

Competition Law Hotline

July 18, 2018

COMMON INSTITUTIONAL INVESTMENT IN OLA AND UBER DOES NOT WARRANT INVESTIGATION - NOT YET?

INTRODUCTION

The Competition Commission of India ("CCI") through a recent common order,¹ *In Re: Meru Travel Solutions Pvt. Ltd. ("Informant") v. MS ANI Technologies Pvt. Ltd. ("Ola"), MS Uber India Systems Pvt. Ltd., Uber B.V., and Uber Technologies Inc. ("Uber")* (collectively referred to as "Opposite Parties") held that that no case was made out against the Opposite Parties of prima facie dominance in the relevant market and have not contravened Sections 3 and 4 of the Competition Act, 2002 ("Act").

Interestingly, the CCI dealt with interesting issues and arguments on 'common ownership and its likelihood of generating anti-competitive effects', given the common shareholding in Ola and Uber, which is a hot topic of debate for regulators across the world. While, the CCI observed that empirical research does not suggest with certainty that common ownership is likely to generate anti-competitive effects in every market situation, it also observed that it will be watching and will not hesitate to initiate action, *suo moto* or otherwise, if concerns arising out of horizontal shareholdings prima facie seem to exist in the future.

FACTS

The Informant, is a group holding company engaged in the business of providing radio taxi services through its two wholly owned subsidiaries, Meru Cab Company Pvt. Ltd. and V-Link Automotive Services Pvt. Ltd since 2007. The Informant filed four separate information(s) under Section 19 (1) (a)² of the Act, against the Opposite Parties identifying four different geographic markets/regions (*Delhi, Mumbai, Hyderabad, and Chennai*).³

The Informant alleged that (i) the Opposite Parties had entered into anti-competitive agreements with the respective driver partners in the relevant market, in contravention of the provisions of the Act;⁴ and (ii) the Opposite Parties have abused their dominant position in the relevant market.⁵ The Informant based their allegations on the market share, network strength, countervailing buyer power held by the Opposite Parties, and the existence of entry barriers on account of huge capital requirement, as per market study report prepared by New Age TechSci ("Tech Sci"), a private research company. Since, the allegations in the four information(s) were largely similar, CCI disposed them off through a common order.

Based on the allegations made by the Informant, CCI analysed both issues alleged against Opposite Parties- (i) entering anti-competitive agreements and (ii) abusing their dominant position. After hearing the parties, the CCI delineated the relevant market as the 'market for radio taxi services' as defined in its earlier orders.⁶ As we have comprehensively analysed the earlier orders in our previous hotline,⁷ we have not dealt with the issue of 'relevant market' in detail here. A brief analysis on various points raised during arguments are as under:

JUDGMENT

Anti-Competitive Agreements

Contentions of Informant:

- Opposite Parties have entered anti-competitive agreements with their drivers imposing exclusivity restrictions, in contravention of Section 3(4) read with Section 3(1) of the Act.
- Strategy/incentive model of the Opposite Parties namely providing incentives to lure the drivers to fulfil a minimum number of rides, amounts to an agreement between the Opposite Parties and their drivers. The strategy/incentive model is such that the drivers stay locked in a particular network to fulfil the minimum guarantee and are not available to provide services on any other competing platform.

Contentions of Opposite Parties:

- There is no exclusivity condition in the agreement between Uber/Ola and their respective driver partners nor any conditions are imposed on them.
- There is no exclusivity condition in the agreement between Uber/Ola and their respective driver partners nor have there been any conditions imposed on them.

Decision: The CCI held the existence of an agreement/arrangement between parties is a pre-requisite under Section 3 of the Act. Considering strategy/incentive model to be an agreement between the Opposite Parties and their respective driver partners, would be a narrow reading of the term 'agreement'. There is no compulsion on drivers to join the network of Opposite Parties but they avail out of own choice to receive benefits and incentives. Relying on earlier decisions,⁸ CCI held that both drivers and riders have access to multiple applications and can 'multi-home' and easily switch between different aggregators. Further, there is no dearth of supply in the relevant market for

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drivers and thus such incentives are not anti-competitive and do not pose any entry barriers.

Individual and Collective Dominance

Contentions

- Opposite Parties are individually and collectively dominant in the relevant market based on the market research conducted by Tech Sci. Market share of more than 50% leads to a presumption of dominance.
- Opposite Parties have engaged in variable cost pricing leading to significant losses but done with the intention to reduce competition and ouster competitors. They have been able to sustain due to huge amounts of funding by institutional investors.
- Definition of dominant position under section 4 of the Act is broad enough to include two enterprises, which have position of strength to affect relevant market in their favour. Relying on a Canadian case law,⁹ Informant argued that two undertakings can have market power in the same relevant market. Further, there can be consolidation between two rivals in the industry leading to elimination of competition.

The Opposite Parties submitted that there is no concept of ‘*collective dominance*’ under the Act. They are not part of the same group pursuant to common ownership by some investors, as standard of applying the definition of ‘group’ under Section 5 for the purposes of Section 4 is different than that applicable for Section 6.

Decision: CCI relying on its earlier decisions,¹⁰ held that while market share is theoretically an important indicator for lack of competitive constraints, it is not a conclusive indicator of dominance. Market share of more than 50% does not lead to a presumption of dominance, especially when the Act prescribes no numerical threshold for presumption of dominance.

The CCI held that prima facie dominance of either Uber or Ola was not made out as market share alone is not an indicator of lack of competitive constraints. Further, the CCI observed that Section 4 of the Act stipulated for a dominant position to be occupied by one enterprise or one group. Relying on earlier decisions, CCI held that two enterprises cannot be in a dominant position at the same time.¹¹

Common Institutional Ownership

Contentions of Informant:

- Opposite Parties have certain common investors, who have substantial shareholding in both entities viz SoftBank, Tiger Global Management LLC, Sequoia Capital and Didi Chuxing. Therefore, Opposite Parties form part of the same group under Section 4 of the Act;
- SoftBank’s investment in Ola via its affiliate SIMI Pacific Pte. Ltd. is more than 25% and recent acquisition of 17.5% stake in Uber in January 2018, made it the largest stakeholder in Uber. Having their nominee Directors on Board of Opposite Parties would adversely affect competition;
- The common investors have control over the Opposite Parties and the Opposite Parties may end up serving as a platform to facilitate collusive arrangement or exchange of sensitive information between the two competitors.

Contentions of Opposite Parties:

- Opposite Parties submitted that cross shareholding is not unusual as investors seek to reduce failure of companies by spreading their investment across multiple companies in the same sector and hence, they do not form a part of the same group for the purposes of Section 4 of the Act.
- Further, SoftBank’s shareholding of approximately 15 per cent in Uber vests them with a right to appoint only 2 out of 17 directors on its board of directors. The test for “control” under Explanation (b) (ii) of Section 5¹² of the Act is not met. Decisions on businesses strategies are made by the board of directors and not driven by any individual investor.
- There is no agreement as investment by Softbank in Opposite Parties does not fall within the ambit of Section 3 of the Act and the investor does not compete with Uber or Ola nor do they provide goods/services at different levels of supply/production chain.

Decision: CCI observed that overlapping ownership interests in competing firms may reduce competition and give rise to anti-trust risks. It could incentivize unilateral price increases (or reductions in quality), profitable to investors who have shares in both entities. It may also create incentives for investors to facilitate collusion and earn collusive profits.

However, since these economic theories are yet to be tested, they concluded that there is no evidence of anti-competitive effects of the same. No definitive, tested predictions reflect casual relation between common ownership and softening of competition. They only suggest that where common ownership translates into control,¹³ there can be potential harm to the competition in concentrated markets but there is no certainty. Further, whether common ownership violates fiduciary obligations and harms competition is yet to be seen. The effect of common ownership needs to be established through market inquiry to determine the levels of risk posed.

Having kept the above issues in mind and analysing the effects of the theories, CCI held that investigation under Section 26(1)¹⁴ of the Act can be ordered only upon *prima facie* establishment of a contravention either under Section 3 or Section 4 of the Act and not based on apprehensions and conjectures. In the absence of any material record or evidence, it is legally untenable to hold that Opposite Parties can be influenced in their decisions on operations by the minority number of directors of parties having common shareholding in them, or could reach an agreement as envisaged under Section 3 of the Act.

With respect to dominance, CCI held that in the absence of an alleged abusive conduct by a dominant enterprise or group, which is a *sine qua non* to order investigation under the Act, CCI cannot conclude that overlapping investments by common investors in competing firms itself amounts to anti-competitive conduct.

CCI recognized that the potential effect of common shareholdings on competition cannot be completely ruled out however, in the absence of any evidence furnished, it cannot be held legally that Opposite Parties can be influenced in their decisions on operations by the minority number of directors of parties having common shareholding in them,

or they could reach an agreement to this effect under Section 3 of the Act. CCI held that it would keep a close watch on the actions of the Opposite Parties and will not hesitate in taking appropriate action *suo moto* or otherwise.

ANALYSIS

Increased common ownership/shareholding in concentrated industries has given rise to anti-trust concerns in major economies of the world. It has raised concerns both from corporate governance as well as an anti-trust perspective. In certain developed jurisdictions, minority shareholdings are scrutinized under the prevailing merger control rules.¹⁵ Concerns have been raised in the past in relation to common institutional ownership in Europe mainly due to notorious minority shareholdings operations such as Ryanair's acquisition of Aer Lingus's stock.¹⁶ The concern is that overlapping ownership among competitors may imply a reduction in firms' incentives to compete¹⁷ and could also escape regulatory compliances if they fall under some exemption.

In line with international jurisprudence and debates, CCI correctly identified that empirical literature on anti-competitive effects of common ownership is still at its nascent stage.¹⁸ Although the CCI through its decision has alerted the investors about the possibility of an investigation in such cases, where compelling evidence is available, it has also observed that empirical research does not suggest with certainty that common ownership is likely to generate anti-competitive effects in every market situation. Further, the CCI has interestingly linked common shareholding in both entities with the composition of the Board of the Opposite Parties and the role of minority Directors in decision making. The CCI appears to suggest that mere commonality of shareholding in both entities would not affect independence in the operations of the Opposite Parties and would also monitor if safeguards/chinese walls are put in place, to ensure that competition is not compromised by the common investments.

– Shireen Moti, Payel Chatterjee & Shivendra Singh
You can direct your queries or comments to the authors

¹ Order dated June 20, 2018

² 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.*

³ Case no. 25 of 2017 the relevant market was the 'market for radio taxi services in Hyderabad'; Case No. 26 of 2017, the relevant market was the 'market for radio taxi services in Mumbai'; Case No.27 of 2017 the relevant market was the 'Market for radio taxi and yellow taxi services in Kolkata and Case No. 28 of 2017 the relevant market was the 'Market for radio taxi services in Chennai'. A common order was passed by CCI with respect to all complaints.

⁴ Section 3 (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—
(a) tie-in arrangement;(b) exclusive supply agreement;(c) exclusive distribution agreement;(d) refusal to deal;(e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement.

⁵ Please note similar allegations have been raised in previous cases, Case Nos. 6 & 74 OF 2015, Order dated July 19, 2017; Case No. 81 of 2015, order dated December 22, 2015; Case No. 82 of 2015, Order dated February 9, 2016; Case No. 21 of 2016, Order dated August 31, 2016. Please find link to our hotline dealing in detail with the allegations and analysis of CCI orders.

⁶ CCI relied on its earlier decisions, Case Nos 6&74 of 2015, CCI relied on its earlier decisions, Case Nos 6&74 of 2015, <https://www.cci.gov.in/sites/default/files/6%20%26%2074%20of%202015.pdf>; Case No. 81 of 2015, <https://www.cci.gov.in/sites/default/files/812015.pdf>; Case No. 82 of 2015, https://www.cci.gov.in/sites/default/files/26%282%29_82%20of%202015_0.pdf; and Case No. 21 of 2016, <https://www.cci.gov.in/sites/default/files/212016.pdf>.

⁷ <https://nishithdesai.com/SectionCategory/33/Competition-Law-Hotline/12/63/CompetitionLawHotline/5159/1.html>

⁸ Case Nos 6 & 74 of 2015, Case No. 81-82 of 2015 and Case No. 21 of 2016

⁹ Commissioner of Competition v. Visa Canada Corporation and Master Card International Corporation, 2013, <http://www.ct-cc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=333>

¹⁰ Case Nos. 6 & 74 of 2015 Order dated July 19, 2017.

¹¹ Case no. 6 and 74 of 2015, Order dated July 19, 2017.

¹² Explanation (b) (ii) of Section 5 of the Act, "control" includes controlling the affairs or management by—(i) one or more enterprises, either jointly or singly, over another enterprise or group.

¹³ Control can be in the form of de facto control, controlling interest (de jure control) as well as material influence- Market influence, the lowest in the hierarchy of control, implies presence of factors which give an investor the ability to influence affairs and management of the enterprise.

¹⁴ Section 26(1) Procedure for enquiry under Section 19

On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter: Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

¹⁵ Xavier Vives, Institutional Investment, Common Ownership, and Antitrust, available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/06/CPI-Vives.pdf>

¹⁶ The proposed *Ryanair/Aer Lingus* merger was notified to the European Commission ("EC") but when the EC prohibited the merger, Ryanair acquired a close to 30 percent stake in its competitor

¹⁷ Azar, Joshi and Schmalz, Martin C. and Tecu, Isabel, Why Common Ownership Creates Antitrust Risks (June 16, 2017). CPI Antitrust Chronicle June 2017.

¹⁸ See Hearing on Common Ownership by institutional investors and its impact on competition - Note by the United States, (6 December, 2017, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/common_ownership_united_states.pdf (last visited 30 June, 2018).

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