COMPETITION COMMISSION OF INDIA

Case No. 25-28 of 2017

Case No. 25 of 2017

In Re:

Meru Travel Solutions Pvt. Ltd.	**Informant**

And

M/s ANI Technologies Pvt. Ltd.	**Opposite Party No.1**
M/s Uber India Systems Pvt. Ltd.	**Opposite Party No.2**
Uber B.V.	**Opposite Party No.3**
Uber Technologies Inc.	**Opposite Party No.4**

With

Case No. 26 of 2017

In Re:

Meru Travel Solutions Pvt. Ltd.	**Informant**

And

M/s ANI Technologies Pvt. Ltd.	**Opposite Party No.1**
M/s Uber India Systems Pvt. Ltd.	**Opposite Party No.2**
Uber B.V.	**Opposite Party No.3**
Uber Technologies Inc.	**Opposite Party No.4**

With

Case No. 27 of 2017

In Re:

Meru Travel Solutions Pvt. Ltd.	**Informant**

And

M/s ANI Technologies Pvt. Ltd.	**Opposite Party No.1**
M/s Uber India Systems Pvt. Ltd.	**Opposite Party No.2**
Uber B.V.	**Opposite Party No.3**

Uber Technologies Inc. **Opposite Party No.4**

With

Case No. 28 of 2017

In Re:

Meru Travel Solutions Pvt. Ltd. **Informant**

And

M/s ANI Technologies Pvt. Ltd. **Opposite Party No.1**
M/s Uber India Systems Pvt. Ltd. **Opposite Party No.2**
Uber B.V. **Opposite Party No.3**
Uber Technologies Inc. **Opposite Party No.4**

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Appearance

For Informant: Shri Udayan Jain, Advocate
Shri Abir Roy, Advocate
Shri Sonal Jain, Advocate
Shri Ishkaran, Advocate
Shri Tishampati Sen, Advocate
Shri Kamal Sharma, Advocate
Ms. Prerana De, Advocate
Ms. Heena Sharma, Advocate
Shri Varun Kejriwal, VP Business

For ANI Technologies Pvt. Ltd. (OP-1) : Shri Ramji Srinivasan, Sr. Advocate
Ms. Nisha Kaur Uberoi, Advocate

	Shri Shiv Johar, Advocate Shri Tushar Bhardwaj, Advocate Shri Chetan Chopra, Asst. Director Law
For Uber India Systems Pvt. Ltd. (OP-2):	Shri Amit Sibal, Sr. Advocate Shri Naval Satarawala Chopra, Advocate Shri Aman Singh Seth, Advocate Shri Sapan Parekh, Advocate Shri Avinash Amarnath, Advocate Shri Nayantara Menon Mehta, Counsel (OP-2) Shri Hardeep Singh, Counsel (OP-2)
For Uber B.V. (OP-3) :	Shri Naval Satarawala Chopra, Advocate Shri Aman Singh Seth, Advocate Shri Sapan Parekh, Advocate
For Uber Technologies Inc. (OP-4) :	None

Order under Section 26(2) of the Competition Act, 2002

1. Through this common order, the Commission shall dispose of four information(s) filed by Meru Travel Solutions Pvt. Ltd. **(MTSPL)** (hereinafter, '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against ANI Technologies Pvt. Ltd. (hereinafter, '**Opposite Party No. 1'/ 'OP 1**'/'**Ola'**), Uber India Systems Pvt. Ltd.(hereinafter, '**Opposite Party No. 2'/ 'OP 2**'), Uber BV (hereinafter, '**Opposite Party No. 3'/ 'OP 3**'), Uber Technologies International Inc. (hereinafter, '**Opposite Party No. 4'/ 'OP 4**'), collectively referred to as the Opposite Parties/OPs, involving similar allegations under the provisions of Sections 3 and 4 of the Act.

Parties to the Case

2. The Informant, same in all the four cases, is a group holding company which is engaged in the radio taxi service business through its wholly owned subsidiaries namely Meru Cab Company Pvt. Ltd. and V-Link Automotive Services Pvt. Ltd.

The Informant started its Radio Taxi Service in India in the year 2007 and commenced its operations in different cities at different time periods thereafter.

3. OP-1 is a company engaged in the provision of radio taxi services under the brand name '*Ola*' and '*Taxi for Sure*'. OP-2 to OP-4 are part of the '*Uber Group*' ('Uber') and are engaged in business of provision of Radio Taxi Services. OP-4 is the ultimate holding company of the Uber Group. As per the information, OP-2 provides assistance in connection with marketing and promotion and acts as an agent of OP-3 for doing business in India. OP-3 directly enters into a contract with different taxi owners attached to the Uber network and is responsible for making payments to the drivers from the fare collected from the passenger as well payment of incentives to the driver. It is claimed that, till date, OP-4 has received a total funding of about USD 11 billion through various venture capital funds and private equity investors. It further claimed that the scale of its Indian operations have reached enormous proportion on the strength of such global funding.

4. The Informant has alleged that the OPs, with their deep pockets, have entered into agreements with drivers and employed such lucrative incentive model that the drivers are locked-in into one network. The incentive model of providing unrealistic incentives to the drivers and discounts to customers in addition to low fares, is aimed at gaining a high market share, it forecloses competition in the market by creating entry barriers. It is alleged that the incentive policies are not based on sound business rationale except to induce driver partners to remain loyal to their network. It is also alleged that OP-1's scheme of Minimum Business Guarantee (MBG) induces the drivers to stay on its network and, thus, is an anti-competitive arrangement. It is further alleged that the OPs have been able to spend such huge sums of money on discounts and incentives because of the huge funding received by them. The Informant has relied upon data to argue that OPs, in aggregate, have burnt cash of about INR 130 billion in India on driver incentives, pursuant to which there exists an agreement between *(i)* OP-1 and its drivers; *(ii)* OP-2/OP-3/OP-4 and its drivers, in the different regional markets of Hyderabad, Mumbai, Chennai

and Kolkata. Such anti-competitive agreements are alleged to be in contravention of Section 3(4) read with Section 3(1) of the Act.

5. Besides alleging anti-competitive agreements under Section 3(4) read with Section 3(1) of the Act, the Informant has alleged abuse of dominant position by the OPs within the meaning of Section 4 of the Act. Though the allegations in all four information(s) are largely similar, Informant has identified four different geographic markets/regions. Therefore, before delving into the common facts and issues, the specific facts of the four cases are enumerated in the following paragraphs.

Fact in Case No. 25 of 2017

6. The Informant has alleged that the OPs, *i.e.* Ola and Uber Group, are collectively dominant in the '*market for radio taxi services in the city of Hyderabad*' and that they have abused their dominant position. Alternatively, the Informant has alleged that OPs are dominant as part of the same 'group' pursuant to common ownership by institutional investors.

7. The proposition of the Informant regarding dominance is primarily based on the market shares held by the OPs, *inter-alia* based on the market study report prepared by a private research company, namely, Tech Sci. It has been stated that market shares of Ola and Uber, based on number of trips per day per car, have remained constantly high during October, 2015 to February, 2017 while the market shares of other players have depleted in number. The Informant has provided the following data in support:

Market share of operators in Hyderabad

Company	Market share (% active fleet) as of October 2015	Market share (% active fleet) as of February 2017	Market share (% trips) as of October 2015	Market share (% trips) as of February 2017
Ola	41	46.24	43.8	49.2
Uber	40.1	45.47	42.8	48.3
Meru	10.07	3.1	7.6	1.4
Sky cab	3	0.7	2.1	0.4
Easy Cab	4.9	3.1	3.3	0.1
Other	-	-	-	0.4

8. Based on the market shares, network strength of OPs, countervailing buyer power, existence of entry barriers on account of huge capital requirement *etc.*, Informant has alleged dominance of the OPs in the relevant market *i.e.* '*market for radio taxi services in the city of Hyderabad*'. The proposition of the Informant is three-fold: first, Ola and Uber are individually alleged to be dominant in the relevant market; second, Ola and Uber collectively hold a dominant position and that Section 4 of the Act encompasses dominance by more than one undertaking; and last pursuant to shareholdings by common investors in both Ola and Uber, it is possible that both these entities are controlled by these common investors and, thus, form part of the same 'group' within the meaning of Section 5 of the Act.

Fact in Case No. 26 of 2017

9. Similarly, in Case No. 26 of 2017, Informant has alleged that OPs, *i.e.* Ola and Uber Group, are collectively dominant in the '*market for radio taxi services in the city of Mumbai*' and pursuant to such dominance, they have abused their dominant position. Alternatively, the Informant has alleged that OPs are dominant as part of the same 'group' pursuant to common ownership by institutional investors. The market shares held by the OPs, *inter-alia*, based on the market study report prepared by Tech Sci are tabulated below:

Market share of operators in Mumbai

Company	Market share (% active fleet) as of October 2015	Market share (% active fleet) as on February 2017	Market share (% trips) as of October 2015	Market share (% trips) as on February 2017
Ola	38.3	47.87	42.6	50.86
Uber	22.6	44.03	25.2	46.79
Meru	18.1	2.84	13.4	1.01
Tab cab	16.9	1.7	15.6	0.5
Easy Cab	3.9	1.28	2.9	0.3
Other	-	2.27	-	0.5

10. Based on the market shares, network strength of OPs, countervailing buyer power, existence of entry barriers on account of huge capital requirement *etc.*, the Informant has alleged dominance of the OPs in the relevant market, *i.e.* '*market for radio taxi services in the city of Mumbai*'. The proposition of the Informant is three-fold: first, Ola and Uber are individually alleged to be dominant in the relevant market; second, Ola and Uber collectively hold a dominant position and that Section 4 of the Act encompasses dominance by more than one undertaking; and last pursuant to shareholdings by common investors in both Ola and Uber, it is possible that both these entities are controlled by these common investors and, thus, form part of the same 'group' within the meaning of Section 5 of the Act.

Fact in Case No. 27 of 2017

11. In Case No. 27 of 2017, the Informant has alleged that Uber Group is dominant in the '*market for radio taxi services in the city of Kolkata*' and pursuant to such dominance, it has abused its dominant position. Alternatively, the Informant has alleged that the OPs are dominant collectively and/or as part of the same 'group' pursuant to common ownership by institutional investors. The market shares held by the OPs, *inter-alia*, based on the market study report prepared by Tech Sci are tabulated below:

Market share of operators in Kolkata

Company	Market share (% active fleet) as of May 2015	Market share (% active fleet) as on February 2017	Market share (% trips) as of May 2015	Market share (% trips) as on February 2017
Uber	54.6	60.7	58.7	63.8
Ola	33.3	33.2	32.5	34.8
Sure Taxis	7.7	-	5.3	-
Meru cabs	2	1.34	2	0.3
Mega cabs	0.8	2.01	1.2	0.6
Book my cab	-	0.9	-	0.1
Fast Track	-	0.07	-	0.01
others	-	1.6	-	0.2

12. Based on the aforesaid market shares, network strength of OPs, countervailing buyer power, existence of entry barriers on account of huge capital requirement *etc.*, the Informant has alleged dominance of the Uber/OPs in the relevant market, *i.e.* '*market for radio taxi services in the city of Kolkata*'. The proposition of the Informant is three-fold: first, Uber is alleged to be dominant in the relevant market; second, Ola and Uber collectively hold a dominant position and that Section 4 of the Act encompasses dominance by more than one undertaking; and last, pursuant to shareholdings by common investors in both Ola and Uber, it is possible that both these entities are controlled by these common investors and, thus, form part of the same 'group' within the meaning of Section 5 of the Act.

Fact in Case No. 28 of 2017

13. In Case No. 27 of 2017, Informant has alleged that Ola is dominant in the '*market for radio taxi services in the city of Chennai*' and pursuant to such dominance, it has abused its dominant position. Alternatively, the Informant has alleged that the OPs are dominant collectively and/or as part of the same 'group' pursuant to common ownership by institutional investors. The market shares held by the OPs, *inter-alia*, based on the market study report prepared by Tech Sci are tabulated below:

Market share of operators in Chennai

Company	Market share (% active fleet) as of October 2015	Market share (% active fleet) as on February 2017	Market share (% trips) as of October 2015	Market share (% trips) as on February 2017
Ola + TFS	54.4	60.86	68.3	72.9
Uber	9.69	29.64	10.1	24.86
Meru	5.28	0.20	4.42	0.02
Fast Track	20.2	4.59	12.72	1.65
NTL	10.3	0.79	4.31	0.09
Utoo cabs	-	0.79	-	0.09
others	-	3.14	-	0.38

14. Based on the aforesaid market shares, network strength of OPs, countervailing buyer power, existence of entry barriers on account of huge capital requirement *etc.*, the Informant has alleged dominance of the OPs in the relevant market. The proposition of the Informant is three-fold: first, Ola is alleged to be dominant in the relevant market, *i.e.* '*market for radio taxi services in the city of Chennai*'; second, Ola and Uber collectively hold a dominant position and that Section 4 of the Act encompasses dominance by more than one undertaking; and last, pursuant to shareholdings by common investors in both Ola and Uber, it is possible that both these entities are controlled by these common investors and thus, form part of the same 'group' within the meaning of Section 5 of the Act.

15. Besides aforesaid specific facts in the information(s) filed by the Informant, some common arguments have also been submitted. It is argued that most of the earlier cases filed before the Commission in the radio taxi industry were closed due to competitive constraints posed by Ola and Uber on each other. Questioning this analysis, the Informant has alleged that Section 4 of the Act contemplates analysis based on 'competitors' and not a single competitor. Thus, presence of two players, posing competitive constraints on each other, may not be sufficient to ensure competition in the market. Further, relying upon economic testimonies, legal scheme of the Act, legislative history, purposive interpretation, international

precedents *etc.*, the Informant has argued that both Ola and Uber are individually dominant in the relevant market. With regard to collective dominance, it is stated that the definition of dominant position under the Act is very broad and it can include two enterprises which have the position of strength to affect competitors or relevant market in their favour. The Informant also placed reliance on the observations made by the Canadian Competition Tribunal in the case of *Commissioner of Competition v. Visa Canada Corporation and Master Card International Corporation, 2013*, wherein the Tribunal found that 2 undertakings *viz. Visa* and *MasterCard* to be having market power in the same relevant market simultaneously. Alternatively, it is argued that on account of the strong common investor, there can be consolidations between two rivals in the industry leading to elimination of effective competition, eventually harming the consumer interest.

16. It is further submitted that Section 4 does not stipulate that there can be only one dominant enterprise but states that 'no enterprise' shall abuse its dominant position. It is stated that the term 'no enterprise' is to convey with certainty the prohibition and not to limit such prohibition to one enterprise. Moreover, if the General Clauses Act is applied to interpret the statute it becomes clear that singular terms would include plural terms and, therefore, the expression 'an enterprise' used in the explanation would include reference to more than one enterprise.

17. In regard to the common ownership, it is stated that since Ola and Uber have common investors, *viz.* Tiger Global Management LLC and DidiChuxing, it is possible that they end up forming part of the same group as per the definition provided under Section 5 of the Act. They are then liable to be assessed under 'group' for the purpose of Section 4. Besides, through the additional information filed on 12th April, 2018, the Informant has highlighted certain recent developments with regard to common ownership. Relying on the newspaper reports mentioning recent investment by SoftBank buying 12-20% stake in Uber, it is argued that this investment further exacerbates the situation. Pursuant to the common investors holding substantial shares in both Ola and Uber (the OPs) and the presence of

SoftBank nominee directors on their respective boards will adversely affect competition in the relevant markets. It was further stated that facts and figures provided in the four sets of information demonstrate that OPs have garnered more than 90% in each of the market. In such a scenario, the recent investment by SoftBank in Uber would further strengthen the combined market position of the OPs and weaken the competition in the market and, thus, they are liable to be investigated.

18. With regard to the abuse of dominant position by OPs, it is alleged that OPs have been indulging in below variable cost pricing for a period of more than two years which has led to significant losses as well increased bookings. It is stated that actions of the OPs are not a part of promotional activities but have been undertaken with the specific purpose of reducing competition and ousting competitors from the market.

19. The Informant has relied upon the financial statements of Ola for the financial year 2015-16. Based on this, it is averred that at a marginal level, Ola spends about Rs. 3.24 /- on its drivers as incentive for every Re 1 that it earns. While the revenue of Ola has increased by Rs. 440 crores from 2014-15 to 2015-16, expenses only on driver incentives (which is the biggest component of Ola's variable cost) has gone up by Rs.1,030 crores. In 2015-16, Ola has spent nearly Rs. 1,630 crores on incentive pay-outs to drivers. Further, Ola offers huge discounts to its customers which are in effect earnings foregone by it. It is stated that total loss borne by Ola in 2015-16 amounts to Rs.2,311 crores. Ola has been able to sustain the losses emanating from predatory pricing solely because of the huge amounts of funding it has been receiving at repeated intervals. The Informant has provided the data showing the funding received by Ola and Uber overtime.

20. In regard to Uber, the Informant has stated that it has relied on newspaper reports to analyse Uber's losses as Uber BV, which is responsible for paying driver incentives, is a foreign company. As such, it has no obligation to report its financial

statements in India. It is averred that Uber's loss worldwide is in the range of USD 3.8 billion. It is further stated that Uber has sold its China business last summer and has nearly attained break even in US. Based on this, the Informant submits that since Uber's India operations are its second biggest after US (as per officials of Uber), significant chunk of its losses would be because of Indian operations.

21. It is submitted that predatory practices of the OPs have adversely impacted the business of Informant as it has not been able to match the huge customer and driver network created by OPs through their discount and incentive schemes.

22. Based on the aforesaid facts, the Informant has alleged that the conduct of OPs is in violation of Section 4(2)(a)(ii) and Section 3(4) read with Section 3(1) of the Act and has prayed for a detailed investigation in the matter under Section 26(1) of the Act.

23. The Commission considered the four sets of information on 25th July, 2017, and 03rd August, 2017, and decided to seek further information from the Opposite Parties before forming a *prima facie* opinion. The information sought is primarily in regard to their shareholding pattern along with the names of major shareholders; details of cross-shareholding, if any; details of funds raised in the form of share capital and/or loans/bond *etc.* from the major investors along with their names, terms of investment, right in management *etc.* along with copies of the agreement, if any; details of board composition, nominee directors (if any) including details of investors who have the right to nominate such director(s); copies of the agreement(s) with the drivers stating separately the terms and conditions relating to Minimum Business Guarantee (MBG) *etc.*

24. After seeking additional time, OPs filed the requisite information. OP-1/Ola filed its response, both *confidential & non-confidential*, to the queries on 26th September, 2017, whereas Uber filed the response on 13th September, 2017 (*confidential version*) and 10th October, 2017 (*non-confidential version*) to the queries raised by the Commission.

25. On 09th January, 2018, the Commission considered the responses filed by the OPs, including their requests relating to confidentiality. The Commission decided to hear the parties in a preliminary conference on 15th February, 2018. The Commission also decided to hear the OPs on their confidentiality requests on the same day. Pursuant to the directions of the Commission, OP-1 filed a revised public version of the response dated 26th September, 2017, incorporating the information already available in public domain.

26. After the extensions sought by the parties, preliminary conference in the matter was held on 03rd May, 2018. During the preliminary conference, the Informant reiterated the facts and allegations stated in the information and those submitted *vide* its additional information dated 12th April, 2018. These have already been stated in the preceding facts and are not repeated further for the sake of brevity.

27. As for the OPs, it is argued that the Informant had made substantially the same arguments before the Hon'ble Commission in earlier cases, which the Hon'ble Commission closed at the *prima facie* stage. The Informant is attempting to resurrect the same issue for the cities of Hyderabad, Chennai, Mumbai and Kolkata.

28. With respect to the allegations of anti-competitive agreement between Uber/Ola and its driver-partners, it was submitted that neither there is any exclusivity condition in the agreement between Uber/Ola and their respective Driver Partners nor such a condition has been imposed on the drivers otherwise. The drivers are free to move to alternative platform by just clicking on the other app and that the drivers are not bound to stay with one particular cab aggregator. It was also stated that there are several actual and potential competitors in the relevant market, which is vibrant and dynamic.

29. Uber disagreed with the delineation of the relevant market submitting that the relevant market product market is much broader than provision of "*radio taxi services*". It should include all modes of public transportation (such as taxis, buses,

auto rickshaws, sub-urban railway and metro), as well as private transport as these are substitutable with one another. Uber further submitted that the market should also include the 'market for driving services for three and four wheelers'.

30. The OPs objected to allegation of dominance in the relevant market. It was argued that collective dominance is not recognised by the Act. Further, it was contended that OPs cannot not be held to be part of the same group pursuant to common ownership by some investors. The standard of applying the definition of 'group' under Section 5 for the purposes of Section 4 is different than that applicable for Section 6.

31. It was submitted that cross-shareholding by investors is not unusual as investors seek to reduce the risk of failure of companies by spreading their investment across multiple companies in the same sector and hence, Uber and Ola are not part of the same group for the purposes of Section 4 of the Competition Act.

32. With respect to the allegation of SoftBank's influence and control in both Ola and Uber, it was submitted that SoftBank has a shareholding of approximately 15% in Uber in addition to the right to appoint only 2 of 17 directors on its Board of Directors. Thus, the test for "control" under Explanation (b)(i) to Section 5 of the Act is not met. Further, OPs disregarded the reliance made by the Informant upon the material suggesting that SoftBank is orchestrating consolidation in the market stating that such newspaper reports cannot be relied upon. It was submitted that decisions on business strategies are made by the Board of Directors and are not driven by any individual investor. In addition, it was highlighted that jurisdictions of Singapore, Malaysia and Philippines inquired into Uber's merger with Grab Taxi only once the transaction was complete. Thus, it is premature for the Commission to investigate similarly in India.

33. Addressing the submission of the Informant relating to economic studies in concentrated markets, it was submitted that reliance cannot be placed upon the

economic studies for the reasons that *first*, airline sector in USA is mature, regulated with barriers to entry whereas radio taxi service market in India is still a nascent market. It displays extraordinary growth and has low barriers to entry. *Second*, OECD Report cannot be relied upon as institutional investors cannot influence competitive strategies.

34. It was further argued that the "agreement" referred to by Informant, being an investment by SoftBank in Ola and Uber is not covered by the provisions of Section 3 because neither SoftBank competes with Uber or Ola, nor do they provide goods/services at different levels of production/supply chain. It was emphasised that as Section 5 and 6 of the Act specifically deal with the regulation of combinations, the transaction should not be dealt under Section 3 of the Act.

35. Based on the aforesaid submissions, the OPs submitted that Informant has failed to make out a *prima facie* case against any of the OPs in any of the regional markets. Therefore, the allegations of dominance should be rejected.

Observations and Findings

36. The Commission has perused the material placed on record, including the information, additional information, responses filed by the OPs and other material brought before the Commission during the preliminary conference.

37. At the outset, the Commission notes that apart from the allegation of OPs' dominance, the Informant has also alleged that the OPs have entered into anti-competitive agreements with their drivers wherein exclusivity restrictions have been imposed on the drivers, in contravention of Section 3(4) read with Section 3(1) of the Act. However, the Informant has neither placed on record any written agreement wherein such anti-competitive restriction has been imposed upon the drivers nor has it alleged any oral agreement between the OPs and their drivers. Instead, the Informant has claimed that the OPs' strategy/incentive model amounts to an agreement. It is urged that the strategy/incentive model employed by the OPs

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. This, in the Commission's opinion, is a narrow reading of the term 'agreement' defined under Section 2(b) of the Act. Existence of an agreement/understanding/arrangement between parties is a pre-requisite to attract the provisions of Section 3. The agreement referred to by the Informant in this case consists of incentives offered by the OPs which have been availed by the drivers out of their choice. While dealing with the matter in Case Nos. 6 & 74 of 2015, the Commission observed that, in radio taxi service market, both drivers and riders can have applications developed by multiple service providers and can 'multi-home'. The drivers/fleet owners connected to various aggregators through apps, can easily switch between different aggregators depending on the incentive scheme *etc.* by simply switching off or switching on their mobile handsets. Moreover, there is no reason to believe that there are supply constraints in the market for drivers such that these alleged agreements can cause lock-ins and, hence, barriers to entry in the radio taxi services market. Thus, the incentives given by OPs to their prospective drivers cannot be held to be anti-competitive agreement as such. This, in the Commission's view, does not fall under the definition of agreement as understood within the meaning of Section 3 read with Section 2(b) of the Act. The allegation, thus, does not hold any merit.

38. In regard to the other allegations made in the four sets of information, the Commission note that facts and issues raised in these information are almost similar to those made in earlier cases (*Case Nos. 6 & 74 of 2015*, *Case No. 81 of 2015*, *Case No. 82 of 2015*, *Case No. 21 of 2016* etc.). In the said cases, the Commission while defining the relevant product market as '*Radio Taxi services'* took into consideration factors like convenience of time saving, point-to-point pick and drop, pre-booking facility, ease of availability even at obscure places, round the clock availability, predictability in terms of expected waiting/ journey time etc. It was opined that these features of a radio taxi may not be available in case of other modes of road transport. The Commission also noted that there was a dedicated category

of commuters who use radio cabs, especially executives, professionals, tourist etc. who will not switch to auto-rickshaws or buses under normal circumstances even though they have to pay a little higher than the other modes of transport. It is further observed that the Informant has also proposed the relevant product market as the market for radio taxi services, barring in one market where the relevant product market was held to be '*services offered by radio taxis and yellow taxis*' (*Case No. 81 of 2015* in Kolkata). With regard to the relevant geographic market, the Commission, in earlier cases, took the view that providing taxi services is a highly localised service. From the commuter as well as the taxi driver's point of view, it won't be feasible to offer such services beyond the local limits of a particular city/state. Also, it was observed that a commuter would generally rely on local transport available to him/ her within the vicinity of the city rather than going beyond it.

39. The Commission finds no reason to differ and given the facts in 4 sets of information, adopts the relevant market definition from its earlier orders. Consequently, the relevant market in the 4 cases would be as follows:

    39.1 Case No. 25 of 2017: '*Market for radio taxi services in Hyderabad*';

    39.2 Case No. 26 of 2017: '*Market for radio taxi services in Mumbai*';

    39.3 Case No. 27 of 2017: '*Market for radio taxi and yellow taxi services in Kolkata*';

    39.4 Case No. 28 of 2017: '*Market for radio taxi services in Chennai*';

40. In the aforesaid markets, the Informant has alleged OPs to be dominant. The Commission notes that the Informant has proposed two alternative line of arguments under Section 4 of the Act.

    40.1 *Both Ola and Uber are independently as well as collectively dominant in the relevant market and both are abusing their dominant position; or*

    40.2 *Ola and Uber are dominant as a 'Group' owing to common investors and they are abusing their dominance.*

41. Besides, in Case No. 27 of 2017, Informant has alleged dominance of Uber and in Case No. 28 of 2017, dominance of Ola has been alleged. These have been alleged primarily because of the high market shares held by these OPs in the respective geographic market and the entry barriers created by them in the form of network. The Commission notes that the market shares relied upon by the Informant are based on the market research conducted by Tech Sci, a private research company. Without going into the authenticity of this market research report, suffice to say that high market share in itself may not be indicative of dominance. This has been discussed at length by the Commission in its order dated 19th July, 2017 in *Case Nos. 6 & 74 of 2015* wherein initial investigation was directed primarily on the basis of market share. However, detailed investigation revealed that market shares were neither an indicator of lack of competitive constraints nor depicted the real competition that existed in the market. Though market share is theoretically an important indicator for lack of competitive constraints, it is not a conclusive indicator of dominance. Further, there cannot be any objective criteria for determining market share thresholds and a standard time-period as an indicia of dominance to apply in all cases. Therefore, the Informants' contention that market share of more than 50% leads to a presumption of dominance may not be accepted, especially when under the scheme of the Act, no numerical threshold for presumption of dominance has been prescribed. Thus, the Commission is of the view that *prima facie* dominance of Uber (in Case No. 27 of 2017) or Ola (in Case No. 28 of 2017) is not made out.

42. In regard to the Informant's argument regarding dominance of Ola and Uber independently as well as collectively in the relevant markets, the Commission is of the view that the provisions of Section 4 of the Act clearly stipulate dominant position by only one enterprise or one group. This issue was raised in *Case Nos. 6 &74 of 2015*. The observations of the Commission, given *vide* final order dated 19th July 2017, on this issue are as under:

104. *The Commission further notes that in the alternative, the Informants have argued that Uber and Ola can both be held dominant simultaneously in the relevant market. While doing so, the Informant has also relied upon international case-laws, including a Canadian case law, where two entities MasterCard/Visa were held to be dominant. To substantiate their claim, the Informants have also stressed upon the following sub-clause (b) of Section 27 of the Act:*

Section 27 (b): 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:

[….]

105. *It has been argued that the use of word 'enterprises which are parties to such agreements and abuse' implies that there can be more than one enterprise which can be dominant and hence abusing their dominant positions. In this regard, the Commission notes that the Informants have mistakenly relied upon a penalty provision to infer an interpretation which is contrary to the charging section. In doing so, the Informants have applied the rules of literal interpretation in a very narrow sense to Section 27(b) without realizing that the literal interpretation of statutory provisions have to be dispensed with if they lead to absurd interpretation. Although rule of literal interpretation suggests that words used in a statute have to be construed as per their literal meaning, there are sufficient exceptions if the same leads to absurdity or meaning which is contrary to the other provisions of the Act. In any case the use of words 'parties' or 'enterprises' in Section 27(b) seems to be meant for parties entering into anti-competitive agreements and not for enterprise indulging in unilateral conduct.*

106. *The Commission observes that there are various provisions in the Act that signify the intent of the legislature that there cannot be more than one dominant enterprise in the relevant market at a particular point of time.*

107. *Provisions of Section 4 of the Act clearly stipulate that dominant position can be held by only one enterprise or one group. Section 4(2) states that "There shall be an abuse of dominant position, if an enterprise or a group—." The term 'a'/'an' used in section 4(2) evidently states the singular form, which shows that the intention of the legislature was never to hold more than one enterprise to be in a dominant position, unless they are part of the group within the meaning of Section 5 of the Act.*

108. *Besides the usage of 'a'/ 'an' in Section 4(2), the explanation (a) to Section 4 of the Act states as follows:*

"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 competitors or consumers or the relevant market in its favour.

(emphasis supplied)

109. *The usage of words 'operate independently' appearing in the aforesaid definition clearly shows that the concept of 'dominance' is meant to be ascribed to only one entity. Further, the underlined words in the above explanation indicates that the whole essence of Section 4 of the Act lies in proscribing unilateral conduct exercised by a single entity or group, independent of its competitors or consumers. In the presence of more*

than one dominant entity, none of those entities would be able to act independent of one another.

110. *Further, Section 19(4) of the Act, which enlists factors assessment of dominance, is also of relevant in this regard. The plain reading of the factors mentioned under Section 19(4) signifies that the focal point of such assessment is the alleged dominant entity, around which the assessment revolves. If there was any scope of more than one entity being envisaged by the Act, factors like 'size and resources of competitors', 'economic power of the enterprise including commercial advantages over competitors' etc. would not have found place under Section 19(4) of the Act.*

111. *Furthermore, in Section 28 of the Act, which specifically deal with division of enterprises enjoying dominant position, the usage of the words unambiguously indicates that the Act does not provide for more than one enterprise to be dominant in the relevant market.*

112. *Lastly, the Commission finds it appropriate to refer to the Competition (Amendment) Bill, 2012 (Bill No. 136 of 2012) which lapsed due to dissolution of Lok Sabha. Clause 4 of the said Bill states as follows:*

'In section 4 of the principal Act, in sub-section (1), after the words "or group", the words "jointly or singly" shall be inserted.'

(emphasis supplied)

113. *The aforesaid proposed amendment further reinforces the proposition that there is no scope in the present scheme of the Act, either expressly or by implication, to contemplate the presence of two independent entities as dominant at the same time in the relevant market. Had there been any scope for such interpretation, this amendment would not have*

been required.

114. Based on the foregoing discussions, it can be concluded that the Act does not allow for more than one dominant player under Section 4. Rather the existence of two strong players in the market is indicative of competition between them, unless they have agreed not to compete, which also can be only be looked into under Section 3 of the Act, not Section 4. Hence, the present argument of the Informant regarding the collective dominance of OP and Uber is rejected herewith.

43. Based on the above, the Commission rejects the contention of the Informant that the Act allows for more than one dominant player under Section 4, being without any merit.

44. The Commission notes that the Informant has suggested in the alternative that the OPs, Ola and Uber, are dominant as a group owing to common investors having substantial stakes in these OP companies. It is alleged that Ola and Uber have certain common investors *viz SoftBank, Tiger Global Management LLC, Sequoia Capital* and *Didi Chuxing*. The common investors have allegedly control over both Ola and Uber and it is possible that they may end up serving as a platform to facilitate collusive arrangement or exchange of sensitive information between the two competitors.

45. The concept of common investors holding shares or having investment in competing firms has evinced interest of both academics and competition authorities alike on the impact of common ownership on corporate governance, especially competition. 'Common ownership' describes a situation where large institutional shareholders such as investment funds, foreign wealth funds, pension funds, *etc*., hold minority stakes in a large number of companies that are active in the same industry and compete with each other. Recent economic researches have argued that concentration among shareholdings by institutional investors has led to higher

prices in two relatively concentrated industries: airlines and banking. The competition concerns relating to common ownership are usually scrutinized under the merger control rules of competition regulation. However, in certain markets, and increasingly in digital markets, the concerns related to common ownership may not be under the scanner of merger control rules if the merging firms or share acquisitions fall under the *de minimis* exemption, thus, giving rise to a statutory lacunae.

46. Such overlapping ownership interests in competing firms may imply a reduction in firms' incentives to compete, compared to a situation in which competing firms are controlled by separate sets of investors, and may thus give rise to antitrust risks. Two types of theories of harm may arise due to common ownership. These include unilateral effects where common ownership may incentivize unilateral price increases (or reductions in quality) that may be unprofitable for a firm, but beneficial for its investors if they also hold shares in its competitor(s). The other is coordinated effects where it may create additional incentives to investors to facilitate collusion and earn collusive profits. Though there is currently no evidence that these anti-competitive harms have played out in the market, the Commission will not hesitate in taking appropriate action under the Act if an inquiry reveals compelling evidence of the anticompetitive effects of common ownership by institutional investors in concentrated industries. It is currently an unanswered empirical question whether common ownership leads to company managerial behaviour that violates fiduciary obligations and harms competition. The empirical studies have mainly concentrated on common owners like hedge funds, mutual funds *etc.* which have passive investments across competing companies. However, in the present case, Softbank has emerged to be an "active investor" which has a significant stake in both Ola and Uber. Although it is a minority shareholder in both the firms, it has the ability to exercise material influence over them. Softbank is known for bias towards those start-ups which have the potential to dominate an industry. In the absence of powerful undiversified shareholders who would benefit from increased competition, influence of minority shareholders like

Softbank who have made lumpy investment in competing firms and may have more voice in management needs to be monitored carefully.

47. Markets function fairly and in a healthy manner when there are incentives to compete. The market in the present case, *i.e.* the radio taxi service market, is a two-sided market. While dealing with *Case Nos. 06 & 74 of 2015*, the Commission observed the role of network effects in two-sided markets. The competition in such a market is more intense due to the incentives to build strong network. In the said case, one of the main factors that satisfied the Commission about existence of competitive constraints on Ola (the Opposite Party in that case) was the active presence of a strong competitor, namely Uber, in the relevant market.

48. The issue for consideration in the present matter is whether the existence of common investors in the OPs has or we lead to the erosion of competitive constraint that each poses on the other. This apprehension arises on account of the aforesaid theory of harm. The economic theory has not yet produced a definitive, tested prediction that establishes a causal relation between common ownership and softening of competition. It only suggests that in cases where common ownership translates into control, there can be potential harm to the competition in concentrated markets.

49. In the context of competition law, there are various degrees of control, each having a different implication based on associated rights. Control can be in the form of *de facto* control, controlling interest (*de jure* control) as well as material influence. Material 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. Against this, *de facto* control implies a situation where an enterprise holds less than the majority of voting rights, but in practice exercises control over more than half of the votes actually cast at a meeting. There is no dearth of literature and precedent in international jurisprudence to suggest that the concepts of material influence and *de facto* control are significant in competition law as there can be

situations where the operational realities can be more telling than the formal agreements and structures.

50. The Commission is aware that many market regulators around the globe are grappling with this issue and devising ways to come up with definite theory (ies) of harm associated with common ownership. However, recent empirical research does not suggest with certainty that common ownership is likely to generate anticompetitive effects in every market situation. Thus, given the theoretical ambiguities, the effect of common ownership has to be established through market enquiry to determine at what level common ownership can pose a competitive risk. It is the case of the Informant that common ownership in Ola and Uber by common investors has raised the competitive risks. The OPs have countered it and argued that investments by the common investors are circumscribed by several other fiduciary responsibilities and thus, make it highly improbable for them to exercise any 'control' in both the OPs at the same time.

51. The data on record indicates that there are at least 4 common investors, namely, Softbank, Tiger LLC, Sequoia Capital, Didi Chuxing. SoftBank's investment in Ola *via* its affiliate SIMI Pacific Pte. Ltd. is more than 25%. The Informant has alleged that the recent acquisition by SoftBank, along with the other co-investors, of the 17.5% stake in Uber in January, 2018, has made it the largest stakeholder in Uber. Further, it has also been pointed out during the preliminary conference that this investment by SoftBank bequeaths it with the right to appoint two directors in Uber, while its affiliate SIMI Pacific Pte Ltd. already has 2 directors in Ola as per the information provided by them. However, investments/shares held by other common investors *i.e.* Tiger LLC, Sequoia Capital, Didi Chuxing in OPs (Ola and Uber), does not seem to suggest possession of control by these investors in OPs.

52. Undoubtedly, there are apprehensions that common ownership may give rise to the possibility of efforts by or through the common investors to coordinate the decisions of competing entities to lower their risk and in doing so, dampen the

competition. In addition, common ownership of firms with related and competing commercial interests may increase the risk of exchange of sensitive information which may facilitate price-collusion or restrain capacity and volumes. An institutional investor, despite 'passive' investments, may affect the competitive dynamics of the market. Thus, potential effect of common shareholdings on competition, either by affecting unilateral horizontal incentives to compete or through incentivizing collusive behaviour, cannot be completely ruled out.

53. However, investigation under the Act cannot be ordered solely based on conjectures and apprehensions. The mandate of the Act is clear. The trigger point to order investigation under Section 26(1) is the *prima facie* establishment of a contravention either under Section 3 or Section 4 of the Act. Section 3 requires an agreement/arrangement/understanding between the parties 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. The OPs in the present case are two competing cab aggregators whose shares have been acquired by common investors. There is no evidence furnished which could suggest that OPs have any role in decision for common investment in these two companies. Nor there is any material on record to suggest that competition between them has been compromised because of the common investments. In the absence of any discernible effect, it will be legally untenable to hold that OPs can be influenced in their decisions on operations by the minority number of directors of parties having common shareholding in them, and that they could reach an agreement to this effect as envisaged under Section 3 of the Act.

54. Further, Section 4 of the Act requires existence of an alleged abusive conduct which can be subject to investigation. Dominance in itself is not bad, its abuse is. The erstwhile market legislation, *namely* the *Monopolies and Restrictive Trade Practices Act, 1969* (repealed *w.e.f.* 01st September, 2009) provided for control of monopolies, derived from the basic philosophy of prohibition ingrained in the

Constitutional Directive of 'prevention of concentration of economic power to the common detriment'. However, the Competition Act, 2002 made a paradigm shift from 'monopoly being *per-se* bad' to 'abuse of dominant position' being bad in law. Therefore, even if contention of the Informant is accepted that OPs have secured a dominant position as a group pursuant to common ownership, the existence of dominance in itself cannot be held to be the basis to order investigation. Existence of alleged abusive conduct under the provisions of Section 4(2) of the Act is a *sine qua non* to order investigation under the Act. In the absence of such a conduct, the Commission is hesitant to conclude that overlapping investments by common investors in competing firms can be a proxy for anti-competitive conduct.

55. In view of the above, the Commission concludes that, at present, facts of the case have not led to establishment of a *prima facie* case against the OPs, either under Section 3 or under Section 4 of the Act. The case is, hence, closed then under the provisions of Section 26(2) of the Act.

56. Before parting with this order, the Commission observes that market dynamics post common investments is yet to fully effectuate. The details are yet to unfold regarding the impact of investments by common investors *i.e.* whether the common ownership has translated into control and, if yes, whether such an ownership can pose a competitive risk. The Commission is cognizant that the degree of competition between the OPs, who are the only effective competitors in the radio taxi service industry, may undergo a significant change, especially if the common investors try to control the destiny of the companies in ways that may at times conflict with the interest of the firm or competition in the market. In other words, common ownership may lead to softening of competition and it is possible that the anti-competitive effects of common ownership may arise more as an error of omission, rather than an error of commission. There is presumably a long path ahead in this direction. Thus, though the Commission is legally constrained from ordering investigation at present owing to the contours of Section 3 and Section 4 of the Act, it will keep a close watch on whether OPs by virtue of the common

investors indulge in behaviour which is in any way in violation of the provision of the Act.

57. The Commission will also monitor whether safeguards/chinese walls put in place, and/or envisaged further by them, to ensure that competition is not compromised by the common investments. Needless to mention, the Commission shall not hesitate to take action, *suo-motu* or otherwise, if concern arising out of horizontal shareholdings *prima facie* seem to exist at any point of time in future wherein the OPs are found to be competing less vigorously consequent to any interference by the common investors in the management decisions by these that are detrimental to competition.

58. The Secretary is directed to inform the parties accordingly.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U.C. Nahta)
Member

New Delhi
Dated: 20/06/2018