

Competition Law Hotline

August 22, 2017

END OF OLA'S WOES? COMPETITION COMMISSION OF INDIA DISMISSES CASE FOR ABUSE OF DOMINANCE

- The Commission takes into account dynamic nature of radio taxi market to hold that Ola is not dominant in the market of *"Radio Taxi services in Bengaluru"*
- The Commission notes that test for dominance of an entity in a nascent market characterized by disruptive innovation and dynamism would have to be made as per the Competition Act, 2002
- The Commission holds that the purpose of investigation under the Competition Act cannot be restricted to the limited scope of the Information filed and the Commission has the power to review beyond the strict time periods and limited allegations made in the Information
- The Commission dismisses Ola's argument on its distinguishable position as an aggregator and holds that the service provided by them was functionally substitutable with services provided by traditional radio taxi service providers

INTRODUCTION

The Competition Commission of India ("**Commission**") in its recent order in Fast Track Call Cab Pvt. Ltd. ("**Informant I**") and Meru Travel Solutions Pvt. Ltd. ("**Informant II**") v. ANI Technologies Pvt. Ltd. ("**Ola**") held that Ola was not in a dominant position in the market of *"radio taxi services in Bengaluru"* and dismissed the information filed alleging abuse of dominant position by Ola in contravention of the Competition Act, 2002 ("**Act**") (*Informant I and Informant II shall hereinafter shall together be referred to as "Informants"*).¹

The Commission juxtaposed the rise of Ola with that of Uber India Pvt. Ltd. ("**Uber**") to conclude that with the steady rise in Uber's market share, Ola could not be determined to be in a dominant position in the relevant market. The Commission also noted that the growth of Ola had to be analyzed against the impressive growth in size of the relevant market itself (by 1900% in terms of number of trips between June 2012 and September 2015).

In 2015, Mega Cabs and Meru Cabs filed information against Ola and Uber, respectively, alleging abuse of dominance in New Delhi.² The Commission, in those cases, held that Uber and Ola were not in a dominant position in the relevant market of *"radio taxi services in Delhi"*.³ The matter came up for appeal before the Competition Appellate Tribunal ("**COMPAT**") where similar allegations were made by the informants that Ola has been able to engage in predatory pricing because of access to generous funding which has acted as an entry barrier for new players and has restricted ability of existing players to effectively compete with Ola. COMPAT had found infirmities in the investigation and directed the Commission to conduct a fresh probe in the matter.⁴ Thereafter, the Supreme Court of India imposed a stay on the carrying out a fresh probe.

BACKGROUND FACTS

Informants are engaged in the business of providing radio taxi services in certain cities in South India under the brand names "*Fast Track*" and "*Meru*". Informants had filed separate information under Section 19 (1) (a)⁵ of the Act alleging that Ola had abused its dominant position by engaging in predatory pricing in the relevant market by offering heavy discounts to passengers and incentives to cab drivers, in contravention of Section 4 (2) (a) (ii)⁶ of the Act. Informants alleged that the fact that Ola controlled over 50% of a highly concentrated market, demonstrated Ola's dominance. The Informants also alleged that there were considerable entry barriers present which made it difficult for a new player to effectively compete. Consistent payment of high incentives along with exclusivity clauses in agreements with drivers allowed Ola to thwart effective competition, lock-in drivers and create a wide base of customers.

Additionally, the Informants alleged that presence of an extensive network of Ola across the nation has acted as a sufficient detriment to any countervailing buying power available with consumers. It was alleged that the presence of a large network of Ola has restricted the power of consumers to negotiate and substantially affect the service provider by shifting to a competing network.

Based on the high market share of OP, the Commission was of the *prima facie* view that Ola held a dominant position in the relevant market of *"Radio Taxi services in the city of Bengaluru"* and directed the Director General ("**DG**") to conduct a detailed investigation into the matter.

FINDINGS OF THE DG

The DG recognized the different business models prevailing in the radio taxi service industry i.e. asset-owned model, aggregator model and hybrid model. It also recognized that while Ola functioned under the aggregator model, its services are *functionally substitutable* with those provided by other taxis operating under these different business

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Accordingly, the DG concluded that the relevant product market would be the “market for radio taxi services” and the relevant geographic market would be the city of Bengaluru.

The DG compared the number of trips / rides undertaken by different players in the relevant market between 2012 and 2016 to observe that while Ola did grow at a meeker rate of 63% between January and September of 2015, Uber’s trip size registered a growth of 1200% in the same period. It noted that the rise of Uber as a healthy competitor defeated the argument for presence of entry barriers. The DG concluded that Ola was not in a dominant position given these facts.

JUDGMENT

The Commission recognized that the services offered by Ola and other radio taxi service providers were functionally substitutable and agreed with the DG on determining the relevant market. The Commission observed that mere adoption of a new business model to provide the same goods/services would not create a distinct relevant product market.

Commission expanded the scope of its enquiry and concluded that the relevant market was volatile throughout the investigation period and saw no steady trends to be able to impinge dominance on a single player. Informant I had objected to the investigation being delayed as a result of the Commission’s direction to investigate the information filed by Informant II along with it, considering the similarity in allegations made. The Commission observed that the proceedings before the Commission under the Act were *in rem* and not *in personam*. It observed that allegations under an information do not restrict the scope of examination for the Commission nor do they restrict it from examining every aspect of a dynamic market.

The Commission rejected the Informants’ contention that control of more than 50% of the relevant market by Ola was sufficient to determine test of dominance. It held that the test enshrined under Section 19 (4)⁷ of the Act has to be met to determine dominance and such a numerical threshold cannot be accepted as a valid test under the Act. It also noted the unique and volatile nature of an industry such as this, where technological innovations are causing significant disruptions making it all the more difficult to depend on absolute numerical figures. The Commission compared the rise of Ola with that of its biggest competitor in the relevant market, Uber, observing that Uber was able to enter the market belatedly and rapidly expand.

Although the Commission held that Ola was not in a dominant position, it made certain observations on its pricing strategies. The Commission rejected the contention of the Informants that ease of access to wide pool of funding exclusively with Ola acted as a key constraint on smaller competitors and new entrants from effectively competing in the relevant market. The Commission observed that in an innovative technology industry such as this, a level playing field in access to funding would be key to determine the existence of an entry barrier as opposed to a mere high requirement of capital.

On the basis of an analysis of pricing strategies of the players in the market, the Commission concluded that Ola’s alleged “aggressive pricing strategy” was not an independent strategic choice but was rather a reaction to Uber’s aggressive pricing which was itself indicative of the competitive forces already present in the relevant market.

Informants had argued that in the alternative, both Ola and Uber ought to be held to be simultaneously dominant in the relevant market. Informants relied on Section 27 (b)⁸ of the Act to contend that more than one enterprise can be considered to be in a dominant position. The Commission rejected this contention and noted that literal interpretation of the law must be avoided when it lends itself to absurdity and held that the particular language in Section 27 (b) was with respect to anti-competitive agreements under Section 3 and not Section 4 of the Act. The Commission held that two enterprises cannot be held to be in a dominant position at the same time.

ANALYSIS

The Commission recognized the technological advances in the market and held that mere adoption of a new business model powered by new technology may not distinguish it from traditional players in the relevant market

It has recognized that access to generous funding from private equity players in the market was not unequal and was an insufficient ground by itself to establish that it allowed Ola to function outside the constraints of a competitive market. The Commission took note that technology start-ups in India which have access to investments from various investors to hold that there existed a level playing field in access to finance. In fact, it noted that there existed a fiercely competitive environment in the industry because of the presence of abundant sources of funding and constant innovation in business and pricing models.

What is interesting to note is that the Commission has erred on the side of caution and been careful not to meddle in a young industry. It has acknowledged the precarious and nascent stage at which this new industry lies and has refused to intervene more than necessary under law.

Entities that practice disruptive technology are more likely to be subjected to intense scrutiny by regulators and the Commission’s observations in this regard are quite heartening. It is hoped that these observations help guide exercise of powers by Commission and other regulators in the future.

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You can direct your queries or comments to the authors

¹ Case No. 6 and 74 of 2015, Order dated July 19, 2017
Order dated February 9, 2016 and Case No. 96 of 2015,

² Case No. 82 of 2015, Order dated February 10, 2016

³ NDA Hotline **Competition Commission Nips Litigation at the Bud – Dismisses Cases Against Ola and Uber**, <https://nishithdesai.com/SectionCategory/33/Competition-Law-Hotline/12/63/CompetitionLawHotline/5156/1.html>

⁴ 2017 Comp LR 43 (COMPAT)

⁵ Section 19. Inquiry into certain agreements and dominant position of enterprise

(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or subsection (1) of section 4 either on its own motion or on—

(a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association;..”

⁶ Section 4. Abuse of dominant position

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...
(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group.—
(a) directly or indirectly, imposes unfair or discriminatory—

...
(ii) price in purchase or sale (including predatory price) of goods or service.

7 Section 19. Inquiry into certain agreements and dominant position of enterprise

...
(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—
(a) market share of the enterprise;
(b) size and resources of the enterprise;
(c) size and importance of the competitors;
(d) economic power of the enterprise including commercial advantages over competitors;
(e) vertical integration of the enterprises or sale or service network of such enterprises;
(f) dependence of consumers on the enterprise;
(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
(i) countervailing buying power;
(j) market structure and size of market; (k) social obligations and social costs;
(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
(m) any other factor which the Commission may consider relevant for the inquiry.

8 Section 27. Orders by Commission after inquiry into agreements or abuse of dominant position

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—
(a) impose such penalty, as it may deem fit which shall be not more than ten percent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:
Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher."

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