

COMPETITION APPELLATE TRIBUNAL

Appeal No.31/2016

(Under Section 53B of the Competition Act, 2002 against the order dated 10.02.2016 passed by the Competition Commission of India in Case No.96/2015)

CORAM

Hon'ble Shri Justice G.S. Singhvi
Chairman

Hon'ble Shri Rajeev Kher
Member

Hon'ble Ms. Anita Kapur
Member

IN THE MATTER OF

Meru Travels Solutions Private Limited
128, IJMIMA – Raheja Metroplex,
Behind Goregaon Sports Club,
Off. Link Road Malad (W),
Mumbai – 400 064, Maharashtra

...Appellant

Also at:

No.89/1, Raja Icon Building,
II Floor, Marathalalli Bengaluru,
Karnataka – 560037

Vs.

1. Competition Commission of India
18-20, The Hindustan Times House,
KG Marg, Connaught Place,
Barakhamba, New Delhi – 110 001

...Respondents

2. Uber India Systems Pvt. Ltd.
Regus Business Centre Pvt. Ltd.,
Level 13, Platinum Techno Park,
Plot No.17/18, Sector 30 A, Vashi
Navi Mumbai, Maharashtra

Also at –

B-101, South City – 1,
Near Signature Towers,
Gurgaon, Haryana

3. Uber BV
Vijzelstraat 68, Amsterdam,
1017, HL, The Netherlands
4. Uber International
Holding BV
Vijzelstraat 68, Amsterdam,
1017, HL, The Netherlands
5. Uber International BV
Vijzelstraat 68, Amsterdam,
1017, HL, The Netherlands
6. Uber Technologies Inc.
182, Howard Street #8,
San Francisco CA 94105

Appearance: Shri A.N. Haksar, Senior Advocate assisted by Shri Udayan Jain, Shri Sonal Jain, Shri Akshay Nanda, Shri Rudra Dutta, Shri Manas Gaur, Ms. Khyati Dhupar and Ms. Anju Thomas, Advocates for the Appellant

Shri Amit Sibal, Senior Advocate assisted by Shri Aman Singh Sethi and Shri Tahir Siddiqui, Advocates for Respondent No. 2

None for Respondent Nos. 3 to 5

ORDER

Having failed to satisfy the Competition Commission of India (the Commission) in forming prima facie opinion under Section 26(1) of the Competition Act (the Act), to order an investigation against alleged abuse of dominance by the respondent, the appellant has filed this appeal on 18.04.2016 against the order of the Commission dated 10.02.2016 in Case No.96 of 2015.

2. The appellant, M/s. Meru Travels Solutions Private Limited is a group holding company which provides radio taxi services through its fully owned subsidiaries namely, Meru Travels Solutions Private Limited and V – Link Automotive Services Private Limited. Both these subsidiaries are engaged

in business of providing radio taxi services under the brand names, Meru, Meru Genie and Meru Flexi respectively in 21 major cities across India. The appellant started its Delhi operations in March 2008. Since 2012, appellant revised its business model and started providing radio taxi services through an aggregation model.

3. Respondent No.2, M/s. Uber India Systems Private Limited is a company registered in India whereas Respondent Nos.3 to 5, M/s. Uber BV, M/s. Uber International Holding BV (which holds 90% shares of Respondent No.2 besides 10% shares of Respondent No.2 are held by Respondent No.5 M/s. Uber International BV) are other associated companies. Respondent No.6 M/s. Uber International Technologies Inc. is the ultimate holding company of the Uber Group companies. (Respondent Nos.2 to 6 for short are termed 'Uber' hereinafter). According to the appeal memo, Uber provides radio taxi services under the brand name Uber. It entered the Indian market in 2013 and started its operations in Delhi NCR in December 2013. In Delhi NCR, they offer their services through three different brands which are Uber XL, Uber X and Uber Go.

4. The Appellant filed information under Section 19 of the Act before the Commission on 9th October, 2015. The main elements of the information were as follows:

- i) It was stated that Respondent No.6 was founded by Travis Kalanick and Garrett Camp in 2009 in the United States of America through various venture capital funds and private equity investors. Respondent No.6 routes the financial resources for India operations through Respondent No.3.

- ii) The Appellant has given a table showing significant investments made in Respondent No.6. The primary reasons according to appellant for Uber's phenomenal growth is large global funding and anti-competitive business model allowing it to unleash a series of abusive practices prohibited under the Act.
- iii) Quoting certain newspaper reports, it has been stated that the company has earmarked US\$ one billion for its Indian operations to be spent within 6 to 9 months to reach a target figure of one million trips per day. Appellant has quoted several newspaper reports to establish the large financial backup available to Uber.
- iv) Since starting business in the Delhi NCR in December 2013, Uber has resorted to many abusive practices with the sole intent to establish its monopoly and eliminate otherwise equally efficient competitors from the market.
- v) Uber and Meru operate in the same line of business, i.e. radio taxi services.
- vi) It has been stated that average market price of radio taxis existing in Delhi NCR before the launch of Uber were in the range of about Rs.23 per km. Uber launched its services @ Rs.20 per km. and, thereafter, successively brought down its per kilometer price to Rs.7/- per km, Rs.12/-per km. and Rs.9/- per km. for different categories of services. At the time of dropping its prices to Rs.12/- per km. in November 2014, it

offered incentives to first time customers and discounts of subsequent trips. Appellant has quoted the relevant advertisements given out by Uber on that occasion. This price was further brought down from Rs.12/- to Rs.7/- per km. for one of the services. Relevant advertisement has been provided in the information. A list of further discounts and incentives offered by Uber from time to time has been given in para 22 of the information.

- vii) It has been further informed that Uber pays its drivers/car owners attached on its network unreasonably high incentives over and above and in addition to the trip fair received from the passengers. Para 23 of the information provides one such calculation indicating per trip net loss of Rs.204/- to Uber.

- viii) It was informed that as a consequence of these practices, the appellant's market share from 18% in December 2013 came to 11% in September 2015 by number of trips and it lost Rs.107 crores during this period. Uber in this short span increased, from nowhere to a market share of about 50% by the number of trips done on its radio taxi service network. A chart showing respective market share of competing taxi services is reproduced below:

| Market Share in Delhi | | | | | | |
|-----------------------|------------|-----|--------------|-----|-----------|-----|
| | Fleet Size | | Active Fleet | | Trips/Day | |
| | Dec'13 | | SeP'15 | | Sep'15 | |
| Uber | | 0% | 6000 | 44% | 33000 | 50% |
| Meru | 1,850 | | 1455 | 11% | 7384 | |
| Ola + | 18% | | 3800 | | 11% | |
| TFS | 2,800 | | 28% | | 15200 | |
| Easy | 28% | | | | 23% | |
| Mega | | | 1015 | | | |
| Quick | 2,000 | | 7% | | 4944 | |
| Others | 20% | | 540 | | 8% | |
| | 900 | 9% | 4% | | 2420 | |
| | 1,350 | 13% | 480 | | 4% | |
| | 1,120 | 11% | 3% | | 1485 | |
| | | | 465 | | 2% | |
| | | | 3% | | 1395 | |
| | | | | | 2% | |
| Total | 10,020 | | 13,755 | | 65,828 | |
| | 100% | | 100% | | 100% | |

- ix) It was alleged that Uber which is valued at US \$ 51 billion with an allocation of US\$ one billion for Indian operations has around 6,000 active cars in its fleet of radio taxi doing about 33 thousand trips per day in Delhi NCR. It was informed that Uber is spending about US \$ 885 million to generate a revenue of US \$ 415 million.
- x) The information then went on to give details of the radio taxi service business, evolution of technology, role of GPS based platform, etc. On the issue of market share informant relied upon a market research report produced by New Age Tech Sci Research Private Limited (Tech Sci) which analyzed radio taxi service in Delhi NCR region as on 30th September 2015. A

summary of market share in terms of fleet size, active fleet size and total trips per day in tabular form extracted from the report is reproduced below:

“Cabs registered with Radio Taxi Service providers and their related trips as extracted out of the afore-mentioned report.”

| Share of Radio Taxi Market in Delhi | | | | | | |
|--|-----------------------------|----------------------|----------------------------------|-----------------------|---------------------|----------------------|
| Radio Taxi Company | Total Fleet [Refer Page 12] | Share of Total Fleet | Active Fleet Size Refer Page 13] | Share of Active Fleet | Total Trips Per Day | Shared Trips Per Day |
| Uber | 14,500 | 44% | 6,200 | 44% | 33,000 | 50.1% |
| Ola | 7,000 | 21% | 2,400 | 17% | 9,600 | 14.6% |
| TFS | 3,450 | 11% | 1,400 | 10% | 5,600 | 8.5% |
| Meru | 2,380 | 7% | 1,455 | 111% | 7,384 | 11.2% |
| Easy | 1,790 | 5% | 1,015 | 7% | 4,944 | 7.5% |
| Quick | 1,000 | 3% | 480 | 3% | 1,485 | 2.3% |
| Mega | 975 | 5% | 540 | 4% | 2,420 | 3.7% |
| Others | 1,550 | 0% | 465 | 3% | 1,305 | 2.1% |
| | | | | 0% | | 0.0% |
| Total | 32,645 | 100% | 13,755 | 100% | 65,828 | 100% |
| Notes | | | | | | |
| Estimated 30% Active Fleet for Others with 3 trips per day | | | | | | |
| | | | | | | |

- xi) It has been concluded in the report that on a per trip basis, Uber has 50.1% of the market in Delhi NCR. The information then went on to comment upon the size and resources of the enterprise in terms of Section 19(4) of the Act, size and importance of the competitors and economic power of the enterprise including commercial advantages over competitors,

dependence of customers on the enterprise and countervailing buying power.

- xii) The informant alleged that Uber has abused its dominance by alluding to predatory pricing and following unfair conditions by virtue of its dominance in the relevant market. In paragraph 64 and 65, the information contains allegations relating to the kinds of incentives being offered by Uber to its drivers/partners to build a network effect, the gains that drivers make out of their engagement with Uber, the losses that Uber makes out of every trip and the kind of discounts that Uber offers to its customers.

- xiii) Finally, it was informed that in view of Uber's exiting from China, strategically, India has been considered as the most important market. Since it is flush with resources, Uber is in a position to offer deep pockets to its partners in order to grab a large part of the market and eliminate competition from the market.

5. The Commission considered the facts and allegations given in the information and heard both the parties on 17th November 2015. Subsequently, informant made additional written submissions on 30th November 2015. Notably no written submissions/affidavits/material was submitted on behalf of Respondent Nos.2 to 6. It was argued on behalf of the respondents that the prerequisite for examining the abuse of dominance is that dominance should be proved. It was stated that the report (Tech Sci)

on which the appellant was relying upon lacked credibility as while preparing the report, none of the representatives of Uber was interviewed. It was stated that this made the nature of report dubious and it could not be believed. It was also stated that the report was made for business up to 30th September 2015 while the information was filed on the 9th October, 2015 raising a doubt on the nature of the report as it was impossible to file information so soon after the reporting period was completed.

6. The Commission has not found a prima facie case to order investigation on the following grounds,

- a) The nature of the report on which the appellant has relied upon is controversial as Uber was not interviewed and the findings of this research report were entirely contrary to another report 6Wresearch which had been presented before the Commission in an earlier case Fast Track Call Cabs Pvt. Ltd. vs. ANI Technologies thereby raising doubt about the credibility of the report.
- b) The Commission held Delhi as the relevant market and not Delhi NCR region as requested by the appellant/informant on the grounds that the regulatory framework in relation to taxi services and use of CNG in public transport were different in both the regions.
- c) In view of the Commission, there was a vibrant and dynamic radio taxi service market in Delhi. The Commission did not consider Uber to be dominant in the relevant market. Therefore, the Commission decided to close the information under Section 26(2).

7. We have heard the learned counsels from both sides and carefully perused the relevant pleadings, reports and documents placed before us. Dominance has to be examined on the benchmark of Section 4 read with Section 19(4) in order to form a prima facie view in accordance with Section 26(1) of the Act. Section 4 reads as follows:

“Section 4 –Abuse of dominant position

[(1) No enterprise or group shall abuse its dominant position.]

(2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

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

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access [in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.”

Explanation.—For the purposes of this section, the expression—

(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;

(b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

[(c) “group” shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.]”

8. Section 19(4) relates to the various benchmarks provided under the Act on which existence of dominance has to be examined. Section 19(4) is quoted below:

“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.”

Section 26(1) and (2) are also quoted :

(emphasis supplied)

“26. Procedure for inquiry under section 19] -- (1) 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.

(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19 the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.”

9. According to Section 26(1) on receipt of a reference/information, 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.” If in the opinion of the Commission “there exists no prima facie case”, it shall close the matter forth with. There is a plethora of jurisprudence on the scope of Section 26(1) and (2). Both sides from their own perspectives relied upon Competition Commission of India vs. SAIL (2010) 10 SCC 744. The appellant also drew our attention to this Tribunal’s decision in Appeal No.51/2014 North East India Petroleum Dealers Association vs. Competition Commission of India and others and a few other cases decided by the Tribunal on the scope of Section 26(1). The gist of jurisprudence developed so far on the basis of decisions made by the Commission, this Tribunal and higher Courts is that on receipt of an information from any of the sources mentioned in the Act, the Commission on the basis of the information, the preliminary conference allowed under Regulation 17 of the General Regulations, using the material and documents placed before it form a prima facie view whether a case exists for directing an investigation by the Director General. In case the Commission is not in a position to form a view even after having considered information, material, documents and listening to the parties by virtue of the preliminary conference, it will close the matter. We have eschewed the temptation of quoting from decided cases.

10. In a matter where abuse of dominance has been alleged, the most crucial exercise is to form an opinion about dominance of the relevant entity in the relevant market. In order to form an opinion on dominance, the first

step is to delineate a relevant market. While the information suggested Delhi NCR region as the relevant market, the Commission considered Delhi as the relevant market. In order to justify the Commission's opinion, it has been stated in the impugned order that since transport is a State subject under the Constitution, the radio taxi services market is largely regulated by the State Transport authorities. Thus the conditions of competition appear to be homogenous only in a city/State. According to the Commission, since the regulatory architecture in Delhi is quite different from that operating in the NCR, they were persuaded to consider Delhi as the relevant geographic market. The Commission has further stated as follows:

“The demarcation of Delhi as a separate relevant geographic market is further corroborated by the fact that the app (i.e. applications) designed by such aggregators (i.e. OP, OLA etc.) also specifically distinguish between taxis available for booking within Delhi and those available for booking for commuting from Delhi to NCR. Therefore, it appears that the radio taxis operating in Delhi region face homogenous competitive constraints distinct from those prevailing in other cities/States.”

11. As far as the relevant product market is concerned, the Commission has agreed with the suggestion given by the informant, i.e. radio taxi services to be the relevant product market. The appellant has argued that the Commission's understanding of the regulatory framework is not correct and on the practical side also, the Commission has taken a wrong view by not agreeing to consider Delhi NCR as the relevant geographic market.

12. We may at this point reiterate that at the stage of Section 26(1), a determination on relevant market is only prima facie and deeper determinative exercise is not required. It is a matter of common knowledge that customers can move from one point in NCR to another point calling taxis on telephone/internet platforms. Neither in the practical sense nor even in the regulatory sense, the kind of distinction made by the Commission exists. The Commission had referred to High Court of Delhi order on the mandate on the use of CNG in public transport within NCT. We were informed by the appellant that this mandate has been revised by the Supreme Court to cover the entire NCR of Delhi. A copy of the order has been placed on the file. Further as far as the consumer is concerned, a seamless movement between two points within the NCR is a more pragmatic way of looking at any transport regulation as customers are not affected by political demarcations. Thirdly, according to Motor Vehicle Act, taxis which operate under a tourist agency permit are not constrained to operate within municipal limits and taxis such as Uber and Ola use tourist taxi permits. Therefore, on all of these counts, restricting relevant geographic market to Delhi NCT was an error. In our opinion, the relevant geographic market on a prima facie basis should have been radio taxi service in Delhi NCR. However, we must hastily point out that we do not want to be determinative on this issue as at this stage we are not inclined to go into the merits of the matter but we are simply responding to the approach the Commission has adopted in this particular matter.

13. On the issue of dominance, the Commission has stated that respondent had raised doubt about the credibility of the Tech Sci report on some grounds. The Commission recalled its consideration of another

research report called 6Wresearch Report which had come before it in an earlier consideration wherein another radio taxi service, Ola had been reported to be in dominance. Since the two research reports in question showed contrary results, the Commission decided to ignore both of them but then in subsequent paragraph alluded to a combined reading of the two reports. If the Commission had ignored both these reports, then there was no reason for the Commission to give a combined reading to both of them as it was difficult to say which part was being excluded by the Commission from each report and what parts were being read. The appellant had argued before the Commission that the 6Wresearch Report was dated in time and since Uber did not operate in two months of November and December 2014, due to regulatory restriction this report, which was dated March 2015, did not have realistic figures for Uber, thereby Ola was shown in dominance in terms of market share.

14. The appellant has, argued that Tech Sci Report had statistics till 30th September, 2015 and was, therefore, updated. It was further argued that the Commission has relied upon size of the fleet and not the number of trips. It may also be noted that in an earlier consideration on information filed by M/s. Fast Track in relation to radio taxi service in Bangalore, the Commission had given credence to a research report prepared by Tech Sci. It may further be observed that the data presented in the Tech Sci Report has simply been denied by Uber in the preliminary conference but nothing in writing or by way of material has been presented by Uber to assist the Commission in making an assessment about the size and share of the market. They have not controverted the figures factually. If they did not believe the correctness of the Tech Sci figures, they had the option of

giving their own figures. They offered to do so under confidentiality but perhaps the matters ended there itself.

15. We, therefore, feel that the Commission's approach was not consistent in this respect. Tech Sci Report had made certain statistical reporting which had not been challenged in substantive terms by the respondents except by raising doubts about the credibility of the report. Even an affidavit was not placed on their behalf. Since the objective of Section 26(1) is to formulate a prima facie view, the information along with material and facts made available should have been enough for the Commission to formulate an opinion. It may be noted that while 6Wresearch report was not accepted by the Commission in Mega Cabs, the Tech Sci report on Bangalore had been accepted by it in Fast Track. Further the fact that two reports being referred, which had contrary results to show, could have been a good reason for the Commission to order an investigation to reach a decision on a matter which has attained significant interest in the Indian market place.

16. This examination also needs to look at the provisions of Explanation a to Section 4. It explains that dominant position means a 'position of strength'. It does not say that this position of strength necessarily has to come out of market share in statistical terms. The assistance in this respect to the Commission comes from Sub-Clause (i) and (ii) of Explanation 1 read with Section 19(4). The cumulative effect of this exercise would be that the Commission would not be constrained to look at only the market share of the enterprise but it will have to look at other Sub-Clauses of Section 19(4) particularly Sub-Section (b), (c), (d) and (e). The information made available

by the informant/appellant should be seen in the context of overall picture as it exists in the radio taxi service market in terms of status of funding, global developments, statements made by leaders in the business, the fact that aggregator based radio taxi service is essentially a function of network expansion and there was adequate indication from the respondent that network expansion was one of the primary purpose of its business operation. Further, availability of financial resources and existence of discounts and incentives associated with the model of business adopted by the respondents are good supporting reasons to suggest that the issue of dominance needs to be seen from a perspective that does not limit to the market share of the enterprise alone. If necessary, the figures on financial flows by ways of investment in India could have been verified through appropriate measures.

(emphasis supplied)

17. While discussing as above, we do not intend to say that Uber is necessarily in a dominant position. The Tech Sci Report shows that Uber's market share in terms of various parameters is as follows:

| | |
|-------------------|--------|
| Fleet size | 44.42% |
| Active fleet size | 41.38% |
| Number of trips | 50.1% |

Thus on all three parameters, the figures were quite close to halfway mark. We cannot ignore the fact that besides the appellant, there are a few very small players in the market who can be seriously affected, if any of the bigger players adopts anti-competitive practices.

18. Aggregator based radio taxi service is a relatively new paradigm of public transport in Indian cities which has revolutionized the manner in

which we commute and work. Reportedly, it has done wonders to consumer satisfaction in whichever city it has started. Therefore, it cannot be said definitively that there is an abuse inherent in the business practices adopted by operator such as respondents but the size of discounts and incentives show that there are either phenomenal efficiency improvements which are replacing existing business models with the new business models or there could be an anti-competitive stance to it. Whichever is true, the investigations would show.

19. In our view there is a good enough reason for Director General to investigate this matter. It will also help in settling an issue which has agitated business discourse for quite some time. In several jurisdictions, it has been done with different shades of judicial consequences. We, therefore, think that the facts on the record are enough to trigger an investigation by the DG. If he finds that the dominance of Uber is not made out, the follow up to that will not happen.

20. In view of our discussion, we accept the appeal and direct the DG to conduct an investigation into the allegations contained in the information filed by the appellant and submit report to the Commission within the period prescribed under the Act. If the Director General is unable to submit report within 60 days and there exists good reasons for seeking extension of time, then he may approach the Commission for grant of time to complete the investigation.

21. On receipt of the investigation report, the Commission shall pass appropriate order after giving opportunity to the parties to file their replies/objections and affording them opportunity of personal hearing.

(Rajeev Kher)
Member

G.S. Singhvi)
Chairman

(Anita Kapur)
Member

07.12.2016