



COMPETITION COMMISSION OF INDIA

Case No. 96 of 2015

In Re:

Meru Travel Solutions Pvt. Ltd. (Meru)

128, IJMIMA-Raheja Metroplex,
Behind Goregoan Sports Club,
Off. Link Road, Malad (W),
Mumbai-400064

Informant

And

Uber India Systems Pvt. Ltd.

Regus Business Center Pvt. Ltd.,
Level 13, Platinum Techno Park,
Plot No. 17/18, Sector 30 A,
Vashi, Navi Mumbai,
Maharashtra-400705

Opposite Party No. 1

Uber B.V.

Meester Treublann 7,
1097 DP Amsterdam,
The Netherlands

Opposite Party No. 2

Uber International Holding B.V.

Vijzelstraat 68, Amsterdam 1017,
HL, The Netherlands

Opposite Party No. 3

Uber International B.V.

Vijzelstraat 68, Amsterdam 1017,
HL, The Netherlands

Opposite Party No. 4

Uber Technologies Inc.

182, Howard Street 8,
San Francisco CA 94105

Opposite Party No. 5



CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Appearances

For the Informant

Mr. Sonal Jain, Legal Counsel
Mr. Udyan Jain, Advocate
Mr. Abir Roy, Advocate
Mr. Vivek Pandey, Advocate
Mr. Rahul Kalpani, Authorized Representative

*For Uber India System Pvt.
Ltd. OP-1)*

Mr. Amit Sibal, Senior Advocate
Mr. Saksham Dhingra, Advocate
Ms. Ajita Tondon, Counsel, Legal
Mr. Rohan Mahendra Arora, Authorized
Representative

For Uber B.V. (OP-2)

Mr. Amit Sibal, Senior Advocate
Mr. Saksham Dhingra, Advocate
Mr. Aman Singh Sethi, Authorized Representative
Ms. Anjali Kumar, Authorized Representative
Mr. Devarsh Harsh Kotak, Authorized
Representative

Order under Section 26(6) of the Competition Act, 2002

1. The present information was filed by Meru Travel Solutions Pvt. Ltd. (hereinafter, the '**Informant**'/'**Meru**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against Uber India Systems Pvt. Ltd. (hereinafter, the '**Opposite Party No.1**'), Uber B.V. (hereinafter, the '**Opposite Party No. 2**'), Uber International Holding B.V. (hereinafter, the '**Opposite Party No. 3**'), Uber International B.V. (hereinafter, the '**Opposite Party No. 4**'), Uber Technologies Inc. (hereinafter, the '**Opposite Party No. 5**') (hereinafter, collectively referred to as '**Uber**



Group’/‘OP Group’/‘Uber’), alleging contravention of the provisions of Section 3 and 4 of the Act. It has been alleged that Uber, which is a dominant enterprise in the market for radio taxi services in Delhi-NCR (National Capital Region), has abused its position by resorting to predatory pricing with an intention to drive out its equally efficient competitors like Meru.

Brief facts of the case

2. Meru, the Informant, is engaged in the radio taxi service business in India through its wholly owned subsidiaries namely: Meru Cab Company Pvt. Ltd. and VLink Automotive Services Pvt. Ltd. Both these subsidiaries are stated to provide radio taxi services under the brandnames ‘Meru’, ‘Meru Genie’ and ‘Meru Flexi’ in 21 major cities across India including Delhi NCR. It started operations in India in the year 2007, with self-owned cars but since 2012, it has started offering its services through aggregation model as well.

3. OPs 1 to 5 are part of Uber Group, with OP-5 being the holding company of the Uber Group which started its business in 2009. OP-3 holds 90% shares of OP-1 whereas OP-4 holds 10% shares of OP-1. Uber Group entered the Indian radio taxi services market in 2013 and started its operations in Delhi-NCR in December 2013, wherein it offered services under three different brands namely ‘Uber Black’, ‘Uber X’ and ‘UberGo’. As per the information, OP-1 provides assistance in connection with marketing, logistics and operations to Uber in India and acts as an agent of OP-2 for doing business in India, under a contract executed between OP-1 and OP-2. OP-2 was directly entering into a contract with different taxi owners attached to the Uber network and also with the passengers who used Uber’s radio taxi services. OP-2 is also responsible for payments to drivers. However, post 01.10.2019, all the agreements stood transferred to OP-1.



4. The Informant started its business in 2007 from Mumbai and entered in Delhi-NCR in 2008 and had a significant market share in Indian Market. The Informant claims that by December 2013, it became one of the biggest and most efficient radio taxi service providers. However, due to the alleged anti-competitive practices adopted by its competitors, the Informant lost its market share. Specifically, the Informant has alleged that owing to Uber's deep pockets, Uber indulged into a series of anti-competitive practices *inter alia* imposition of unfair conditions, predatory pricing *etc.* with the sole intent to establish its monopoly and to eliminate otherwise equally efficient competitors from the market.

5. The Informant submitted that the average market price of radio taxis prevailing in Delhi-NCR, before the launch of Uber was ₹ 23 per Km. However, Uber launched its services like Uber Black, Uber X and UberGo with prices much below ₹ 23 per Km. On an average, Uber was losing ₹ 204 per trip which made no economic sense other than the intent to eliminate competition in the market. To survive in the market, the Informant was constrained to offer discounts and incentives in Delhi NCR because of which it incurred a loss of ₹ 107 crores till July 2015. It has been submitted that the Informant's market share decreased from 18% in December 2013 (based on number of cars) to 11% in September 2015 (based on number of trips), whereas the market share of Uber increased to 50% (based on number of trips).

6. Based on a market research report namely '*Delhi-NCR Radio Taxi Service Market Analysis*' conducted by New Age TechSci Research Pvt. Ltd. in September 2015, the Informant has claimed that Uber Group is dominant in the relevant market of 'radio taxi services in Delhi-NCR'. According to the said report, Uber had a market share of 44% based on the fleet size and active fleet size and around 50% based on the number of trips during the relevant time. The other players in the market were stated to be Ola,



TaxiForSure, Meru, Easy Cabs, Quick Cabs, Mega and others. The Informant also alleged that in terms of size and resources, economic power vis-à-vis its competitors in relevant market, growing dependence of its customers on it, vertical integration of its resources, lack of countervailing buying power *etc.*, Uber held a dominant position in the relevant market.

7. The Informant alleged that owing to its dominant position, Uber Group adopted certain abusive practices, which *inter-alia* included offering of unreasonable discounts to the customers leading to abysmally low/predatory prices to oust its competitors from the market. Further, Uber was stated to have employed an incentive policy which is not economically justified and only aimed at exclusively engaging the drivers to its network so as to exclude its competitors having access to such drivers. Thus, it was alleged that Uber has contravened the provisions of Section 4(2)(a)(ii), Section 4(2)(b)(i) and Section 4(2)(c) of the Act.
8. Further, the Informant also alleged that Uber has entered into exclusivity contracts with its driver partners in violation of Section 3(1) read with Section 3(4) of the Act whereby the taxi drivers are restrained from getting attached to any other competing radio taxi operators' network.
9. *Vide* order dated 10.02.2016, the Commission *prima facie* found no contravention against Uber and the matter was closed therewith. As regards the allegation of Section 4 of the Act, the Commission observed that there existed stiff competition between Ola and Uber in the radio taxi industry in Delhi and there existed other competitors in the said market also. The fluctuating market shares of these players, also evident from the two research reports available before the Commission (namely, the *TechSci* Report and *6W Research* report), led the Commission to conclude that the market is competitive in nature and that Uber is not dominant. In relation to allegation pertaining to exclusive contracts of Uber with its drivers under



Section 3 of the Act, the Commission did not find it necessary to deal with the said allegation as OP-1 categorically denied imposition of any such conditions on its driver partners and the Informant failed to adduce any evidence.

10. Aggrieved with the order of the Commission, the Informant filed an appeal (Appeal No. 31 of 2016) before the erstwhile Hon'ble Competition Appellate Tribunal (COMPAT) on 18.04.2016 with a prayer to set aside the order of the Commission and to remand the matter for investigation by the Director General of the Commission. The erstwhile Hon'ble COMPAT noted that Delhi has been delineated as the relevant geographic market by the Commission whereas as a matter of common knowledge, customers can move from one point in NCR to another point calling taxis on telephone/internet platforms. The Commission had referred to Hon'ble High Court of Delhi order on the mandate on the use of CNG in public transport within NCT. But this mandate has been reportedly revised by the Hon'ble Supreme Court to cover the entire NCR of Delhi. On the issue of dominance, the erstwhile Hon'ble COMPAT observed that though Uber has denied the data presented in TechSci Report, it did not produce any data from its side to counter the same. Further, the erstwhile Hon'ble COMPAT opined that the contrary results in the TechSci Report and 6W Research report should have been a good reason for the Commission to order an investigation. In addition, erstwhile Hon'ble COMPAT also noted that the dominant position of Uber should not only be dependent on the market share and other factors should also be looked into. As regards dominance, it was observed that though it cannot be definitely said that there is an abuse inherent in the business practices adopted by Uber, the size of discounts and incentives show that either there were phenomenal efficiencies in its business model or there could be an anti-competitive stance to it. On this account, erstwhile Hon'ble COMPAT, *vide* its order dated 07.12.2016, directed the Director General ('DG') to investigate the matter and submit a



report to the Commission.

11. This order of the erstwhile Hon'ble COMPAT was challenged by Uber in the Hon'ble Supreme Court of India, by way of an appeal (Civil Appeal Nos. 641 of 2017 and 7012 of 2019). The Hon'ble Supreme Court, *vide* order dated 03.09.2019, upheld the order of the erstwhile Hon'ble COMPAT, while making the observation that “...Uber was losing Rs. 204 per trip in respect of every trip made by the cars of the fleet owners, which does not make any economic sense other than pointing to Uber's intent to eliminate competition in the market...”. Accordingly, the Hon'ble Supreme Court dismissed the appeal(s) requesting the DG to complete investigation within a period of six months from the date of its order.
12. In compliance with the aforesaid directions, the DG submitted the Investigation Report on 28.02.2020, both in confidential as well as public version.
13. Subsequently, OP-1 (Uber India) and OP-2 (Uber BV) filed separate applications dated 11.03.2020, stating that they had filed several confidential submissions with the DG during the course of the investigation in the captioned case, with requests seeking confidential treatment in accordance with Section 57 of the Act read with Regulations 35 of the CCI (General) Regulations, 2009 ('General Regulations'). *Vide* order dated 27.02.2020, the DG had rejected the aforesaid request for confidential treatment in respect of certain items. OP-1 and OP-2 further stated that they intended to file their respective detailed applications, in terms of Regulations 35(10) of the General Regulations, 2009, challenging the confidentiality order passed by the DG and requested the Commission that the information and data on which confidential treatment was requested, should not be disclosed to any other party, in any manner.



14. Thereafter, *vide* separate emails dated 06.05.2020, OP-1 and OP-2 filed their respective detailed applications challenging the order of the DG *vide* which their confidentiality requests were disposed of. Both the OPs also requested for an opportunity of hearing on their applications. On 20.05.2020, the Commission considered the applications filed by them and decided to allow an opportunity of hearing to the said OPs on their respective applications on 16.06.2020. Thereafter, due to the ongoing pandemic, the hearing got adjourned on various occasions and OP-1 and OP-2 were heard on their confidentiality applications on 05.11.2020 *via* virtual mode. *Vide* order dated 05.11.2020, the Commission allowed most of the requests made by these OPs and directed the DG to revise the non-confidential version of the investigation report, submitted on 28.02.2020, in accordance with the decision of the Commission on each item as provided in the said order and submit the revised report thereof. On 21.12.2020, the DG submitted its revised version of the non-confidential Investigation Report.

Observations and findings of the DG

15. In view of the allegations made in the information and the observations made by the Commission, erstwhile Hon'ble COMPAT and the Hon'ble Supreme Court in the matter, the DG carried out a detailed investigation.
16. Before dealing with the specific issues, the DG analyzed the taxi industry in India in general and Delhi-NCR, in particular. The DG also looked into the emergence of radio taxi market in India and the distinctive features which radio taxis have with respect to the traditional taxis.
17. The DG noted that the conventional taxi market in India largely comprised of tourist taxis and kerb-based taxis which are not designed for point-to-point service, provided by the radio taxis. Thus, radio taxi in recent times has emerged as a separate and distinct market independent of other modes



of transport (including black and yellow taxis, auto rickshaws, private cabs *etc.*). The said market is separate and distinct from both supply and demand side perspective. Further, in the past few years, the radio taxi companies' leveraged technology to offer bookings through application-based platforms ('app') available on mobile and over the internet. Such mobile applications allow passengers (through the app) to actually see the availability of taxis in or around their location on real time basis (along with estimated time of arrival and the estimated fare for the trip) at the time of booking of the taxi. The customer can track the taxi at all times of his journey including a linkage to the final invoice. The distinguishing features of radio taxi include ease of booking, reliability of service due to GPS tracking, transparent fare and accurate meter, option to select the type of taxi and quality of the vehicle, the quality of the drivers maintained by the company, emergency assistance button, ease of payment and feedback facility.

18. The DG relied upon various market study reports to gauge the present competitive landscape and growth potential in the radio taxi industry. While the TechSci report of June 2014 showed that the taxi market in India is projected to surpass USD 1.22 billion mark, as per Netscribes Report on 'Online Taxi service Market in India (April- 2015), the organised taxi market comprising of radio cabs and aggregators were still miniscule at about 14% as compared to rest of the taxi market in India, indicating the huge market potential. Further, the RedSeer report titled 'Taxi Market in India: Diving into the Future' (December, 2014) showed that the taxi market in India was relatively in a nascent stage in 2014 with a growth rate of 35% CAGR during 2010-2014, but was estimated to sustain a rapid growth rate of 25-30% CAGR till 2020.
19. The DG further examined the three types of business models on which the radio taxi businesses operate in India, *namely* the asset owned model,



aggregator model and hybrid model, besides noting their distinctive features and players operating under those models. The DG observed that while the radio taxis are owned by the radio taxi service providers under the asset-owned model; in the aggregator's model, the operator does not own the radio cabs but only acts as an aggregator (platform) that connects the drivers with the prospective consumers. Uber operates under the aggregators' model and one of its competitors, working on the same business model, in the relevant market, is Ola. The DG also observed that there are certain players who operate as a mix of both these models like 'Mega' and 'Meru'.

20. For delineating the relevant market, the DG looked at the substitutability from both the demand-side as well the supply-side. From the demand side-substitution, the DG observed that SSNIP, which is one of the well-known economic test/tool, may not be appropriate in defining the market in this case as it would result in defining the relevant market very narrowly. As regards the supply side substitution, the DG observed that excluding supply side consideration at the market definition stage may lead to higher market shares which would overstate the degree of market power possessed by the firm.
21. Before the DG, while the Informant submitted that radio taxi market is a separate market from other modes of transportation, Uber submitted that it faces strong competition from Radio taxi service providers in Delhi-NCR, *e.g.* Ola, Meru, Easy cabs and others, as well as from other forms of public transport such as Auto rickshaws, taxi, buses, car-pooling services and the Metro. It was, thus, argued by Uber that the relevant product market in which Uber operates is much broader than radio taxi services.
22. The DG, however, did not agree with Uber's contention that auto-rickshaws, bike-taxis, buses, Metro and private car-pooling in Delhi-NCR, form part of the same relevant market. Further, since Uber as a radio taxi



operator is not merely a platform, the two relevant product markets – ‘market for transportation services for riders’ and ‘market for facilitation services to drivers for accessing riders’, as provided in the ‘CUTS report’¹ submitted by Uber, were also not found to be appropriate or acceptable by the DG in the present case.

23. The DG thus, delineated the relevant product market as ‘*the market for radio taxi services*’.
24. As regards the relevant geographic market, the DG observed that Meru as well as Uber has proposed Delhi-NCR to be the relevant geographic market which was also upheld by the erstwhile Hon’ble COMPAT in its order dated 07.12.2016. Moreover, the DG found that Delhi is hub of Central Government offices, Courts, Tribunals, private sector and so are its adjoining areas of NOIDA and Gurgaon/Gurugram. The population that lives in such areas has to travel to their offices and markets between Delhi and such adjoining areas and for this, the movement has been made seamless by the governments of such adjoining States. Further, Delhi-NCR is a developed market in terms of transportation since its inhabitants are already exposed to the convenience of travel by the Delhi Metro and its buses. Further, the DG also took note of the Meru’s submission that the Hon’ble Supreme Court in its Order dated 05.01.2016 passed in the case of ‘*M.C. Mehta vs. Union of India & Ors. [Writ Petitions(s) (Civil) No(s). 13029 of 1985]*’ clarified its previous Order dated 16.12.2015 and directed that its order regarding CNG taxis would be applicable on all taxis operating in the NCR region and that there was a typographical error in its previous Order dated 16.12.2015.

¹ CUTS International, *An Evidence-Based Analysis of Relevant Market: The Case of Ridesharing in Delhi-National Capital Region (India)* (2020), available at <https://cuts-ccier.org/pdf/evidence-based-analysis-the-case-of-ride-sharing-in-delhi-national-capital-region.pdf>.



25. Based on the aforesaid, the DG accepted the relevant geographic market proposed by the Informant and accordingly, the relevant market in the present case was delineated by the DG as the market of '**Radio Taxi services in Delhi NCR**'.
26. To assess Uber's position in the relevant market delineated *supra*, the DG took into account various factors listed under Section 19(4) of the Act. The DG observed that the market shares provide a useful first indication of the market structure and relative importance of competitors active in the relevant market. However, market share needs to be interpreted in light of the market conditions and dynamics of market, keeping in consideration the trend and development of such market shares over time for drawing conclusion. The DG also opined that the market share can be assessed on the basis of different parameters e.g. total turnover/ Revenue, capacity, size of assets etc.
27. Though the DG collected information on fleet size and active fleet size of various players in the relevant market, it observed that these parameters may not be appropriate for calculating market shares as the drivers/fleet owners can be connected to various aggregators through applications easily and switch between them. So, the DG collected information on the basis of trip size also. According to total number of trips per day, Meru had a market share of 55-60%, whereas Ola had a market share of 15-20% in 2014. Uber comparatively had a low number of trips per day, with 5-10% as market share in 2014. However, the market share of Meru subsequently decreased to 10-15% in 2015 and further to 0-5% in 2016. The market share of Ola and Uber increased exponentially. The market share of Uber in 2015 was 55-60% which was maintained till 2016 but it reduced to 45-50% in 2017. The market share of Ola, however, rose to 30-35% in 2015 and increased further to 40-45% in 2016 and then to 50-55% in 2017. The DG noted that the market share (in % terms) of Meru, Mega and Easy Cab declined faster



than their absolute trip size which showed that these players were not able to catch-up with the growth in the market.

28. According to monthly trip size, it was observed by the DG that Meru (Informant) which had a market share of [65-70] % in January 2014 maintained its lead position till December 2014, when its share came down to [50-55] %. However, Meru's number of trips increased till December 2014. On the other hand, Uber which had a market share of merely [0-5] % in January 2014 went up to [20-25] % in November 2014, before sudden decline in December 2014 due to ban of Uber's services by the State Transport Authority, Delhi. During the year 2014, Easy Cab (Carzonrent) and Mega Cab recorded increase in absolute number of trips but their market shares declined. Ola another key competitor in the market was able to raise its trip size and market share from [5-10] % to [30-35] % during the period from January 2014 to December 2014. In the subsequent period from January 2015 to August 2016, Ola was the market leader having market share in the range of 45 % to 70 % in Delhi NCR market, and was followed by Uber whose market share was in the range of 30% and 40% between April 2015 and July 2016. The absolute trips size of these two competitors also increased manifold from January 2015 till August 2016.
29. The Investigation further revealed that the market share of Uber (OP) in terms of trip size which was alleged to be around 50% in September 2015 as per TechSci report cited in the Information, was actually [35-40] % while Ola was a market leader with [50-55] % during that month.
30. Based on the aforesaid analysis, the DG opined that in the rapidly growing radio taxi market of Delhi NCR, Meru had been the market leader, having share of [25-30] % in terms of fleet size till October 2014 and [50-55] % in terms of trip size. Ola replaced Meru and continued as market leader till August 2016, and thereafter was replaced by Uber. In the intervening



period, the fleet size and trip size of these two players, *i.e.* Uber and Ola, witnessed exponential growth. During the months of September 2016 to April 2018, Ola and Uber displaced each other as market leader on repeated occasions. However, Uber has been able to maintain its lead position and increase its gap in subsequent months. The DG opined that the highly competitive market with fluctuating market shares of Uber and Ola, cannot be construed to be a sign of market power or dominance of Uber.

31. Further, the DG also considered factors other than the market shares. The DG noted that the financial resources and strength of Uber and its competitors who are active in the relevant radio taxi market may not be accurately analyzed only on the basis of the numbers reflected in the form of their share capital and reserves and surplus, as depicted in their financial statements. This is because radio taxi market is evolving and has peculiar nature, which has different business practices as compared to a normal business and operates in a distinct manner from other traditional markets. However, it is perceived that availability of funds at the disposal of Uber and its competitors in the evolving radio taxi market in Delhi-NCR may be the appropriate indicator to assess the financial resources and strength available with them.

32. The DG further observed that given that Uber is a global player and active in many countries across the world, all of its resources cannot be said to be available at the disposal of Uber India. This can be noted from the fund infusion of Uber through its subsidiaries, namely, Uber International B.V. and Uber International Holding B.V., in the form of share capital and amount which was meant for expenses and payments for Uber's ride business across India including 2&3 wheeler offerings and expenses incurred towards Uber's Eats app. The total funds received by Uber from 2013-19 was ₹ 8126.17 crore.



33. The DG further noted that Meru's capital and long-term funds mobilization during the period from 2007-2012 was ₹ 213.51 crore. Meru further mobilized ₹ 211.30 crore over the period from 2013-2017. Further, the Capital and long-term funds mobilized by ANI Technologies Private Limited (Ola) from 2010 to 2018-19 was ₹ 14,571.95 crore.
34. The DG also looked into the funding pattern of Uber which revealed that by 2015-16, Uber India was able to attract fund infusion to the tune of ₹ 1,669.20 crore while funding in Ola by 2015-16 was to the tune of ₹ 8,079.25 crore. Further, fund infusion in Uber India in subsequent period from 2016-17 to 2018-19 was ₹ 6,456.97 crore, as compared to Ola's funding of ₹ 6,492.70 crore during the same period. Ola has been able to attract funding mostly by foreign venture capital firms. Thus, the DG observed that the funding pattern of Ola revealed that it has an edge over Uber in terms of financial resources at its disposal and accordingly, Uber cannot be considered to have an exclusive access to funding/investment.
35. Further, the huge financial resources available with Ola which is active in about 127 cities/towns in India was found to have the ability to counter the below-cost pricing strategy of Uber, and sustain losses. The DG further noted that Uber is active in only 42 cities in India. Further, Ola commenced its operations in the relevant market in December-2011. After getting huge funding mostly from global VC investors, it has focused on growth/expansion of business rather than on immediate profitability. Ola consolidated its position in the market by acquiring two rival companies *i.e.* Apra Cab and TaxiForSure in 2015. With below-cost pricing and heavy advertisement/ promotional campaign, Ola was able to leave behind the established players like Meru, Mega Cabs, Easy Cabs, etc. and remain a market leader in terms of trip size for most of the period from January-2015 to April-2018. In May-2018, Uber replaced Ola as the market leader (in terms of trip size), but Ola still poses a significant threat to Uber's position



in the relevant market of Delhi NCR. Therefore, Uber cannot be said to enjoy any commercial advantages over its competitors like Ola. Further, Ola's operation, which was initially confined to India has gradually expanded outside India as it began its international foray in February 2018 by launching in Australia, followed by UK in August and New Zealand in November of that year.

36. The DG also noted that the taxi booking is made by individual customer of radio taxi who have the choice and option to switch quickly to the competing service providers like Ola, and therefore the countervailing buyer's power in the radio taxi business in Delhi-NCR poses significant competitive constraint on Uber. Moreover, the regulatory requirement for entry in the market depends on the local taxi schemes and the licensing conditions which are gradually being fine-tuned to deal with app-based aggregators. However, the technological barrier is not high enough to deter new entrants. The business is based on revenue-sharing between the aggregator and the drivers/fleet owners. The collection from the customers is done on a real-time basis, and as such the working capital requirement of the aggregator is not very high. The viability of radio taxi business depends upon the quick availability of vehicle from customers' perspective and minimum idle running from the drivers' perspective. Thus, the business of radio taxi service can only be profitable when the service/platform provider has a sizeable number of customers and sizeable number of vehicles/drivers at various locations within the city to meet the demand. Though, a new entrant may face difficulty in short run to create a network of drivers and customers, however in the long run, the success would depend on the financial resources and the capacity of the new entrant to sustain initial losses. In the present case, Uber's aggressive pricing strategy has not worked as a deterrent or a barrier for network expansion for Ola.

37. Based on the aforesaid analysis, the DG concluded that Uber is not in a



position of strength so as to behave, to an appreciable extent, independently of its competitors and customers, in the relevant market. Thus, Uber is not found to be dominant in the relevant market in the present case.

38. The main allegation of abuse in the present case was below-cost pricing strategy by Uber. The DG noted that in the absence of dominance of an entity, the question of abuse would not arise. However, the DG analyzed the pricing strategy of Uber vis-à-vis its competitors and found that during the relevant period, both Uber and Ola, the two major competitors in the Delhi-NCR radio taxi market, adopted the “below-cost pricing strategy” during the period from January-2014 till September- 2017, and from April-2014 to March-2018, respectively. However, since the scheme of the Act only attracts the provisions of Section 4 when an incumbent is found to be dominant, the DG stated that OP can be said to have indulged in abuse by way of predatory pricing, only if it is found to be dominant in the relevant market. Since OP was not found to be dominant, the DG concluded that OP did not contravene the provisions of Section 4 of the Act.
39. Since the DG did not find Uber to be in a dominant position in the relevant market of radio taxi market of Delhi NCR, the allegation that it has indulged in abuse of dominant position in terms of Section 4(2)(a)(ii), Sections 4(2)(b)(i) and 4(2)(c) were found to be unsubstantiated.
40. However, the analysis of financial data by DG revealed that during the relevant period, both Uber and Ola, the two major competitors in the Delhi NCR radio taxi market, adopted the “below-cost pricing strategy” during the period from January-2014 till September- 2017, and from April-2014 to March-2018, respectively.
41. The Informant, in its information, had also alleged that Uber (OP) has entered into exclusive contract with its driver partners which are in violation



of Sections 3(1), 3(2) and 3(4) of the Act as those contracts restrain the driver partners from getting attached on the network of other competing radio taxi operators. Such agreements/contracts were alleged to be causing AAEC in the market since other competitors could not match Uber's anti-competitive strategy of incurring losses and thus all such competitors except Ola were slowly bleeding to death. The cumulative effect of agreement entered between Uber and its drivers was stated to have marginalized all other competitors of Uber, barring Ola. And these other competitors were on the verge of elimination.

42. During investigation, Uber submitted a copy of the sample service agreement it had with its Driver-Partners. The agreement was originally entered into by Uber B.V., however, with effect from 01.10.2019 those agreement(s) stood transferred to Uber India.
43. The DG considered the relevant clauses from the said service agreement and noted that the driver-partners of Uber were not restricted from registering with other software application services including those of competitors. Uber submitted before the DG that it does not restrict its driver-partners from being simultaneously active on competing platforms and in fact its driver-partners are typically registered on more than one platform and routinely multi-home. Their choice of platform depends on factors such as ride availability and short-term incentives schemes on offer. According to Uber's estimates at any given point, more than 50% of its driver-partners are also registered with other aggregators.
44. The Informant in its submission dated 20.01.2020 filed before the DG also highlighted the clauses relating to Uber's Ratings mechanism for its driver-partners according to which the drivers must maintain a minimum average rating and a failure to do so would entitle Uber to deactivate the driver from login into the Uber App. It was alleged that the Rating system is a



mechanism to keep the drivers onto the Uber network which restricted competition in the market. However, Uber stated that the Rating clause of the Uber's agreement with Driver-Partners reflected that the purpose of average rating system was to ensure that users (riders) have access to high quality service, through Uber's app. The Informant further alleged that the incentive scheme of Uber is designed in such a manner that driver would get incentives on an accelerated basis, which means that the driver would receive ratings based on the number of trips accepted in a day and thus they remain logged in network of Uber. Uber *vide* its reply dated 30.10.2019 countered Informant's allegation and submitted that the incentives are not based on any long-term agreement with the driver-partners but are provided on an ad-hoc basis, assessing the demand and supply in the market at the time. It has been stated that these incentives are not loyalty inducing, do not create any foreclosure effect and have been decreasing over time as Uber's network reaches an efficient scale. Uber in its submission dated 20.02.2020 further stated that the incentives were aimed at growing the market to achieve a certain minimum scale, which will allow it to achieve a balance between supply and demand on its platform at all times.

45. The DG, after considering the rival submissions, observed that the performance linked incentives offered by Uber and Ola, which were intended to build the network of drivers and attain growth, cannot be stated to have foreclosed competition in the market. There has been considerable growth and resultant capacity enhancement on the supply side of fleet /vehicles in the radio taxi market after the entry of Uber and Ola, and the aggregate fleet size stood at 106,127 in March 2019. Though Meru's fleet size has declined in the last five years between January 2014 and March 2019, the corresponding increase/growth in Uber's fleet size during the same period (which was exponential) clearly indicates that Uber has been able to build its own network which cannot be said to be at the expense of Meru's fleet size. Further, the fact that Ola, a significant competitor of Uber has



also been able to get more and more vehicles attached to its network, goes to demonstrate that there has been no supply constraint or entry or expansion barrier or foreclosure of competition in the relevant the market.

46. In view of the above analysis, the DG concluded that the allegation of Meru regarding violation of provisions of Sec 3(4) of the Act by Uber are unsubstantiated.
47. On 04.01.2021, the Commission considered the Investigation Reports (confidential and non-confidential version) and decided to forward a copy of the revised public version of the Investigation Report to the Informant and the OPs, for filing their respective objections/ suggestions thereto. The OPs were directed to file their objections/suggestions to the Investigation Report, if any, latest by 15.02.2021 and the Informant was directed to file its objections/suggestions to the said Investigation Report and its reply to the submissions made by the OPs, if any, latest by 01.03.2021. The Commission further decided to hear the parties on the Investigation Report on 10.03.2021 *via* virtual mode.
48. On 10.03.2021, the parties appeared before the Commission through their respective learned counsel and/or authorised representatives. The learned senior counsel for OP-1 and OP-2, at the outset reiterated the joint application for adjournment of the hearing citing his unavailability on account of matters listed before the Hon'ble Supreme Court on that day. The Commission considered the same and decided to reschedule the oral submissions of OP-1 and OP-2 on the Investigation Report on 17.03.2021 at 10:30 A.M, through virtual mode. As regards the Informant's oral submissions, the Commission heard its learned counsel on the very same day, *i.e.* 10.03.2021, in detail which submissions, however, remained to be concluded. Upon a leave being sought by the Informant, the Commission decided to give some more time to the Informant to conclude its oral



submissions on 17.03.2021, before OP-1 and OP-2 started with their submissions. Accordingly, on 17.03.2021, the matter was further heard and the oral submissions of the parties were concluded. The parties were directed to file written synopsis of their oral arguments, within two weeks, *i.e.* latest by 31.03.2021, which they filed. The submissions of the Informant as well as Uber, including their oral submissions, are briefly summarised below.

Replies/Submissions of the Parties

Meru/Informant

49. Besides arguing on merits, Meru/Informant raised certain preliminary objections. It was highlighted that Uber's request for grant of confidentiality was disposed of by the Commission without hearing Meru in flagrant violation of principle of natural justice. Further, there was no basis to allow confidentiality on old and commercially non-sensitive information which is available in public domain, nor is such information liable to cause any prejudice to Uber. Rather, it has caused grave injury to Meru in prosecution of its Information and in preparing comprehensive detailed objections to the Investigation Report.
50. Meru also stated that the Investigation Report lacks any objective finding or analysis regarding one of the principal cohorts in the matter *i.e.* drivers as the DG has not interviewed even a single driver during investigation. Meru further submitted that there is lopsided analysis of competitive conditions prevailing in the relevant market and various self-contradictory findings exist in the Investigation Report. It is further argued that the DG has turned a blind eye to capital-dumping, high barriers to entry and adverse effects on competition and laid too much emphasis on 'absence of dominance' based on wrong notions/understanding to conclude no contravention against Uber.



51. Besides aforesaid preliminary objections, Meru has specifically countered the analysis carried out by the DG under Section 3 as well as Section 4 of the Act. According to Meru, Uber and Ola were not the first companies to enter the market with aggregator model, and FastTrack Cab with its aggregator model was popular in South India. Meru also argued that Meru was amongst the first movers to introduce radio cabs in India, along with Mega and Easy cabs which changed the face of taxi market, and Ola and Uber merely built their network on the strength of model developed by Meru, due to internet penetration and advanced system of mobile application and deployment of incentives provided to drivers and discounts to the customers. Meru also argued that revenues of these two companies were not enough to cover the cost of drivers' incentives and customers' discounts and they sustained in the market with huge losses backed by heavy investments. Meru commented that the huge size of operations of Uber built on their exclusivity creating contracts/predation model / capital dumping which led to elimination of competitors from the market and lack of any new entry in the market is reflective of the effect such agreement caused in the market. Meru highlighted the DG's observation and commented that the market shares of Meru, Mega and Easy Cab declined faster than their absolute trip size which shows that these players were not able to catch-up with the growth in the market.
52. Meru argued that the DG has failed to appreciate that the market has grown by 62.51 times in terms of monthly trip size, and 42.58 times in terms of number of fleet size, from 2014 to 2019 and that both, Ola and Uber have been able to corner the growth among themselves in such expanded market.
53. Meru submitted that it is critical, from a Section 3 analysis, to look at the cumulative effect of all the agreements together and referred to the decision in the case of *SA Brasserie v. Consorts; Delimitis v. Henninger in EC; Aston*



Recycling Austria, AG v. European Commission and inferred that it is necessary to assess the cumulative economic impact of the agreement of Uber and its drivers, in the context of all the incentives and discounts offered. Meru also argued that the defence of Uber that there is no exclusivity clause in the agreement is not tenable as there is no requirement of specific exclusivity clause in case exclusivity is ensured by Uber through the implementation and effect of various clauses in the agreement and most importantly through the effect of the incentives offered to the drivers.

54. Meru argued that the aggregate effect of Meru's agreements with its driver partners is (i) that drivers are not left free in their choice of other radio taxi operators which leads to creation of exclusivity once a driver logs on to Uber's network, (ii) the wordings and operation of the agreements entered into between Uber and its drivers show that it creates *de facto* exclusivity; (iii) the nature of the agreements irrespective of any discussion on creation of exclusivity is such that they have an appreciable adverse effect on competition in the market and hence the same are liable to be held anti-competitive under Sections 3(1) and 3(4) of the Act.
55. Meru further argued that all the decisions regarding driver incentives were taken by Uber BV until very recently and anti-competitive intent in its operations has been admitted by them in IPO prospectus dated 11.04.2019 which clearly stipulates that “[t]o remain competitive in certain markets, we have in the past lowered, and may continue to lower, fares or service fees, and we have in the past offered, and may continue to offer significant Driver incentives and consumer discounts and promotions, which may adversely affect our financial performance”.
56. Meru has also given practical examples of how exclusivity has been ensured through the incentive programmes by Uber and has also relied upon judgments from the EU to reiterate that fidelity schemes aimed at building



loyalty, not based on efficiency considerations, can be anti-competitive. Meru while supporting its contentions with Guidelines on Vertical Restraints from EU, explained that the contract needs to be analysed based on the restriction it contained, their duration and the way in which the agreement is implemented. The contract needs to be analysed for likely impact in future in the relevant market.

57. Meru submitted that it would not be out of place to mention that the DG has itself referred to the manifold increase in losses and has noted from Uber's financials that while Uber's gross bookings and revenue may have increased from 2015 to 2019, its losses from operations and losses attributable to Uber Technologies have also seen a meteoric rise.
58. Meru further explained that, in order to capture the market, Uber has reduced the price that they charge from riders and in addition it even offers discount over such reduced fares. Therefore, if the competition is purely on merits and the drivers have to choose between different service providers then they would not choose a service provider, by serving on whose network they would incur losses on account of low fares and customer discounts. Therefore, to make themselves attractive to such driver partners, Uber offers incentives because of which the driver partners accept to enter into such arrangements/contracts. Meru added that the manner in which such incentive schemes are devised would show that the drivers are not left free to multi-home once they log on to Uber's network and hence in effect there is no fluidity in the market with the creation of exclusivity. Further, these incentive schemes were also devised in such a manner that maximum incentives are given during peak hours, so as to dissuade drivers from accessing other cab aggregators.
59. Meru also highlighted various incentive schemes which according to it led to foreclosure. Under the 'Hourly Guarantee Scheme' which was applicable between 2013 and 2015, Uber paid guaranteed gross earnings to its driver-



partners on a per hour basis. According to ‘Trip based incentives Scheme’ which is applicable from 2014, Uber offered incentives to drivers upon successful completion of a particular number of trips per day/week. ‘Minimum Business Guarantee Scheme’ of Uber between 2015 and 2016 provided guaranteed gross earnings to drivers upon completion of a particular number of trips. Further, Uber is operating ‘Guaranteed Surge Level Scheme’ from 2016 onwards under which Uber is paying guaranteed per trip incentive to drivers which is up to a portion of the trip fare based on particular location.

60. Meru also added that Uber BV devised the incentive scheme keeping in mind that the same must be profitable to the driver after deducting their operational expenses which are required to be incurred by the driver as a consequence of ownership. Uber provides incentives to compensate the drivers for running their cars which is also admitted by Uber in their response to DG. Meru argued that the submission of Uber regarding competition being there at the beginning of the day even if impacted for the rest of the day is liable to be taken as deemed admission by Uber to the effect that the incentive agreements do have a foreclosure effect in the market in as much as the drivers get locked for the day and have no real choice but there are instances where incentive schemes are doled out on weekly basis. Therefore, competition is foreclosed to that extent that it is not based on anything except incentives at the bare minimum. Moreover, the choice if any, is only between Ola and Uber since no other operator could afford to give such incentive payouts for such extended periods.
61. Based on its calculations, Meru commented that real block can be demonstrated by how drivers / aggregators were induced into purchasing additional cars to ply on the Uber platform on account of high incentives. However, once the incentives were pulled back by Uber, the drivers beset with the high cost of ownership of the cars had nowhere else to go. Based



on this, Meru deduced that the only option left with the drivers to recover their costs was to increase the number of trips on the platform to sustain themselves in the market. Further, Meru argued that the expenses to maintain a car has increased. Meru added that DG has ignored to interview the drivers in relation to the contract and also to analyse the argument of multi-homing as there is continuous increase in number of trips despite a reduction in incentives, which clearly shows without a shadow of doubt that drivers are locked-into the platform. Meru added that the DG has accepted the bald assertions of Uber that 50% of their drivers' multi home since they download other apps as well, without any verification without even undertaking any interview with the drivers/driver survey.

62. Meru added that incentives given to drivers depends upon the number of rides completed by a driver, mileage clocked, or the revenue received in a particular time frame which essentially compels continuous usage of the Uber app. Therefore, drivers can earn maximum profit only when they use only one app for a maximum period of time. In such a case, the argument put forth by Uber that drivers are not restricted from registering on the application services of competitors holds no relevance owing to the fact that the model adopted by Uber creates *de facto* exclusivity. There is no reasoning that why performance linked incentives that are intended to in effect create exclusivity in the market are not to be considered to be the reason behind foreclosure of competition in the market.
63. Further, Meru submitted that the rating mechanism followed by Uber also creates exclusivity. Reliance is placed on Clause 2.4 of the Agreement which deals with driver ratings. The clause reads that drivers must maintain a minimum average rating and a failure to do so would entitle Uber to deactivate the driver from logging into the app. Meru has highlighted that Uber has a policy of rating its drivers on the basis of acceptance rate and the customer ratings. Where drivers are logged in to the application and they do



not accept the leads sent by Uber, then after a particular number of non-acceptances, such driver would not be sent any more leads. The threat of deactivation by Uber of a driver based on the said rating mechanism keeps the driver under the control of Uber and also tied to its platform. This in effect causes appreciable adverse effect on competition in the market and hence the same is anti-competitive in nature. This again compels each and every driver to use only one application at a time and log out from other applications, which in turn is not fluid multi-homing as sought to be understood by the DG. The argument given by Uber that the rating system is a mechanism to control quality is nothing as for a good rating, driver must keep accepting leads sent by Uber so that Uber rates a driver and also customers rating is high. Meru added that the working of this driver ratings would show that on account of such rating system (i) there is exclusivity in effect; (ii) it leads to entry barriers and foreclosure effect. Meru also examined the Ola Agreement and highlighted that Ola also controls the way drivers operate and contented that the manner of operation is exclusionary.

64. Meru submitted that this policy of deactivating drivers on the basis of their low acceptance rate was under challenge in the Courts in United States of America (US), and it has now been changed in the US after a settlement was arrived at with Drivers in a case filed in US.
65. Meru also submitted that the Uber's rating policy has a four-level reward system: Blue, Gold, Platinum and Diamond. In the policy, "*All drivers in the 13 cities will start at the Blue tier. To unlock rewards in the Gold, Platinum or Diamond tiers, drivers need to maintain at least a threshold star rating, a low cancellation rate, and a threshold acceptance rate. Drivers earn points on every trip during a fixed 3 month period which go towards unlocking a status. Drivers earn more points for trips done during peak hours.*"



66. Further, Meru mentioned that Uber also mandates its drivers to insert the logo of Uber on its car, thus adopt the branding of Uber. This also leads to *de facto* exclusivity.
67. Meru placed its reliance on *Uber BV and others v. Aslam and Ors. [2021] UKSC 5* and reported that rating and acceptance system developed by Uber has caused AAEC in the market as drivers on acceptance rate falling below 80% receive warning signals and if the driver's acceptance rate doesn't improve, the warnings escalate to automatic logging off of the drivers. Moreover, a collective 10 minutes log off from the system, results in penalty.
68. Meru submitted that agreements leading to foreclosure for competitors based on creation/strengthening of barriers to entry/expansion including below cost pricing considerations are considered inherently anti-competitive if done by players in position of substantial market power and in this case, below cost pricing has been done by way of vertical agreement, which can be analysed under Section 3(4) of the Act. In this case, the below cost pricing is due to the agreements entered into between drivers and Uber and hence liable to assessed under Section 3(4) of the Act. Meru supported its contentions by referring to Germany and Korea's example where predatory pricing by non-dominant firms is regulated.
69. Further, Meru argued that even Hon'ble Supreme Court of India in the case of *Excel Crop Care* has held that Section 3 is crafted in broadest terms so as not to let any anti-competitive agreement slip out of its purview. Meru also stated that the aforesaid argument gains strength from the order passed by the Commission itself in case of *Delhi Vyapar Mahasangh v. Amazon & Flipkart* [Case No. 40 of 2019] (hereinafter, *Delhi Vyapar Mahasangh* case). The Commission in the said case, found that the *prima facie* case is not made out under Section 4, but on the same set of facts, the Hon'ble Commission issued an order for investigation under Section 3(4) of the Act.



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70. Meru also supported its argument with *MCX vs NSE* case and held that Uber is engaging in a conduct that does not make commercial sense for any prudent enterprise and the inference can only be of exclusionary conduct. Further, the conduct of Uber on the basis of its deeper pockets is *ipso facto* reflective of its intent to eliminate/reduce competition in the market. Meru submitted that below cost pricing by even a non-dominant firm can cause an AAEC and therefore, such conduct ought to have been analysed by the DG in light of section 3(4) read with section 19(3) of the Act.
71. Meru further submitted that Uber is a significant player in the market as Uber has deep financial reserves which have been used exponentially to fund incentives to drivers and discounts to customers and the magnitude of below cost pricing in terms of discounts to consumers and incentives to driver has increased manifold since 2015. The admitted losses of Uber BV are about \$7.9 billion which are primarily due to driver incentives, which practice it has indicated in the prospectus shall continue in future as well. Forgoing profitability and the decision to earn positive margins since October 2017 is a strategic decision on account of market having tipped in Uber's favour, which is evident from the fact that they have only further gained the market share after slight dip.
72. To show AAEC, in terms of Section 3(4) read with Section 19(3) of the Act, being caused from Uber's conduct, Meru relied upon the following additional factors:
- a. Market Power: Uber commands a high market share (more than 50% since 2015. The DG Report points a higher market share than others since 2017 which is reflective of market power and the same is much above the *standard de minimis* thresholds adopted across different jurisdictions, which makes them a significant player. The market power of Uber is further evident from the fact that it can devise



contracts and strategies that are harming its rivals and such strategies are not linked to innovation or efficiencies. Meru also mentioned that Uber has global presence in over 300 cities across the world. It has only withdrawn from few markets on instructions of its biggest investor Softbank, which incidentally is also the highest stake holder in Ola. Uber Inc. and Uber B.V. have a capital arsenal to endlessly indulge in below cost pricing. It was submitted by Meru that the Commission may seek documents, details and an affidavit from Uber to see the control which is being exercised by Softbank in Uber which is also one of the largest stakeholders in Ola.

- b. Foreclosure of competitors and creation of entry barriers: Meru submitted that Uber is doling out incentives based on their funding and the incentive scheme is devised in such a manner to ensure that the drivers complete maximum number of trips on their platform. Thus, the operation of the said agreement between Uber and its drivers respectively is foreclosing the other operators from the market. Meru also highlighted that, as per DG, the market has almost matured and established with Uber and Ola cornering the market with their anti-competitive conduct and that there has not been any effective entry in the market since 2013, existing players like Mega amongst several others and new players like Quick Cabs, Yo Cabs have exited the market. Meru also referred to the EU guidance on vertical restraints where it has been noted that in a mature market the technology is well known and widespread with no major brand innovation and in such a market negative effects are more likely than in more dynamic markets to indicate the theory of harm. Meru added that the incentive scheme is devised by Uber with the sole intention to exercise market power to the detriment of other players and increase their market share and in the process, foreclose the competition and create entry barriers. Meru also submitted that for



existing player or potential entrant, it will be difficult to break this network as it must spend much more than Uber to create his own network and such expenditure will be sunk costs and thus, not an attractive proposition. Meru also stated that as a direct consequence of its anticompetitive designs, potential investors become blindsided about their investments as they are not able to identify if incumbents are losing market share/drivers and customers due to their inefficiencies or solely because of the artificially skewed pricing practices, and even as the market has matured, investors realize the mammoth capital required to make even a slight dent in the market. Meru added that the fact that the existing players were driven out of the competition and no new player has entered the market is itself a proof of AAEC due to conduct of Uber. The mere fact that one more entity (Ola) was engaged in below cost pricing, cannot be used as a defence by Uber to argue that market was competitive.

- c. Lack of consumer benefit: Meru highlighted that with no efficiency development in the business model and in absence of any path breaking technological advantage on account of the model adopted by Uber, they are not aiming for any public good but for foreclosure of competition and making profits with a little delay thereafter. Meru also commented that consumer choice as a direct result of these agreements would ultimately rest between Ola and Uber which is death knell for all other competitors and hence for the competition in the market. While referring to judgement passed by the Hon'ble Supreme Court in the case of *CCI v. SAIL* in India and *Mastercard /VISA* by Court of Appeal in the UK, Meru presented that by virtue of the agreement, the choice for consumer has been curtailed and is only limited to Ola and Uber.



73. Therefore, based on the abovementioned, Meru submitted that the conduct of Uber has definitely caused an AAEC in the relevant market and their agreement is in violation of Section 3(4) of the Act read with Section 3(1) of the Act, based on the factors mentioned under Section 19(3) of the Act.
74. As regards Section 4 of the Act, Meru has submitted that the DG has been misled into making recommendations in the Investigation Report that on account of financially stronger competitor in form of Ola, which is able to indulge in similar practices of below cost pricing, Uber is not liable to be declared as dominant. It has been stated that in an earlier case [Case No. 06 and 74 of 2015], the case against Ola was closed for the want of its dominance stating that Uber exists in the market as a stronger player. It has been alleged that both these observations are contradictory.
75. Meru has prayed that Uber's dominance should be seen from its conduct [circular approach to gauging dominance]. It has been submitted that Uber's dominance can be gauged by the fact that since inception they are engaging in below cost conduct which has the effect of 'reducing competition' and/or 'elimination of competitors' with vast experience of predation in the international markets. Also, the funds available to Uber are funds to sustain long term losses in the global market as is evident from the prospectus of Uber BV Uber's valuation in the year 2017 when DG has found it dislodged Ola to gain superior market share in the relevant market which was about USD 68 billion. Thus, the size, resources, experience Uber has in international markets all add to its strengths and makes it a dominant enterprise in relevant market so delineated. Meru added that Ola in the market has grown, only when they adopted the strategy of Uber of below cost pricing and incur losses, to develop the network. Meru also referred to the *Uber (India) Systems Private Limited v. Competition Commission of India, (2019) 8 SCC 697*, and mentioned that the DG has found that Uber was in fact making losses for its trips and the Hon'ble Supreme Court had



categorically laid out the roadmap for the case before the Commission that if the investigation finds below cost pricing, the outcome would be that Uber would fall under the explanation 4(2)(a)(ii) and would be found to be dominant; thereafter once such dominance is established, the case of abuse would also be established. Hence the conduct of Uber is clearly in violation of Section 4(2)(a) of the Act.

76. Meru has highlighted that the DG has concluded that Uber has increased the market share based on astronomical consumer discounts and driver incentives and the said strength has affected its competitors like Meru, Easy Cabs, Mega Cabs *etc.* to its own benefit since their market share (both in terms of active fleet and number of trips) have shrunk to virtual non-existence. Further, the fact that competition is not based on merit, but on capital dumping shows that the actions of Uber has weakened the competitive process and the Commission must step in to protect and restore effective competitive process. The actions of Uber have compelled the operators in the market to follow their predatory pricing model, but none except Ola, could continue the same because of their limited financial muscle. In fact, the Informant tried to match the predatory pricing strategy of Uber to survive in the market, and in the process incurred a loss of INR 107 crores till July 2015 but could not continue to match the below cost pricing strategy beyond a short period.
77. Meru has argued that the definition of dominance under Explanation (a) of Section 4 has two limbs to it, (i) operate independently of competitive forces in the relevant market, or (ii) affect its competitors or consumers or the relevant market in its favour. Therefore, Section 4 of the Act requires that dominant position analysis must be from the point of view of the position of strength enjoyed by an enterprise to operate independently of the competitive forces like customers, suppliers, potential entrants. However,



the entire focus of the DG has been on the competitor Ola, instead of making an analysis of the various competitive forces.

78. According to Meru, explanation to (a) to Section 4 also refers to the requirement to operate independently. It is an established principle that the term 'independent' does not mean 'absence of all competitive constraint'. Meru also emphasised that the independence referred to in Explanation (a) to Section 4 does not mean complete independence *i.e.* turning a blind eye towards the other forces and the market. Also, the word used is competitive "forces" and not just one competitive "force" as has been the approach of DG. Thus, the analysis of the DG, which is limited to only a single competitor (*i.e.* Ola in this case) and doesn't take into consideration all/other competitors, is in stark contrast to the true import of the definition of 'dominance' under the Act. Further, Meru submitted that the second limb of the explanation also clearly requires an assessment of the ability of the dominant player to affect its 'competitors' and not just one competitor. In this regard, the DG has focused merely on Ola and has therefore reached an erroneous conclusion. Further, even in the said limb, the analysis must not stop at the level of competitors, the study of DG ought to have included the effect of Uber's market strategies on all competitors, the consumers and the relevant market.
79. Further, Meru has submitted that the conclusion of DG regarding dominance is incorrect since (i) Uber has successfully affected competitors in its favour and (ii) Ola has also been affected because it had to adopt the loss-making model of Uber and burn more capital to remain relevant in the market. Thus, Uber compelled all the operators in the market to adopt its below cost model, which clearly showed that Uber affected the relevant market in its favour and Informant has been pushed to near elimination and its survival has been extended for some time on account of Mahindra & Mahindra taking over majority stake in it.



80. Meru explained that the policies of Uber have impact on both drivers and end consumers, none of them have any bargaining capacity and have to accept what is made available to them. The consumers in the market who have seen such extensive discounts and incentives, have not been able to do anything when such discounts and incentives have been withdrawn.
81. Meru also submitted the factors to show that Uber holds a dominant position in the relevant market in terms of Section 19(4) of the Act. In relation to market share, Meru mentioned that the competition authorities in India and internationally have recognised that a market share of more than 50% creates a presumption of dominance, and Uber has maintained its position of having more than 50% market share since October 2016, except for minor aberrations and as of March 2019, continues to have a staggering market share of 70%. Further, Meru submitted that it has been internationally recognised by competition law regulators that network effects act as a significant entry barrier. Meru added that since a network would take a lot of time to get established, a new player would find it difficult to compete against an established player. Therefore, network effects result in high entry barriers for potential entrants. With the highest number of taxis aggregated, large customer base and highest number of trips on its platform, Uber enjoys the benefit of network effects which has given it a significant edge in the market over its other competitors.
82. In addition to this, Meru emphasised that the large network of drivers built by Uber is a sufficient detriment to any countervailing buyer power which is evident from the fact that Uber routinely indulged in surge pricing. It is evident from ever increasing market share of Uber, to say that consumers had no countervailing power. The consumers, in effect, have been left with limited choice, they could not have moved to players who did not do surge pricing since, they did not even have much network left to offer effective competition. Meru also highlighted that countervailing buyer power has a



few essential requirements like (i) consolidated power to negotiate; (ii) power to substantially affect the service provider by shifting *en' bloc* (all together at the same time) to a competing network and that both the aforesaid critical factors are missing in the present case. Finally, Meru also explained about the massive capital requirement to enter in the market and Uber's ability to successfully choke entry into the market with the argument that DG has ignored that venture funding would be difficult for any player other than Ola and Uber including for new entrants since investors must invest more and be ready to suffer losses. Meru also highlighted that existing investors in Ola and Uber have non-compete obligations which would preclude the existing investors from investing in other radio taxi operators.

83. Meru also explained that DG has completely overlooked a likelihood that top two players of the market are indulging in similar pernicious practices only with a view to eliminate everyone else in order to carve out markets for themselves throughout the country only on account of the position of strength enjoyed by them, which makes them both liable to be declared dominant independent of each other and to have abused such a position of dominance.

84. Further, Meru submitted that the express language of Section 4 provides that '*No enterprise or group shall abuse its dominant position*'. The legislative emphasis with the usage of such language is to prohibit abuse of dominant position by the enterprises in the market. The section has to be read in light of the mischief sought to be prohibited and remedied *i.e.*, to eliminate and provide remedy for a case of an *ex post* abuse. As per Meru, the section does not stipulate that in a given relevant market, there can only be 'one dominant enterprise'.

85. Meru added that the conduct of Uber and Ola has drastically transformed the market for radio taxi from a situation where there were many operators



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(Jan 14 - Dec 14, Market Share of Competitors in Delhi NCR) to an oligopolistic market (Jan 15-Aug 15, Market Share of Competitors in Delhi NCR), which is now headed towards a duopoly. Meru submitted that they do not propose to label Ola and Uber to have joint/collective dominance but it implores the Commission to interpret the law with some dynamism and innovation requiring it to remedy a long-standing situation which is distorting the market for all other players. Meru placed reliance on the decision of Hon'ble Supreme Court in the context of purposive interpretation as held in the case of *State of T.N. v. Kodaikanal Motor Union (P) Ltd., (1986) 35CC 91: 1986 SCC (Tax) 461* and further deduced that the Commission must intervene and pass orders under Section 27 (a), (o) and (e) against Uber.

86. As regards abusive conduct, Meru submitted that there is a clear difference between the phrases 'reduce competition' and 'eliminate competitors'. While the former refers to reduction in the vigour of competition, the latter refers to exit of competitors and Uber's pricing conduct has been reducing the rigour of competition exerted by the Informant, and other competitors with net worth eroding every day, these players foresee their exit in near future. Meru added that the conduct of Uber has led to ousting of Easy Cabs, Quick Cabs, Yo Cabs from the market. It has been noted by the DG that Ola gained the market share only by burning cash by replicating the model of Uber and now both Uber and Ola have stopped giving incentives and discounts in the NCR market which shows that the market is now at the recoupment stage for the predator.
87. Meru also placed its reliance on interim order dated 09.03.2021 passed by the Commission in *FHRAI vs. MMT and others and RubTub Solutions vs. MMT and others* [Case Nos. 14 of 2019 and 01 of 2020] (hereinafter, *MMT matter*) to highlight that there can be instances where the same conduct can contravene the provisions of Section 4 of the Act as well as Section 3(4) of



the Act, the former being applicable in cases where one of the parties to the agreement is dominant, and the latter when at least one of the parties has significant market power so as to result in such agreement which has a potential to cause AAEC. Meru added that the interim relief provided to Treebo and FabHotels was on account of AAEC and in this case too due to incentives, there is AAEC in the market and the Commission cannot remain oblivious to the same.

Uber India/Uber BV

88. Though Uber India and Uber BV (collectively referred to as 'Uber') have filed separate responses, most of their arguments were on similar lines. Thus, their responses have been summarised jointly, to avoid repetition.
89. Uber has proposed a wider relevant product market comprising of other modes of transport also *i.e.* '*market for transportation services for riders*'. Relying on the CUTS report, Uber India has stated that buses, autos, metro services and other transportation services exercise competitive constraints on radio taxi services and thus, should be considered to be a part of the relevant product market. Notwithstanding, Uber has also argued that even in the narrow market delineated by the DG, *i.e.* market for '*radio taxi services in Delhi-NCR*', it is not dominant.
90. Uber has submitted that the DG has correctly found that Uber does not enjoy a dominant position in the relevant market of *radio taxi services in Delhi-NCR*. Further, it was submitted that Meru's allegations of predatory pricing are unfounded. Incentives offered by Uber were pro-competitive and were adopted to achieve a minimum viable scale. There was no intention to eliminate competition in the relevant market, and the reduced prices in the market work to the benefit of users.



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91. Uber further concurred with the finding of the DG that there exists no violation of Section 3(4) of the Act as there is no exclusivity agreement with taxi owners, and Uber's incentives were not exclusive or loyalty inducing. It has also been argued by Uber that its incentives were aimed at achieving a minimum viable scale through building of network, which is essential for enabling an economic activity and is a legitimate business strategy, particularly in nascent and evolving markets, like the relevant market.
92. Uber India referred to the finding in the Investigation Report that pricing strategy was adopted by both Uber and Ola and can be "*attributed to the fierce competition between these two key players to attain high market share and scale in the relevant market*". Further, Uber argued that intent of pricing was not anti-competitive as in the recoupment period, Uber is not earning super normal profit. Uber also highlighted that Ola gained market share when the margin per trip of Uber was positive and Ola was still making negative margins per trip, indicating the fluctuations of market share among both the entities. Uber added that the huge fleet size of Ola is also a competitive constraint on Uber.
93. With regard to the factors under Section 19(4) of the Act, Uber submitted that there is ease of switching between the applications, low or no switching cost, absence of regulatory barriers while multi homing and also equitable access to funding, indicating that Uber India is not dominant in the relevant market. Uber argued that Ola received more funding when compared to Uber in the relevant period.
94. Uber objected to the contention of Meru that Uber has the ability to operate independently of all market forces stating that *firstly*, Uber does not have the ability to operate independently of its competitors and customers in the relevant market and *secondly*, that Meru has argued in a vacuum disregarding the existence of Ola – which is not merely a competitor, but a



better funded, well resourced, fierce competitor which imposes a significant competitive constraint on Uber.

95. Uber added that as there is equitable access to the funding and even if the cash burning was required, no dominance in the market was there due to equal opportunity. Uber submitted that the purpose of the high investment at the time of entry was to evolve in the market and attract drivers and to attract the riders to leave the current existing transportation system and utilise the services of radio taxi. It also benefits other competitors as drivers and riders can multi home as the incentives provided by Uber helps to create a bigger pool of drivers and riders. Moreover, Uber added that at entry level, other companies have also introduced the promotional activities, like Jio, Zomato and others, and due to this, with the expansion in the network, new entry will also earn profits and does not need to incur high cost for attracting drivers and customers. Uber highlighted the findings of DG that in the span of just over five years from January-2014 to March 2019, the market has grown by 42.58 times in terms of number of fleet size. Further, in terms of monthly trip size, the market has grown by 62.51 times indicating the impact of promotional activities, network expansion. Uber India also submitted that the new entrants now have the option to compete in and free ride on the market being developed by the incumbents.

96. As regards Meru's argument about definition of dominance under the Act and emphasis on the "affect its competitors or consumers or the relevant market in its favour", Uber argued that Meru's definition of dominance cannot be read in a narrow sense and referred to the decision of the Commission in *Fast Track Call Cab Pvt. Ltd. and Meru Travel Solutions Pvt. Ltd. vs. ANI technologies Pvt Ltd* where it is mentioned that "market power is a matter of degree. In most markets, every enterprise will have some degree of market power, by virtue of which they can affect consumers or competitors in its favour to some extent."



97. As regards cash burn, Uber submitted that a company stops the cash burn undertaken for attracting the riders, with increase in the demand of fleet, number of rides and earnings of the drivers. Uber further added that if Ola provides incentives to the drivers, they will shift to Ola as drivers can multi-home. Uber further highlighted that the data in the Investigation Report where per trip margins of Ola and Uber in Delhi NCR has been compared indicates that the competition is vigorous. In relation to the common ownership and role of investors in Ola and Uber, Uber submits that after October 2017, their margins are positive, so they are less dependent on the external sources and also, they have the ability to gain positive returns with the increase in pool size and market size, so dependency on the investors has reduced.
98. Further, Uber explained that the market share of Uber and Ola keeps fluctuating, so the question of Uber's dominance doesn't arise. Uber also highlighted the findings of the DG that the below cost pricing strategy followed by both Uber and Ola was to increase their customer base and to expand their respective network.
99. In relation to the reliance of Meru on Supreme Court's decision to direct investigation in this matter, Uber submitted that such reliance is not relevant as the Hon'ble Supreme Court was directing an investigation and such direction was *prima facie* in nature. Moreover, Uber added that judgement of Hon'ble Supreme Court does not clearly indicate its dominance.
100. On the allegation of collective dominance, Uber submitted that the Commission has rejected such an allegation in earlier cases, namely *Fast Track Call Cabs Pvt. Ltd. vs. ANI Technologies Pvt. Ltd.* and *Mr. Ashok Kumar Vallabhaneni vs. Geetha SP Entertainment LLP*. Uber also relied upon Hon'ble Supreme Court's decision in *Arcelormittal India Private limited vs. Satish Kumar Gupta & ors.*



101. As regards the argument that no new entrant has entered the relevant market in past few years, Uber stated that this claim was rejected in *Fast Track Call Cabs Pvt. Ltd. vs. ANI Technologies Pvt. Ltd* by the Commission on the basis that there can be markets which may not be competitive even with large number of players and equally possibly there can be markets which can work perfectly well with fewer players, constraining the conduct of each other.
102. On the argument of exclusive supply arrangement of Uber with drivers, Uber submitted that no exclusivity has been imposed upon the drivers by Uber and there is no AAEC in the market. It was further stated that the allegation related to exclusive supply arrangement has already been rejected by the Commission in *Fast Track Call Cabs Pvt. Ltd. vs. ANI Technologies Pvt. Ltd*. Uber added that drivers and riders have the option to multi-home and the rating system is not restrictive as the drivers have an option to switch to Ola, if Ola provides better incentives. Uber also highlighted that the agreement allows the drivers to switch off the application whenever they are accessing the application of competitor and approximately 50% of its driver partners are also registered with other aggregators.
103. As regards Meru's allegation that Uber's incentives result in *de facto* exclusivity, leading to foreclosure in the market, Uber submitted that the Investigation Report correctly finds that the performance linked incentives offered by Uber and Ola are intended to attain a viable network and cannot be considered to foreclose competition in the market. Moreover, Uber added that as it does not control its Driver-Partners, they frequently keep multiple apps open. On receiving a ride on one app, they can turn off the other apps while completing the trip. As soon as the ride is completed (during which time a Driver-Partner cannot accept a new ride in any event), the Driver-Partner can and does open all the apps again awaiting the next trip. Uber



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can only request that its drivers accept trips while the app is logged-on, which is not always the case and Uber has no ability to require Driver-Partners to stay logged in for extended periods of time.

104. On the nature of financial incentives, Uber submitted that promotional incentives are provided in order to gain a toehold in the market and to achieve a minimum viable scale, like any other new entrant in a market to ensure that there was an efficient network of Driver-Partners and Riders on its platform. Moreover, Uber added that the entry and incentive schemes of Ola and Uber were pro-competitive as riders and drivers benefited. On the rating system, Uber argued that it is for convenience and to ensure quality service.
105. Uber submitted that decline in the market share of Meru was because of its own inefficiency and there is no evidence that the operations of Uber were anti-competitive. Uber added that Meru had the first mover advantage, however, it still lost the market due to innovation in the market. Meru operated on a model where it used to take high charges and lesser number of trips leading to low market share. Further, Uber argued that cost per trip followed by Meru was ₹ 23/- per trip and by Uber was ₹ 6 and ₹ 7.5 per trip, which indicates high charges and loss of consumer welfare.
106. As regards the observations of the DG on abuse, Uber India has submitted that the Investigation Report has rightly concluded that the allegations of “predatory” pricing are unfounded. Further, it has been submitted that Uber’s pro-competitive incentives were adopted to achieve minimum viable scale.
107. In relation to the contention of Meru about confidentiality, Uber submitted that the Commission has passed a considered and reasoned decision on Uber’s confidentiality request, after hearing Uber at length. Meru recognizes the competitively sensitive nature of such information because it has itself



claimed confidentiality on similar information that it provided to the DG.

The same has been duly granted confidentiality by the DG.

Observations and Findings of the Commission

108. The Commission notes that during the course of the proceedings in the present matter, besides arguing on merits, Meru has also raised some other issues, which need to be dealt with.

109. Meru has argued that Uber's request for grant of confidentiality was disposed of by the Commission without hearing Meru in flagrant violation of principle of natural justice, and that such disposal has caused grave injury to Meru in prosecution of its information and in preparing comprehensive detailed objections to the Investigation Report. The Commission finds a conceptual fault in the argument made by Meru. The whole purpose of seeking confidentiality will be negated if the Commission allows the presence or participation of the other party in deciding the confidentiality requests made by the party. The Commission is cognizant of the rights of the parties while deciding/granting confidentiality claims. While the provider of information/document seeking confidentiality is concerned about the secrecy of such documents, the other party would require disclosure to offer a meaningful defense to combat the evidence relied upon by the DG/Commission. The balance between confidentiality of sensitive information and affording right to defence forms the fulcrum of deciding all confidentiality claims made before the Commission. And as such, only upon the satisfaction of the Commission that granting of confidentiality will not affect that balance adversely does the Commission decides in favor of party seeking confidentiality. The confidentiality claims made by Uber were decided by the Commission on those strict standards and in that light, the preliminary objection of Meru does not hold much merit.



110. Coming to the merits of the case, the Commission observes that the main grievance of the Informant is with regard to the alleged below cost pricing adopted by Uber. The Informant has alleged that the said allegation can be looked into both under Section 3(4) as well as Section 4 of the Act. Reliance has been placed on the *prima facie* order passed in *Delhi Vyapar Mahasangh* case as well as interim order passed in the *MMT* case.
111. At the outset, it may be highlighted that there is no statutory inhibition/restriction to look at the same conduct under Section 3(4) as well as Section 4 of the Act, provided that the necessary legal elements of the proposed provision, which is alleged to have been contravened, are met.
112. To assess the case under Section 4 of the Act, a relevant market needs to be delineated. The DG has defined the relevant market in the present matter as '*market for radio taxi services in Delhi-NCR*'. As such, the Informant/Meru has not challenged this relevant market. Uber has relied upon a CUTS report and has stated that, from the riders' point of view, radio taxis compete with other traditional taxis and other modes of transport and thus, the relevant product market should be '*market for transportation services for riders*'.
113. The Commission is of the view that the proposition of Uber that other modes of transportation, *i.e.* auto-rickshaws, buses, metro etc., fall within the same relevant market is unconvincing, besides being contrary to the Commission's approach in earlier cases. Undoubtedly, a rider may opt for Auto-rickshaw or Bus or metro if a cab is not available but it would be inappropriate to include these in the relevant market. The relevant market should ideally compose of only those candidate products, which the consumer perceives as substitute by the reason of their basic characteristics intended end-use, price *etc.*
114. Key features of radio taxis, *viz.* point-to-point pick and drop facility, ease of booking, pre-booking facility, round the clock availability, predictability,



in terms of expected waiting and journey time, reliability in terms of GPS/GPRS tracking, ease of payment, quality vehicles, professional and well-trained drivers, feedback facility etc. makes them different from other modes of transport. Thus, the services of the radio taxi used for point-to-point travel in the city cannot be substituted with any other mode of local transport. Uber's claim of availability of auto-rickshaws on its mobile app/platform similar to that of Radio Taxis cannot be a plausible reason to treat them as substitutable to autos due to peculiar features of taxis discussed above. The auto rickshaws attached to Uber's platform cannot be compared with radio taxis due to certain peculiar features of taxis viz.- comfort and smooth drive, Air Conditioned, boot space, luggage space, safety, status of the passengers etc. Thus, the special features of radio taxis distinguish them from auto-rickshaws and other modes of transport.

115. Further, whether the cab aggregators (*e.g.* Ola, Uber) consider the competitive constraints posed by such other modes of transport while taking their pricing or other commercial decisions, is also relevant, and the answer to this question is not in the affirmative. For the foregoing reasons, the Commission does not agree with the proposition of Uber that other modes of transport fall in the same market as the radio taxis.
116. As regards the relevant geographic market, the Commission notes that Meru as well as Uber had proposed Delhi-NCR to be the relevant geographic market before the DG as well as the Commission, which was also upheld by the erstwhile Hon'ble COMPAT in its order dated 07.12.2016. Moreover, as observed by the DG, Delhi is hub of Central Government offices, Courts, Tribunals, private sector and so are its adjoining areas of NOIDA and Gurgaon/Gurugram. Accordingly, the population that lives in such areas has to travel to their offices and markets between Delhi and such adjoining areas and for this, the movement has been made seamless by the governments of such adjoining States. Further, Delhi-NCR is a developed



market in terms of transportation since its inhabitants are already exposed to the convenience of travel by the Delhi Metro and its buses. Further, the DG also took note of the Meru's submission that the Hon'ble Supreme Court in its Order dated 05.01.2016 passed in the case of 'M.C. Mehta vs. Union of India & Ors. [Writ Petitions(s) (Civil) No(s). 13029 of 1985]'] clarified its previous Order dated 16.12.20151 and directed that its order regarding CNG taxis would be applicable on all taxis operating in the NCR region and that there was a typographical error in its previous Order dated 16.12.2015, which was relied upon by the Commission while restricting the relevant geographic market to Delhi earlier. Further, it is noted that the COMPAT's Order dated 07.12.2016 was upheld by the Hon'ble Supreme Court in its Order dated 03.09.2019.

117. Based on the foregoing discussion, the Commission finds the relevant market in the present case to be '*market for radio taxi services in Delhi-NCR*'.
118. As regards dominance, the Commission notes that Meru has not stressed upon the presence of collective/joint dominance by Uber and Ola in the relevant market. However, Meru has requested the Commission to seek a way out to address the 'abusive' conduct by both these players. Thus, though the original case was filed against Uber, the written submissions filed by Meru seek to remedy the alleged conduct of Ola as well. Be that as it may, the Commission is not inclined to venture into that territory, for the simple reason that Ola was neither arrayed as an opposite party in the original information filed, nor was investigated by the DG in that capacity, or heard at any stage before the Commission during the proceedings. Thus, the dominance assessment of the Commission is restricted to the ascertainment of whether Uber held such position of strength in the relevant market so as to merit assessment of its conduct under the provisions of Section 4 of the Act.



119. Meru has stated that in an earlier case [Case No. 06 and 74 of 2015], the case against Ola was closed for the want of its dominance stating that Uber exists in the market as a stronger player, and now the DG has not found Uber to be dominant because of Ola's presence in the relevant market. It has been alleged that these observations are contradictory.
120. Briefly, in the said earlier matter [*i.e.* Case No. 06 and 74 of 2015], similar allegations were made against Ola by Fast Track Call Cabs and Meru in the relevant market of 'radio taxi services in Bengaluru'. It was alleged that by offering heavy discounts to the passengers and incentives to the cab drivers associated with it, Ola has indulged in predatory pricing under Section 4(2)(a)(ii) of the Act. It was also alleged that Ola has entered into agreements/contracts with its drivers, which contain exclusivity clause and thus, locks in the drivers from associating with competing radio taxi companies, thus contravening the provisions of Section 3(4) of the Act. The Commission *prima facie* ordered investigation under Section 26(1) of the Act. However, the DG, after detailed investigation, was of the view that Ola does not hold a dominant position in the relevant market because of the presence of competitive constraints posed by Uber.
121. While assessing the dominance of Ola in that matter, the Commission applied a nuanced approach considering the challenges posed by traditional antitrust tools and approaches. Realizing that over-reliance on market shares in the assessment of digital market cases may lead to fallacious outcomes, the Commission disregarded high market share held by Ola. It was noted that market share is but one of the indicators for assessing dominance, and the same cannot be seen in isolation to give a conclusive finding. The Commission observed that though market share can be an important indicator for lack of competitive constraints, there cannot be any set guideline and criteria for determining uniform market share thresholds and a standard time-period to apply in all cases. The variance across industries



in terms of their inherent characteristics, such as nature of competition, technology and innovation dimensions, calls for a case-by-case assessment of market share and its implications for dominance with reference to the totality of the market dynamics and competitive strategies of firms. The Commission also recognized the limitation of market shares as an indicator of market power in case of new market economy cases. Rather the Commission relied on factors such as strength of network effect, entry barriers, and assessment of strategies adopted by the players to analyse dominance. Based on these factors, the Commission was of the view that Ola did not hold the position of dominance in the relevant market for '*radio taxi services in Bengaluru*' as it was not able to act independent of the competitive forces in the market.

122. One of the main parameters that weighed in the assessment of the Commission was the role of network effects in two-sided markets. The Commission noted that network effects may enable a large platform/network to become dominant and insulate itself from potential competition as entrants may find it difficult to challenge a large incumbent. However, the Commission noted that there can be certain countervailing market forces that reduce the ability of even a very large platform to insulate itself from competition. And in the facts of that case, the Commission was of the view that despite Ola having the largest network, the network effects were not strong enough to deter entry and rapid expansion of another big competitor 'Uber' who was competing fiercely with Ola in the relevant market of '*radio taxi services in Bengaluru*'. The Commission further observed that the radio taxi apps are offered for free and can be easily downloaded on smartphones and can co-exist on the same handset, thus, multi-homing was found to be possible for both drivers and riders.

123. Coming to the facts of the present case, the DG has given similar finding saying that Uber is not dominant given the presence of Ola in the relevant



market. While Meru has alleged that this finding is contradictory to the earlier order, the Commission finds no such infirmity in the said finding of the DG. *Firstly*, the relevant geographic market in the present case is Delhi-NCR while that in the earlier case was Bengaluru; and *secondly*, and more importantly, competitive constraints, generally, are not unidirectional in nature. Though there can be markets in which practically a situation may arise where the competitive constraints faced by players *inter-se* are not reciprocal and are indeed asymmetric. However, no such asymmetry or a superior position of any of the Radio taxi Service provider exists in the relevant market.

124. Despite the alleged conduct of Uber, which the Informant has stated to have created restraints for other players in the market, Ola has grown in equal measures. As can be seen from the data, collected by the DG during the investigation, in the rapidly growing radio taxi market of Delhi NCR, Meru had been the market leader, having share of 20%-30% in terms of fleet size till October 2014 and 50%-60% in terms of trip size. Ola replaced Meru and continued as market leader till August 2016, and thereafter was replaced by Uber. In the intervening period, the fleet size and trip size of these two players witnessed exponential growth. During the months of September 2016 to April 2018, Ola and Uber displaced each other as market leader on repeated occasions. However, Uber has been able to maintain its lead position and increase its gap in subsequent months where its market share was at least within a range of 50-60%. For any player to be considered dominant, it should be able to sustain its market share for a reasonable period of time. Durability of high market share over a period is one indicator of dominance. This does not seem to be the case here as there has been close competition between Ola and Uber in the radio taxi market of Delhi NCR. Undoubtedly, Ola has been posing significant competitive constraint on Uber, and vice versa, and the market dynamics suggest that Uber did not enjoy a market position which gives it the ability to behave independently of Ola



as also that of the consumers. Given the highly competitive market with fluctuating market shares of Uber and Ola, the Commission does not find Uber to be dominant in the relevant market.

125. Besides Uber's individual dominance, Meru has also alleged that despite transient fluctuations in their market shares, Uber and Ola together held more than 95% of the relevant market during majority part of the period under investigation. Despite there being other fringe players, market is more like a duopoly and, as per Meru, harm to consumers in the long run from this duopoly market situation can also be demonstrated by factors such as presence of barriers to entry associated with likely foreclosure effects on the conduct. Further, relying on the findings of the Court of Appeal in Canadian *Mastercard /VISA* matter, Meru stated that the reduction in options for consumers is not good for competition, as such reduction in number of competitors on account of anti- competitive practices leads to disruption of competitive fabric in the market which must be remedied at the earliest.
126. Though the aforesaid argument sounds appealing on the touchstone of theoretical foundations that forms the basis for application of antitrust rules, there is a need to look at this matter in great detail.
127. In digital economy markets, network effects play a pivotal role. Network effects depend heavily on number of players/participants joining the network on each side of two-sided or multi-sided markets *e.g.* in case of radio taxi/cab aggregators, the network effects depend upon the drivers and riders joining the network. More riders mean more demand scattered across a geographic region owing to higher density of riders, leading to more ride requests on a particular platform as compared to its competitor, which in turn lead to the requirement of more drivers to serve such riders. More drivers improve the service (in terms of pickup time and geographical coverage) for riders, thus attracting more riders which in turn attracts more drivers. Such increased number of rides through limited platforms also



generate efficiencies through higher utilization rate and lesser idle time for cabs/taxis.

128. It has been the constant endeavor of the Commission to promote competition in the market and to ensure efficient competitive markets. Such endeavor shall not be perceived to ensure a particular number of competitors. What is of significance is the strength of competitive constraints faced by players in a relevant market. To quote from an earlier decision *‘as long as there is competition in and for the market satisfying these outcomes, regulatory intervention is not warranted to either protect the existing players or to increase the number of players in the market. Towards that end, Competition and competition law is not about counting the number of firms in a particular relevant market to determine whether or not that market is competitive.’* Further, *‘every market is unique with a unique number of players that are determined organically by competitive forces. There can be no sacrosanct number of firms that ensures the presence or absence of competition. There can be markets which may not be competitive even with large number of players and equally possibly there can be markets which can work perfectly well with fewer players, constraining the conduct of each other. What is significant is that the existing firms are effective enough to constrain the behaviour of one another so as to dissuade independent abusive conduct by any of them.’*²

129. In view of the foregoing, Uber is not found to be dominant in the relevant market. In the absence of dominance of Uber, examination of abuse or any analysis of pricing strategy by Uber is not warranted under the provisions of the Act. However, for the sake of completeness, the Commission deems it appropriate to briefly touch upon the allegations with regard to below-cost pricing strategy of Uber in the relevant market.

² Case No. 06 & 74 of 2015.



130. As regards the allegation of conduct, *i.e.* below cost pricing, the Commission has had the occasion to look into a similar allegation with regard to Ola in Case No. 6 & 74 of 2015 [*Fast Track Call Cab Pvt. Ltd. and Meru Travel Solutions Pvt. Ltd. vs. ANI Technologies Pvt. Ltd.* the relevant excerpt from the said order are reproduced below:

“ 119. Taxis are not a new feature in the transport sector in India. Historically, the sector featured a mix of black-yellow and private taxis, which were mainly unorganised. While the black yellow taxis could be booked by hailing a hand or approaching at a taxi stand, the private taxis were restricted in terms of accessibility owing to information asymmetry between the riders/drivers about the demand/supply situation. The introduction of radio taxi model in the year 2008, by Meru, brought some transformation that enabled booking of taxis via telephone calls or online. Soon, other players like Mega Cabs, Easy Cabs etc. entered the market. All of these were operating under the asset-owned model.

120. The emergence of platform-based model, introduced by OP in the relevant market, challenged the well-established asset-owned model in this industry. The platform-based model allowed real time tracking of prospective riders and drivers on an App to facilitate quick booking and availability of taxis at a click/touch of a button/icon. The drivers were no more constrained to run the taxis idle, after dropping a rider and the riders were also not obliged to pay for the taxi's return fare, which was a norm, at least in the unorganized sector.

121. However, popularizing taxi, as a preferred mode of transport, was not free from challenges, especially considering the common perception by consumer of it being a luxury good in most Indian cities. The platform based model in the taxi industry, like any other two-sided



market, was dependent upon the growth of taxi network for benefits to permeate to riders and drivers. However, riding in taxis operated under asset-owned model was not only expensive in terms of the price, but, as discussed earlier, also entailed transaction and search costs. Thus, to attract prospective consumers/rider to experience the taxi services on this newly introduced model, it was necessary to make it attractively affordable to riders and profitable to drivers. The data on record shows that the taxi industry grew exponentially after the emergence of platform-based model (as much as 1900%) which can be attributed to the strategies adopted by the app based taxi operators. OP and Uber have, in a manner, revolutionized the taxi market by providing radio taxi services at abysmally low prices.

122. The Commission does not fully disagree with the Informants that the low prices of OP are not because of cost efficiency, but because of the funding it has received from the private equity funds. But as discussed above, there is no evidence that the access to such funding was inequitable and that the market for financing was not competitive and had aberrations. Moreover, it was their penetrative pricing strategy that facilitated them to garner high market shares in short span of time as well as develop the networks to a size that could provide sufficient positive externalities to the participants of the network.

131. The aforesaid observations seem to apply to the present case also. Given that platforms rely heavily on network effects which require network creation that entails continuous investment to attract both sides of the platform to interact.
132. A successful network/platform requires that both sides of the market be thick, *i.e.* there are a large number of participants to both sides of the network/platform, so that each participant has a substantial number of



potential matches on the other side of the market. This allows for positive cross side network externalities that benefit the users on both sides of the market, *i.e.* the drivers and riders. Both Uber and Ola are found to be aggressively competing with each other to attract participants, *i.e.* drivers and riders, on both sides of their platforms, which is necessary for reducing search and matching frictions.

133. This is buttressed by the observed pricing strategy of Uber and Ola. While the analysis done by the DG reveals Uber's below cost pricing as evident from its negative margin earned during 2014-2018, a similar trend was observed in case of Ola (and Meru). This shows that the aggressive pricing strategy adopted by Uber was in order to compete aggressively for the market (just like its closest competitor Ola) and to build its network. In multi-sided markets such as the radio taxi market, in order to build network effect, firms indulge in providing discounts and incentives to attract customers on both sides of the market and reap the positive cross side externalities.
134. The investigation also revealed that the discounts and incentives have gradually declined over time with a positive per trip margin recorded by Uber since October 2017. In view thereof, these discounts to consumers and incentives to drivers cannot be seen in isolation by applying traditional market concepts of assessing predatory pricing. Be that as it may, further analysis of the matter is not required given the absence of dominance of Uber.
135. With respect to Meru's allegation of Uber's exclusive agreements with its drivers, the DG investigation has revealed that the drivers face no restriction in terms of getting attached to a competitor's network. As per the DG, the driver partners are typically registered on more than one platform and they routinely multi-home depending on ride availability and short-term incentives schemes on offer. Given the absence of any exclusive agreement



between drivers and Uber, the DG has not found any case of contravention of Section 3 against Uber. Uber has relied upon this finding to argue that in the absence of any explicit exclusivity clause, no case of Section 3(4) can be made out against it.

136. Countering this finding of the DG and Uber's reliance on the same, Meru has argued that there is no requirement of an explicit exclusivity clause when the exclusivity is ensured by Uber through the implementation and effect of various clauses in the agreement and most importantly through the effect of the incentives offered to the drivers. Meru has argued that the aggregate effect of Uber's agreements with its driver partners is that the drivers are not left free in their choice of other radio taxi operators which leads to creation of exclusivity once a driver logs on to Uber's network. Further, the wordings and operation of the agreements entered into between Uber and its drivers show that it creates *de facto* exclusivity, which has caused an AAEC in the market and hence the same are liable to be held anti-competitive under Sections 3(1) read with Section 3(4) of the Act.

137. Meru has also given practical examples of daily and weekly incentive schemes to illustrate how exclusivity has been ensured by Uber through the incentive programmes. Meru has added that the manner in which various incentive schemes, *namely* 'Hourly Guarantee Scheme', 'Trip based incentives Scheme', 'Minimum Business Guarantee Scheme', 'Guaranteed Surge Level Scheme' *etc.*, are devised would show that the drivers are not left free to multi-home once they log on to Uber's network and hence in effect there is no fluidity in the market with the creation of exclusivity. Further, these incentive schemes were also devised in such a manner that maximum incentives are given during peak hours, so as to dissuade drivers from accessing other cab aggregators.

138. Further, Meru has also raised allegations against the rating mechanism followed by Uber to argue that such rating mechanism creates exclusivity



through a threat of deactivation by Uber of a driver partner, which keeps the driver under the control of Uber and also tied to its platform. This in effect causes AAEC and hence the same is anti-competitive in nature.

139. The Commission notes that there is no denial of the fact that Uber, and arguably Ola also, have had in place various incentive schemes and mechanisms, at different points in time. Rather Uber has stated that any incentives offered by Uber India were pro-competitive and adopted to achieve a minimum viable scale. Further, the Commission has already concluded above that Uber did not hold a dominant position in the relevant market during the period of investigation. The main/central issue that, thus, arises for the Commission to decide is whether the various incentive schemes or rating mechanism *etc.* which have been deployed by Uber, a non-dominant player, during the period under investigation, to incentivize more rides on its platform, has led to an AAEC under Section 3(4) read with Section 3(1) of the Act.
140. Clearly, this is not a straightforward question and any determination hereof devoid of the proper understanding of the radio taxi operators' model, especially of the cab aggregators, may lead to outcomes which are incongruous to the very objectives this Act seeks to achieve.
141. Thus, before discussing the aforesaid allegation of exclusivity threadbare, the Commission finds it imperative to examine/understand the cab aggregators' model, which Uber operates as, to have a better perspective of the allegations. The cab aggregators essentially work as digital platforms that connect riders to independent drivers through an application/app. The app takes a request for a ride from the prospective rider, searches for available (nearby) taxis on its platform, makes a match and puts the driver and the rider in contact with each other. An algorithm then sets the price and the revenue is shared between the driver and cab aggregator. Leveraging on the technology, the cab-aggregator model reduces transaction costs



associated with matching dispersed drivers and riders which also means lower search cost for these two sides of participants.

142. This platform-based model, though distinct, competes with the asset-owned model where cabs are owned by the radio taxi operators. While the radio taxi companies operating under the asset-owned model own the taxis attached to them, the cab aggregators like Uber and Ola heavily rely on their network of driver partners with their own cars to provide ride services to the consumers/riders.
143. The digital market economy players rely on the strength of the network effects to generate efficiencies. Network effects in cab aggregators market depends upon the number of drivers and riders joining the network. As highlighted earlier, more riders mean more demand, leading to more ride requests on a particular platform as compared to its competitor, requiring more drivers to serve such riders. More drivers improve the geographical coverage and reduces the waiting time/pickup time for riders, thus attracting more riders which in turn would attract/require more drivers. Thus, *ceteris paribus*, a cab-aggregator platform having a larger network will be able to allocate more ride requests to the drivers and offer more efficient rides to the riders/consumers in terms of lesser waiting time and lower prices. It has been submitted by Uber that its incentives were aimed at building a strong network and achieving a minimum viable scale to generate efficiencies.
144. During the initial stages, the focus of all platform operators, including the cab aggregators, is on developing and growing the network size. Depending upon the network externalities offered by each side, platforms design the pricing structure so as to make 'joining' the network and 'staying committed' to it, attractive to both sides. In cab aggregators' market, this was exhibited by discounts and incentives offered to riders and drivers, respectively. However, as the network grows and reaches a critical mass providing immense cross-side network benefits to the platform participants,



the need to offer discounts/incentives gets obviated. The data collected by the DG during investigation also depicts that the average margin per trip, which is essentially based on the gross billed amount collected from the customers (riders) less the amount spent by Uber on discounts and incentives, had become positive from October-2017 onwards (except in May, 2018).

145. Thus, Uber has been earning positive margin per trip in Delhi NCR market since October 2017, which kept on increasing and went up to a range of Rs.0-50 per trip in March, 2019.
146. Meru has alleged that these discounts and incentives are funded by deep pockets and are not a result of efficiency. However, the present example of cab aggregators market is more of a case of penetrative pricing strategies for creation of a network. Given that Uber operates in a competitive market, having competitive constraints from an equally strong player *i.e.* Ola who has also been allegedly deploying similar pricing strategies, it seems to be a compelling business strategy to induce loyalty by offering incentives to drivers. This in itself becomes a competitive strategy in the early stages of network creation. Unlike players operating under the asset-owned model like Meru, the pure cab aggregators do not have fixed fleet of cabs or drivers working for them. In order to create a fleet of cabs that attach themselves on the platform simulating a fleet model, these incentives in the early stages are essential to attract cab-owning drivers.
147. Further, the data collected by the DG also shows that their unit economics has improved substantially with registering of a positive net margin because of a gradual decline in incentives/discounts. They are booking positive net margin per trip, thus showing a certain business roadmap, typical to a platform market operator seeking to reap on network effects *i.e.* initial low-cost pricing to create network/scale and once a viable scale is achieved, per unit profit.



148. Before proceeding further, the Commission finds it imperative to highlight another unique feature of the cab aggregators model, that distinguishes it from many other platform markets, is the fact that riders (when they are looking for a ride) view the drivers as an extension of the cab aggregator. These cab aggregators (Uber or Ola) are not just platforms on which the riders can choose from an array of drivers available on the platform. While the drivers may be independent entities in a legal sense, for all practical purposes they are effectively extensions of the cab aggregators when they operate through their platforms. A single transaction takes place between the rider and cab aggregator, which provides a composite service and the price is generated only once, as opposed to many other platform operators who do not play a role in pricing of products/services available at their platform.
149. Further, when a rider books his/her ride at any given time, the same is accepted by an anonymous driver available in the area to whom Uber/Ola allocates such ride, and there is no opportunity for the rider or any driver to choose each other, as may be possible in other digital platform transaction. Thus, in view of these unique characteristics, an Uber App works differently from an e-marketplace platform or from an online delivery app *etc.* where sellers on those platforms have their own identities or brand value vis-à-vis the consumers *e.g.* a consumer buying through Zomato App, an online delivery app, may have a preference for a particular restaurant, or a consumer booking a hotel through MakeMyTrip may wish to know the options available in terms of their offerings and characteristics *etc.* It may not be appropriate to equate the same with a Cab Aggregators' app where the consumers have no material information about the drivers available in its area of demand. As such, the rides offered by individual drivers, through Uber or Ola App constitute a homogenous composite product where riders are indifferent between different drivers registered with a particular Cab



Aggregators.³ That being so, the cab aggregators despite being digital platforms are perceived to be the service providers of the ‘ride’ as a product and particularly for this reason, they are considered to be falling in the same market as the radio taxi service providers operating under the asset owned model.

150. The two most important parameters on which these different radio taxi service providers compete with each other for any potential ride request by a rider are (i) the price of the ride; and (ii) the waiting time or the pick-up time. The second parameter has gained relevance primarily on account of the behavioral transformation of consumers in the digital age where the products and services are available to the consumers at the click of the button. Any time-lag in delivery of a product/service thus has become a critical factor in influencing consumer preference for a particular service provider. Both these parameters are, in a way, functions of network effects. The cost of serving each ride as well as waiting time to serve the next rider generally go down as the network grows (due to economies of scale kicking in).
151. The Commission has already deliberated at length on the relevance of network effects and the role of incentives and discounts in catalyzing the building of the network in cab aggregators market. Though Meru has alleged that Uber (and also Ola) operates at below-cost pricing strategy (because of the heavy incentives to drivers and discount to riders) and their pricing strategies are not based on efficiencies, Uber has justified the discounts and incentives to be part of the overall network expansion strategy. Given that a cab aggregator competes in the relevant market on the network, and its operational efficiency is directly proportional to the

³ Samir Agrawal vs. ANI Technologies Pvt. Ltd. and Ors., Case No. 37 of 2018, available at <https://www.cci.gov.in/sites/default/files/37of2018.pdf>.



network strength it has, it may be counterproductive for an antitrust regulator to intervene in such an instance.

152. As has been highlighted by Uber, the incentives given by it to its driver partners were aimed at achieving a minimum viable scale to ensure that the drivers are available on its network and that they accept the rides. Further, Uber has submitted that the acceptance rating system only applies at the time while a driver-partner is online. It does not limit the ability of such drivers to log out of Uber's App, to log in to a competitor's app. Further, it is to encourage that during the time a driver-partner is logged into an app, they are available to accept rides. A failure to do so would result in an inefficient system where riders suffer on account of repeated cancellations, and the quality of Uber's platform is impacted. The Commission finds merit in the submissions made by Uber on the rating mechanism. The network plays a role in generating efficiencies. So, it is relevant for any platform operator (in this case Uber) to ensure that as many drivers as possible join its platform. It is equally important for those driver partners, who have joined its platform, to be willing to accept the ride. A driver registered with the App/platform but not willing to accept the ride request, or resorting to frequent cancellations after acceptance, may adversely impact the consumers' preference for Uber as a brand vis-à-vis its competitors if that competitor ensures quicker and assured ride.

153. Moreover, despite the alleged practices of Uber, which have been argued to be anti-competitive, Ola has grown in the market in almost equal measure. The competitive constraints posed by Ola and Uber on each other outweigh the anti-competitive effects alleged by Meru. Further, the impugned conduct of exclusivity of drivers to the cab aggregator platform through an 'agreement' driven by incentives does not meet the legal test of an exclusionary agreement causing an appreciable adverse effect on competition in this particular case. There is an ever-expanding pool of



drivers available; and as such 'locking' in of drivers through incentives cannot be stated to be a bottleneck facility, which can prohibit entry of new players or the expansion of existing players in the relevant market

154. In view of the foregoing discussion and on a collective assessment of various facts and evidence, the Commission thus, does not find merit in the argument of Meru that the incentives and rating mechanism adopted by Uber for its driver partners has led to any AAEC in the market.

155. Thus, the Commission is of the view that the facts and evidence on record do not establish the dominance of Uber, in the absence of which the question of abuse does not arise within the provisions of Section 4 of the Act. Further, the allegations under Section 3(4) read with Section 3(1) are also not found to be established. Hence, the case is hereby closed.

156. The Secretary is, hereby, directed to inform the parties, accordingly.

**Sd/-
Ashok Kumar Gupta
(Chairperson)**

**Sd/-
Sangeeta Verma
(Member)**

**Sd/-
Bhagwant Singh Bishnoi
(Member)**

**New Delhi
Date: 14/07/2021**