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## Supreme Court of India Upholds Investigation against Uber

Basu Chandola (Jindal Initiative on Research in IP and Competition (JIRICO)) · Wednesday, September 18th, 2019

The Hon'ble Supreme Court of India has dismissed an appeal[1] filed by Uber India Systems Pvt. Ltd. ('**Uber**') against an order of the erstwhile Competition Appellate Tribunal ('**COMPAT**') wherein the COMPAT had ordered an investigation into allegations of abuse of dominance against Uber in the region of NCR. The Hon'ble Supreme Court has observed that on the facts of the case, it would be very difficult to say that there is no *prima facie* case under Section 26(1) as to infringement of Section 4 of the Competition Act, 2002 against Uber.

### Proceedings before the CCI

The information[2] was filed by Meru Travel Solutions Pvt. Ltd. ('**Meru**') alleging that Uber was engaging in predatory pricing by offering huge discounts, in addition to the already reduced tariffs to customers and unreasonable high incentives to drivers to keep them attached to its network. The Commission delineated the relevant market to be the 'market for radio taxi services in Delhi' based on its previously decided cases on radio taxi services. The informant had relied on a TechSci report to establish dominance of Uber in the market. The Commission observed that the TechSci report was not reliable as the Uber group was not interviewed during the collection of data and that another research report with contrary result was received by the Commission in another case.

The Commission observed that there existed stiff competition, at least between Ola and Uber, with regard to radio taxi industry in Delhi. The Commission further observed that the fluctuating market shares of different competitors showed that the radio taxi service market in Delhi was competitive in nature and that Uber was not holding a dominant position in the relevant market. The Commission therefore closed the case under section 26(2) of the Competition Act, 2002 ('**Act**').

### Proceedings before the COMPAT

Meru filed an appeal[3] under Section 53B of the Act against the order passed by the Commission. The COMPAT observed that while the information suggested Delhi NCR to be the relevant market, the Commission considered Delhi as the relevant market on

the basis of settled cases wherein the Commission had held that the conditions of competition in radio taxi services market are homogeneous only in a city/ State. The COMPAT observed that the Commission had erred while delineating the geographical market. It was observed that the distinction made by the Commission in relation to the region of Delhi and NCR did not exist in practical sense or regulatory sense. The COMPAT observed that as far as the consumer were concerned; a seamless movement between two points within the NCR was a more pragmatic way of looking at any transport regulation as customers are not affected by political demarcations. The COMPAT also observed that taxis such as Uber and Ola use tourist taxi permits which are not constrained to operate within municipal limits. Therefore, the COMPAT observed that the relevant market for the case must be the market for 'radio taxi service in Delhi NCR'.

The COMPAT further opined that the TechSci Report had made certain statistical reporting which had not been challenged in substantive terms by the respondents except by raising doubts about the credibility of the report. Since the objective of Section 26(1) is to formulate a *prima facie* view, the information along with material and facts made available should have been enough for the Commission to formulate an opinion. Further, the fact that two reports with contrary results were being referred could have been a good reason for the Commission to order an investigation to reach a decision on a matter which has attained significant interest in the Indian market place.

The COMPAT further observed that the allegations made by the informant should be seen in the context of overall picture as it exists in the radio taxi service market in terms of status of funding, global developments, statements made by leaders in the business, the fact that aggregator based radio taxi service is essentially a function of network expansion and there was adequate indication from the respondent that network expansion was one of the primary purpose of its business operation. The COMPAT observed that though it could not be said definitively that there was an abuse inherent in the business practices adopted by operator such as Uber but the size of discounts and incentives show that there are either phenomenal efficiency improvements which are replacing existing business models with the new business models or there could be an anti-competitive stance to it.

The COMPAT therefore directed the DG to conduct an investigation into the allegations contained in the information filed by the Meru and submit report to the Commission within the period prescribed under the Act.

### **Order of the Supreme Court of India**

Uber filed an appeal before the Hon'ble Supreme Court of India against the order of the COMPAT. The Hon'ble Court observed that there was no need to interfere with the investigation as it would be very difficult to say that there was no *prima facie* case. Reliance was placed on the statement in the information wherein it was stated that Uber was losing Rs.204 per trip in respect of the every trip made by the cars of the fleet owners, which did not make any economic sense other than pointing to Uber's intent to eliminate competition in the market.

The Hon'ble Court observed that 'Dominant position' as defined in Explanation (a) of Section 4 refers to a position of strength, enjoyed by an enterprise, in the relevant market, which

1. enables it to operate independently of the competitive forces prevailing; or
2. is something that would affect its competitors or the relevant market in its favour.

The Court further observed that if a loss is made for trips made, Explanation (a)(ii) would *prima facie* be attracted inasmuch as this would certainly affect the appellant's competitors in the appellant's favour or the relevant market in its favour.

On the basis of the aforementioned observations, the Hon'ble Court dismissed the appeals stating that there was no need for it to interfere with the order made by the COMPAT.

### **Impact of the decision on future cases on predatory pricing**

It has been suggested that the judgment flips Section 4 on its head by requiring the assessment of the conduct of a party to determine whether it enjoys a dominant position or not.<sup>[4]</sup> Rather than first assessing the dominance of the enterprise based on factors enlisted in Section 19(4) of the Act, the Hon'ble court has merely observed the behavior relating to pricing to determine dominance. Therefore, dominant position is being assessed on the basis of ability of the enterprise to offer discounts, rather than considering the market structure and other factors as a whole. This approach may lead to the creation of a dangerous precedent that could spell the end of deep discounting strategies by new entrants.<sup>[5]</sup>

### **Author's comments**

The author feels that more clarity is required on this decision to exactly understand how the new approach has to be undertaken in further cases or if there is any new approach. The author feels that the explanation to section 4 read with section 19(4) provides a very clear method of assessing dominance in a relevant market. An approach of assessment of dominance without considering the factors enlisted in section 19 may not be appropriate and may not fit into the existing framework of the Act. Also, pricing in platform market should be viewed differently due to the existence of network effects and the Hon'ble Court must have considered the same in its decision. However, this appeal only had to decide the validity of the ordering of the investigation and this might be the reason that the Hon'ble Court did not analyze the issues of dominance or abuse in depth. The author hopes that either a clarification order by the Hon'ble Court or a future decision of any of the adjudicatory authorities may shed light on the observations in this case soon.

[1] Uber India Systems Pvt. Ltd v Competition Commission of India, Civil Appeal No. 641 of 2017

[2] In Re: Meru Travel Solutions Private Limited (MTSPL) v Uber India Systems Pvt. Ltd., Case No. 96 of 2015

[3] Meru Travels Solutions Private Limited v Competition Commission of India, Appeal No. 31 of 2016

[4] Aditya Gupta, “Supreme Court flips abuse of dominance jurisprudence in India”.

[5] Ganesh Khemka and Madhavi Singh, “Uber versus CCI: the end of deep discounting in India?”

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