

Meru Travel Solutions Private Limited vs. Uber India Systems Private Limited and Ors

Through this monthly publication, CUTS International intends to undertake independent examination of relevant competition cases in India (on-going as well as decided). The objective is to provide a brief factual background of the facts of relevant cases, followed by an analysis of the predominant issues, therein. This publication will expectantly help readers to better comprehend the evolving jurisprudence of competition law in India.

The issues have been dealt in a simplistic manner and important principles of competition law have been elucidated in box stories, keeping in mind the broad range of viewership cutting across sectors and domains. The purpose of this publication is to put forward a well-informed and unbiased perspective for the benefit consumers as well as other relevant stakeholders. Additionally, it seeks to encourage further discourse on the underlying pertinent competition issues in India.

Executive Summary

Disruptive technologies and innovations have tremendously impacted economies at a global level. What seemed unimaginable in the past decades has now become inevitable and ubiquitous. Not only have disruptive models substantially changed the market dynamics of nearly every sector, they have also constantly tested (and are still testing) the limits of the established regulatory regimes.

Remarkably, the global economy has witnessed the rise of disruptive technologies and innovative business models, which have considerably challenged the way in which conventional businesses function. The novel and innovative market entrants have transformed the traditional business landscape in a major way for times to come.

One such sector, which has been the subject of disruption across the globe is local transportation, mainly due to the growing prominence of online taxi aggregators, such as Uber, Didi, Ola, Lyft, etc. Out of all the taxi aggregators and Transportation Network Company (TNCs), which currently provide services to consumers, Uber is by far the most popular and has shown enormous growth, in short span of time.¹ With its presence in 565 cities across the globe, Uber is one of the leading TNCs in the world and it connects drivers offering rides and passengers seeking them online through Global Positioning System (GPS) enabled smartphones. Due to its unique business mode enabling people to drive their cars as taxis (tapping excess and dormant capacity)², enormous size and global presence, Uber has been under the radar of incumbent taxi service providers owing to direct competition to their businesses.

With growing prominence of Uber, anti-competitive allegations also emerged and the company's business model has been challenged in several jurisdictions. Complaints of anti-competitive behaviour against Uber across jurisdictions (apart from other cases based on labour, safety and regulatory issues) were based on several grounds (ranging from price fixing to abuse of dominance). For example, a federal antitrust lawsuit was filed in the US District Court, Eastern District of Pennsylvania on grounds of attempted monopolisation;³ allegations of predatory pricing were levied by regional taxi companies with the Competition Commission of South Africa⁴ *et. al.*

India is not an exception to such complaints. In 2015, one of the taxi service providers (Meru) filed a complaint against Uber with the Competition Commission of India (CCI). The basic allegation levied against Uber was that it abused its dominant position in Delhi-National Capital Region (NCR) by pricing its services below cost (predatory pricing) and offering unreasonably high discounts to its drivers and consumers. After CCI passed its *prima facie* order in favour of Uber, Meru appealed against the order of CCI with the Competition Appellate Tribunal (COMPAT), which ruled in favour of Meru and called for a deeper

investigation into the matter. Currently, the case is with the Supreme Court (SC), which has showed its interest in hearing out the parties in detail and has, thus, stayed the investigation as of now.

Given the pending lawsuit and Uber's importance to the urban and semi-urban Indian consumers, the first monthly edition of the "*Analysis of Competition Cases in India*" seeks to cover the major highlights of the case. Specifically, this edition will objectively analyse the enforcement action of the Indian competition agencies *vis-à-vis* Uber and discuss the most pressing underlying competition issues emerging from the lawsuit.

Competition Commission of India's Prima Facie Opinion⁵

Meru Travel Solutions Pvt. Ltd. filed case with CCI against Uber under Section 19 (1) (a) of the Competition Act.⁶ The allegations levied against Uber were:

1. Owing to its "deep pockets" and availability of enormous financial resources to fund its business, it was alleged that Uber was able to unleash several anti-competitive practices on its competitors, which included "*predatory pricing, in order to wrongly gain and strengthen its dominant position*".⁷
2. It was also alleged that Uber had constantly offered huge discounts to customers and provided incentives for drivers to be associated with their network, due to which it was in loss on every trip. This was alleged to be predation, as Uber was purportedly pricing its services below costs (hence, incurring losses) with the aim to oust its competitors.⁸
3. Further, it was also alleged that Uber entered into exclusive contracts with taxi drivers restraining them from getting attached with other radio taxi providers' network. Such agreements were contended to be a violation of Section 3(1), 3(2) and 3(4) of the Act.⁹

In order to substantiate its claims, the informant was of the opinion that Uber was dominant¹⁰ in the relevant market¹¹ of "*radio taxi services in Delhi-NCR*" and submitted an independent market research report as evidence (TechSci report).¹² The report established Uber's dominance by indicating that out of the total active fleet of 13,755 taxis in the region, Uber had 6,000 active fleet i.e. 44 percent and out of total 65,828 trips per day, Uber had a share of 33,000 trips per day i.e. close to 50 percent.¹³

Box 1: Difference between Dominance and its Abuse

It is important to note that being in a dominant position is not prohibited under the current Act. What is prohibited is *abuse* of the attained dominant position. Moreover, there are several factors mentioned under Section 19(4) of the Act, which have to be considered in the analysis of establishing dominance of an entity (market share being only one of them). Thus, theoretically even if it was *prima facie* established that Uber was dominant in the relevant market, investigation could only be ordered if the Commission was of the opinion that there was a possibility (and subsequent need to investigate) that Uber *abused* its position of dominance in the relevant market.

The CCI heard both the parties in detail and perused the information, on the basis of which, it held the following in its *prima facie* opinion:¹⁴

- 1. That the nature of the report submitted by Meru Travels Pvt. Ltd. was unreliable.** The credibility of the TechSci report was challenged by Uber and the Commission was also of the view that it could not be relied upon. This was due to the fact that Uber was not interviewed during the research, and the findings were not in consonance with another report prepared by another research and consultancy-based company.¹⁵
- 2. That the relevant market was “Radio Taxi Services in Delhi”** and not “Radio Taxi Services in Delhi NCR region”. The rationale behind the alteration in the relevant geographic market provided by the CCI was that the regulatory framework in relation to taxi services and use of Compressed Natural Gas (CNG) in public transport were different in both the regions.
- 3. Uber was not dominant in the relevant market.** The CCI stated that there was a vibrant and dynamic radio taxi service market in Delhi and Uber’s dominance was not established. Hence, according to CCI’s order, there was no *prima facie* case made against Uber.

COMPAT’s Order in Appeal¹⁶

As CCI did not find a *prima facie* reason to order an investigation against Uber, Meru Cabs filed an appeal against the Commission’s order with the Competition Appellate Tribunal. COMPAT, after hearing the parties involved as well as perusing the evidence put forward, arrived at the following conclusion:

1. Relevant Market

In any matter of alleged abuse of dominance, one of the fundamental prerequisites, which need to be addressed is identification of the relevant market. According to the Commission’s opinion, the relevant market was “Radio Taxi Services in Delhi”. COMPAT disagreed with this

analysis and indicated that the *prima facie* identification of relevant market should have been "Radio Taxi Services in Delhi National Capital Region (NCR)".

The rationale behind this was that the Commission's distinction of the regulatory framework of Delhi and surrounding areas was not practical, primarily because the consumers enjoyed seamless movement in the Delhi NCR and were not affected by political demarcations. Also, taxi operators were free to move beyond municipal boundaries.

2. Dominance

With regard to the assessment of dominance of Uber, COMPAT was of the opinion that the assessment ought not to be restricted to market share of the enterprise alone. It is also important to consider factors mentioned in Section 19(4). In the case of Uber, according to COMPAT, there was a need to look at its global developments, investment flow into its Indian operations, availability of financial resources, discounts associated with the model of business and the implications of Uber's network expansion.

Moreover, COMPAT clearly mentioned that the statistics in the TechSci report pointed towards majority of the market share held by Uber in terms of fleet size, active fleet size and number of trips in the Delhi NCR and the same cannot be ignored. These point out to the possibility of Uber being dominant in the relevant market and, thus there is a scope for further investigation in the matter.

3. Abuse

COMPAT's order indicated a probability of abuse of dominance in Uber's functioning due to the incentives and the size of discounts offered by the company. The tribunal also recognised the possibility of efficiencies and immense benefits to the consumer as a result of its operations.

Box 2: COMPAT's Take on Uber's Model

"Reportedly, it has done wonders to consumer satisfaction in whichever city it was started. Therefore, it cannot be said definitively that there is an abuse inherent in the business practices adopted by operator, such as respondents 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".¹⁷

Recognising the need for a deeper investigation, the tribunal ordered the Director General to investigate into the matter.

Notably, Uber chose to challenge COMPAT's decision and filed an appeal with the Supreme Court of India. Uber's counsel challenged the order in front of the apex court on the ground that COMPAT could have ordered a fresh probe only if it had found a *prima facie* adverse opinion against the company on abuse of its dominant market position.¹⁸ The rationale for the challenge was that because Uber was not a dominant player in online transportation network sector, there was no possibility of the company abusing its position as a market leader.¹⁹ After hearing both the parties, the court stayed the order and restrained the Commission from initiating an investigation, until further orders are passed.

Analysis

The dispute between Uber and Meru is a classic example of the growing rift between disruptors and existing market players across sectors. It depicts that markets, which are driven by innovation often witness incumbents being challenged by new entrants, which aim to transform the economics of existing services. Innovative disruptors are able to do this through various means, such as matching untapped demand, targeting overlooked consumer segments, delivering functionalities previously not available (generally at lower prices and better efficiency) or even creating a demand-supply arrangement that did not exist.²⁰ The following section discusses the underlying issues, which need to be intricately examined:

1. Effect on structure of the market

As innovations change the competitive market structure, incumbents often lose market shares and profits (of the changed market structure), consequently making them uncomfortable with competition. In order to chase higher profitability, the incumbents tend to react in a vigorous manner but it is often little too late as the new entrants have already gained an advantageous position.

Resemblances to the aforementioned scenario can be practically perceived in the TechSci report, which was submitted to CCI by Meru. Assuming the credibility of the report, it clearly illustrates the growth of Uber since the taxi aggregator began its operations in 2013. In two years (2013-2015), Uber ended up attaining an active fleet of 6000 taxis in the Delhi NCR region, i.e. 44 percent out of total and enjoyed a share of more than 50 percent trips per day. Consequently, the market share of incumbents decreased significantly.

But what was the exact reason behind this significant change in the structure of the market? Was it because Uber had "deep pockets", allowing the company to indulge into anti-competitive practices, such as predation? Or was it due to the innovative and inherently disruptive nature of their business model, which seemingly expanded the market's size (subsequently reducing market shares of its competitors)? According to the complainant, it was the former.

The rationale presented was that Uber wrongly gained and strengthened its dominant position and was successful in displacing the incumbents because of availability of a large resource pool, which enabled it to indulge in predatory pricing. Hence, the complainants put forward a very simplistic cause and effect relationship between availability of resources and anti-competitive practices, assuming other factors to be insignificant.

2. Difference in business models

Notably, this above-mentioned argument fails to consider one of the most important factors, which is the difference in the underlying business models of incumbent taxi services and that of Uber. Incumbents had lost sight of a substantial chunk of the consumers which did not receive affordable access to taxi services. Uber offered a unique solution to this problem by overcoming the limitations and restrictions of existing offerings and invested in something that consumers wanted (affordable, quality and readily available cabs) but did not have.²¹

Moreover, by creating an online network for users and drivers to connect through, it smartly took advantage of assets that were lying idle, that had been paid for, and found out a way to extract new value from them.²² Thus, Uber filled in a demand and supply vacuum which existed, but was not known to the incumbents.

Uber's network catered to those consumers of the market, which were previously ignored by the incumbents. Over time, this enabled Uber to improve its product performance trajectory and facilitated its up-market trend, consequently displacing the dominance of the incumbents.

Unfortunately, COMPAT's order does not shed much light on this important aspect of the situation. Firstly, the analysis of COMPAT rightly focussed on the relevant market and the tribunal was successful in arriving at a definition i.e. "*Radio Taxi Services in Delhi NCR*". Secondly, the tribunal focussed on establishing (*prima facie*) dominance of Uber and considered the statistics provided by the TechSci report. COMPAT's analysis was relatively detailed until this step, but going further it had to form a *prima facie* case of *abuse of dominance* in order to reason the need for an investigation.

Notably, other jurisdictions have factored in the important role which technology plays in such cases. For example, the Australian Competition and Consumer Commission has received complaints against the online taxi aggregators since their entry into the market but its stance has been pro-technology. The Commission's Chairman has markedly mentioned that "*Technology will solve whatever problems that all of us have had about competition in the taxi industry*".

3. Is there a need to investigate?

Admittedly, it can be quite hard to form a *prima facie* opinion on whether a disruptor's rise in an established market is caused due to prevailing efficiencies or anti-competitive behaviour. But needless to say, the court/tribunal ought to give equal weightage to both anti-competitive and pro-competitive arguments. If the anti-competitive arguments are compelling and there is *prima facie* evidence, which could possibly indicate an anti-competitive stance of a particular act, then the adjudicatory authority could order an investigation.

Unfortunately, COMPAT did not provide a compelling argument as to why it thought it was prudent to order an investigation and what was the basis of propounding the possibility of *abuse* of dominance. Although it does mention that the size of discounts and incentives offered by Uber might be anti-competitive, but establishing a *prima facie* opinion of *abuse* requires a deeper analysis. It is pertinent to mention here that although the need for an investigation lies, but without considering important underlying issues (such as the anti-competitive/pro-competitive nature of the price fixing algorithms) the order of investigation would be futile.

4. Need for uniform assessment mechanism

The market complications caused by the interaction of disruptors and incumbents need to be viewed uniformly (although each case would be independently analysed). While assessing cases, especially between disruptors and incumbents, the competition agency should have an objective and uniform assessment mechanism. This should take into consideration the underlying functioning of the business models and algorithms, and not be limited to market shares.

Moreover, the *prima facie* assessment of whether there is a likelihood of *abuse* should entail an evaluation, which objectively weighs both anti-competitive and pro-competitive possibilities. This could possibly be achieved through guidelines, which would provide support to the agency in analysing specific cases between incumbents and disruptors. Some specific factors that could be taken into account for establishing a *prima facie* decision in such cases could include; (i) expansion of the demand/supply side of the market due to entry of new players; (ii) preliminary changes in pricing algorithms and consequent effect on prices; (iii) changes in entry/exit barriers (if any) due to disruptors' entry; (iv) differences in business models of players; and (v) establishment of new markets due to disruptors' entry.

Conclusion

It has often been the case in disrupted markets that incumbents tend to lose market share and profits (purely a result of competition) and subsequently levy allegations of unfair competition against the new entrant. A scenario of this nature deserves an objective analysis, which equally weighs the relative probability of natural competitive market results and anti-competitive practices. If anti-competitive behaviour would prevail in a market, it would negatively affect the consumer in terms of quality, price and choice.

Moreover, competition regulators cannot simply treat innovative business models in the same light as others. This is because there are technical algorithms involved in the working of these models, which are completely different from how conventional models work. Generally, the evolved and superior solutions offered by new entrants ought to be recognised and viewed in a positive manner by the competition agencies, unless a detailed understanding of the algorithm (or business model) suggests that there is an inherent possibility of anti-competitive behaviour.

This is because their adjudicatory and enforcement actions have direct repercussions on incentives to invest in a market. They also affect the broader innovative ecosystem, the consequences of which trickle down to the end consumer. Hence, the *prima facie* competition analysis of a tussle between new entrants and incumbents in innovation led markets is integral and should be dealt with carefully and intricately.

The regulators need to understand the underlying algorithm and how it is formulated/updated by the company. If there is an inherent anti-competitive element to the same and the algorithms are being intentionally altered (algorithms are developed and updated regularly by company officials) in pursuance of anti-competitive goals, there is a definite need to investigate in order to protect competition and consumers.

Disruptive innovations are constantly challenging the foundational principles of competition regulation and enforcement. As landscape of markets evolve due to digital penetration, the application of well-established concepts of competition, such as relevant market and dominance are being continually tested.

Policy makers need to figure out how to effectively monitor digital networks and pricing algorithms, failing which they might endanger innovations and fair competition. Moreover, the long-run effect of such models on the consumer needs to be predicted. This can be done through tools, such as the regulatory sandbox. Lastly, it is important to keep in mind that the end objective of competition law is to encourage fair markets, thereby increasing consumer and producer welfare. This should never be lost sight of.

- ¹ Huet Ellen, *Uber's Global Expansion in Five Seconds*, Forbes, Harvard Business Review (2014), available at: <http://www.forbes.com/sites/ellenhuet/2014/12/11/ubers-global-expansion/#5b30cf547a7a>
- ² Robin Chase, *We Need to Expand the Definition of Disruptive innovation*, (2016), available at: https://hbr.org/2016/01/we-need-to-expand-the-definition-of-disruptive-innovation&ab=Article-Links-End_of_Page_Recirculation
- ³ Philadelphia Taxi Association Inc. et al. vs. Uber, case number 2:16-cv-01207, in the U.S. District Court for the Eastern District of Pennsylvania (case dismissed).
- ⁴ *Uber beats anti-competitive claims*, available at: <http://www.sabreakingnews.co.za/2016/10/21/uber-beats-anti-competitive-claims/>
- ⁵ Meru Travel Solutions Private Limited vs. Uber India Systems Pvt. Ltd. and Ors, Case 96 of 2015, available at: [http://www.cci.gov.in/sites/default/files/26\(2\)_96%20of%202015.pdf](http://www.cci.gov.in/sites/default/files/26(2)_96%20of%202015.pdf)
- ⁶ Section 19 basically lays down CCI's power to inquire into certain agreements and dominant position of enterprises upon filing of information by individuals, associations or upon Governmental reference.
- ⁷ Supra note 5, at p.4.
- ⁸ Supra note 5.
- ⁹ Supra note 5, at p.6. Section 3 of the Competition Act basically prohibits enterprises or individuals to enter into anti-competitive agreements. These are essentially agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which cause an appreciable adverse effect on competition in India.
- ¹⁰ According to the Competition Act, "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to: (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour
- ¹¹ The relevant market analysis is based on the concepts of the relevant geographic and relevant product market, which depend on the concept of substitutability. For example, the relevant product market means a market comprising all those products or services, which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;
- ¹² "Delhi-NCR Radio Taxi Service Market Analysis" conducted by New Age TechSci Research Pvt. Ltd.
- ¹³ Supra note 5, at p.5
- ¹⁴ Once the Commission receives information under Section 19, it has to form a prima facie opinion. According to Section 26, if the Commission is of the opinion that there exists a *prima facie* case of anti-competitive nature, it causes the Director General (its independent investigative arm) to investigate into the matter.
- ¹⁵ Supra note 5, at p.8
- ¹⁶ Meru Travels Solutions Private Limited v. Competition Commission of India & Uber India Systems Pvt. Ltd., Appeal No.31/2016, COMPAT, available at: http://www.compat.nic.in/Attachments/JudgementList/4198_Meru.pdf
- ¹⁷ Ibid, at p.20.
- ¹⁸ *Uber pricing: Supreme Court for status quo on CCI probe*, ToI (27.01.17), available at: <http://timesofindia.indiatimes.com/companies/uber-pricing-supreme-court-for-status-quo-on-cci-probe/articleshow/56827035.cms>
- ¹⁹ *Uber refutes allegation of unfair practice and predatory pricing in Supreme Court*, available at: <http://timesofindia.indiatimes.com/business/india-business/uber-refutes-allegation-of-unfair-practice-and-predatory-pricing-in-supreme-court/articleshow/57414891.cms>
- ²⁰ Refer to Clayton M. Christensen et. al., *What Is Disruptive Innovation?*, Harvard Business Review (2015) available at: <https://hbr.org/2015/12/what-is-disruptive-innovation> and Supra note 2
- ²¹ Viswanath Pingali, *Competition law and innovation*, LiveMint, 09/01/2017, available at: <http://www.livemint.com/Opinion/necZY54c6BxLHzXB6WqeP/Competition-law-and-innovation.html>
- ²² Supra note 2

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