

Predatory Pricing and Market Determination in Non - Traditional Markets: An Analysis of Recent Cases Decided by The Competition Commission of India

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Abstract

The Directive Principles of State Policy as enshrined in Article 39 of the Constitution of India lay down, inter alia, that the State shall direct its policy towards securing that the operation of the economic system does not result in concentration of wealth, to the common detriment. However, a study of the Indian market, decades after the enactment of the Constitution, reveals that the same is prone to wealth concentration, due to failure of the competitive fabric of the market. One of the ways in which such market failure occurs is by abuse of market power by firms, due to anti-competitive practices such as predatory pricing.

According to competition law, only a dominant firm can be guilty of predatory pricing. To assess dominance, it is necessary, at the outset, to determine the relevant market. However, market determination in case of emerging markets is complex because traditional definitions do not take into account the competition dynamics that characterize new markets. In India, predatory pricing allegations against online taxis like Uber have necessitated an urgent relook at existing competition law provisions, to assess whether the same are equipped to deal with the challenges posed in defining non-traditional markets.

An analysis of the Competition Commission of India [CCI]'s orders reflects confusion. In most cases relating to emerging markets, allegations of predatory pricing could not be sustained, as the demarcation of the relevant market by the CCI did not support a conclusion of dominance. In this paper, the author analyses certain CCI decisions relating to predatory pricing, by focusing on the challenges of market definition in non-traditional markets.

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I. Introduction: The Sharing Economy – An Emerging Market

The sharing economy is an economy based on technology driven collaboration. According to the [Cambridge Advanced Learner's Dictionary & Thesaurus](#), “*sharing economy* is an economic system that is based on people sharing possessions and services, either for free, or for payment, usually using the Internet to organize this.”² In simple terms, sharing economy denotes using of technology for better access to exchange of goods and services between two or more parties, based on the notion that parties can derive more value from an otherwise underutilized asset, by such exchange. In a sharing economy, the exchange takes place through a shared marketplace, a collaborative platform or peer-to-peer application. In a way, the sharing model is hardly a novel concept, as ancient communities basically used the same idea via bartering. In modern times, sharing economy is a term used to cover a host of overlapping concepts like:

1. “Collaborative Economy” - which denotes collaborative consumption and production.
2. “Peer-to-Peer Economy” – or creation of peer to peer (P2P) networks for the production and sale of products or services.
3. “Freelancing” or “Gig Economy” – where free lancers or workers are hired for “gigs” or projects.
4. “Crowd-Economy” – which includes concepts like crowd-funding or raising money from a large number of people through the Internet, for a project or venture.
5. “Digital Economy” – or economies powered by digital technology, including platform economies.³

²[Cambridge Advanced Learner's Dictionary & Thesaurus](#), <https://dictionary.cambridge.org/dictionary/english/sharing-economy> (last accessed on July, 30, 2020).

³ DEREK MILLER, THE SHARING ECONOMY AND HOW IT IS CHANGING INDUSTRIES, <https://www.thebalancesmb.com/the-sharing-economy-and-how-it-changes-industries-4172234> (last accessed on July, 30, 2020).

The sharing economy has registered tremendous growth in the last decade and has considerably impacted traditional methods of doing business. Due to lessening of overhead and inventory costs, and by making it easy to pool in resources on demand, the sharing economy has increased efficiency in various sectors like transportation, consumer goods, and professional services, health care and so on.

In the transportation sector, Uber is an example of sharing economy. Uber connects the passenger with the agent or driver, who in turn offers his time and his vehicle (the taxi) for rent. This business model uses the Internet and a smartphone based application which connects the driver with the customer seeking the taxi ride. Out of the fare paid by the passenger, Uber retains a percentage and the rest is paid to the driver, who earns more money with more trips completed. This is a classic example of a two sided platform which benefits two or more parties.⁴

II. Competition Law Concerns Relating to the Sharing Economy

With the advent of the sharing economy, traditional business models across the world are being disrupted. As put by Tom Goodwin: “*Uber, the world’s largest taxi company, owns no vehicles. Facebook, the world’s most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory. And Airbnb, the world’s largest accommodation provider, owns no real estate. Something interesting is happening.*”⁵

With the growth of the sharing economy, interesting challenges are being faced by competition regulators across the world. The sharing economy is characterized by low entry barriers where sellers can enter and leave the market easily without incurring high costs. Further, with the use of technology like

⁴[HAZEM ALDANF, SOCIAL RESPONSIBILITIES WITHIN THE SHARING ECONOMY - \(UBER CASE STUDY\)](https://medium.com/@hazemaldanf/social-responsibilities-sharing-economy-uber-case-study-b5b7bb571b5b), <https://medium.com/@hazemaldanf/social-responsibilities-sharing-economy-uber-case-study-b5b7bb571b5b> (last accessed on July, 30, 2020).

⁵[MARCIN MLECZKO, SHARING AND TRADITIONAL ECONOMY: A MATTER OF SUBSTITUTABILITY...BETWEEN CATS AND DOGS? http://petitionlaw.com/2017/03/24/sharing-traditional-economy-matter-substitutability-cats-dogs/#_ftn1](http://petitionlaw.com/2017/03/24/sharing-traditional-economy-matter-substitutability-cats-dogs/#_ftn1) (last accessed on July, 30, 2020).

Internet based applications, the cost of operating in the market may on instances, drop to almost zero levels. As reported by the online classified site Craigslist, it employs around 40 people only, to handle a network that deals with more than 80 million classified advertisements per month. Thus, the marginal cost of transactions in such markets has almost dropped to zero levels.⁶ Emerging markets are difficult to fit in within the traditional notions of market definition and market power in competition law.⁷ New entrants, having smaller market shares in a sharing economy may be in a position to exert considerable pressure on existing, bigger players. This classically happens in case of transaction platforms where such firms are able to use price leverage on both sides of the market that they operate on, as compared to existing players who operate on one sided markets and are constrained by a unidirectional price structure. In addition to lower costs (both fixed and variable), sharing economy platforms also have the potential of reaching out to a large number of customers in a shorter frame of time. Due to these various advantages which are not available in traditional market platforms, the rise of sharing economy platforms has been exponential, over the last decade. Sharing economy platforms have literally taken over markets by storm. Such firms have rapidly gained market power, which they can successfully use as an entry barrier to keep out potential entrants.⁸

However, the problem that arises here from a competition law perspective is with respect to determination of the relevant market, and assessment of dominance in the same. According to competition law, unless a firm is dominant, it cannot be held responsible for abusing its dominance through various practices. The Competition Act, 2002, defines ‘dominant position’ as a “*position of strength, enjoyed by an enterprise, **in the relevant market**, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant*

⁶ SMRITI PARSHEERA ET AL, *COMPETITION ISSUES IN INDIA’S ONLINE ECONOMY*, https://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf (last accessed on July, 30, 2020).

⁷ [FRANCESCO RUSSO](#) AND [MARIA LUISA STASI](#), *DEFINING THE RELEVANT MARKET IN THE SHARING ECONOMY*, <https://policyreview.info/articles/analysis/defining-relevant-market-sharing-economy> (last accessed on July, 30, 2020).

⁸Id.

market in its favour.”⁹Section 4(1) of the Competition Act, 2002, provides that “*No enterprise or group shall abuse its dominant position.*” Section 4 (2) states that “*There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group (a) directly or indirectly, imposes unfair or discriminatory (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service.*”¹⁰ Thus, it is clear upon a reading of this section, that it is not dominance which is frowned upon, but abuse of such dominance, through forms of conduct specified in the statute.

Further, the dominance of an enterprise is always assessed with respect to a “relevant market”. According to Section 2(r) of the Competition Act, 2002, “*relevant market means the market which may be determined by the commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets*”. Thus, defining the relevant product and geographic market accurately is a crucial exercise in the determination of dominance. Section 19 (6) and Section 19 (7) of the Act lay down the parameters of defining the relevant geographic and product markets respectively.¹¹ Like other competition laws across the world, the Competition Act, 2002, focuses on “substitutability” as a test for defining the relevant market. An important tool for determining substitutability is the “Small but Significant, Non-Transitory Increase in Price” test or the SSNIP test. Simply put, SSNIP evaluates whether, in the event of a small, yet significant price rise (of about 5% to 10%), the consumers of a particular product would shift their

⁹ The Competition Act, 12 of 2003, INDIA CODE (2002) ,Expl. to s. 4.

¹⁰Id.s.4

¹¹ Id. s. 19(6) provides that “*The Commission shall, while determining the relevant geographic market, have due regard to all or any of the following factors, namely:— (a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services.*” Section 19 (7) provides that “*The Commission shall, while determining the relevant product market, have due regard to all or any of the following factors, namely:— (a) physical characteristics or end-use of goods; (b) price of goods or service (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialised producers; (f) classification of industrial products.*”

choices to another product.¹² If so, then the two products can be considered to be part of the same market. This test is also known as the “Hypothetical Monopolist” test – one which reveals whether “a relevant market is worth monopolizing.”

As cases decided by the CCI reveal, applying the SSNIP test and assessing market power in newer markets like the sharing economy, is a considerable challenge for competition authorities. One of the earliest cases relating to two sided markets was the *MCX-NSE* case.¹³ This case related to the rapidly changing dimensions of the stock market and its various segments. Here the issue was whether National Stock Exchange [NSE] had abused its dominant position by its zero-pricing strategy in the Currency Derivative segment. In this case, the CCI did not apply the SSNIP test to determine the relevant market, as there was absence of “*historic data on prices*”, the market being new. Moreover, the CCI considered that the transaction value paid by a broker or trader as fees was too small to have any real impact on substitutability.¹⁴ The CCI did not use economic tools in the strict sense, however, from the features of the market in question, the CCI held that the Currency Derivative segment was a distinct and separate market and could not be “*said to be either interchangeable or substitutable by a product in segments like equity and F&O (Futures and Options) for the purchaser.*”¹⁵

As regards the issue of predatory pricing,¹⁶ the CCI noted that the operating cost of NSE for the Currency Derivative segment could not possibly be zero.¹⁷ Thus,

¹² For a detailed discussion on the SSNIP test and its limitations, see KAUSHAL SHARMA, SSNIP TEST: A USEFUL TOOL, NOT A PANACEA http://www.cci.gov.in/sites/default/files/presentation_document/SSNIPTestKKSharma260711.pdf (last accessed on 30/07/2020).

¹³ Case No. 13/2009.

¹⁴ Id. at para 10.16.

¹⁵ Id. at para 10.19.

¹⁶ The Competition Act, 12 of 2003, INDIA CODE (2002), s. 4 exp. (b) “*predatory price means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors*”.

¹⁷ Id. at para 10.69

the CCI concluded that “predatory price” is a subset of “unfair price” and the zero price strategy adopted by NSE, while not predatory, may be regarded as unfair pricing.¹⁸ Unfortunately, the majority opinion in this case did not go into an analysis of the features of the network industry and two-sided markets. The dissenting opinion in this case is more relevant as it was the first of its kind to shed light on the economics of network industries. The dissent stated that network industries are different from traditional markets as they operate on network effects, which mean that the value of a platform increases to the user with increase in the number of users. Further, costs and prices in network platforms may not follow trajectories similar to traditional markets, hence cannot, under all circumstances, be analyzed using traditional economic tools like normal supply-demand curves leading to determination of prices in the market. The dissenting order stated that in view of the nature of the market, NSE could not have said to occupy a dominant position in the same.¹⁹ The CCI order in the MCX-NSE case is significant as it is one of the first cases which dealt with the issue of determination of the relevant market in a network industry, though the order is unclear about the specific economic tools which need to be employed for such determination.

III. The CCI’s Stance in the OLA/UBER Cases

The CCI has, on several occasions in the recent past, been faced with the issue of market determination and assessment of market power in the sharing economy. From 2015, a number of cases have been filed against Ola and Uber, alleging abuse of dominance by these companies, by means of predatory pricing and other anti-competitive behavior. The CCI’s orders in the Ola and Uber cases reflect the inability of the regulator to coherently define newer markets. The CCI rejected the claims in all the cases, primarily on the ground that Ola and Uber did not enjoy dominance in the market. The decisions of the Commission have evoked much criticism and debate.²⁰ For the sake of brevity (most

¹⁸ Id. 10.76.

¹⁹ See DISSENT *supra* note 12.

²⁰ Case No. 25, 26, 27 & 28 of 2017.

facts/allegations being common) the key points of the decisions are discussed below.

The principle allegation in the cases was that Ola and Uber were “dominant” players in the market, as they held very high market shares and created barriers to entry through their networks, via various strategies including predatory pricing.²¹ Further, Ola and Uber also imposed exclusivity restrictions on their drivers, which amounted to anti-competitive agreements contravention of Section 3(4)²² read with Section 3(1)²³ of the Act.²⁴ With regard to the second allegation, the CCI observed that the market being one of “radio taxi services” the drivers as well as the passengers have access to multiple applications, developed by different service providers. The drivers are able to easily change between cab aggregators, and opt for the service provider who is giving maximum incentives at a particular time. This ability of using multiple platforms simultaneously is called “multi homing”.²⁵ In such a market, there is sufficient competition between different service providers, therefore there is no creation of “lock ins” or barriers to entry. Further, according to the CCI “*The agreement referred to...consists of incentives offered by the OPs which have*

²¹ Id. paras 4-5.

²² The Competition Act, 12 of 2003, INDIA CODE (2002) s. 3(4) states that “Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including— (6) (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.”

²³ The Competition Act, 12 of 2003, INDIA CODE (2002) s. 3(1) provides that “No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India”.

²⁴ Case No. 25, 26, 27 & 28 of 2017 at paras 4-5.

²⁵ See OECD PAPER ON MARKET DEFINITION IN MULTI-SIDED MARKETS, available at <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282017%2933/FINAL&docLanguage=En> last accessed on 30/07/2020.

been availed by the drivers out of their choice".²⁶ These incentives could not be regarded "agreement" within the meaning of Section 3 read with Section 2(b) of the Act²⁷.

With regard to the allegation of dominance, the Commission noted that the market share calculation relied upon was based on the market research conducted by a private research company. Without going into the authenticity of the market research report, the Commission opined that "*high market shares by themselves may not be indicative of dominance. Though market share is theoretically an important indicator for lack of competitive constraints, it is not a conclusive indicator of dominance. Further, there cannot be any objective criteria for determining market share thresholds and a standard time-period as an indicia of dominance to apply in all cases, especially when under the scheme of the Act, no numerical threshold for presumption of dominance has been prescribed.*"²⁸ Thus, the CCI rejected allegations of dominance in the market by Ola and Uber as there was no conclusive data on the same, instead of ordering an investigation into the matter to ascertain the true nature and structure of the market.

Among the gamut of allegations levied, another important allegation was the issue of dominance of Ola and Uber as a "group" owing to the shareholding by common investors in Ola and Uber. Shareholding by common investors could indicate deeper pockets, as well as unity of long term purpose and interest by so called competitors. Although the CCI exonerated Ola and Uber, considering the absence of dominance of the latter, it made certain observations on the issue of antitrust risks posed by common shareholders holding investments in competing entities.

It was pointed out that the companies in question have common investors, like "SoftBank, Tiger Global Management LLC, Sequoia Capital and Didi Chuxing".²⁹ The CCI considered whether the existence of common investors in Ola and Uber can erode competition between the two firms. According to the

²⁶ Case No. 25-28 of 2017 at para 37.

²⁷ Id.

²⁸ Case No. 25-28 of 2017 at para 41.

²⁹ Id. at para 44.

CCI, the two main concerns arising out of common ownership would be, firstly, increase in price and decrease in quality (which being unprofitable for the companies, could be beneficial for the investors) and secondly, “coordinated effects” where there could be incentives given to collude and earn collusive profits.³⁰ The CCI observed that common ownership may lead to “*softening of competition*”, however, in absence of clear evidence in this regard, an adverse finding could not be made on “conjectures and apprehensions”.³¹ Thus, on the basis of the above observations, the CCI concluded that there existed no “prima facie” case to order an investigation into the matter.

IV. The COMPAT and Supreme Court Orders

In a timely judgment on 3rd September 2019, the Supreme Court of India reopened investigation into the Uber matter by dismissing an appeal filed by Uber against the order of the erstwhile Competition Appellate Tribunal (COMPAT) dated 7th December 2016.³² In this case,³³ like the other cases, CCI had closed the matter, stating that “*no case of contravention is made out against Uber Group under Sections 3 or 4 of the Act*”³⁴ as the CCI did not reach a finding of dominance by Uber, nor the existence of any anti-competitive agreement. When this order was appealed before the COMPAT³⁵ the latter was of the view that the order of the CCI was erroneous, on several grounds.

Firstly, the COMPAT found fault with the determination of the relevant geographic market by the CCI.³⁶ The CCI had determined the geographic market as Delhi, as opposed to Delhi-NCR. The COMPAT regarded this as illogical, as it was fairly easy for customers to move “*from one point in NCR to another point calling taxis on telephone/internet platforms.*”³⁷ Thus, demarcation of Delhi as a separate geographic market was unjustified. Secondly, regarding

³⁰Id at para 46.

³¹Id at para 53.

³²Civil Appeal No. 641 of 2017.

³³Case No. 96/2015.

³⁴Id. at para 25.

³⁵Appeal No.31/2016.

³⁶Id. at para 11.

³⁷Id. at para 12.

dominance, the CCI had considered conflicting research reports on Uber's market shares and hence concluded that there was no clear proof of dominance. However, according to the COMPAT, the very existence of conflicting research reports in such emerging markets should have indicated that the matter needs to be investigated.³⁸ Most importantly, the COMPAT opined that dominance in non traditional markets, like two sided platforms cannot be judged by market shares alone. It "*should be seen in the context of overall picture as it exists in the radio taxi service market in terms of status of funding, global developments, statements made by leaders in the business, the fact that aggregator based radio taxi service is essentially a function of network expansion and there was adequate indication from the respondent that network expansion was one of the primary purpose of its business operation.*"³⁹ Accordingly, the COMPAT ordered that the matter be referred to the Director General of the CCI for investigation.⁴⁰

On further appeal, the Supreme Court upheld the decision of the COMPAT. In a concise judgement, the Supreme Court stated that since an allegation was being made about predatory pricing by Uber, in the form of losses made for trips, the same had the potential of falling foul of Section 4 of the Competition Act, 2002. Hence, the CCI was ordered to start investigation into the matter.⁴¹

V. Analysis of the COMPAT and Supreme Court Orders

The September 2019 order of the Supreme Court has far reaching consequences. As reflected by the cases, market dynamics in the sharing economy remains an ambiguous issue and the CCI has been unable or unwilling to analyze dominance in such markets with precision. Also, the CCI has acknowledged its inability to evaluate the impact on competition created by factors such as the existence of common investors, in emerging markets. The CCI has observed that "*the details are yet to unfold regarding the impact of investments by common investors i.e. whether the common ownership has*

³⁸Id. at para 15.

³⁹Id. at para 16.

⁴⁰Id. at para 20.

⁴¹Civil Appeal No. 641 of 2017 at pp. 5-6.

translated into control and, if yes, whether such an ownership can pose a competitive risk...In other words, common ownership may lead to softening of competition and it is possible that the anti-competitive effects of common ownership may arise more as an error of omission, rather than an error of commission. There is presumably a long path ahead in this direction."⁴²

The COMPAT's order had more clarity as it pointed out that the aggregator based radio taxi service had revolutionized the manner in which people commuted, and had brought great consumer satisfaction in the cities where it operated. Therefore, it could not be said with certainty that there had been any abuse of dominance. However, the large discounts and incentives indicated that either new business models like sharing economies were far more efficient and cost effective, or there was anti-competitive behavior and predatory pricing by the players in these emerging markets. Hence, the COMPAT directed the Director General to investigate this matter and help in settling an issue which had agitated business discourse for quite some time.⁴³

The Supreme Court while upholding the order of the COMPAT, relied on data produced in the complaints and stated that "*it can be seen that Uber was losing Rs.204 per trip in respect of the 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.*" The brevity of this order is remarkable as, according to the Supreme Court there was an allegation (with prima facie data) of loss making pricing, which could indicate predatory pricing Section 4 of the Competition Act, 2002. Hence, this situation would warrant a detailed investigation of the market in question.

VI. Conclusion

Market definition in the sharing economy is not an easy task and requires detailed economic analysis. Such analysis has been absent so far, in CCI orders pertaining to the sharing economy. It remains to be seen how the CCI will take a relook into the Uber matter and approach the issue of dominance. Factors such as overlapping technologies, and demand and supply side substitutability may

⁴² Case No. 25-28 of 2017 at para 56.

⁴³ COMPAT Appeal No.31/2016 at paras 18-19.

be required to be analyzed more comprehensively by the CCI, to assess whether there is the existence of effective competition in the market. As this is unfamiliar territory for the CCI, it may take a cue from other jurisdictions. The recent decision of the United States Supreme Court in the case of *Ohio v. American Express*⁴⁴ provides insight on examining anti competitive restraints on each side of a two sided or multi sided platform market which caters to consumers whose demands are distinct yet related. The case provides valuable guidance on how anti-trust regulators should consider the impact of alleged restraints on the entire market in question, instead of relying on consumer demand and price increases as indicators of market power.⁴⁵ The Supreme Court order in the Uber cases is timely and commendable, as there is urgent need for accurately defining the relevant market and the assessing competitiveness of the same, in emerging markets in India.

⁴⁴ (2018) 138 S. C.2274.

⁴⁵ For a concise analysis see [SHEARMAN & STERLING LLP](#), UNITED STATES SUPREME COURT ACCEPTS THE IMPORTANCE OF TWO-SIDED MARKETS ANALYSIS, (last accessed on 30/07/2020).