also submitted that the requirement of a higher degree of satisfaction in the context of



Section 33 of the Act as laid down by the Hon'ble Supreme Court in the *SAIL* judgement is applicable only in relation to *ex-parte* proceedings.

24. As regards the *second* condition, *i.e.* the balance of convenience in favour of party seeking relief, Treebo has submitted that such balance of convenience lies in its favour. The operation of the Agreement, which has been extended for a further period of 5 years, would virtually allow MMT-Go and OYO to exclude any future competitors from the dominant MMT-Go platform without any checks. Relying on CCI's market study¹ on e-commerce in India, Treebo submitted that the budget hotels are more dependent on OTAs like MMT-Go which has been further accentuated due to increased internet penetration due to the pandemic.
25. Treebo stated that MMT-Go is much better funded and Treebo's interim finance is in no way comparable to more than ₹ 2200 crore reserves that MMT has. Treebo further objected to the baseless problems mentioned by MMT regarding the scalability of IT resources. Treebo relied upon MMT-Go's investor presentation wherein they have clearly mentioned that their platform has higher degree of reliability, security and scalability. Further, Treebo contended that IT and personnel cost constitute a minimal portion of the costs incurred by MMT-Go in the last three financial years, and thus, shouldn't be cited as the reason for inconvenience in relisting Treebo's hotels.
26. Further, Treebo stated that interim relief would not take away MMT-Go's right to screen hotels on quality considerations. MMT-Go's allegations in this regard are completely baseless as Treebo's delisting was not at all a consequence of such considerations, but a consequence of an anticompetitive agreement and abuse by MMT-Go of its dominant position.

¹ Available at https://cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf.



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27. As regards the *third* condition, *i.e.* irreparable harm being caused to Treebo, it has been stated that the Agreement has significantly affected the growth of Treebo and visibility of its partner hotels. Treebo has been affected both in terms of revenue and reputation because of the delisting. Further, the new vertical which was launched to offer new services to partner hotels as part of the ‘Superhero Programme’ has also been stifled and virtually ended by MMT-Go because of its Agreement with OYO.
28. Treebo has stated that the pandemic has adversely affected the tourism industry and the effects of anti-competitive practice of MMT-Go, which is an unavoidable trading partner because of it being a dominant OTA, in continuing to delist the Treebo branded properties, accentuated to cause irreparable harm to Treebo as it is facing existential threat.
29. Treebo also relied on the MMT-Go’s investor presentation and statistia’s India internet penetration rate and explained that with increased internet penetration due to the pandemic, pegged at 50% as per market reports, which may reach upto 60% by 2022, reliance of budget hotels on OTA becomes all the more critical and non-listing on OTA platform for Treebo and FabHotels will cause them irreparable injury.
30. Treebo has further claimed that efficient competitors who have tried to bring innovative solutions in the market like Treebo’s Superhero programme have single handedly been obliterated due to the abusive practices of MMT-Go, pursuant to the operation of the Agreement. Further, Treebo relied upon data submitted to the Commission which shows how even the branded hotels associated with it are merely 511 at present (as opposed to 820 claimed by MMT-Go) and Superhero properties which had reached around 430 properties as of January 2020 is now at zero, thus obliterating the entire Superhero scheme.



MMT-Go

31. At the outset, MMT-Go challenged the assertion made by FabHotels and Treebo that the requirement of a higher degree of satisfaction in the context of Section 33 of the Act as laid down by the Hon'ble Supreme Court in the *SAIL* judgement is applicable only in relation to *ex-parte* proceedings. It was submitted that it is evident from a plain reading of the provisions of Sections 26(1) and 33 of the Act that the threshold for exercise of powers under Section 33 is higher than that contemplated for the exercise of powers under Section 26(1). While the Commission's opinion that '*there exists a prima facie case*' suffices to direct an investigation in terms of Section 26(1) of the Competition Act; for exercising powers under Section 33 of the Act, the Hon'ble Commission must be '*satisfied that an act in contravention of...Section 3 or... Section 4 ... has been committed or continues to be committed*'. Further, Section 33 of the Act requires a '*definite expression of satisfaction*' upon due application of mind while Section 26(1) of the Act only contemplates a '*tentative view*'. MMT-Go also relied upon the interim orders of the Commission to contend that the Commission's decisional practice relating to Section 33 of the Act demonstrates that even where the Commission decided to hear the party against whom interim relief was sought, the Commission itself has relied upon the conditions laid down under *SAIL* judgment.
32. Further, it was argued that neither FabHotels nor Treebo has been able to assist the Commission in forming a '*definite expression of the satisfaction*' as regards the existence of a case than what has already been recorded at the *prima facie* stage in the two matters.
33. Relying on the Hon'ble Supreme Court's judgement in *Dorab Cawasji Warden v. Coomi Sorab Warden [(1990) 2 SCC 117]*, MMT-Go submitted that the threshold for a *prima facie* case is even higher when the relief sought is in the nature of a mandatory injunction. In the said case, it was held that while granting interim injunctions the court will have to satisfy itself that the applicant/plaintiff has a "strong case for trial" and



that this threshold “*shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction*”.

34. MMT-Go further stated that the allegation pertaining to the delisting of FabHotels pursuant to the OYO Agreement can only be assessed under Section 3(4) of the Act since the investigation has been directed into the effects of OYO Agreement under Section 3(4) of the Act. Since ‘inquiry’ into the OYO Agreement has been directed under Section 3(4) of the Act, the Commission is expected to record its satisfaction (for purposes of Section 33) as regards the OYO Agreement only in relation to Section 3(4) of the Act, and not under Section 4 of the Act. Further, it has been argued that if the grievance of FabHotels has arisen from a contractual obligation that has been imposed on MMT-Go by OYO, it is unimaginable that the OYO Agreement will be susceptible to scrutiny as unilateral conduct on the part of MMT-Go under Section 4 of the Act.
35. MMT-Go also stated that FabHotels introduced new facts, including data sets, during their arguments on 04.01.2021, without providing it an adequate opportunity to respond to the allegations.
36. Besides the aforesaid preliminary objections, MMT-Go stated that FabHotels and Treebo have failed to make out a case for interim relief. MMT submitted that Treebo and FabHotels’ entire case is built on the claim that MMT is an essential distribution partner and that their delisting in April 2018 and June 2018 respectively, was the only factor which caused a significant adverse impact to Treebo’s and FabHotels’ business on account of their alleged channel dependence on MMT. MMT-Go has stated that this allegation is belied by the fact that there is no explanation as to why a similar positive impact on their performance is not borne out between 2015 and March 2018, when Treebo and FabHotel were listed on MMT (except for a brief period in 2017 when Treebo itself had decided to delist from Treebo).



37. MMT-Go has stated that it is an OTA engaged in the business of providing travel and tourism related services. For the hotels/accommodations booking business, as an OTA, MMT-Go provides services to: (a) hotels/accommodations, who use MMT-Go portals to sell room inventories on the one hand; and (b) consumers/travellers searching for hotels/accommodations for booking on the other hand. While doing so, MMT-Go claims to constitute one of the multiple and substitutable channels for distribution of room inventories. These distribution channels include direct bookings made through the hotel's own website; corporate sales; OTAs; offline travel agents; unorganized intermediaries such as coolies, taxi drivers, *etc.*; metasearch services such as Trivago; global distribution services such as Amadeus and corporate travel management companies.
38. Relying on the Google-Bain report, MMT-Go argues that approximately ninety-five per cent (95%) of the traffic to the hotels and accommodations section on the MMT-Go platforms does not result into an actual booking and the consumers, therefore, multi-home and compare prices and complete the purchase through the channel that offers the best price or deal. MMT-Go further argued that the relevant market is wide and includes all channels for distribution of room inventories of hotels/accommodations. MMT-Go submitted that the relevant market should be '*market for travel and travel related services*'; or, in the alternative, at the narrowest possible market comprising the market for '*booking of hotels/accommodations in India*' and the further segmentation of the relevant market would result in narrowing the market. All channels in such market fiercely compete with one another and in terms of volume, less than ten per cent (10%) of the overall bookings of hotels/accommodations take place through OTAs. New entrants continue to enter the hotel/accommodation bookings business and expand at a rapid pace. Likewise, e-commerce platforms such as Amazon and Flipkart, payments apps like PhonePe, Google Pay, bank and credit card websites, and super apps like PayTM and JustDial have also entered into travel booking services and have expanded their business within a short period of time. MMT-Go also claimed that TripAdvisor, a platform that offers



travel price comparison services and where bookings are finally made through third-party sites including those of the direct suppliers, is ranked as the second-best travel app in India, surpassing OYO and all other OTAs. Further, websites and apps provided by the search and metasearch service providers such as Google, Trivago.in (part of the Expedia group), Skyscanner, TripAdvisor, Kayak, *etc.* have led to increased price transparency and have provided the consumers/travellers with one-click option of knowing the best price offered for a particular hotel through all the distribution channels, including the direct channel. Further, the economic strength, sophisticated front-end and back-end technology, and the exponentially larger inventory base of large-scale global players such as Booking.com, Expedia and Airbnb, pose competitive constraints on the operation of MMT-Go. MMT also relied upon an interview of Sidharth Gupta, Co-Founder of Treebo, post-delisting to submit that Treebo relied upon multiple distribution channels for getting bookings.

39. MMT-Go also submitted that among the conditions put forth by OYO for the relisting and closer commercial arrangement with MMT-Go was that it will delist FabHotels and Treebo. MMT-Go also highlighted that at the relevant point of time, when the negotiations were taking place, OYO had a huge inventory of ten thousand (10,000) hotels and a much wider geographical footprint with presence in one-hundred and sixty (160) cities as compared to the combined inventory of FabHotels and Treebo of approximately six hundred (600) hotels across 100 cities. It was, therefore, commercially expedient and imperative for MMT to partner with OYO which led to the execution of the Agreement dated 21.02.2018. Relying on similar figures, MMT-Go also stated that FabHotels and Treebo are nowhere comparable or similarly placed with OYO to allege the conduct of MMT-Go discriminatory.
40. MMT-Go stated that it entered into a partnership with OYO for benefitting the consumers through the availability of competitively priced, larger selection of rooms as well as the hotels which were associated with OYO through access to the MMT-Go platforms.



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41. MMT-Go stated that to allow interim relief, the Commission has to necessarily assess: *Firstly*, if the MMT-Go Agreement with OYO has caused or is likely to cause an AAEC in India in terms of the factors enumerated under Section 19(3) of the Competition Act; *Secondly*, given that the present proceedings relate to the powers of the Commission under Section 33 of the Act, the Commission must express satisfaction of a ‘much higher degree than formation of a *prima facie* view’ that the said Agreement has not only resulted in AAEC but that there is a continuing AAEC resulting from the Agreement; and *Thirdly*, in light of the continuing AAEC, the Commission is satisfied that it is imperative to restrain MMT-Go’s freedom to trade and contract, at a time when MMT-Go has equally suffered (if not more), pending the conclusion of investigation that is currently being undertaken by the DG.
42. MMT-Go submitted that the Agreement did not cause an AAEC in India. Neither it creates entry barriers for new players (as the restrictions therein apply against two existing players) nor it weakened the performance of Treebo and FabHotels as they both became even more effective players on the supply side. Since MMT-Go was able to secure a larger selection of competitively priced inventory for its own customers pursuant to the Agreement, there were clear benefits (such as lower prices and more choices) accruing to the consumers.
43. MMT-Go also explained the impact of Covid-19 pandemic on hotel industry and stated that MMT-Go also suffered because of the pandemic as its revenues contracted by 96.4% during the second quarter of FY 2020-2021. As a result, MMT-Go was forced to take severe measures to cut down its operational costs.
44. MMT-Go submitted that the grant of interim relief to Treebo would cause irreparable injury to MMT-Go as it would lead to suspension of MMT’s commercial and contractual freedom. MMT-Go submitted that the issues raised in the present case relate to the technology led segment of a market, which is complex, highly dynamic



and still evolving and for an OTA like MMT-Go, commercial freedom to determine the selection of the hotels/accommodations that would be made available on its platform is important. Such selection is an integral dimension of competition and any undue intervention with the freedom to determine availability of selection may affect the legitimate benefits accruing to the consumers or other hotels/accommodations associated with MMT-Go. Further, granting of the interim relief would mean that the exclusivity secured by OYO against Treebo and FabHotels would be lost which may prompt OYO to suspend the obligations relating to inventory commitments or other reciprocal obligations under the Agreement with MMT-Go.

45. MMT-Go also submitted that Treebo and FabHotels have primarily suffered because of Covid-19 and not because of delisting and if they did not suffer an insurmountable loss post its delisting from MMT-Go's platforms, granting of interim relief would mean that any hotel chain/standalone hotel which has suffered on account of the Covid-19 pandemic would claim listing on the MMT-Go platform as a matter of right and MMT-Go would lose control over the selection made available on its platform and it may also have an adverse effect on consumer experience.
46. It has been further alleged that Treebo and FabHotels claim to have room inventory in excess of ten thousand (10,000). The resource commitments required by MMT to support the bookings of such a large inventory base in terms of IT infrastructure, customer-facing support *etc.*, will strain the already pruned resources of MMT. The lack of resources to appropriately support its existing hotel partners has already led to MMT-Go platform losing more than seven thousand (7000) hotel partners from MMT-Go platforms between May 2020 and November 2020 and due to this, MMT-Go has not been able to undertake any significant efforts to on-board new hotel partners and is currently concentrating more on retaining the properties listed on its platforms. In such situations, diversion of existing resources available with the MMT-Go to an additional inventory pool of more than 10,000 rooms supported by Treebo and FabHotels will allegedly have an adverse effect on MMT-Go.



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47. MMT-Go has also claimed that Treebo and FabHotels have failed to demonstrate that the balance of convenience lies in their favour. The Commission's primary mandate is to ensure robust competition in the markets and, therefore, the duty of the Commission is towards the market and the economy at large and not towards any particular market player. MMT also submitted that every contract and every economic act in itself is in restraint of trade, and the Commission must balance MMT-Go's duty towards thousands of independent hotel owners in their own right against the demand of Treebo and FabHotels, who are no more a start-up and are established player in the hospitality industry, backed by some of the most distinguished investors. Almost all of the independent hotel owners who are MSMEs or start-ups do not have access to capital/funding like FabHotels and Treebo and are struggling to overcome the challenges presented by the pandemic. Therefore, their access to MMT-Go platforms should not be encouraged at the cost of resources spent by MMT-Go to support independent hotels.
48. MMT-Go claims that balance of convenience squarely lies in its favour as the grant of any interim relief would likely affect its business and market presence as: (a) prior to the pandemic, Treebo and FabHotels both had already overcome any alleged dependence on MMT-Go as a distribution platform by strengthening their presence through direct and other distribution channels; (b) there has been a slump in overall demand which has resulted in the drastic decline of hotel bookings on the MMT-Go platform; and (c) MMT-Go has reduced its overall spends towards promotional and marketing activities as part of its austerity measures.
49. MMT-Go also highlighted the inordinate delay in filing interim relief by Treebo and FabHotels, approximately 30 months and 29 months, respectively, from the alleged conduct of delisting in 2018. MMT-Go further argued that Treebo and FabHotels have surprisingly elected to make this belated filing on the ground of Covid 19 disruption in



the month of November, when it is apparent that the hospitality segment may witness a revival because of the imminence of an effective vaccine and revival of leisure travel.

50. Further, it has been urged that granting this relief will amount to granting of final relief pending investigation which would frustrate the subject matter of the investigation and prejudice MMT-Go's freedom to trade and contract. MMT-Go also stated that awarding such relief has been criticized time and again by the Hon'ble Supreme Court.
51. Besides the general arguments made by MMT-Go in response to both the application which are already iterated above and not reproduced for the sake of brevity, MMT-Go also made some specific assertions as regards Treebo. MMT-Go highlighted that Treebo was first listed on MMT platform in July 2015. In the period commencing from the last quarter of 2016, MMT and Treebo were engaged in discussions, initiated at the behest of Treebo, relating to the prospects of a minority investment by MMT in Treebo. However, the investment talks failed and MMT's investment proposal was finally declined by Treebo in March 2017. Despite Treebo's refusal to MMT's investment proposal, Treebo properties continued to be listed on MMT. Thereafter, in April 2017, Treebo had unilaterally decided to delist itself from MMT-Go portals. Though the investment talks with MMT did not materialize, and despite delisting itself from MMT's platforms, within a short period of four (4) months, Treebo was able to raise significant funding of ₹ 220 Crores in July 2017 from seasoned investors such as Ward Ferry Management, Karst Peak Capital, SAIF Partners, Matrix Partners India, and Bertelsmann India Investments. Thereafter also, Treebo raised funding totalling about ₹ 90 Crores during the year 2020, which as per MMT-Go is demonstrative of the continued belief of the investors in Treebo even during the period where businesses are hit by the pandemic. MMT further claimed that Treebo has already raised close to ₹ 530 Crores till date which it has thoroughly invested in direct brand engagement with its potential customers through special discounts, promotional offers and loyalty programs available on Treebo's own website and apps, none of which are extended to OTA platforms and their customers, and Treebo does not require the support of a third-



party platform such as MMT to support its business. MMT-Go also described that the contractual arrangement/agreements between MMT-Go and Treebo were finalized after multiple rounds of one-to-one negotiations, as opposed to them being imposed on Treebo in any manner.

52. MMT-Go also submitted that subsequent to the delisting, Treebo has registered a massive increase of 64% in its revenues while its losses have only increased marginally by approximately 2.86% in FY 2019. Treebo has diversified its distribution channels and works with all OTAs (except MMT-Go), offline travel agents, unorganized intermediaries, *etc.* while it continues to focus on direct bookings and corporate tie-ups. Treebo was able to drive up occupancy rates by partnering with various government and corporate initiatives.
53. MMT-Go also submitted screenshots of mails sent by various hotel partners, to delist them from MMT-Go platform as they were listing themselves on Treebo's platform.
54. MMT-Go also submitted that the growth of Treebo and OYO is neither dependent nor connected with listings on OTAs such as MMT-Go, as between October 2015 and February 2018 when OYO was not listed on MMT-Go, it witnessed phenomenal growth in terms of its revenues, valuation and room inventories. Further, in the period between May 2018 and November 2020, Treebo has also registered a growth in its revenues and hotel inventories. Therefore, while MMT-Go could be one of the many channels of distribution available to Treebo, it is not and neither could be deemed to be an essential facility for the distribution of hotels and accommodations in India.
55. MMT-Go further claimed that Treebo's 60-70% bookings are secured through direct channels and through corporate tie-ups and while delisting Treebo from MMT in April 2017, Treebo's founder had also admitted that MMT was neither a significant nor an economically viable distribution channel for them. MMT submitted that 25% of Treebo's consumers are repeat customers which in itself is demonstrative of low



dependence of Treebo on OTAs, including MMT-Go, for distribution of inventories. MMT-Go further relied upon an interview of Sidharth Gupta (Co-Founder, Treebo), post delisting, to indicate diversified reach of Treebo on various other distribution channels.

56. MMT-Go claimed that Treebo has submitted report titled “*Covid-19: Impact on the Indian Hotels Sector, report by HVS dated April 10 2020*” as an evidence of existential crisis but the said report does not contain any findings on Treebo’s financial position. Thus, merely claiming existential threats without an iota of evidence to substantiate this claim cannot be taken into consideration by the Commission. MMT-Go also submitted that the interim relief has been filed in the last week of November, 2020 while relying on the pandemic as the change of circumstance, indicating that the alleged immediate threat to Treebo’s financial viability is not a direct consequence of MMT-Go’s conduct in March 2018, but of the Covid-19 pandemic which has had a decimating effect on the entire travel and tourism industry, including MMT-Go.
57. MMT-Go also argued that in August, 2017, Treebo had 150+ inventory and when notice of delisting was provided in March 2018, they had 300+ hotels and when Treebo was delisted from MMT-Go’s platform, they had 400 inventory, which shows the increase in the inventory of Treebo even during the process of delisting. Further, the inventory of Treebo goes up to 820 in November, 2020 which shows the growth in the business of Treebo. MMT-Go also submitted that the focus of Treebo is on corporate clients.
58. As regards the Superhero’ program, MMT-Go argued that it was merely a revenue management service offered by Treebo to the independent hotels and Treebo was merely providing backend support and managing distribution through OTAs, global distribution system (‘GDS’), social media, *etc.* Such ‘Superhero’ properties were delisted from MMT-Go’s website only when it was discovered that such properties were also listed on Treebo’s platform, as allowing them to be listed on MMT-Go’s



platform would have been a breach of MMT's obligations under the OYO Agreement. However, MMT-Go also submitted exhibits, which indicate that independent properties were listed on MMT-Go in 2019.

59. Treebo has claimed that the discounts available on MMT-Go's platform and the unparalleled user experience offered by MMT-Go in comparison to other players indicates its dominance. In response, MMT-Go has submitted that price is an important contour of competition amongst the different channels of distribution and discounts are therefore, offered across the different distribution channels to attract consumers, including MMT-Go. Furthermore, MMT-Go claimed that not all discounts offered on the properties listed on its platforms are borne by it. In fact, a majority of the discounts are actually offered by the hotels themselves (on their own volition).
60. MMT-Go also made specific arguments in relation to FabHotels. It was stated that FabHotels started operations in 2014 and in August 2015 it had an inventory of around 200 hotels across around 20 cities and the inventory reduced to 85 properties across around 15 cities even when it was listed on MMT-Go platform, whereas, OYO was not listed on any platform from October 2015 to October 2017 and still was able to increase the inventory from 200 hotels across 10 cities to more than 5500 hotels across 170 cities.
61. MMT-Go submitted that in early 2017, there was a discussion related to the prospects of a minority investment in FabHotels by MMT-Go and even after failure to yield any results, FabHotels continued to be listed on MMT-Go Platforms. Further, FabHotels was in conversation with other investors as they secured a series B funding of more than ₹ 161 Crores from seasoned investors such as Goldman Sachs and its existing investor Accel Partners.
62. In relation to the allegations made in impleadment application by FabHotels, MMT-Go claimed that no evidence whatsoever has been presented by FabHotels to



demonstrate that the discounts were, in fact, ‘withdrawn’ for FabHotels’ listings in August 2017 and there is contradiction in the claim of ‘unilateral withdrawal’ of discounts and lowering of discounts. MMT-Go also mentioned that the temporary decline in bookings and revenue of FabHotels during August 2017 can be due to seasonality of demand. MMT-Go also claimed that the fall in FabHotels’ revenues in the period between July and August 2017 could be attributable to FabHotels’ operational inefficiencies as a similar trend is apparent even during the time when FabHotels was not listed on the MMT-Go platforms. MMT-Go also clarified that discounts provided on MMT-Go platforms were offered by MMT-Go on its own account and FabHotels has benefitted from these discounts from time to time, including before, during and after the termination of the investment talks.

63. MMT-Go also submitted that FabHotels was already listed on MMT-Go platforms pursuant to the listing agreement executed in 2015 and could have continued to access the MMT-Go platforms under the existing agreement but FabHotels had voluntarily negotiated a closer commercial arrangement with MMT-Go; and pursuant to that MMT-Go and FabHotels entered into the Chain Agreement and the Exclusivity Agreement on 21.09.2017. In this regard, MMT-Go submitted that the email conversations between Mr. Kamal Avutapalli of MMT-Go and Mr. Vaibhav Aggarwal of FabHotels shows that FabHotels had bargaining powers as they were able to reduce the commission charges payable on PAH (pay at hotel bookings). Further, even as regards the commercials offered by Treebo to MMT-Go, FabHotels was able to secure “an option to match [such commercials]”.
64. MMT-Go further submitted that FabHotels’ clear uncompromised bargaining position *vis-à-vis* MMT-Go is also established from a unilateral termination right that FabHotels was able to secure in the course of negotiations of the agreements. FabHotels had imposed an obligation on MMT-Go requiring MMT-Go to inform FabHotels if Treebo properties were subsequently listed on the MMT-Go platforms; and in such a case, FabHotels reserved a unilateral right to terminate the contract with



MMT-Go after giving a 7 days' notice, as against the 90 days' notice period provided under the Chain Agreement that gave each of MMT-Go and FabHotels an equal right to terminate the Agreements without assigning any reasons. MMT-Go also argued that FabHotels was also fully aware: (i) that OYO, another direct competitor of FabHotels, was already absent from the MMT-Go Platforms; and (ii) that Treebo had unilaterally decided to delist itself from MMT-Go.

65. MMT-Go also stated that during the subsistence of the Agreements, while the volume of bookings for FabHotels' properties increased significantly on account of the focused promotional and marketing initiatives of MMT-Go, MMT-Go's earnings net of the promotional expenses incurred by it was even less than one per cent (<1%) for some months.
66. MMT-Go submitted that after delisting from MMT-Go, the performance of FabHotels improved as prior to the issuance of the notice of termination in March 2018, FabHotels had approximately 275+ properties across more than 25+ cities. However, post the issuance of the termination notice, FabHotels' partnership with the hotels registered a 118% increase, with the inventory of more than 600+ properties across more than 50+ cities by November 2019.
67. MMT-Go also contended that even after delisting, FabHotels was able to secure funding and none of the investors saw delisting as a negative impact. Moreover, MMT-Go submitted that FabHotels itself had represented that it was pursuing an omnichannel distribution strategy comprising direct sales through FabHotels' own portals and tie-ups with corporates and offline travel agents apart from sales through third-party channels, including OTAs; and post delisting from MMT-Go, it was reliant on OTAs to the extent of merely 15% of its overall booking pie. In addition, MMT-Go states that FabHotels has been able to secure a funding of approximately ₹ 100 Crores from its existing investors in the period following the delisting from MMT-Go platforms.



68. Referring to various news reports, including a news report dated 31.03.2020 where Mr. Vaibhav Aggarwal of FabHotels claimed that FabHotels is the most cash efficient player in this segment, MMT-Go submitted that the delisting event in June 2018 did not have any adverse effect (appreciable or otherwise) on FabHotels' business operations. Further, MMT-Go also submitted that FabHotels has not provided a roadmap/business plan demonstrating how its listing on the MMT-Go platforms will help revive demand. MMT-Go also stated that number of visits to the website of FabHotels was approximately 6 lacs in November, 2020 which was not revealed by them in interim relief application and they have reached the Commission with unclean hands and hence, should not be allowed interim relief. MMT-Go further submitted that the valuation of FabHotels increased from ₹ 651 Crores in June 2019 to ₹ 856 Crores in January, 2020.
69. MMT-Go claimed that FabHotels' submission that they have cash reserve to sustain only for 3 months was not backed by any evidence and was a false claim as they were still carrying on with its business operations and that FabHotels' business may not necessarily perish even if access to MMT-Go's platforms is not granted. MMT-Go also submitted that FabHotels is misleading the Commission into believing that FabHotels is a new entrant, when, in reality, FabHotels is an established player which has been operating for more than 6 years and are backed by seasoned investors such as Goldman Sachs.
70. MMT-Go also submitted that assuming, *albeit* strongly denying, that FabHotels' business prospects have got disrupted, the ongoing investigation would reveal that reasons for such disruption would not qualify as an injury to competition in terms of the Act or if such injury is caused because of the MMT-Go's conduct or because of the OYO Agreement.
71. MMT-Go also alleged that FabHotels has placed on record email correspondences received from its hotels-partners to allege that MMT-Go was inducing Fab-Hotels



hotel partners to delist themselves from FabHotels, whereas the emails simply demonstrate that hotel partners who wanted to disassociate themselves from FabHotels were requested by MMT-Go's executive to submit a confirmation that they were, in fact, independent hotels and were no longer associated with FabHotels.

72. MMT-Go further claimed that the news reports and FabHotels' data relating to booking for November 2020 and December 2020 show that there has been a healthy increase of 50% in its room nights booked per day in December 2020 as compared to November 2020.

Rebuttals/Rejoinder by FabHotels and Treebo

73. FabHotels has stated that MMT-Go heavily relied upon the observations of the Hon'ble Supreme Court of India in *SAIL* judgment, to argue that the Commission while exercising the powers conferred under Section 33 of the Act, has to record satisfaction of a higher standard than under Section 26(1) of the Act. FabHotels has claimed that this submission is based on an incorrect reading of the relevant paragraphs of *SAIL* judgment. Observations made at paragraph 117 of the said judgment relate to *ex-parte* proceedings under Section 33 of the Act which requires the adjudicatory authority to follow a higher legal standard while passing an adverse order against the party that is not represented in the oral hearing. And since MMT-Go were fully represented in the present proceedings, no such higher standard needs to be followed by the Commission.
74. FabHotels vehemently objected to MMT-Go's argument that FabHotels' inventory has increased post-delisting and therefore, it does not require listing on MMT-Go Portals to survive in the market. FabHotels submitted that inventory is not the correct parameter to gauge viability of FabHotels' commercial operations in the market for franchising budget hotels in India. Relying on Commission's order in *Fast Track Call Cab Pvt. Ltd. and Another vs. ANI Technologies Pvt. Ltd.* [Case No. 6 & 74 of 2015], wherein the Commission considered number of trips/rides by a taxi operator instead of



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the fleet size to calculate market shares, FabHotels submitted that occupancy and revenue would be the correct parameters for assessing market presence since FabHotels earns commissions only on the bookings made of its partner hotels. Further, FabHotels stated that inventory data submitted by MMT-Go seems to have been scraped from the home page of FabHotels' website which does not show real-time information and therefore, does not reflect how many hotels are live and how many are sold-out. FabHotels, as per the submissions, currently operates at approx. 15% occupancy and its occupancy level in November, 2020 was approx. 10%. At these occupancy levels, FabHotels' hotel partners cannot even cover their fixed costs, since they would need 35%-45% occupancy level in order to just break-even. Further, FabHotels submitted that MMT-Go's conduct of refusing even independent listing of hotels that have any arrangement or association with FabHotels has led to a high churn in FabHotels' inventory. Before delisting from MMT-Go Portals, FabHotels would lose 2 out of every 10 hotels per year. Post delisting, FabHotels has been losing 7 out of every 10 hotels per year, on an average. FabHotels stated that other OTAs operating in India are significantly smaller than MMT-Go and do not impose any competitive constraint on it.

75. FabHotels further stated that MMT-Go's arguments and assertions fail to take into account the fact that offline segment has seen significant adverse impact due to the Covid-19 pandemic since consumers' preference for online channels has increased significantly; and thus, to state that FabHotels relied on OTAs only for 15% of its booking is totally incorrect.
76. FabHotels argued that MMT-Go's assertion that the exclusivity obligation has been imposed by OYO on MMT-Go is without any evidence and, given the dominant position held by MMT-Go, the same should not be accepted. Notwithstanding, FabHotels urged that MMT-Go's conduct must be assessed keeping in mind its dominance in the market for online intermediation for booking hotels in India.



77. As regards delay in filing interim relief application, FabHotels clarified that interim relief has been filed after a long period of time because initially they were trying to relist on MMT and Covid-19 has been an accelerator for this situation.
78. FabHotels objected to the MMT-Go’s claim that its conduct has objective justifications. FabHotels further stated that the data placed on record by MMT-Go rather shows that FabHotels was an effective competitor of OYO, but its growth was significantly impaired because of MMT-Go’s discriminatory conduct of delisting, which foreclosed competition. Relying on such data, as given below, FabHotels demonstrated that pursuant to delisting in 2018, its revenue was considerably affected.

	Revenue (FY 2016)	Revenue (FY 2017)	YOY increase	Revenue (FY 2018)	YOY increase
OYO	INR 32.9 crore	INR 140.8 crore	<i>approx. 4.27 times</i>	INR 477.7 crore	<i>approx. 3.39 times</i>
FabHotels	INR 20.98 crore	INR 84.11 crore	<i>approx. 4 times</i>	INR 216.3 crore	<i>approx. 2.57 times</i>

79. Regarding MMT-Go’s argument that FabHotels’ inventories reduced by more than 50% between August 2015 to August 2016, despite being listed on MMT Go’s platform, FabHotel stated that this is a complete misrepresentation of facts because during this time, FabHotels switched from ‘partial inventory model’ to ‘full inventory model’ because of which its overall inventory reduced.
80. Treebo has also responded to certain objections raised by MMT-Go in respect of the interim application filed by Treebo. Addressing the issue of delay in filing the interim relief application, Treebo explained that they made all attempts to get listed on Treebo till the last moment, however, MMT-Go never relented. After the termination of its agreement in 2018, Treebo tried to reach out to MMT-Go for resuming their relationship. However, this was to no avail. Importantly, in late 2018 and 2019, Treebo



launched the Superhero scheme and on discussions with MMT officials, they were of the opinion that such independent hotels (which are not branded by Treebo) could be listed on MMT-Go. Later, in the month of December 2019 / January 2020 onwards, it was made clear that even independent non-branded Treebo hotels who are affiliated with Treebo under the Superhero scheme are blacklisted by MMT-Go and in the process, such independent hotels left Treebo. Aggrieved by this conduct of MMT-Go and only as a last gasp measure, Treebo filed the information with the Commission. Thereafter, post the pandemic, with online penetration increasing, the dependence of budget hotels on OTA platform only increased. MMT-Go had announced during the pandemic that there is a greater need for close coordination with the supply partners and in that spirit, Treebo wanted to initiate a dialogue with MMT-Go for relisting. Further, while Treebo was in a commercial relationship with MMT-Go in 2018, there were certain dues that were outstanding for more than two years for which Treebo used to reach out to MMT-Go repeatedly. Along with the said talks, there was another attempt which was made to relist the Treebo hotels on MMT-Go platform due to hotels increased dependence on OTA platform. This attempt was also snubbed by MMT-Go in October 2020 which left no choice to Treebo but to file this interim application.

81. While relying on Hon'ble Delhi Court's observations in *Hindustan Pencils Private Limited vs. M/s India Stationery Product co. & Another* [AIR 1990 Delhi 19], Treebo claimed that even if there is delay, that does not amount to fatal blow on the ground of laches since no prejudice is caused to MMT-Go because of the delay.
82. Treebo further stated that the relief sought is not in the nature of final relief as it is subject to the outcome of investigation. Notwithstanding, Treebo also claimed that courts are not constrained from granting a relief in the nature of final relief at the interim stage if the circumstances require the same to meet the ends of justice. Treebo supported its claim by relying upon Hon'ble Supreme Court's observations in *Hammad Ahmed v. Abdul Ajeed and Ors.*, (2019) 14 SCC 1, wherein the said Court rejected the argument that the interim relief is only to maintain the status of the parties. The Hon'ble



Supreme Court observed that the court can direct the parties to do something which was not in existence at the time of filing of the suit.

83. Besides, Treebo alleged malafide on the part of MMT, *inter alia* for not sharing a copy of the Agreement with the Commission, making baseless assertions and submitting incorrect facts without attaching an affidavit in support *etc.* Treebo relied upon recent decision of the Hon'ble Supreme Court in the case of *Arjun Panditrao Khotkar v. Kailash Kushanrao* (2020) 7 SCC 1, wherein it was held that the non-production of the certificate under Section 65B of the Evidence Act, 1872 make the electronic evidence including newspaper clippings, videos, *etc.* inadmissible and liable to be rejected at the first instance.
84. Treebo also objected to MMT-Go's claims that Treebo delisted itself from MMT platform as it does not consider MMT-Go as an important platform for distribution. Treebo argued that the only reason for such delisting was one-sided contractual terms. If it would have delisted in 2017 for the claims made by MMT-Go, then why would it again have conversations with MMT-Go in 2019 for Superhero hotels relisting.
85. Treebo further stated that the transcript of the video relied upon by MMT-Go of Mr. Sidharth Gupta, Co-founder, Treebo also shows how the arrangement between OYO and MMT is creating a monopoly which would hurt the interest of all stakeholders.

Observations and Analysis of the Commission

86. At the outset, the Commission observes that during the course of extensive arguments spanning over two-days, parties have relied upon various judgments/orders of different courts and tribunals with regard to the principles to be followed for recording a satisfaction prior to passing an interim order. Besides such standards being pronounced while deciding civil law matters and directly relatable to such cases, and thus, by implication may not be *stricto sensu* applicable to competition law matters; the



Commission notes that the Hon'ble Supreme Court, in the *SAIL* judgment, has succinctly laid down the criteria for the guidance of the Commission while deciding interim relief requests in competition cases. Suffice to say that the Commission is guided primarily by the stipulations laid down under the said judgment, which is the yardstick recognised by the Apex Court, in competition matters which are neither in the nature of *lis* before a court nor an adjudication in *personam* of the rights of the parties.

87. As highlighted earlier, the *SAIL* Judgment mandates that while recording a reasoned order under Section 33 of the Act, the Commission shall, *inter alia*, ensure fulfilment of the following conditions:

- a) *record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated 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) *from the record before the Commission, 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.*

88. The Commission finds it imperative to test the claims made by the parties on the touchstone of these three conditions to decide on the interim relief request.

89. The *first* condition requires recording of Commission's satisfaction in clear terms that an act in contravention of the stated provisions of the Act has been committed and continues to be committed or is about to be committed. MMT-Go has argued that FabHotels and Treebo have failed to demonstrate any new facts and that all the facts brought before the Commission at the interim stage were already before the Commission even during the *prima facie* stage when the Commission ordered



investigation and thus, the standard envisaged by the *SAIL* judgment of having a ‘stronger case than a mere *prima facie* case’ is not met.

90. The Commission finds this argument bereft of the spirit as contained in the broader observations made by the Hon’ble Supreme Court in the *SAIL* Judgment. It is the cardinal rule that a judgment should be read in its entirety and not selectively to understand its full import and the mind of the court as conveyed through its decision. While pronouncing the *SAIL* judgment, the Hon’ble Supreme Court, in detail, compared the degree of satisfaction or standard of evidence required while ordering investigation under Section 26(1) of the Act at the *prima facie* stage *vis-à-vis* the one required while deciding interim relief claims under Section 33 of the Act. The relevant excerpts from the said judgement, which to the Commission’s mind, needs verbatim iteration here are as follows:

[...] At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions simpliciter and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express prima facie view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.’

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Inquiry and investigation are quite distinguishable, as is clear from various provisions of the Act as well as the scheme framed thereunder. The Director General is expected to conduct an investigation only in terms of the directive of the Commission and thereafter, inquiry shall be deemed to have commenced, which continues with the submission of the report by the Director General, unlike the investigation under the MRTP Act, 1969, where the Director General can initiate investigation suo moto. Then the Commission has to consider such report as well as consider the objections and submissions made by other party. Till the time final order is passed by the Commission in accordance with law, the inquiry under this Act continues. Both these expressions cannot be treated as synonymous. They are distinct, different in expression and operate in different areas. Once the inquiry has begun, then alone the Commission is expected to exercise its powers vested under Section 33 of the Act. That is the stage when jurisdiction of the Commission can be invoked by a party for passing of an ex parte order. Even at that stage, the Commission is required to record a satisfaction that there has been contravention of the provisions mentioned under Section 33 and that such contravention has been committed, continues to be committed or is about to be committed. This satisfaction has to be understood differently from what is required while expressing a prima facie view in terms of Section 26(1) of the Act. The former is a definite expression of the satisfaction recorded by the Commission upon due application of mind while the latter is a tentative view at that stage. Prior to any direction, it could be a general examination or enquiry of the information/reference received by the Commission, but after passing the direction the inquiry is more definite in its scope and may be directed against a party. Once such satisfaction is recorded, the Commission is vested with the power and the informant is entitled to claim ex parte injunction. The legislature has intentionally used the words not only 'ex parte' but also 'without notice to such party'. Again for that purpose, it has to apply its mind, whether or not it is necessary to give such a notice. The intent of the rule is to grant ex parte injunction, but it is more desirable that upon passing an order, as contemplated under Section 33, it must give a short notice to the other side to appear and to file objections to the continuation or otherwise of such an order. Regulation 31(2) of the Regulations clearly mandates such a procedure. Wherever the Commission has passed interim order, it shall hear the



parties against whom such an order has been made, thereafter, as soon as possible. The expression 'as soon as possible' appearing in Regulation 31(2) has some significance and it will be obligatory upon the fora dealing with the matters to ensure compliance to this legislative mandate. Restraint orders may be passed in exercise of its jurisdiction in terms of Section 33 but it must be kept in mind that the ex parte restraint orders can have far reaching consequences and, therefore, it will be desirable to pass such order in exceptional circumstances and deal with these matters most expeditiously.

During an inquiry and where the Commission is satisfied that the act has been committed and continues to be committed or is about to be committed, in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders, without giving notice to such party where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order, inter alia, should : (a) record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated 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) from the record before the Commission, 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.

[...]

In the case in hand, the provisions of Section 33 are specific and certain criteria have been specified therein, which need to be satisfied by the Commission, before it passes an ex parte ad interim order. These three ingredients we have already spelt out above and at the cost of repetition we may notice that there has to be application of mind of higher degree and definite reasons having nexus to the necessity for passing such an order need be stated. Further, it is required that the case of the



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informant-applicant should also be stronger than a mere prima facie case. Once these ingredients are satisfied and where the Commission deems it necessary, it can pass such an order without giving notice to the other party. The scope of this power is limited and is expected to be exercised in appropriate circumstances. These provisions can hardly be invoked in each and every case except in a reasoned manner. Wherever, the applicant is able to satisfy the Commission that from the information received and the documents in support thereof, or even from the report submitted by the Director General, a strong case is made out of contravention of the specified provisions relating to anti-competitive agreement or an abuse of dominant position and it is in the interest of free market and trade that injunctive orders are called for, the Commission, in its discretion, may pass such order ex parte or even after issuing notice to the other side.'

(emphasis supplied)

91. The aforesaid excerpts, especially the underlined observations, clarify that the degree of satisfaction for forming a *prima facie* view under Section 26(1) 'is a tentative view at that stage' as opposed to a 'definite expression of the satisfaction recorded by the Commission' required to qualify the first condition for Section 33 stage. Such comparison between satisfaction is not of a comparative degree between Section 26(1) stage and Section 33 stage in every case. So, if in a particular case, the records before the Commission are sufficient to formulate/reach a satisfaction of a higher degree at the *prima facie* stage itself, higher than just a mere tentative or *prima facie* view, that does not place any burden on the Commission to have a much higher threshold than the already existing bar which is raised. As per the Hon'ble Supreme Court, satisfaction required at the *prima facie* stage is of a lesser degree wherein the Commission is not required to enter into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, directions for investigation can be passed. At that stage, basic facts informing about the existence of certain allegations along with a potential/likely harm to competition in the market are sufficient to warrant an investigation. Certainly, the existence of clinching evidence at *prima facie* stage would guide the Commission's discretion more judiciously, but to



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mandate the existence of clinching evidence at that stage would render the purpose of investigation infructuous.

92. Juxtaposed to this, at the interim relief stage, the Commission's satisfaction should be of a higher degree depicting a definite expression recorded by the Commission that a strong case is made out and that it is in the interest of free market and trade, necessitating interim intervention by the Commission. Thus, one of the primary reasons which weighs in the mind of the Commission while exercising its power under Section 33 of the Act is not merely the harm caused to a party seeking a relief under the said provisions, but also the likely harm that has been caused or can be caused to competition in the market if the impugned act/conduct is not restrained at the interim stage pending an inquiry. This, to the mind of the Commission, is the spirit of the preamble to the Act as well as of Section 18 of the Act thereof.
93. Notwithstanding the aforesaid, the Commission notes that in the present case, the facts before the Commission are more compelling than the *prima facie* stage, as are elucidated in detail in the ensuing paragraphs thus, meeting the higher threshold arguably required to fulfil the first condition envisaged under the *SAIL* judgment.
94. The Commission notes that in the *prima facie* order, it was observed that FabHotels and Treebo are not present on MMT-Go platform, while they earlier used to be. The Commission further opined that '*if this is a consequence of an agreement between OYO and MMT, which is also reported by media, to not list the closest competitors of OYO on the platform, it may potentially contravene the provisions of Section 3(4) of the Act*'.
95. It is now an admitted position that MMT-Go delisted FabHotels and Treebo from its online portals in June and April 2018 respectively, pursuant to its Agreement with OYO. Such Agreement allegedly conditioned delisting of these players from MMT-Go portals, for them being competitors of OYO during that relevant time.



96. Throughout the interim proceedings, MMT-Go disputed the relevant market delineated by the Commission at the *prima facie* stage stating that it competes with all channels for distribution of room inventories of hotels/accommodations, including direct bookings made through the hotel's own website; corporate sales; OTAs; offline travel agents; unorganized intermediaries such as coolies, taxi drivers, *etc.*; metasearch services such as Trivago and Trip Advisor; global distribution services such as Amadeus and corporate travel management companies *etc.* Such assertion may make some sense in a casual parlance of end-use substitutability for end-consumer looking for accommodation. However, in the context of a competition case, that too in platform markets, it neither satisfies the contours specified under the Act nor the competition dynamics of digital markets.
97. From competition standpoint, relevant market comprises all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of their characteristics, price and intended use. MMT-Go is essentially a digital platform catering to two sides or two sets of consumers— one that consists of consumers searching for hotels for booking/occupancy and the other that comprises hoteliers or hotel partners who use the services of these platforms to sell their hotel rooms. In case of platform markets, where the platforms may be serving many sets of consumers and may be having multitude of relationships with these consumers, the consumer-side for which the relevant market is being defined needs to be identified. Given that the allegations in the present case are primarily with regard to the hoteliers and franchising service providers like FabHotels and Treebo who depend upon intermediaries/OTAs for listing their hotels, the relevant market analysis needs to be carried out from their perspective. Thus, the relevant product market should include all alternatives available with such hotels/franchising service providers and the competitive constraints faced by the focal product *i.e.* the service provided by the MMT-Go in the present matter. Viewed from the competition lens, the Commission does not find that the various distribution channels argued by MMT-Go (*e.g.* direct bookings made through the



hotel's own website; corporate sales; offline travel agents; unorganized intermediaries such as coolies, taxi drivers, *etc.*; metasearch services such as Trivago, Trip Advisor *etc.*) to be constraining MMT-Go.

98. At the cost of repetition, the Commission reiterates the observations made in the *prima facie* order dated 28.10.2019 wherein it held that the market realities necessitate a *hotel to consider all the three booking channels, i.e. direct booking, offline booking through travel agents and booking through online travel agents are used simultaneously and not as substitutes to each other. Considering the growing importance of online platforms for visibility and discoverability of hotels, it is unlikely that in case of a small but significant increase in the commission rates by all platforms, such a significant proportion of hotels would move completely offline or to direct supply so as to make such an increase in commission unprofitable for a hypothetical monopolist. Moreover, the online mode of distribution through third party platforms, which provide the facility to search, compare and book at the same place, is characteristically distinct from the services that the offline mode such as travel agents provide. Thus, the Commission holds the view that the relevant market delineated for MMT-Go at the prima facie stage i.e. the 'market for online intermediation services for booking of hotels in India' does not require any change for deciding the interim relief applications. To hold otherwise, and to accept that OTAs are constrained by other distribution channels or that the hotels/franchisee service providers consider those distribution channels as substitutes to OTAs would be completely oblivious of the market realities.*
99. Further, the *prima facie* opinion of the Commission as regards the dominance of MMT-Go, in the relevant market, as expressed in the *prima facie* order does not require to undergo a change at this stage. There is nothing on record to suggest that MMT-Go does not enjoy such dominance in the relevant market or that any other OTA/competitor has emerged so as to pose any significant competitive constraint to it, as from the passing of such *prima facie* order. Rather, the conviction of the Commission is further strengthened by the recent global shift in the distribution



architecture including in India, with digital distribution channels growing at an unprecedented pace, especially post the outbreak of pandemic. This growth story is here to stay and is poised to gain further momentum going ahead. As consumers move online for shopping and booking hotels, it has become critical, more than ever before, for the other side of the market (*i.e.* the hotels/franchising service providers) to get visibility on OTAs to survive and be relevant.

100. As regards, abuse, with regard to the present interim relief applications, the Commission notes that MMT-Go has not denied having an agreement with OYO because of which FabHotels and Treebo were delisted from its online portals in June and April 2018, respectively. Rather MMT-Go has gone to the extent of saying that it will not hesitate from listing further hotel partners on its online portals as long as the same does not amount to breach of its contractual commitment with OYO. Thus, there is no denial to the fact of existence of such contractual commitment which led to FabHotels and Treebo's delisting from MMT-Go's portals. MMT-Go has made two pronged arguments—*firstly*, that listing on OTAs is not necessary for hotel/franchisee service provider. To make such argument, MMT-Go has relied upon the growth of FabHotels and Treebo on one hand and OYO on the other hand, during the period intervening 2016-2018, when the formers were listed on MMT but the latter was not. MMT-Go has argued that while OYO grew exponentially during this period, FabHotels and Treebo's growth in business, either in terms of inventory or revenue was nowhere near that of OYO which did not have access to OTA platforms. Though this argument sounds very attractive, there are compelling reasons for which the Commission finds it difficult to accept such an argument. There are various newspaper reports published during the end of 2017², *i.e.* around 2 months prior to OYO and MMT-Go announcing their commercial tie-up through a joint press statement³, indicating publicly a shift of

² Available at <https://inc42.com/buzz/oyo-hotel-aggregation-franchise/>, <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/oyo-changes-business-model-from-aggregation-to-franchise/articleshow/61989125.cms>

³ Available at https://s22.q4cdn.com/244830719/files/doc_news/FINAL-MMYT-OYO-Joint-Press-Release.pdf.



OYO from aggregation model to franchise model, to ‘reduce its operational costs and improve serviceability’. Thus, initially OYO seems to have started off as an aggregator, providing services somewhat similar to that of MMT-Go. However, it gradually started to move to a franchisee service provider model, thereby completely exiting the aggregation model by the end of 2017.⁴ Thus, the comparison made by MMT-Go between FabHotels/Treebo and OYO during 2016-2018 may not be appropriate. *Secondly*, MMT-Go has argued that by excluding FabHotels and Treebo, no discrimination has been caused as these players are neither comparable nor similarly placed with OYO, given the vast difference in their inventory base in comparison to that of OYO. This argument also, to the Commission’s mind, negates the argument of MMT-Go and goes in favour of FabHotels/Treebo. If FabHotels/Treebo were not viewed as competitors by OYO, there would not have been any reason why OYO would ask MMT-Go to agree to such a condition. Thus, the Commission observes, as stated in its *prima facie* order also, that FabHotels and Treebo were competing with OYO and operated in the same relevant market, at least at the time when exclusion was occasioned to them. Further, if the implication of MMT-Go’s argument is that FabHotels/Treebo were competitors of OYO at that particular time but not now, then also, harm being caused to them can be attributed to the exclusion/delisting event practiced by an arrangement between MMT-Go and OYO and the consequent foreclosure of the market.

101. The Commission notes that MMT-Go has objected to the assessment of the alleged delisting of FabHotels and Treebo from MMT-Go’s platform under Section 4 of the Act stating that the said allegation can only be assessed under Section 3(4) of the Act since the investigation has been directed into the effects of OYO Agreement under Section 3(4) of the Act. Since ‘inquiry’ into the OYO Agreement has been directed under Section 3(4) of the Act, the Commission is expected to record its satisfaction (for purposes of Section 33 of the Act) as regards the OYO Agreement only in relation

⁴ Available at <https://www.medianama.com/2017/12/223-oyo-exits-from-hotel-aggregation-model-report/>.



to Section 3(4) of the Act, and not under Section 4. Further, it has been argued that if the grievance of FabHotels has arisen from a contractual obligation that has been imposed on Go-MMT by OYO, it is unimaginable that the OYO Agreement will be susceptible to scrutiny as unilateral conduct on the part of Go-MMT under Section 4 of the Act. The Commission does not find much merit in this argument for two reasons—*firstly*, the provisions of Section 3(4) and Section 4 of the Act are not mutually exclusive. There can be instances where the same conduct can contravene the provisions of Section 4 of the Act as well as Section 3(4) of the Act, the former being applicable in cases where one of the parties to the agreement is dominant, and the latter when at least one of the parties has significant market power so as to result in such agreement which has a potential to cause AAEC. *Secondly*, MMT-Go has been *prima facie* found to be dominant in the order passed under Section 26(1) of the Act and has been ordered to be investigated under Section 4 as well as under Section 3(4) of the Act. Specifically, as regards the impugned commercial arrangement/agreement between OYO and MMT-Go, since they were found to be vertically related, the Commission also invoked Section 3(4) of the Act. The following observation from the *prima facie* order of the Commission dated 28.10.2019 is relevant in the present context:

“Para 58. [...] While MMT has been prima facie held to be dominant in the ‘market for intermediation services for booking of hotels in India’, OYO has been prima facie found to be a significant player in the ‘market for franchising services for budget hotels in India’. Thus, whether the commercial agreement between OYO and MMT entails preferential treatment to OYO and consequent exclusion of Treebo, Fab hotel and any other hotel chain and if so, the effect of the same on competition merits investigation.”

102. Thus, even while contemplating ordering an investigation into the impugned arrangement/agreement between OYO and MMT-Go, MMT-Go’s dominant position



was not excepted from the consideration of the Commission for such an assessment. Further, the Commission cannot be oblivious to the fact that 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.

103. Thus, the Commission is of the view that the first element envisaged under the *SAIL* judgment that a strong *prima facie* case that an act in contravention of the stated provisions has been committed and continues to be committed is being met. Before the Commission moves on to the second element/requirement envisaged under the said judgement, the Commission finds it imperative to deal with another argument of MMT-Go which was vehemently argued by it throughout the proceedings. MMT-Go has contended that the injunctive relief sought by FabHotels and Treebo is mandatory in nature and argued that the legal standard required for grant of a ‘mandatory’ injunction is higher than the legal standard required for the grant of a ‘prohibitory’ injunction. MMT-Go also relied upon Hon’ble Supreme Court’s observation in *Dorab Cawasji Warden v. Coomi Sorab Warden* [(1990) 2 SCC 117] wherein it was held that while granting interim injunctions the Court will have to satisfy itself that the applicant/plaintiff has a “*strong case for trial*” and that this threshold “*shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction*”.

104. It is an accepted position that Commission is not an adjudicatory body akin to courts, nor are the rules of procedure or evidence strictly applicable in relation to the proceedings under the Act in the same manner as they apply to the civil courts. The discretion of the Commission to allow or not to allow interim relief lies within the narrow compass of the principles laid down by the Hon’ble Supreme Court under the *SAIL* judgment which is the guiding light for the Commission. Thus, the context in which mandatory and prohibitory are being understood while deciding interim relief claims in civil law cases may not apply *mutatis mutandis* to competition cases,



particularly as the proceedings before the Commission are *in rem* and the reliefs, if any, are granted bearing in mind the process of competition which the Commission is mandated to protect under the Act having regard to all the stakeholders in the market, not just for the benefit of a particular party/parties before the Commission in a case.

105. Against the aforesaid backdrop, the Commission observes that the relief being sought by FabHotels and Treebo is relisting of their branded properties/hotels, and independent hotels which are availing their other services, on the MMT-Go's online portals. On a cursory glance, this may appear to be in the nature of a mandatory injunction when seen from the perspective of benefits which may be passed on to FabHotels and Treebo through relisting of their partner hotels by MMT-Go. However, the Commission essentially is a market regulator entrusted with the duty to ensure fair competition in the market. In performing such overarching role as a market regulator, the Commission is not concerned about the individual competitors but of the process of competition. The acts/conducts in competition law cases often affect the market on a continuous basis. An act of exclusion, especially, may continually distort the market and from that perspective the act is still in existence. So, when the Commission prohibits/restrains a party from continuing an act/conduct that has *prima facie* affected the market adversely, it cannot be compartmentalised as being in the nature of a mandatory relief, merely because such prohibition may entail a positive action on the part of the party against whom such relief has been sought. Specifically, in the facts of the present case, the act being complained of is the termination of listing arrangement which FabHotel and Treebo had with MMT-Go pursuant to the OYO Agreement. The Commission is *prima facie* satisfied, to a level of satisfaction as envisaged by *SAIL* judgment and which satisfaction has already been recorded in clear terms *supra*, that such act/conduct was committed and that it continues to be committed.

106. The Commission observes that the second element/requirement envisaged under *SAIL* judgment is the balance of convenience or the necessity condition. As regards this condition, the Commission is convinced from the contentions made by FabHotels and



Treebo that the balance of convenience lies in their favour and that as such MMT-Go will not be put to much inconvenience even if they have to provide access to these players on its online portals. Determination under this head is comparative in nature whereby the Commission is mandated to compare the inconvenience to the claimant/applicant, if the interim relief is refused, *vis-à-vis* the inconvenience caused to the Opposite Party (*i.e.* MMT-Go in this case) if such relief is granted.

107. The Commission, at the outset observes that MMT-Go is a dominant platform, and as alleged a gateway for online hotel booking, which constitutes an important access route for independent hotels to reach the end-consumers. While the non-accessibility may significantly hamper the online visibility of the claimants *i.e.* FabHotels and Treebo but more importantly of the associated budget hotels that avail of the franchise services of FabHotels and Treebo, providing such access does not seem to cause any significant comparative hardship to MMT-Go as such. As argued by the claimants, MMT-Go will earn revenue in the form of commission on every consummated booking of FabHotels or Treebo branded property through its portals, without incurring any significant costs for allowing such access. The Commission does not find much weight in MMT-Go's argument regarding the inconvenience being apprehended by it regarding the scalability of its IT resources to allow access to FabHotels and Treebo. MMT-Go's investor presentation, which was also relied upon by Treebo, vouches about their platform having higher degree of reliability, security and scalability. Further, given the insignificant share of the IT infrastructure cost involved in providing access on digital platforms in its overall cost, especially considering the inventory owned by FabHotels and Treebo [around 600+ and 511 respectively, as per their submissions] and inventory being allegedly managed by MMT-Go [approximately 72000 as per the submissions made by FabHotels, which has not as such been countered by MMT-Go], the Commission unhesitatingly holds that the balance of convenience lies in favour of the claimants in this case.



108. The third element of the *SAIL* judgment states that the Commission should be satisfied that *‘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’*. Throughout the proceedings, MMT-Go argued that FabHotels and Treebo are not being ousted from the market because of delisting and since they are able to survive and grow, they are not suffering any irreparable harm/injury. Such interpretation ignores the second limb of the condition envisaged by the Hon’ble Supreme Court’s observation, which to the Commission’s mind is more appropriate for any market regulator casted with the role to ensure healthy and fair competition in the markets. The third condition laid down by the Hon’ble Supreme Court has the following two sub-conditions, disjuncted by an ‘**or**’ in between, implying that fulfilment of either of them suffices the third criterion mentioned therein:

- a) *there is every likelihood that the party to the lis would suffer irreparable and irretrievable damage, **or***
- b) **there is definite apprehension that it would have adverse effect on competition in the market**

(emphasis supplied)

109. Further, the following observation of Hon’ble Supreme Court clarifies that the second limb of the third element/condition was purposive and, thus, not without judicial intention:

Wherever, the applicant is able to satisfy the Commission that from the information received and the documents in support thereof, or even from the report submitted by the Director General, a strong case is made out of contravention of the specified provisions relating to anti-competitive agreement or an abuse of dominant position and it is in the interest of free market and trade that injunctive orders are called for, the Commission, in its discretion, may pass such order ex parte or even after issuing notice to the other side.



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110. Thus, the Commission is equally guided by both the sub-conditions and fulfilment of any of these would suffice the third element/condition. As stated earlier also, the explosion of online commerce has changed the dynamics of consumer preferences and transactions. As a market regulator, it is thus imperative that the competition regulator ensures that all stakeholders get an opportunity to compete on merits and get a fair chance to be part of digital commerce.
111. The recent upsurge in online search, booking and shopping has changed the distribution architecture for sellers and service providers, underscoring the importance of digital distribution as an essential means for reaching the end consumers. The online marketplace platforms, in particular, have emerged as key access routes for sellers/service providers to reach consumers who are increasingly shopping, searching or booking hotel rooms online. The search and comparison functionalities of the intermediary platforms, their reach and scale, and the network effects that work in their favour, lead to huge consumer footfalls on these platforms thereby making presence on these platforms critical for the visibility and competitive ability of sellers/service providers.
112. Recent reports and studies (national as well as international) strengthen this conviction by showing how a few large platforms can control online distribution because of a variety of factors, including strong network effects in the digital environment, and their ability to access and accumulate large amounts of data. These characteristics equip these large platforms with such market power that their actions can influence and affect competition between business users significantly. The Commission further observes that the market power held by these digital platforms has accentuated due to the pandemic because of the changing landscape of customer preferences and nature of transactions, making traditional businesses increasingly dependent on a limited number of large online platforms, further contributing to the bargaining power asymmetry between large online platforms on the one hand and their users on the other.



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113. Thus, the Commission is of the view that denial of access to a dominant online intermediation can be lethal to the functioning of businesses who rely on such intermediaries to reach the end-consumers. MMT-Go has argued that FabHotels and Treebo have been able to survive and rather grow despite being delisted from its portals and since their exit is not imminent or real, no irreparable injury is being caused to them. The Commission finds the actual extinction of a player from the market a rather strict standard to gauge an effect of denial of market access on competition. 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 denial of market access under the provisions of the Act.

114. The Commission observes that MMT-Go had also argued that FabHotels and Treebo are not comparable with OYO in terms of their inventory base. As already analysed by the Commission, OYO started off as an aggregator and operated in such position, at least partially, till the end of 2017. Thereafter, in the span of 2-3 months' time, *i.e.* by Feb-March 2018, MMT-Go entered into exclusive listing arrangement with OYO and issued termination notices to FabHotels and Treebo. Thus, the actual time period during which these players have competed with OYO in the '*market for franchising services for budget hotels in India*' is too less to reach any definite conclusion on how effective competitors they could have been. The counter-factual to carry out such an analysis is absent given the exclusion occasioned to FabHotels and Treebo pursuant to the arrangement MMT-Go had with OYO. Suffice to say, however, that they were the only effective players in the said relevant market and OYO possibly considered them as competitors which perhaps explains the motivation of it asking for their exclusion from MMT-Go portals in the first place. Further, as claimed by Treebo and FabHotels, there has been no credible entry in the market since these players have been delisted. Further, the impugned exclusion has not only affected FabHotels and Treebo branded hotels, but also those budget hotels which were availing some logistic support (*e.g.* as in the Superhero programme) from them, while operating as independent hotels. Such



impugned arrangement between MMT-Go and OYO may leave these budget hotels with no option but to necessarily engage with OYO, if they wish to avail franchisee services or any other logistics support from a consumer-recognised franchise chain *inter alia* for quality improvement or branding purposes, without losing the visibility of their properties on the largest online booking platform in the country. Thus, as the facts appear before the Commission, the impugned exclusion under the Agreement has the dangerous probability to irreversibly alter the competitive landscape, especially in the franchisee budget hotel downstream market and may tip the market in favour of OYO causing irreparable harm to competition. A continued operationalisation of this exclusive agreement will therefore, compel all independent hotels seeking franchise services, for improving their brand recognition and for the purpose of signalling to the consumer the unobservable feature of quality to forcibly tie up with OYO. Any other franchisee arrangement with competitors like FabHotels and Treebo would delist them from the dominant intermediary *i.e.* MMT-Go reducing their visibility and footfalls. It becomes a Hobson's choice in as much as the '*market for franchising services for budget hotels in India*' is concerned. Such a likely outcome cannot be ignored and hence requires an immediate redressal. In *winner takes all* platform markets, if the impugned conduct is not based on the merits, eliminating such anti-competitive behaviour at the earliest assumes utmost importance. Network effects coupled with even small actions by the platforms may exclude and marginalize rivals, and further strengthen these effects that may be difficult to dilute at a later stage. Any remedy at that stage will be too little and too late as the suppliers' side of the market, *i.e.* the franchisee service providers, can be potentially eliminated due to the alleged anti-competitive conduct.

115. The Commission notes that MMT-Go had vehemently argued that Treebo and FabHotels have primarily suffered because of Covid-19 and not because of delisting and given such scenario, granting interim relief would mean that any hotel chain/standalone hotel which has suffered on account of the Covid-19 pandemic would claim listing on the MMT platform as a matter of right and MMT would lose control



over the selection made available on the platform. At the outset, the Commission is of the view that the assessment cannot be oblivious of the prevailing market circumstances as they exist at the time when claim for interim relief is being adjudicated upon. Covid-19 has undoubtedly affected the businesses and market participants in the hospitality segment in numerous ways. As can be gathered from the claims made by FabHotels and Treebo and also the data furnished by them, the delisting already affected their growth adversely, even before the outbreak of pandemic and weakened their position as credible competitors in the relevant market. Covid-19 further exacerbated the situation given the sudden shift in the distribution architecture with digital distribution channels gaining unprecedented relevance during the pandemic, as elucidated by the Commission in earlier paras. With the change in consumer preferences to online booking of hotels, it has become critical, more than ever before, for the budget hotels and those as franchisee service providers to get visibility on OTAs to effectively survive. Thus, lack of access to the largest and dominant OTA is likely to cause severe competitive injury particularly in the wake of the pandemic. Further, MMT-Go's claim that the hospitality sector is on the path of recovery from the Covid-19 shock makes it even more imperative for a competition regulator to ensure that level playing field in the downstream market is guaranteed through accessibility of indispensable channels of distribution, lest it may lead to irreparable harm to competition occurring before the conclusion of its investigation and subsequent proceedings. Such relief is necessary to ensure the enforceability and efficiency of the future decisions by the Commission following the inquiry/investigation.

116. The Commission is conscious of the contractual freedom of the parties and towards that end, it is not the Commission's objective to interfere with such freedom unless such freedom leads to anti-competitive outcomes. This denial of access emanates from an exclusionary and mutually beneficial agreement between MMT-Go and OYO and not from any non-compliance of contractual commitments on part of FabHotels and Treebo. Had it been a case that FabHotels and Treebo were denied access on MMT-



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Go's platforms because of breach of any of their commitments under their listing agreements with MMT-Go, the Commission would have been hesitant to allow any relief to them. However, as the records and facts exist before us, such denial has been admittedly occasioned because of the exclusionary contractual commitment MMT-Go has with OYO. Given this scenario and the market power of both the parties to the agreement, continuation of such an exclusionary agreement may change the competition landscape tipping the markets in favour of MMT-Go and OYO, causing an irreparable harm to competition. Timing is crucial in these dynamic markets as the harm to competition will be irrevocable. It would be difficult to take corrective actions as inter-platform competition would not develop and the competition harm done to the downstream market of franchisee service providers cannot be undone. Thus, the Commission feels no hesitation in restraining MMT-Go from indulging in this exclusionary act.

117. The Commission is thus, convinced that the conduct of MMT-Go in delisting and continuing to delist franchisee service providers, specifically FabHotels and Treebo, as well as the budget hotels which were availing some logistic support from them, has affected competition in the market by denying access to an important channel of distribution through foreclosure. It is in the interest of free market and trade that injunctive orders are called for in this matter and the Commission finds it a fit case to exercise its discretion to allow interim relief in the matter, till further orders. The Commission notes that FabHotels and Treebo have primarily prayed for a relisting on the MMT-Go portals for attaining visibility. Accordingly, MMT-Go is directed to allow FabHotels and Treebo to be listed on its online portals.
118. As regards the objection made by MMT-Go for the alleged delay on the part of FabHotels and Treebo in approaching the Commission for seeking interim relief, the Commission notes that it, having been otherwise convinced based on the material on record that the criteria laid down by the Hon'ble Supreme Court in *SAIL* judgment is met, need not be constrained by any alleged delay on the part of any party seeking



interim relief, as long as the principles enshrined therein have been amply demonstrated to exist at the time of seeking such relief, to the satisfaction of the Commission. As mentioned earlier also, the Commission is guided by the wider interest of ensuring fair and competitive markets while deciding competition matters which are neither in the nature of *lis* before a court nor an adjudication in *personam* of the rights of the parties. Towards that end, it would not be in the interest of justice to let the market suffer because of the alleged delay, if any, on the part of any party. Further, the provisions of Section 33 of the Act have to be read and understood in the context of the markets which are dynamic in nature, more so in the context of digital markets.

119. MMT-Go is directed to comply with the interim directions stated in para 117 *supra* with immediate effect of the receipt of this order.
120. Before parting with this order, the Commission observes that FabHotels and MMT-Go filed various submissions on which they claimed confidentiality. Some of those submissions have been relied upon by the Commission to reach the present decision. For the sake of completeness and in the interest of justice, such submissions, thus, have not been granted confidentiality. The rest of the documents/information on which confidentiality has been sought by FabHotels and MMT-Go is allowed, subject to Section 57 of the Act, at this stage. The confidentiality application of the parties is hence disposed of accordingly.
121. The Secretary is directed to send a copy of this order to the parties to the present proceedings for their information and compliance. A copy of this order is directed to be sent to the DG, along with the applications and submissions received from the parties. Further, in view of the peculiar facts and circumstances of this case, the DG is recommended to expedite the investigation and furnish the investigation report as soon as possible.



122. Nothing stated in this order shall tantamount to a final expression of opinion on the merits of the case and the DG is directed to conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

123. It is ordered accordingly.

-sd/-
(Ashok Kumar Gupta)
Chairperson

-sd/-
(Sangeeta Verma)
Member

-sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi

Date: 09/03/2021