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CCI DISMISSES UNFAIR BUSINESS PRACTICES COMPLAINT AGAINST UBER

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On 14 July 2021, the Competition Commission of India (CCI) dismissed a claim of charging prices below-cost and entering exclusive agreements with drivers against Uber India Systems Pvt. Ltd. (Uber).[1]

Facts

In 2015, Meru Travel Solutions Pvt. Ltd. (Meru) had alleged Uber to be a dominant player in the market for radio taxi services in Delhi-NCR due to: (i) its size and resources, (ii) economic power vis-à-vis its competitors, and (iii) growing dependence of customers. It alleged that Uber abused this position by offering unreasonable discounts to the customers leading to predatory prices to oust its competitors, thereby violating Section 4(2) of the Competition Act, 2002 (Act).

Meru had further alleged anti-competitive vertical restraints arguing that Uber entered exclusivity contracts with its driver partners, whereby the taxi drivers were restrained from operating with any other competing radio taxi operators. Further, financial incentives to drivers tied with a "rating system" – which enables customers to rate drivers based on which driver incentives are offered, were argued to have exclusionary effects for competing businesses.

Case Lifecycle

The CCI, through two orders passed in 2015 and 2016, respectively, had dismissed anti-competitive claims against Uber.[2] Meru approached the then-existing Competition Appellate Tribunal (COMPAT) in appeal. The COMPAT allowed the appeal and ordered the Director General, CCI (DG) to investigate the allegations.[3]

Meanwhile, in 2018, Meru simultaneously pursued its allegations against a rival cab aggregator, ANI Technologies Private Limited (Ola), but CCI yet again did not find a prima facie case for investigation.[4]

[1] *Meru Travel Solutions Pvt. Ltd. v Uber India Systems Pvt. Ltd. & Ors.*, (Case No. 96 of 2015), order dated 14 July 2021.
[2] *Meru Travel Solutions Pvt. Ltd. v Uber India Systems Pvt. Ltd. & Ors.*, (Case No. 81 of 2015), order dated 22 December 2015; *Meru Travel Solutions Pvt. Ltd. v Uber India Systems Pvt. Ltd. & Ors.*, (Case No. 96 of 2015), order dated 10 February 2016.
[3] *Meru Travel Solutions Pvt. Ltd. v CCI & Ors.*, (Appeal No. 31 of 2016), order dated 7 December 2016.
[4] *Meru Travel Solutions Pvt. Ltd. v ANI Technologies Pvt. Ltd. & Ors.*, (Case No. 25-28 of 2017), order dated 20 June 2018.

On the other end, Uber appealed against the order passed by the COMPAT in the Supreme Court of India (SC), but the SC dismissed the appeal and directed the DG to complete the investigation within six (6) months from the date of its order.[5]

As a result, the DG completed its investigation and the CCI ruled on that basis.

The DG investigation and the CCI's decision

The CCI's analysis can be divided into three issues: (i) whether Uber is dominant in the relevant market; (ii) is the below-cost pricing strategy adopted by Uber an abuse of its dominant position; and (iii) whether the exclusive agreements with drivers and the incentives offered by Uber to them caused an adverse appreciable effect on competition (AAEC) in India.

Relevant market

The DG suggested that due to the unique features of radio cabs, such as point-to-point service, tech-enabled reliable service, ease of payment, etc., radio-taxi services are distinct from other public transport services. Uber stated that it faces competition from both radio taxi service providers and public transport options like autorickshaws, buses, and metro.

However, rejecting such arguments, the DG delineated the relevant product market as the "*market for radio-taxi services*". Based on the stance by the parties before the COMPAT previously, the DG agreed with geographic market delineation of "*Delhi-NCR*", and accordingly, defined the relevant market as the "*market for radio-taxi services in Delhi-NCR*" (Relevant Market).

Abuse of dominant position

The DG did not find Uber dominant in the Relevant Market, given its close competition with Ola, and stated that it could not be said to have the ability to act independently of the market. Further, both Uber and Ola adopted a "below cost pricing" strategy but in absence of dominance, abuse of dominant position was not possible.

Accepting the DG's delineation of the Relevant Market and the finding on dominance, the CCI noted that Ola and Uber are close competitors. It rejected Meru's contention that high market shares (around 70%) indicate Uber's dominance and held that while the durability of a high market share over a period indicates dominance, there has been fluctuating market shares of Uber and Ola in this case. The CCI observed that Ola imposed a significant competitive constraint on Uber in the Relevant Market, and therefore, in the absence of dominance of Uber, the alleged abusive conduct need not be examined.

Further, on the issue of "duopoly" of Uber and Ola and reduced choices for consumers, the CCI emphasised that what is material is not the number of competitors in the market, but the strength of competitive constraints faced by the players in the market to dissuade abusive conduct by other players. It also clarified that its mandate is not to protect the existing players or to increase the number of players in any market.

Uber's below-cost pricing strategy

For the sake of completeness, the CCI analysed the "below-cost pricing strategy" adopted by Uber. Placing reliance on its decision in an earlier case, *Fast Track Call Cab Private Limited and ANI Technologies Private Limited*[6] (Ola Case), the CCI observed that platforms rely heavily on network effects, which requires continuous investment to

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[5] *Uber India Systems Private Limited v CCI*, (2019) 8 SCC 697, order dated 3 September 2019.
[6] Case No. 6 & 74 of 2015

make it attractively affordable to riders and profitable to drivers. It further observed that the aggressive pricing strategy, including discounts and incentives to riders and drivers, adopted by Uber was to compete for the market and build its network just as its nearest competitor, Ola, did.

It also highlighted that Uber has been recording a positive margin per trip since Oct 2017. Finding such a pricing strategy as a legitimate business model, the CCI also ruled that such pricing policies could not be analysed on the touchstone of traditional market concepts of assessing predatory pricing.

Exclusive agreements and driver incentives

Relying on the DG findings, the CCI observed that there were no explicit exclusivity clauses in the agreements entered between Uber and drivers.

As to the various incentive schemes offered by Uber to its driver partners to allegedly amount to *de facto* exclusivity, the CCI examined and differentiated between the platform-based model (as used by Uber and Ola) and the asset-based model (the operators own the taxis attached to them). The CCI observed that discounts are a penetrative pricing strategy adopted by Uber to induce drivers and create a network since it does not have a fixed fleet of drivers like the asset-based model of Meru. It also reiterated that after adopting low-cost pricing to create the network, Uber is now clocking a positive margin once a viable scale has been achieved.

Further, as to Uber's rating system – that rates drivers and customers, the CCI observed that the rating system was justified since the network of drivers plays a vital role in generating efficiencies. Highlighting a unique feature of the cab-aggregators market, the CCI noted that riders tend to view drivers as an extension of the cab-aggregators, and accordingly, any negative action on behalf of a driver (such as denying rides) would also negatively impact Uber's brand. It further observed that the locking-in of drivers through incentives is not exclusionary or restricts the entry or expansion of players since there is an ever-expanding pool of drivers available.

Given the foregoing, the CCI rejected Meru's allegations that the incentives and rating mechanism of Uber were akin to an exclusionary agreement having an AAEC in India.

Comment

The CCI's approach is consistent with its previous decisions that abuse of a dominant position claim cannot sustain without first establishing a clear dominant position for a relevant temporal period. The decision also confirms that the CCI may not be swayed by high market shares alone and would conduct a more rigorous analysis of the market to determine a dominant position.

The CCI's decision has shown an in-depth understanding of a new-age market that requires a cautious application of traditional principles and market concepts. Particularly, the clarification that it is not the number of players but the degree of competitive strength which matters in a case is helpful. The CCI's analysis of network effects and pro-competitive effects of vertical arrangement will guide players in other new-age markets as well.

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