Competition Law Hotline

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COMPETITION COMMISSION NIPS LITIGATION AT THE BUD – DISMISSES CASES AGAINST OLA AND UBER

- CCI upholds that access to funding and innovative technology or models enabling an entity to provide discounts and incentives did not create entry barriers and is not anti-competitive.
- CCI dismissed allegation due to contradictory views and doubts on impartiality of the industry report highlighting significance of impartial industry reports.
- Consistent approach to be followed by CCI to curtail unnecessary litigation and allowing parties to appear at the outset is a step in the right direction.

INTRODUCTION

The Competition Commission of India ("**Commission**") in its recent order in *M/s. Mega Cabs Pvt. Ltd.* v. *M/s ANI Technologies Pvt. Ltd.*[1] ("**Ola**") and *Meru Travel Solutions Private Limited v. Uber India Systems Private Limited ("**Uber**")*[2] *(together "**Opposite Parties**")*, held that Opposite Parties were not in a dominant position in the relevant market of New Delhi and consequently, the practices followed by Opposite Parties were not in violation of Sections 3 and 4 of the Competition Act, 2002 ("**Act**").

In the case of *Ola*, the Commission categorically held that access to funding sources, which enabled it to provide discounts and incentives, were not available exclusively to Ola and consequently, access to sources of funding could not be considered as being anti-competitive. This is an important issue since an argument to the contrary was raised in *M/s. Fast Track Call Cab Private Ltd. v. ANI Technologies Pvt. Ltd.*[3] (*Fast Track*). In *Fast Track* Commission placed reliance on the report prepared TechSci Research Pvt. Ltd. to come to a conclusion that a *prima facie* case was made out. However, the report prepared by New Age TechSci ("**TechSci**") in Uber case was rejected when another report which had contradictory findings was also placed before the Commission.

Interestingly, while in *Fast Track* where the order was passed under section 26(1) of the Act without hearing the opposite party. In the present cases and in *Meru Travel Solutions Private Limited v. Uber*[4] ("**Meru Kolkata**")[5], all cases where Commission concluded that allegations of anti-competitive behaviour were not made out, the opposite parties in the respective cases appeared and were able to controvert the material placed before Commission.

BACKGROUND FACTS

Informants in both cases (Meru Travel Solutions Private Limited, *Meru*, and M/s. Mega Cabs Pvt. Limited, *Mega Cabs*, both parties "**Informants**") had filed complaints under Section 19 (1) (a) of the Act against the Opposite Parties operating radio taxi services under the brand name "OLA" and "UBER". Informants in their respective cases alleged that the respective Opposite Parties were in a dominant position in the relevant market and that they abused their position by engaging in anti-competitive practices including predatory pricing and incentivising drivers to eliminate competition in violation of sections 3 and 4 of the Act.

CONTENTIONS AND ISSUE

In both cases, the Opposite Parties appeared and contested reliance placed on the reports relied by the respective Informant. The Informants in both cases relied on market search reports to substantiate the allegation that Opposite Parties were in a dominant position and therefore, had committed acts that were in violation of Sections 3 and 4 of the Act. *Mega Cabs* relied on a report prepared by 6Wresearch and *Meru* relied on a report prepared by TechSci. Informants alleged that the practices of excessive discounts, incentives and pricing followed by Opposite Parties were an abuse of the dominant position held by the Opposite Parties and hence, Opposite Parties were in violation of the Act. In both cases, Opposite Parties contested authenticity and reliability of the reports. In the case of *Ola*, the report of 6Wresearch was objected to on the ground that it was commissioned by an unknown client, it was for internal purpose and in any event was not accurate or reliable in respect of the data provided. Interestingly, Informant in *Meru Kolkata* relied on a report by TechSci Research Pvt. Ltd. which was ultimately rejected by the Commission due to existence of another report prepared by 6Wresearch which had contradictory findings.

The issue before the Commission in both cases was whether the Opposite Parties were in a dominant position and whether the Opposite Parties indulged in practices of predatory pricing and incentives to drivers excluded other players from relevant market at the cost of suffering business losses.

JUDGMENT AND ANALYSIS

The Commission rightly determined the relevant market relying on its previous decisions in *Fast Track* and *Meru Kolkata*. The relevant market in all cases was identified to be the "*radio taxi services*" and based on the city in which it was operating, the relevant geographical market would be determined as operations restricted to within the city limits. The Commission narrowed down the relevant market to Delhi even though the reports relied by the Informants

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were in respect of National Capital Region. The Commission in both the cases held that the reports relied by Informants in respective cases did not demonstrate that Opposite Parties were in a dominant position and additionally, due to the existence of several players, despite Opposite Parties being prominent did not establish its dominance in the market.

The Commission also rejected both reports. In *Ola's* case, the report relied was found to be commissioned by an unknown client for internal purpose. In *Uber's* case it was found that another report contradicted the report relied by *Meru* on several parameters. As a result, the Commission did not rely on the contents of the reports though it agreed that stiff competition existed in the market and Ola and Uber were major players. Further, with respect to violations of Section 3 of the Act, the Commission held that availability of the funds and innovative technology or models developed for operating in a particular market did not create entry barriers. Such avenues were available to all existing players and not exclusively to the Opposite Parties and therefore there was no violation of competition law.

This decision is remarkably striking in the different approach of the Commission from its first order in *Fast Track* which involved same issue. In *Fast Track*, Commission placed reliance on the only report which was placed before it, by TechSci Research Private Limited and placing reliance on this report Commission was of the *prima facie* view that predatory pricing engaged by the Opposite Party was aimed at driving the other players out of the market and that it amounted to abuse of dominant position.

It is interesting to note that in the case of *Fast Track* alone, the opposite party was not heard and the Commission directed the Director-General to investigate. In contrast, in all other cases discussed above, the opposite party appeared before the Commission and contested the report and the Commission accepted these objections. While in *Fast Track,* Commission did refuse any interim order under Section 33 of the Act[6], it is interesting to see if Commission would be inclined to exercise its power of review in light of seemingly different conclusions based on similar facts[7] in other cases where an order has been passed directing investigation by the Director-General.

The Supreme Court of India in *Namit Sharma v. Union of India*[8] has held that in order to maintain judicial discipline and consistency in the functioning of quasi-judicial bodies, it is imperative to give appropriate attention to the doctrine of precedence and not overlook the judgments of the courts dealing with the subject and principles applicable in a given case. Further, it is not only the higher court's judgments that form binding precedents but even those of the larger Benches of the Commission should be given due acceptance and enforcement by the smaller Benches of the Commission which has clearly been overlooked in the present case.[9] The approach followed by the Commission in the recent cases has helped nip at the bud litigation which would have otherwise been a burden on the court system and for the opposite party. It is hoped that as observed by the Supreme Court, Commission is consistent in this approach.

– Payel Chatterjee, M.S. Ananth & Pratibha Jain
You can direct your queries or comments to the authors

[1] Case No. 82 of 2015, Order dated February 9, 2016.
[2] Case No. 96 of 2015, Order dated February 10, 2016
[3] Case No. 6 of 2015, Order dated September 03, 2015.
[4] Case No. 81 of 2015, Order dated December 22, 2015.
[5] NDA Hotline **End of bumpy ride for Uber? CCI smoothens the road**; http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/bumpy-ride-for-uber-at-an-end-cci-smoothens-the-road
[6] Order dated September 3, 2015 in Case No. 6 of 2015.
[7] NDA Hotline- CCI exercise of review power here; Delhi High Court: CCI has inherent powers to review / recall its orders, https://nishithdesai.com/SectionCategory/33/Competition-Law-Hotline/12/63/CompetitionLawHotline/5148/1.html.
[8] Writ Petition No. 210 of 2012
[9] Case No. 6 of 2015 by Six Members whereas Case No. 82 of 2015 is passed by Five Members

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