

Uber-Meru COMPAT Order A New Beginning for Aggregator Based Radio Taxi Services

Introduction

The Competition Commission of India (“**CCI**”) has witnessed competition related issues pertaining to aggregator¹ based radio taxi business across different states in India. Most of the issues pertain to various anti-competitive practices vis-à-vis predatory pricing, unfair conditions etc. One such case that has gained limelight recently is “*Meru Travels Solutions Private Limited v. Competition Commission of India & Ors*”², wherein Meru Travels Solutions Private Limited (“**Informant**” or “**Meru**”) alleged that Uber India Systems Pvt. Ltd. along with its affiliate companies (“**Uber**”) had engaged in an anti-competitive business model that was not in consonance with the Competition Act, 2002 (“**Act**”).³

This newsletter seeks to analyze the order dated December 7, 2016 and the interpretations given by the Competition Appellate Tribunal (“**COMPAT**”) for the aforementioned case in relation to the Delhi National Capital Region or NCR.

1. Facts

In 2015, Meru had filed information under Section 19(1)(a)⁴ of the Act before the CCI alleging that Uber had adopted an anti-competitive business model while entering India. The specific allegations levelled against Uber were that it gave unreasonable discounts which led to abysmally low fares and, consequently, predatory pricing⁵ to its passengers and drivers to oust its competitors from the market, thereby abusing its dominant position under Section 4 of the Act.

Meru stated that before the commencement of Uber’s operations the prevailing market price for radio taxis in Delhi NCR was approximately INR 23 per km (\$0.33).⁶ Subsequently, Uber launched its services from INR 20 per km (\$0.29) and progressively reduced it further to INR 7/12 per km (\$0.10/\$0.17) depending upon the services availed by a customer such as carpool, premium or luxury cabs. Uber was allegedly engaging in predatory pricing by providing enormous incentives targeted at both the passengers and drivers. The former would get benefit of substantial discounted price during the scheduled ride, while the latter would get paid by the passengers and, in addition, get a bonus from Uber upon attaining certain targets. Such practices led to an increase in the market share of Uber to almost 50% per trip basis, thereby

¹ Aggregator is an electronic commerce business model where an entity, that does not produce any item collects information on goods and services from several competing sources at its website.

<http://www.businessdictionary.com/definition/aggregator-model.html> (Last accessed on December 19, 2016).

²Appeal No. 31/2016

³ In March 2016, PSA had covered a similar case confined only to Kolkata.

⁴Under Section 19(1)(a), the CCI may inquire into any alleged contravention of Section 3(1) or Section 4(1) on receipt of any information from any person, consumer or their association or trade association.

⁵Under Section 4, Explanation (b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

⁶USD 1 = about INR 68.

declining Meru’s market share from 18% in December 2013 to 11% in September 2015. The Informant stated that Uber was spending approximately USD 885 million in order to generate revenues of USD 415 million. Uber’s loyalty inducing incentive schemes were likely to have an exclusionary effect in the relevant market to the detriment of the competitors who may not be in a position to match the same. Based upon a September 30, 2015 report (“**Report**”) by New Age Tech Sci Research Private Limited (“**Tech Sci**”) it concluded that according to various parameters, Uber had attained a share of 50.1% in Delhi NCR. Meru even gave due regard to the size, resources of the enterprise, dependence of customers on the enterprise in consonance with Section 19(4)⁷ of the Act. It was further alleged that incentives offered by Uber to its drivers, partners, customers and the losses incurred by it out of every trip was done to create a “network effect” thereby eliminating competition from the market. A network effect arises where the value of a product or service increases with the number of other customers using the same product or service. Meru also highlighted the impact of Uber’s exit from China, and its need to enter another fast-growing market like India. As a consequence, it highlighted Uber’s business compulsions and an ability to eliminate local competition with considerable financial resources at its disposal.

In its defence, Uber stated that as a prerequisite when an abuse of dominance is examined, the dominance ought to be proved. Its position was:

- The Report relied upon by the Informant lacked credibility as the representatives of Uber were not interviewed during its compilation, thereby questioning its very authenticity.
- The baseline methodology on the basis of which the Report was compiled was open to challenge as it portrayed Uber having the majority market share on various parameters.
- The gap between the Report i.e. the date when it was issued (September 30, 2015) and when it was used (October 9, 2015) seemed too little for the Informant to have reviewed it in-depth and then rely on it tangibly. However, the rationale of this position seems to be misplaced as, in our view, it is perfectly possible to examine a report within that span of a week.

2. The Findings

2.1 CCI Order

In its order dated February 10, 2016 (“**Impugned Order**”), CCI was unable to find a *prima facie* case and, as a result, it closed the investigation. Its conclusion of absence of a *prima facie* case was based on different reasons, including the following:

- The credibility of the Report was in question as none of the personnel from Uber were interviewed;
- The finding in the Report was contrary to another report of 6Wresearch⁸ as the data on market share was considerably different and this, in turn, weakened Meru’s case;

⁷Section 19(4) stipulates the criterion to be considered while determining the threshold issue of a dominant position. This includes amongst others the market share, economic power of an entity, its size and resources etc.

⁸The report had been considered in another case “*Fast Track Call Cabs Pvt. Ltd. v. ANI Technologies*”.

- CCI's view was that the “relevant geographic market”⁹ was Delhi and not Delhi NCR, (which includes areas that come within three neighbouring states of Haryana, Uttar Pradesh and Rajasthan) since “transport” is a state subject under the Constitution and the “relevant product market”¹⁰ of radio taxi service was regulated by the state transport authorities.

CCI was conscious that the findings of the two conflicting reports related to Delhi NCR and not simply Delhi, and it was unlikely that the market shares of the various radio taxi companies would have changed much based on the different parameters. The CCI was of the view that despite the deficiency in the two reports the radio taxi service market in Delhi was a vibrant and dynamic one with many major companies operating in it and with fluctuating market share figures, Uber did not appear to be in a dominant position. Therefore, it decided to close the matter under Section 26(2)¹¹.

2.2. COMPAT

Aggrieved by CCI's Impugned Order, Meru preferred an appeal before COMPAT where it stated that delineating the “relevant market”¹² was crucial in order to determine if the relevant entity was dominant in that market. COMPAT questioned the stand taken by CCI on the “relevant geographic market” and its restriction to Delhi. It took the position that it should have been Delhi NCR since radio taxis had tourist agency permits and were not constrained to operate within a city's municipal limits. Furthermore, in view of the appellate authority, CCI did not have a consistent approach while reviewing the conflicting reports of Tech Sci and 6Wresearch, particularly since both the reports provided contrary viewpoints, it should have been reason enough to order an investigation into the matter.

COMPAT ruled that in order to decide on the issue of “dominance” looking at only the market share would be futile and, therefore, it should be re-examined from the perspective of Section 19(4) to get an overall picture in terms of impact of the funding, related global developments, network expansion etc. Although COMPAT did not hold Uber to be in violation of the Act; however, the size of the discounts and incentives provided by them did raise concerns which were strong enough for them to stress that an investigation by the DG was essential.

3. Analysis

COMPAT, in its well reasoned order, has taken a different stance from the CCI in order to approach an issue which has agitated this sector in recent years. It was wise of COMPAT not to confine the term “dominance” to the market share only, but to include other

⁹As per Section 2(s) of the Act a “relevant geographic market” means a market comprising of the area in which the conditions of competition for supply of goods and services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.

¹⁰Under Section 2(t), “relevant product market” means a market comprising of all those products and services which are regarded as interchangeable by a consumer basis its characteristics, prices and intended use.

¹¹ Section 26(2) of the Act states that when on receipt of information under Section 19, the CCI forms an opinion that no prima facie case exists, it shall close the matter and pass such orders as it may deem fit.

¹² Under Section 2(r) “relevant market” means the market which may be determined by the CCI with reference to the relevant product market or the relevant geographic market or with reference to both.

parameters stated in Section 19(4) that may help in determining the complexity involved and, accordingly, get an overall perspective. In a complex business model of the aggregator based radio taxi service, aspects such as funding, global developments, prospects of future network expansion can be factors that can cumulatively affect competition. Given the speed with which Uber managed to establish an extensive network in a short span of time, that too with a considerable customer base, the question was looming large whether their business model will lead to a negative network effect on the competition.

As stated previously, to evaluate the issue of abuse of dominance under Section 4 of the Act, the threshold issue is a finding that the enterprise concerned holds a dominant position. Explanation (a) of Section 4 states that a “dominant position” is one of strength in the relevant market in India such that the enterprise is able to operate independent of competitive forces prevailing in the relevant market. Where an enterprise abuses its dominance it results in an appreciable adverse effect on competition in the relevant product and geographic market which, in turn, is completely contrary to the ethos of the Act whose key objective is to ensure healthy competition for the benefit of the consumer. Providing enormous discounts may not necessarily amount to an abuse of dominance, unless it is proved that the dominant entity was, directly or indirectly, resorting to abusive practices like unfair and discriminatory instances as stated under Section 4 of the Act.

Conclusion

COMPAT’s order, in essence, reversed CCI’s finding to the extent that a prima facie case was made out and the DG should be directed to conduct an investigation. It did not rule on abuse of a dominant position by Uber, rather asked CCI to probe Uber’s practices. It remains to be seen whether Uber’s purported efforts of offering discounts and incentives will tantamount to creation of a monopoly, with an intent to eliminate other competitors from the market. Relying upon Uber’s market share, COMPAT concluded that (apart from Meru) there are other smaller taxi operators who could stand to lose by the potential anti-competitive conduct of larger companies. Once CCI concludes its investigation and, depending on the findings, chances are a new paradigm may emerge for this sector.

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