

e-Competitions

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The Indian Supreme Court flips its jurisprudence on abuse of dominance in a case involving radios taxis alleged of predatory pricing (*Uber*)

UNILATERAL PRACTICES, DOMINANCE (ABUSE), DOMINANCE (NOTION), PREDATORY PRICING, RELEVANT MARKET, REBATES, SERVICES, MARKET POWER, EFFECT ON COMPETITION, INDIA, TRANSPORT (ROAD)

India's Supreme Court, *Uber*, MANU/SC/1241/2019, 3 September 2019

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On September 3, 2019 The Supreme Court of India vide its judgement in **Uber India Systems Pvt. Ltd. (Uber) v. Competition Commission of India (CCI)** [1] appears to have flipped the jurisprudence on abuse of dominance under the Indian Competition Act, 2002 (the "Act") [2] by requiring the assessment of the conduct of the opposite party-enterprise to determine whether it enjoys a dominant position or not. This position is opposite to the hitherto jurisprudence on this subject, whereby dominance of an enterprise is established based on the factors mentioned in Section 19(4) of the Act, before delving into whether the enterprise has abused its dominance based on its conduct in the relevant market.

The Division Bench of the Supreme Court comprising of Mr. Justice Rohinton Fali Nariman and Mr. Justice Surya Kant, dismissed the appeal filed by Uber against the erstwhile Competition Appellate Tribunal (COMPAT)'s order in **Meru Travels Solutions Private Limited v. CCI and Ors.** [3] whereby the COMPAT had reversed an earlier order of the CCI and had asked the CCI to investigate Uber's conduct in the relevant market under Section 26(1) of the Act, vide its order dated September 3, 2019. The Bench, even though noted that section 4(1) of the Act has two ingredients – (i) dominant position of the enterprise and (ii) its abuse, it used the definition of 'dominant position' in Explanation (a) to Section 4 [4] to seemingly merge the two ingredients as one while delivering the judgement, effectively saying **alleged anti-competitive conduct of the enterprise in the relevant market can be used to determine its dominant position in the relevant market.** [5] The Supreme Court held that if Uber is incurring losses on its trips, by way of discounts to customers and incentives to cab owners, such conduct is bound to affect its competitors and would therefore fall under Explanation (a)(ii); and therefore, according to the Supreme Court, Uber enjoys a dominant position.

Determining dominance: Section 4 and Section 19(4): As said before, Section 19(4) of the Act specifically lists factors to be considered while determining whether an enterprise enjoys a dominant position in the relevant market. By convention, market share of an enterprise has been considered more important than the other factors for determination of dominant position. Typically, enterprises with lower market shares are not considered

dominant. Consequently, these enterprises could indulge in deep discounting, which is generally considered pro – consumer [6], to meet competition. It is only when a dominant enterprise indulges in deep discounting, it is considered an abuse, as such behaviour can lead to exit of smaller players. In the past, the CCI has dismissed complaints on the basis that the concerned enterprise is not *dominant* as per Section 19(4) factors and thus no question of abuse arises. However, as said before the instant order of the Supreme Court flips this position. Because of this judgement, conduct of an enterprise which adversely affects competitors (rather than competition) could be deemed to be abuse of dominance. Also, many more enterprises, could now fall into the anti-trust net. Entities offering discounts to its customers may have a rethink, as under the changed circumstance, they may be considered ‘dominant’ and their conduct an ‘abuse’.

For ease of reference, the facts of the cases leading up to the Supreme Court cases are discussed in brief.

Proceedings before CCI:

Meru Travels Solutions Private Limited (**Meru**) had filed an information with the CCI in 2015 [7] whereby Meru had alleged that Uber is abusing its dominance in the relevant market of radio taxis in Delhi-NCR by way of predatory pricing by offering huge discounts, in addition to the already reduced tariffs to customers and unreasonably high incentives to drivers to keep them attached to its network, backed by ‘unlimited’ funds from its investors. To establish Uber’s dominance, Meru cited a TechSci report which showed Uber had close to 50% share in total number of trips and fleet size in Delhi-NCR region. The CCI closed the case primarily on the following grounds:

- The TechSci report cited by Meru was not trustworthy as it was contrary to earlier report by 6Wresearch and hence market shares provided in the TechSci report cannot be relied upon.
- CCI delineated the relevant market as the market for radio taxis in Delhi and *NOT* Delhi-NCR, basis road transport being a State subject under the Constitution and radio taxi services market being largely regulated by the State Transport authorities, and consequently the conditions of competition are homogenous only in a city/State.
- It found that the mobile applications of radio taxi operators, including of Meru, specifically distinguish between taxis available for booking within Delhi and those available for booking for commuting from Delhi to NCR.
- It found that Ola’s presence in the relevant market exerted a significant competitive influence.
- The fluctuating market shares of different competitors indicated 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.

Proceedings before COMPAT:

Aggrieved by the CCI’s order, Meru appealed before the COMPAT. The COMPAT held that CCI should order investigation under Section 26(1) of the Act, primarily on the following grounds:

- At Section 26(1) stage, only a prima facie determination is required.
- The fact that the two reports by TechSci and 6Wresearch were contrary, was good enough reason “ *to order an investigation to reach a decision on a matter which has attained significant interest in Indian marketplace.*” COMPAT further said that CCI should not limit itself to market share to determine dominance but should give importance to other Section 19(4) factors as well. **If necessary, figures on financial**

flows by ways of investment in India could have been verified through appropriate measures. Also, COMPAT did not agree with the CCI's delineation of the relevant market. It said that customers treat the Delhi-NCR market as a single geographic market. Uber and Ola's cabs operate on tourist taxi permits which allow for seamless travel between Delhi and the larger NCR region and hence the relevant geographic market ought to be Delhi-NCR.

[1] MANU/SC/1241/2019

[2] Section 4 of the Act deals with abuse of dominance. The section *inter alia* defines 'dominant position' and what behaviours constitute abuse of dominant position in the relevant market in India.

[3] 2017 ComplR 43 (CompAT)

[4] Explanation (a) to Section 4 reads as follows:

"(a) '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;"
(Emphasis added)

[5] In this regard, the Supreme Court noted, *"...Given the allegation made, as extracted above, it is clear that if, in fact, a loss is made for trips made, Explanation (a) (ii) [of Section 4] 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. Insofar as 'abuse' of dominant position is concerned, under Section 4(2)(a), so long as this dominant position, whether directly or indirectly, imposes an unfair price in purchase or sale including predatory price of services, abuse of dominant position also gets attracted."*

[6]

See Claus-Dieter Ehlermann, Isabela Atanasiu, *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?*

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