



**COMPETITION COMMISSION OF INDIA**

**Case No. 6 & 74 of 2015**

**In Re:**

**Fast Track Call Cab Pvt. Ltd.**

**Informant No. 1**

**Meru Travel Solutions Pvt. Ltd.**

**Informant No. 2**

**And**

**ANI Technologies Pvt. Ltd.**

**Opposite Party**

**CORAM**

**Mr. Devender Kumar Sikri  
Chairperson**

**Mr. S. L. Bunker  
Member**

**Mr. Sudhir Mital  
Member**

**Mr. Augustine Peter  
Member**

**Mr. U. C. Nahta  
Member**

**Mr. Justice G. P. Mittal  
Member**

**Appearances:**

*For Fast Track Call Cabs Pvt. Ltd.:*

Sh. Udayan Jain, Advocate  
Sh. Abir Roy, Advocate  
Ms. Anju Thomas, Advocate  
Sh. Prashanth Shivadass,  
Advocate  
Sh. Manas Gaur, Advocate  
Sh. Kamal Sharma, Advocate



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*For Meru Travel Solutions Pvt. Ltd.:*

Sh. Someshekhar Sundaresan,  
Advocate  
Sh. Zerick Dastur, Advocate  
Ms. Sonal Jain, Advocate  
Sh. Abir Roy, Advocate  
Sh. Manas Gaur, Advocate  
Sh. Varun Kejriwal, V.P  
Corporate (Meru)

*For ANI Technologies Pvt. Ltd. (OLA):*

Sh. Ramji Srinivasan, Sr.  
Advocate  
Ms. Nisha Kaur Uberoi,  
Advocate  
Ms. Nandita Sahai, Advocate  
Sh. Sammith. S, Advocate  
Sh. Tushar Bharadwaj,  
Advocate  
Ms. Ridima Bhargava, Legal  
Counsel (OLA)  
Sh. Karanveer Singh Shekhawat,  
V.P (OLA)  
Sh. Arvind S., V.P-Corporate  
Affairs (OLA)  
Sh. Chetan Chopra, Litigation  
Head (OLA)

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

Fast Track Call Cab Pvt. Ltd. and Meru Travel Solutions Pvt. Ltd. (the '**Informants**') had filed information, separately, under Section 19(1) (a) of the Competition Act, 2002 (the '**Act**') against ANI Technologies (the '**Opposite Party**'/'**OP**') alleging *inter alia* contravention of the provisions of Section 4 of the Act. Since the allegations were similar in both the cases, the Commission decided to club the matters for the purposes of investigation and final disposal.



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### **Facts, in brief**

2. The Informant in Case No. 06 of 2015 is a company engaged in the business of providing radio taxi services, under the brand name '*Fast Track*', in the southern part of India.
3. The Informant in Case No. 74 of 2015 is a group holding company engaged in radio taxi business through its wholly owned subsidiaries namely Meru Cab Company Pvt. Ltd., (MCCPL) and V-Link Automotive Services Pvt. Ltd. (VASPL or V-Link). Both these subsidiaries of the Informant are engaged in the business of providing radio taxi services under the brand names '*Meru*', '*Meru Genie*' and '*Meru Flexi*' in many major cities across India.
4. OP (common in both the cases) is a company engaged in the business of providing radio taxi services, under the brand name '*OLA*'. The main allegation of the Informants in both the cases is that OP has abused its dominant position in the relevant market by offering heavy discounts to the passengers and incentives to the cab drivers associated with them which amounts to predatory pricing under Section 4(2)(a)(ii) of the Act. This conduct, as per the Informants, has affected other competitors in the market who cannot offer similar discounts/incentives to commuters/drivers.
5. At that stage, the Commission, based on the high market share of OP, was *prima facie* of the view that OP held a dominant position in the market for '*Radio Taxi services in the city of Bengaluru*' and that it was abusing its dominant position. *Vide* order dated 24<sup>th</sup> April 2015, the Commission directed the Director General (DG) to conduct detailed investigation into the matter. Thereafter, as stated earlier, another information based on similar facts and allegations, in Case No. 74 of 2015, against OP was received by the Commission. The Commission, *vide* order dated 30<sup>th</sup> September 2015, clubbed this information with the



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earlier case which was being investigated by the DG and directed the DG to submit investigation report covering both the Informants. During the course of investigation, the DG sought information from the parties and other radio cab companies (third parties), including Uber India Pvt. Ltd. ('Uber'), operating in the geographic region of Bengaluru.

6. The DG accordingly submitted the confidential version of the joint investigation report on 12<sup>th</sup> April 2016. Thereafter, the public version of the investigation report was submitted by the DG on 24<sup>th</sup> November 2016, taking into account the orders of the Commission with regard to confidentiality requests made by OP and Uber. The public version of the investigation report was sent to the parties for their response/objections. The observations and findings of the DG in the investigation report are entailed in the ensuing paragraphs.

#### **Observations and findings of the DG**

7. The issues before the DG for investigation were twofold-(i) whether, OP held a dominant position in the relevant market or not; and (ii) if it held a dominant position, whether its conduct would amount to abusive practice (predatory pricing) within the meaning of Section 4(2)(a)(ii) of the Act.
8. The DG analyzed the taxi industry in India in general and Bengaluru, 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. Before the DG, OP contended that it is a technology company which connects potential customers and the drivers through technology platform. It referred itself as an 'aggregator' of taxis and claimed that it is not in the business of radio taxis, like other players such as Fast Track, Mega Cabs, Easy Cabs and Meru which have obtained license from the respective transport authorities as radio taxi operators. The DG analyzed various business models prevailing in the



radio taxi service industry, *i.e.* asset-owned model, aggregator model and hybrid model. 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. OP operates under the aggregators' model and one of its competitors, working on the same business model, in the relevant market, is Uber. The DG also observed that there are certain players who operate as a mix of both these models like 'Mega' and 'Meru' (one of the Informants).

9. Despite OP's argument that it is only a technology software service provider, which is primarily engaged in providing internet and mobile technology platform for taxi hiring by commuters and is thus different from radio taxi companies operating under asset-owned model, the DG opined that taxis operating under these different business models are functionally substitutable.
10. OP also submitted, before the DG, that in Bengaluru, the radio taxis running on OP's platform compete with equally other commercial modes of transport and accordingly, the relevant market should be defined broadly to capture all such alternative modes of transport as well as they pose an effective competitive constraint on OP's taxis. The DG, however, found no merit in this contention and observed that the key features of radio taxi, *viz.* point-to-point pick and drop facility, ease of booking, pre-booking facility, round the clock availability even at obscure places, 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, *i.e.* radio taxi services, different from other modes of transport. Highlighting the distinctions between radio taxis and all these other modes of transport, the DG delineated the relevant market as



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*'market for radio taxi services'*. With regard to the geographic market, the DG observed that transport is a State subject under the Constitution and therefore, the radio taxi/city taxi schemes formulated by the State Governments/ Regional Transport Authorities (RTAs) differ from State/ to State and City to city. Thus, the regulatory conditions of competition are homogenous only in a particular city like Bengaluru and distinct from conditions prevailing in any other neighboring cities/states. Further, the radio/local point-to-point taxi service is a highly localized service from demand side and supply side perspective. Based on these considerations, the DG delineated the relevant geographic market as the city of Bengaluru.

11. The DG then analyzed the position of strength of OP in the relevant market of *'market for services of radio taxi in Bengaluru'* to assess whether it held a dominant position in the said market during June 2012 till September 2015 or not. The DG has based its analysis taking into account the market shares of OP in comparison to the other radio taxi operators on the basis of number of trips (both monthly and annually). The DG also obtained information regarding the total fleet size and active fleet size for different players in the relevant market for assessment of dominance. However, these parameters were not found to be appropriate indicators for assessment of market shares because there are chances of one radio taxi getting registered on multiple platforms, giving rise to the problem of multiple counting.
12. The DG, as such, considered it appropriate to measure the market shares of all the players on the basis of number of trips/rides during the relevant time period. On the basis of annual data (2012-13 to 2015-16), it was observed that in terms of number of point to point trips, the market shares of Meru, Mega Cabs, Easy Cabs and Karnataka State Tourism Development Corporation (KSTDC) declined from 2012-13 to 2015-16. The DG further observed that OP, which entered in the market in early



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2011, had a market share of only 5-6% in the year 2012-13 which increased to 61-62% in the year 2015-16 (till September 2015). It was also noted that Uber, which started its operation in August 2013, had a negligible share of less than 1-2% in 2013-14 which increased to 9-10% in the year 2014-15. However, in the first six months of 2015-16 (till September 2015), the DG noticed that while OP's market share increased from marginally by 2% to 3%, Uber's share increased at a faster rate *i.e.* by about 20%-22%.

13. Further, based on the monthly data (June 2012- September 2015) for point to point services, the DG observed that whereas till August 2014, Meru (one of the Informants) maintained the lead position, while from September 2014 onwards, OP took the lead position amongst other radio taxi companies. It was further noted that from March 2015 onwards, Uber has maintained the second position. The DG also noted that from January to September 2015, Uber's trip size registered growth of nearly 1200%, while OP's growth has been about 63% during the same period.
14. The DG has opined that for a player to have a dominant position in the relevant market, it should be able to hold its market share for a reasonable period of time. In the present case, OP's market share has started declining as Uber entered the relevant market almost three years after OP's entry.
15. The DG also took into account the findings made by Raghavan Committee Report to observe that factors other than market share are relevant to assess whether a given entity is dominant in the relevant market or not.

*Findings of Raghavan Committee Report*

*“[.....] even a firm with low market share of just 20% with the remaining 80% diffusely held by a large number of*



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*competitors may be in position to abuse its dominance, while a firm with say 60% market share with the remaining 40% held by a competitor may not be in a position to abuse its dominance because of the key rivalry in the market. Specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape or result in unnecessary litigation. Hence in a dynamic changing economic environment, a static arithmetical figure to define dominance will be an aberration [.....]*

*[...] As already stated there is no single objective market share criteria that can be blindly used as a test of dominance.*

*[...]”*

16. Furthermore, the DG took into account the European case laws (*AKZO Chemie BV vs European Commission*, *United Brands Case* and *Hoffman-La Roche Case*) to establish that though market share is important, it is only one of the indicators from which the existence of a dominant position may be inferred. There can be factors other than market shares which play a vital role in assessing dominance of an enterprise.
17. Accordingly, the DG took into account various factors enumerated under Section 19(4) of the Act to assess the relative strength of OP. With regard to the financial resources, the DG viewed OP ahead of its rivals, being able to attract additional funding of Rs. 2,059.01/- crore by the end of 30<sup>th</sup> September 2015, in addition to the investment of Rs. 3445.50/- crore by the end of 2014-15, raising its total resources to Rs. 5504.81/- crore. Other competitors like Meru and Mega Cabs were found to be lagging much behind OP in this respect. It was further noted that Uber has been able to raise its funding from Rs. 2.39/- crore as at to Rs. 161.78/- crore by the end of 2014-15. Interestingly, DG found that Uber Inc., which is the parent company for Uber had a total capital investment





of about 15 to 20 times of OP's financial resources.

18. The DG, thus, noted that backed by its marketing technology and logistics and financial support, Uber was able to successfully counter the pricing strategy of OP, and being able to sustain losses, which restrained OP from exercising market power in the relevant market. This was evident from the fact that similar strategy was followed by Uber and as a result, the gap in market share between OP and Uber narrowed down from 69% in January 2015 to 22% by September 2015.
19. The DG also noted that in a scenario where the cab drivers have an option of getting themselves registered onto another platform and customers have an option of booking taxis from another platform, it is difficult for an incumbent to exercise market power. Thus, neither the customers nor the drivers are locked up in any manner. The DG further stated that, in the present case, competitive constraints can also be exerted by the customers/commuters in the form of countervailing buyer power, as they have an option of booking taxis from other platforms like Uber.
20. It was further noted that the potential impact of expansion of the existing competitors or entry of potential competitors is also relevant while assessing the competitive constraints on an enterprise. The DG noted that the regulatory requirement in the present case did not constitute a barrier for a new entrant. Further, the key feature of the aggregator model is that the company does not have to invest capital on purchase of cabs and therefore, the capital investment as an entry barrier is not high enough to deter new entrants.
21. In its analysis, the DG also pointed out the 'network externalities' prevalent in two sided markets, observing that the aggregator's model of radio taxi service can only be profitable when the service/platform provider has a sizeable number of customers availing the service and



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sizeable number of cabs/drivers at various locations within the city providing the services to meet the demand. The demand for taxis depends on the tariff structure and quick availability of the taxis while the supply of taxis depends upon the incentive structure and minimum assured bookings.

22. One of the Informants, Meru, argued before the DG that OP's market share has been over 50% consistently for a period of two years, and therefore, it was dominant in the relevant market. However, the DG noted that after achieving a growth rate of 75-76% in January 2015, OP's share started to decline and came down to 58-59% by September 2015. Further, with the steady increase in Uber's market share from 6-7% in January 2015 to 36-37% in September 2015, it could not be said whether OP would be in a position to hold on to its market share for a sustainable period for assessment of dominance in the relevant market.
23. Based on the foregoing analysis, the DG concluded that OP is not in a dominant position in the relevant market to act, to an appreciable extent, independently of its competitors and customers.
24. The main allegation of abuse in the present case was below-cost pricing strategy by OP. 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 OP vis-à-vis its competitors and rather found Uber to be a more aggressive player, in terms of below-cost pricing, in the relevant market than the OP. Thus, DG opined that both OP and Uber have adopted 'below-cost pricing strategy'. 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.



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**Replies/ objections/ submissions of the Parties to the Investigation Report**

***Replies/ objections/ submissions of the Informants (FastTrack and Meru)***

25. The Informants have filed separate responses to the investigation report and were represented by different counsels at the time of oral hearings. However, considering the similarity in their arguments, their responses are jointly summarized hereunder unless specified otherwise. The Informants have stated that though the evidence on record indicate contravention of the provisions of Section 4 of the Act by the OP, the conclusion in the investigation report has been stated otherwise.
26. The Informants have vehemently argued that the finding of the investigation report regarding (non) dominance of OP is solely based on the fact that Uber is present in the relevant market and is engaging in a similar conduct as OP.
27. The Informants have agreed with the delineation of the relevant market proposed by the DG. It is submitted that the radio taxi market forms a separate relevant market in itself and can be distinguished from other modes of transport.
28. The argument of OP that it is merely a technology company has been challenged by the Informant. The Informants contend that the services offered by OP are that of a radio taxi provider and the services being consumed by the users of OP are that of radio taxis. They are also soliciting their business as radio taxi providers through advertisements. It is stated that OP enters into contracts with the taxi owners and uses its brand image, platform to offer the services of taxis to the customers. It has also been submitted that OP determines the tariffs payable by the consumers for the taxi services and has control over all aspects of taxi services. Hence, it is submitted that the argument that it is merely a



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platform which is connecting customers and drivers cannot be accepted.

29. As regards dominance, it has been submitted that OP is a self-proclaimed dominant player in the market. There have been public statements made by the promoters of OP that it has a high market share in the radio taxi industry in India.
30. The Informants have relied upon various factors enumerated under Section 19(4) of the Act to show that OP is dominant. In this regard, it is submitted that market share of more than 50% of an entity creates a presumption of dominance. The market share of OP is more than the aggregate of all the competitors put together for the years 2014-15 and 2015-16. Further, the market share of OP on the basis of active fleet was 60-61% in 2015-16 as against the market shares of Meru (4-5%), Mega Cabs (1-2%), Uber (33-34%). With regard to the absolute number of OP's trips, it is stated that the number of trips by OP has increased from 46,571 in September, 2013 to 2,318,175 in September, 2015. HHI index has also been relied upon to argue that in the present case, the concentration of OP itself is over 3600 and that of the market is over 4700. This, as per the Informants, shows that OP is dominant in a highly concentrated market.
31. The Informant has contested the findings of the DG with regard to the fact that since the market share of OP has been declining from February, 2015 to September, 2015, OP is not dominant. As per the Informant, the dip in the market share does not vitiate the fact that OP is dominant in the market. To substantiate its claim, the Informant has placed reliance on various case laws including the General Court's decision in *Astra Zeneca v. Commission* (Case T-321/05) and *British Airways plc v. Commission* (Case T-219/99) case, wherein it was noted that decline in the market share cannot be taken as an evidence that the entity is not dominant.



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32. Besides OP's high market share, the Informants have also alleged high entry barriers in the relevant market. It is stated that radio taxi market is characterized by network effects which can act as an entry barrier. Since it would take considerable time for a new player to capture a good position and compete against an established player, the network effects result in high entry barriers for potential entrants. The Informants have placed reliance on international case laws where network effects were shown to be posing a significant barrier to entry viz, European Commission decision in *Microsoft* case (COMP/C-3/37.792) and District Court of New York's decision in *MasterCard/Visa* case. It is claimed that OP was the first player to build a strong network with the help of its predatory model by virtue of which, it tipped the market in its favour, which has given it a strong edge in the market over its competitors.
33. The Informants have submitted that OP was paying an incentive of Rs. 302 per trip in January, 2015. The high incentives paid by OP hooked on more number of drivers to its platform. Even post January 2015, the number of trips of OP were high and there was no decrease in the incentives paid by OP to its drivers. The ultimate effect of OP continuing to pay such high incentives even post January, locked in a lot of drivers and increased its customer base as well. Further, the agreement that OP enters into with its drivers contains an exclusivity clause and thus, locks in a lot of drivers. It is alleged that other operators in this industry do not enter into agreements containing such clauses which further proves that OP is in a dominant position.
34. The Informant has pointed out high capital requirement in the radio taxi market as an entry barrier. It is submitted that OP has been able to practice predatory pricing because of huge funding which acts as an entry barrier for the small and medium enterprises which cannot enter the market because of inadequate funds. This is also stated to be a barrier for expansion for the existing players. However, the DG has wrongly



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concluded that there is no entry barrier in the radio taxi market as Uber was able to expand in the said market, when OP was already existing and had a high market share. The Informants have also mentioned that the first mover advantage is not limited to having a large presence in the market, but also relates to the fact that most of the credible investors, who have invested in OP, are not likely to invest in other companies.

35. Another argument put forth by the Informants is that the exclusionary conduct of OP itself demonstrates the economic strength enjoyed by it. The Informant has relied upon the European Commission's case of *United Brands v. Commission*, to infer that the conduct of an alleged dominant firm could be taken into account in deciding whether it is dominant or not. The Commission's order in the *MCX Stock Exchange Ltd v. NSE and other* has also been relied upon in this regard, wherein it was noted that levying zero transaction fee by NSE and incurring huge losses in the process demonstrated that NSE was in a dominant position. Thereafter, zero pricing was held to be an abuse of dominant position by NSE. The Informants have also relied upon the Commission's order in *M/s HT Media v. Super Cassettes Industries Limited* to substantiate the same.
36. The Informants have submitted data which, as per them, shows that OP has been able to increase its market share only because of its predation strategy backed by multiple rounds of funding. The Informants have also placed reliance on the judgement passed by Competition Appellate Tribunal (COMPAT) in the case of *Meru Travel Solutions Private Limited v. Competition Commission of India & Others*, where the COMPAT overturned the order passed by CCI under Section 26(2) of the Act. It was noted in the said judgement that "*the size of discounts and incentives show that there are either phenomenal efficiency improvements which are replacing existing business models with the new business models or there could be an anti-competitive stance to it. [...]*".



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37. With regard to the countervailing buyer power, another relevant factor to be considered under Section 19(4) of the Act, it is submitted that the large network of OP acts as a sufficient detriment of any countervailing buyer power. The essential requirement to prove that there is sufficient countervailing buyer power, it is necessary to show that buyers/consumers have the power to negotiate and to substantially affect the service provider by shifting to a competing network. Both the essential requirements are missing in the present case because of the large network created by OP. Thus, DG's conclusion that there is enough countervailing buyer power in the radio taxi market has been challenged by the Informants.
38. The Informants have also challenged OP's assertion and DG's observation that the radio taxi market is a dynamic market which is going through a phase of disruptive innovation and because the market is at its nascent stage, it will be very difficult to hold an entity as a dominant entity. In this regard, it has been submitted by the Informants that no disruptive innovation has been undertaken by OP.
39. As per the Informants, it is a fallacy that the pre-requisite of finding an enterprise to be dominant is its ability to increase prices above competitive levels. However, as per the EU guidelines, market power is the ability to influence prices which would not only include the ability of the firms to increase prices beyond competitive levels, but also their ability to keep them suppressed over a longer period of time, thereby adversely affecting its competitors in a market. Therefore, OP which has built the network for itself and forced other competitors to follow its model shows that it has market power.
40. According to the Informants, the DG has erroneously held OP to be not dominant merely because of the existence of Uber in the relevant market. It is argued that existence of another entity in the relevant market, indulging in a similar conduct, does not preclude a finding on OP's



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dominance. In the alternative, the Informants have averred that it is not necessary that only one entity can be dominant in a particular relevant market. There is a possibility of two entities exercising dominance at the same time. In this regard, the Informants have claimed that the analysis of the DG is pointing towards presence of more than one dominant player in the relevant market. The DG has, in its report, admitted the growth of both OP and Uber and also, that their growth is not the result of any technological innovation or efficiency but the result of a practice to charge substantially below the average variable cost. The Informants have relied upon the observations of the Canadian Competition Tribunal, which noted that both MasterCard and Visa can individually possess market power in the relevant market. It has thus been submitted that a conclusion of simultaneous dominance of OP and Uber is not incompatible with the provisions of the Act.

41. The first Informant, Fast Track, has submitted that OP and Uber, through their below cost pricing, have pushed the Informant to a situation of virtual nonexistence. The second Informant, Meru, on the other hand, has claimed that established players like itself and Mega have lost market shares and are on the verge of elimination. Thus, DG's observation OP is not dominant as hat none of the players are ousted from the market has been challenged by the Informant, stating that elimination is not a necessary condition for ascertaining dominance and abuse.
42. The decision of the European Court of Justice in the case of *AKZO Chemie* has also been relied upon by the Informants to infer that any price below the average variable cost by means of which a dominant enterprise seeks to eliminate a competitor must be regarded as an abusive practice since there is no conceivable economic purpose for charging a price below average variable cost by an enterprise other than elimination of a competitor. Since OP has charged prices below average





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variable cost, as has been demonstrated by the DG, it is sufficient to imply that it has indulged in an anti-competitive conduct.

43. As per the Informants, the defence of below cost pricing in a nascent market is untenable. It has been argued by OP that below cost pricing is a result of promotions, achieving economies of scale and expanding network. In this regard, it is submitted that market expanding efficiencies are generally not accepted as a defence in predation cases. Further, it is unlikely that any efficiency pursuant to predatory price would outweigh its anti-competitive effects. The Informant has relied upon the European Commission's decision in *Wanadoo Interactive* case (COMP/38.233) (hereinafter referred to as '*Wanadoo Interactive* case'), in which it was noted that economies of scale which are enjoyed by any enterprise by virtue of such pricing cannot exempt the liability of such undertaking.
44. The Commission in its *prima facie* order passed, under Section 26(1) of the Act, noted that OP has contravened the provisions of Sections 3 or 4 of the Act. However, the DG has failed to come to a conclusion on Section 3 of the Act. In this regard, it is submitted that the agreements entered into between OP and its drivers have caused an appreciable adverse effect on competition in India. Therefore, the DG should have carried out the investigation with respect to Section 3 of the Act.
45. Fast Track, the Informant in Case No. 6 of 2015, has stated that the information was filed on 16<sup>th</sup> February, 2015 and was based on the conduct of OP prior to and as of January, 2015. However, the DG has investigated OP's conduct till September, 2015. This is argued to be an over reach of its powers as prescribed under the Act and the General Regulations.

**Replies/ objections/ submissions of OP**

46. OP endorsed the findings of the DG with regard to it not being dominant, though the delineation of the relevant market has been



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challenged by it. Further, OP has also challenged the observations and findings of the DG in relation to the nature of services provided by it and its pricing below Average Variable Cost (AVC).

47. OP submitted that it is only a technology software service provider engaged in providing internet and mobile technology platform for taxi-hailing by the commuters and the finding of the DG that it is a 'radio taxi service provider' is fundamentally flawed and not an accurate representation of the service being provided by it.
48. OP claims to have created a software platform in the form of a mobile application *i.e.*, a portal that can be download by commuters as well as licensed taxi drivers, on their respective mobile phones. Once the portal is downloaded, it allows the commuters to register themselves, along with allowing them a wide range of customisations such as, preferred payment method, preferred type of cab, *etc.* In the case of licensed drivers, the portal allows them to register themselves, after a thorough screening process involving a valid commercial driver's license, a Know Your Customer ('KYC') complaint bank account, a car with a taxi permit, a background check on the character of the driver, *etc.* It is claimed that OP does not employ drivers (they are self-employed) and does not own any cars. It is stated that the portal aggregates a wide range of choices for the commuters and driver and once the commuter makes his choice and the driver accepts the ride, the driver would provide the end-to-end service of picking up the commuter from the preferred pick-up point and dropping the commuter to the preferred destination. At the end of the ride, the portal provides an opportunity for the driver as well as the commuter to rate each other respectively.
49. Highlighting the above working model, OP submitted that it merely acts as a facilitator, an intermediary which connects two ends of the supply chain, the taxi service provider and a commuter. There is ample freedom of choice on both the sides of the supply chain, with the Portal only



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playing an intermediary role of connecting a commuter with a driver. Further, OP relied on view taken by certain other jurisdictions to submit that ride-sharing service operators namely Uber, Lyft, *etc.*, have been held to be digital platforms and not transportation companies.

50. Further, OP also relied upon the definition of ‘information society service’ under the Directive 98/34 of the European Union and contended that it falls under that definition on numerous counts. Firstly, OP’s services are provided ‘at a distance’ since the service is provided without the driver and the commuter being simultaneously present. Secondly, the services are clearly provided ‘by electronic means’, *i.e.*, a mobile software application. Thirdly, OP’s services are provided ‘at the individual request of a recipient of services’ to both commuters and drivers, which request the service by connecting to the portal. Finally, the services are ‘service normally provided for remuneration’. While OP’s services can be termed as ‘ride sharing’ or ‘app hailing’, there is a clear pecuniary element to the transaction in that the driver expects a payment for transporting the commuter. It is claimed that OP can be described as an online platform in that it connects producers (in this case, drivers) with consumers (in this case, commuters) and facilitates their interactions and exchanges. In other words, OP does not create value by performing transport services, but by enabling direct interactions between two distinct categories of users.

51. It was also urged that the main purpose of OP is not to provide a transport service but an intermediation service connecting drivers with commuters. Further, OP is not directly involved in the physical act of moving persons or goods from one place to another.

52. Drawing strength from the above analysis, OP argued that it is being categorized as radio taxi service provider for various purposes such as, service tax, STAs, *etc.*, merely due to the lacuna of legislation in India for such advanced technologies and such categorization is not a fair



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representation of the actual services provided by it.

53. OP further submitted that it is functioning in a two-sided market that brings together two different user groups providing network benefits to each other. The peculiarity of a two-sided market is that an intermediary is engaged in the activity of connecting two different and distinct ends of the supply chain, by charging a fee or consideration for such a connection. However, the intermediary is worthless and its utility is nullified if one end of the supply chain stops using the intermediary. Thus, the pricing structure must be balanced in a way to attract both sides of the platform.
54. OP further submitted that though the DG has correctly concluded that it is not dominant, the assessment based on market shares has not been represented accurately. OP disagreed with the market share calculated by the DG based on its active fleet size. OP submitted that on that parameter of total active fleet, its market shares is merely ( $\approx 1.97\%$ ) in the city of Bengaluru as opposed to wrongly computed figure of 60-61% by the DG.
55. Further, OP also relied upon case laws of the Commission (*Mr. Ramakant Kini v. L.H. Hiranandani Hospital, M/s ESYS Information Technologies Pvt. Ltd. v. Intel Corporation (Intel Inc) & Ors. etc.*) to contend that the market share of an entity is only one of the factors which decides whether an enterprise is dominant or not, the same cannot be conclusive proof of dominance.
56. Without prejudice, OP submitted that the market share of OP was not sufficient enough to exercise market power and affect competitors or consumers in the relevant market. OP also relied upon the DG's observation of Uber being an effective competitor to OP, with greater economic power, in the relevant market. Further, the dynamic nature of the relevant market along with the volatility of market shares was



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claimed to be sufficient to conclude that Uber exerted sufficient competitive pressure on OP. OP also relied upon the Commission's decision in *MCX Stock Exchange Ltd v. NSE and other* to profess that 'position of strength' is not some objective attribute that can be measured along a prescribed mathematical index. Rather, what has to be seen is whether a particular player in a relevant market has clear comparative advantages in terms of financial resources, technical capabilities, brand value *etc.* to be able to do things which would affect its competitors who, in turn, would be unable to or would find it extremely difficult to do so on a sustained basis. OP also stated that the investigation report demonstrates that Uber was comparatively stronger than OP, and was potentially capable of acquiring the market share of OP in the event of OP operating independent of the market forces.

57. OP also challenged the methodology used by the DG to arrive at a conclusion that OP has indulged in below Average Variable Cost (AVC) pricing. It was reiterated that OP, being a technology software service provider, connects two distinct user groups namely the taxi service provider and the commuter. Thus, its revenue is based on a revenue sharing model shared with the taxi service provider in terms of the amount of commission. It is stated that the revenue sharing between the taxi driver and OP varies between 95:5 (%) to 80:20 (%) depending upon *inter alia* city and car category, with OP earning positive (5% to 20% of the Gross Merchandise Value ("GMV")) revenue per ride. Since the variable cost for OP (i.e. payment to the drivers, 80% to 95%) is lower than the pricing by 20% to 5%, therefore the pricing at all times, is more than the AVC. This argument of OP was based on the proposition that customer discounts, bonus and driver incentives are not variable costs. OP claimed customer discounts, bonus and driver incentive are budgeted fixed costs and that it's low Effective Net Take Rate ('ENTR') was not due to below cost pricing. As such, OP has not indulged in predatory pricing by pricing its services below AVC. OP also submitted



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that it has been subject to sufficient competitive constraint from Uber in the relevant market.

58. Based on these submissions, OP prayed that DG's finding of it not being dominant in the relevant market be upheld and the DG's finding with regard to nature of services offered by OP and its pricing be dismissed.

### **Observations and Findings of the Commission**

59. The Commission has examined the material available on record, including the information, investigation report, written submissions filed by the parties, and heard the oral submissions made by their respective learned counsels on 15<sup>th</sup> February 2017 and 1<sup>st</sup> March 2017.
60. The primary allegation of the Informants in this case is regarding abuse of dominant position by OP, by way of predatory pricing, in the relevant market, in contravention of Section 4(2)(a)(ii) of the Act. This, as per the Informants, has distorted fair competition in the market, resulted in business loss to equally efficient but small players like the Informants and has foreclosed market to potential entrants. For examining the allegations pertaining to Section 4 of the Act, delineation of the relevant market is essential to ascertain dominance and analyzing the alleged abusive conduct of OP in the present case.
61. The Informants have also raised an objection as to the DG not investigating the allegation of exclusivity condition imposed upon the drivers by OP under Section 3(4) of the Act. In this regard, the Commission notes that the *prima facie* order of the Commission directed the DG to investigate with respect to allegations under Section 4 of the Act. Moreover, while investigating under Section 4 of the Act, the DG found that the drivers are allowed to opt for another platform and they were not restricted because of their association with OP. Thus, the allegation of the Informant is not established. Just because this fact was



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not investigated specifically under Section 3(4) of the Act, it will not alter the fact that there was no exclusivity condition imposed upon the drivers. This point thus does not require any further deliberation.

62. The Informants have proposed the delineation of relevant product market on the same lines as done by the DG *i.e.* ‘*market for radio taxi services*’. The OP, however, has argued at length that it is only a ‘technology company’ and cannot be termed as a radio taxi service provider. The Commission has considered the submissions made by OP but finds them to be implausible for the reasons provided hereinafter. The Commission is aware that OP acts as a platform and operates in the radio taxi service market as an aggregator. It is also well acknowledged that it does not own any of the taxis registered on its network and only acts as an intermediary. However, none of these factors supports the argument of OP that it is not part of the same relevant market as that of other players operating under the asset-owned model. By merely adopting a new business model of operation for providing the same goods/services, the incumbent cannot qualify for a distinct relevant product market.

63. While defining the relevant product market under Section 2(t) of the Act, all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use, need to be included in the realm of relevant product market. The purpose of defining the market is to encompass all those products or services which are considered to be the effective substitutes for the product or service in question, by the consumers. It is observed that OP has, undoubtedly, replaced the ownership/asset based model in the radio taxi service business and is operating under the platform based model. It outsources the bookings to the drivers/vehicle owners who are attached to its platform, instead of providing the same by taxis owned by it. However, this fact alone cannot make it a distinct category of service provider when the basic nature of



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service provided by it is same as that provided by other players operating under the traditional business model.

64. In this regard, the Commission agrees with the contentions of the Informants that the services offered by OP are that of a radio taxi provider and the services being consumed by the users of OP are that of the radio taxis. OP enters into contracts with taxi owners/drivers and uses its brand image, platform to offer these services to the customers. The tariff payable by the consumers for the taxi services rendered is determined by OP, which has control over all aspects of taxi services. Moreover, the gross billing amount received from customers is shown as revenue in OP's books of accounts, instead of 'commission'. Also, the amount paid/payable to the drivers is a share of revenue from the amount so received from the passengers/customers and is shown as the fleet operators cost. It is evident that OP is providing the same functional product which the players operating under the asset-owned model are providing. This is also clear from the fact that OP's Article of Association, *inter alia*, also refer to 'Uber', 'Meru Cabs', and 'TaxiForSure' (subsequently acquired by it) as its competitors. For the end consumer, who is booking a taxi ride through OP's platform, identity of the driver who owns the taxi is inconsequential. The consumer perceives OP as a service provider of radio taxi service whose service is substitutable with the services provided by other radio taxi service operators, irrespective of the business model followed by them. Thus, substitutability, in the radio taxi industry, is between the operators and not between the drivers.

65. The Commission has considered the regulatory framework along with the advisory issued by the Ministry of Road Transport and Highways, Govt. of India in October 2015 and subsequent amendments made by various state transport authorities which indicate that the aggregators are included within the scope of radio taxi schemes. Specifically, pursuant to





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an amendment in the Delhi's City Taxi Scheme 2015, aggregators are included in the same category as that of radio taxi service providers. All the requirements under the said scheme are equally applicable to aggregators such as OP. Although, we are dealing with a different geographic market, it can be safely inferred that app (application) based aggregators are also covered under the category of radio taxi service providers. Similarly, the Government of Karnataka's 'City Taxi Service Scheme 1998' mandates that each motor cab is required to be connected with radio telephone/GPRS/GPS/company/company operated control room having facility to monitor the movements of the cabs. In view of the existence of regulatory framework in various States in India specifically stipulating the inclusion of aggregators under the category of radio taxis, it can be inferred that services provided by OP are that of radio taxis. Accordingly, the Commission finds no merit in the argument of OP that it is only a technology software service provider and not a radio taxi service provider.

66. Based on these reasons, the Commission is of the view that the relevant product market in the instant case is '*market for radio taxi services*'.
67. With regard to the relevant geographic market, the Commission agrees with observations made by the DG that transport is classified as a state subject under the Constitution of India, therefore the regulatory conditions governing competition are homogeneous only across a particular city/State. Further, the consumers availing point-to-point radio taxi service in a city would not avail the radio taxis operating in another city/State. The point-to-point taxi service is a localized service that is offered with the intent of meeting the local travel demand of consumer within a particular city/State. From the supply side also, it would not be feasible for a taxi service provider to generally offer taxi services in another city for local point-to-point travel due to factors such as cost, distance and regulatory barriers. Although in some cities/states, taxi



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operators might provide services between two neighboring cities/states, no such fact was highlighted by the Informants, OP or DG the present case. Thus, in the absence of any evidence to the contrary, the relevant geographic market would be the city of Bengaluru.

68. Accordingly, the relevant market in the present case would be the *'market for radio taxi services in Bengaluru'*.
69. In this relevant market, OP is alleged to be engaging in abusive conduct by way of predatory pricing within the meaning of Section 4 of the Act. The discounts/incentives offered by OP to the commuters/drivers are alleged to be anti-competitive, as the same are stated to be backed by deep pockets rather than an efficient pricing model of OP.
70. The scheme of the Act is such that provisions of Section 4 are only attracted when the entity under scrutiny holds a dominant position in the relevant market. Thus, whether OP holds a dominant position in the relevant market for radio taxi services in Bengaluru is a key issue for determination.
71. The Act explains dominant position as a position of economic strength enjoyed by the enterprise in the relevant market, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitor or consumer or the relevant market in its favour. Such ability of the enterprise to behave independently of competitive forces needs to be assessed in light of all relevant circumstances and the factors enlisted under Section 19(4) of the Act. A complete and correct assessment warrants comprehensive examination of the competitive conditions of the market, taking into account the inherent characteristics of the market, the market structure, nature of competition, competitive strategies adopted by the market participants and all such factors that strengthen or weaken the market position of the enterprise under scrutiny. Thus, the assessment of a case would be



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unique to its own facts and market under consideration.

72. The market in the instant case is that of radio taxi services in Bengaluru. As per the investigation report, radio taxis got introduced in the city of Bengaluru in the year 2008 when Meru launched its services. Subsequently, the market saw the entry of new players like Mega Cabs, Easy Cabs and KSTDC. All these initial players were operating under an asset-owned model, wherein either they owned the vehicles or had third party owned vehicles exclusively attached to them. The mode of booking of taxis was *via* telephone calls to customer care or online through the respective website of the radio taxi operator.
73. The entry of OP into the relevant market, in the year 2011, marked a shift in two key dimensions of the radio taxi market in Bengaluru. First, the market witnessed the emergence of platform-based model, which connected the riders with driver-owned taxis, thus obviating the need for capital investment in acquiring and maintaining an exclusive fleet as required in the then prevalent asset-owned model. Second, it capitalized on the widespread use and adoption of internet and smartphone technology which facilitated the matchmaking between the drivers and commuters instantaneously in real time through a software application ('App') designed by OP and accessed by the riders/commuter on one side and drivers on the other side. The App takes a request for a ride from the prospective rider, search for the 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 OP. This platform-based model competed with the labour intensive system of matching taxi drivers with riders through telephones and dispatch centers/websites.
74. Leveraging technology, the new model reduced transaction costs associated with matching dispersed drivers and riders which also meant lower search cost for riders and drivers. The use of new technology



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changed the nature of commercial transactions enabling OP to appropriate the untapped demand by reaching markets that they would not otherwise have reached. The platform facilitated transactions that search and transaction costs would otherwise have prevented. It is also pertinent to note that being the early adopter of the disruptive technology, OP left other competitors in the market in the position of followers. Thus, the entry of OP was a potential disruptive incursion into existing markets, thereby resulting in a shift of commuters availing transport services from other modes of transportation (not just from the existing radio taxis) to the App based radio taxis, which is evidenced by the manifold growth in the market for radio taxis that ensued. As apparent from the figures available in the investigation report, the market has seen a growth of nearly 1900% in terms of number of trips between June 2012 and September 2015. In a span of one year between September 2014 and September 2015, in terms of number of trips, the market in Bengaluru witnessed a growth of about 555%. Thus, though the operators under the platform-based model provided the same product/service (taxi services), the technology enabled them to expand the market at both ends (*i.e.* the consumer and driver base) immensely. It is against this backdrop that the market position of OP need to be evaluated.

75. The Informants, among other things, have delved into the issue of OP's market share in the relevant market and its interpretation in the context of assessment of dominance at great length. The Informants have repeatedly hammered the argument that OP held a high market share in the relevant market throughout the period of investigation and is, thus, dominant. It is also submitted that a market share of more than 50% of an entity creates a presumption of dominance.
76. Market shares have been computed by the DG in terms of fleet size, active fleet size and number of trips, based on yearly and monthly data



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collected from the players active in the relevant market. The DG has evaluated the yearly market shares for the years 2012-13 to 2015-16 (till September 2015) and the monthly market shares from June 2012 to September 2015.

77. Before delving into the discussion on market shares based on the data collected by the DG, the Commission notes that Fast Track, Informant in Case No. 6 of 2015, has objected to the period of investigation being stretched to September 2015, when the information was filed by it in January 2015. It has been argued that the DG ought to have restricted the period of investigation up to January 2015. The Commission finds no merit in this objection. The proceedings before the Commission are in *rem*, not in *personam*. While proceedings in *personam* are done or directed with reference to a specific person, proceedings in *rem* are with reference to no specific person, and consequently with reference to the whole world. In the present matter, the DG was initially tasked with investigating Case No. 6 of 2015. Subsequently, information in Case No. 74 of 2015 was filed which pertained to the same relevant market with similar allegations against the OP. Therefore, the investigation in the subsequent case (Case No 74 of 2015) was clubbed with the information filed by Fast Track and the DG was directed by the Commission, vide order dated 30<sup>th</sup> September 2015, to investigate both the cases simultaneously. Though the allegations highlighted in the information serve as a starting point for investigation, the same does not determine its scope in entirety. Moreover, the purpose of investigation in the said markets is not limited to visualizing the static nature of competition, but to have an overall examination of the dynamic aspects. Thus, the Commission finds no infirmity in the period of investigation selected by the DG as the scope of investigation in clubbed cases has to be seen collectively. Having disposed of this objection, the Commission will now assess whether OP held a dominant position in the relevant market, by taking into account the factors enshrined under Section 19(4) of the



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Act.

78. As per the investigation report, in terms of annual active fleet size, where active fleet size is defined by the number of taxis which accept at least one booking from the taxi service provider in a day, OP's market share has seen approximately six-fold increase from 2012-13 to 2015-16. The monthly data on the same parameter shows largely an increasing trend in the OP's share during June 2012 till January 2015. Thereafter, OP's share of active fleet has registered a gradual decline in the relevant market. However, as observed by the DG, the active fleet size of players may not give a true picture of the market shares of each player owing to the problem of double counting, thereby necessitating the requirement of another parameter for computing market shares for assessing the comparative strength of players in the market. Resultantly, a better measure, based on the data available on record, is the number of trips/rides by a taxi operator in a given period of time.
79. It is observed that in terms of annual number of trips, OP's market share increased from a miniscule 5-6% in 2012-13 to 59-60% in 2014-15 and to 61-62% in 2015-16. In terms of number of monthly trips, OP's share witnessed a rising trend from June 2012 (0-1%) to January 2015 (75-76%) and, thereafter, a gradual decline. However, the Commission is of the view that market position/strength is a relative concept. Thus, to assess the strength of OP in terms of market share, its competitors' market shares in the relevant market must also be examined in order to arrive at a meaningful conclusion.
80. The data collected by the DG indicates that Meru was the market leader in 2012-13 and 2013-14 with an annual market share of 59-60% and 50-51% respectively in terms of number of trips. However, it lost its market position in the subsequent years with its share coming down to a miniscule 6-7% in 2015-16. Likewise, Easy cabs, which was the second largest player in 2012-13, lost its share drastically to have only a



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negligible market presence in 2015-16. On the other hand, Uber, which entered the relevant market in 2013-14, expanded its network rapidly to account for nearly one third of the active fleet in the relevant market in 2015-16. In terms of annual number of trips, its share increased from 1-2% in 2013-14 to 30-31% in 2015-16.

81. On perusal of the market shares of OP and its competitors on the basis of annual/monthly number of trips in the relevant market during the period of investigation, two key observations are discernible. First, the incumbents such as Meru, Mega Cabs, Easy Cabs *etc.* have witnessed a decline in their market shares during the period of investigation, in terms of number of trips. However, for a considerable period, till August 2014, Meru held the highest market share. Moreover, barring Easy Cabs, all the other incumbents saw an increase in their installed base in terms of absolute number of trips from 2012-13 to 2014-15. In the new market dynamics, the incumbents were left catching up with a new entrant armed with a new technology which allowed it to arrogate to itself a large unmet demand, resulting in the growth of OP's market share during the same period. The emerging pattern indicates that the new additions to the market, *i.e.* the new taxis and the new riders chiefly opted for OP instead of the incumbents. Thus, the erosion in their market shares is more attributable to the expansion of consumer base in the market than them being deprived of the demand which they were serving before. This is evident from the exponential growth (around 1900%) in the number of trips in the relevant market during June 2012 to September 2015.

82. Second, notwithstanding the rapid growth in the market share of OP, a sharp deceleration in its share is observed in 2015-16, in terms of number of trips. In terms of monthly data, a decline in the market share of OP from February 2015 is evident. This decline was matched by a commensurate increase in Uber's market share during the period.



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83. The Informants have argued that OP has maintained a healthy lead over its competitors and maintained its market share in spite of the competition posed by Uber. It is also averred that decline in market share is not an indication of absence of dominance. Further, the market share of OP is more than the aggregate of its next two competitors and that the dip in the market share figures would make no difference to the analysis of dominance. To substantiate these arguments, the Informants relied on the judgements of General Courts in the European Commission in cases such as *Akzo case*, *United Brands v. Commission*, *Wanadoo Interactive*, *British Airways*, *Astra Zeneca*, *Hoffman-la Roche etc.*, along with orders of the Commission in *HT Media v. Super Cassettes* and *MCX-SX*.
84. It is a widely accepted view that high and durable market share can be an important indicator for lack of competitive constraints and accordingly for dominance. However, that does not imply that uniform market share thresholds and a standard time-period to assess durability of market share can be applied in the same manner to all businesses/sectors. 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. Thus, the Informants' proposition that market share of more than 50% leading to a presumption of dominance cannot be accepted, especially when the scheme of the Act does not specify any numerical threshold. Moreover, market share is but one of the indicators enshrined in Section 19(4) of the Act for assessing dominance, and the same cannot be seen in isolation to give a conclusive finding. Particularly, in case of new economy/hi-tech markets, high market shares, in the early years of introduction of a new technology, may turn out to be ephemeral, as is visible from the fluctuating trends in market shares across different months in the relevant market throughout the period of investigation.





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85. The radio taxi market is a market for technology-enabled transportation services. New technology and the new business model in the form of a platform marketplace has had a transformative effect on how services are provided in the sector and has altered the competitive landscape concomitantly. It has been argued that OP held the highest market shares from September 2014 onwards. In this regard, the Commission observes that though OP held the highest market share from September 2014 to September 2015 in the relevant market, any conclusions based only on that period without referring to the market shares held by players during the remaining period of investigation would be erroneous. The market was in a state of flux throughout the period of investigation. Meru, one of the Informants, held the highest market share during June 2012 till August 2014. However, in the subsequent months its share started to decline. In 2013, Uber, entered the relevant market in the year 2013 and garnered a sizeable market share in just about two years' time. In terms of number of trips on monthly basis, its share increased from 0-1% in August 2013 to 36-37% in September 2015. Further, Uber showed a steady growth February 2015 onwards, with its share in terms of monthly number of trips having increased from 6-7 % in January 2015 to 36-37% by September 2015. Its entry as well as steady growth during the period of investigation shows that the market was evolving. While Uber's entry, as the Informant has argued, did not dislodge OP during the period of investigation, OP's declining market share post January 2015 reflects the competitive constraint posed by Uber and the fragility of leadership position in a dynamic business environment, as discussed earlier.

86. The Commission has also considered the case-laws relied upon by the Informants. However, in each of those cases relied upon, for instance *United Brands v. Commission*, *British Airways*, *Michelin etc.*, the European Commission was more influenced by the lack of competitive constraints in the market. Notably, the competitors' market shares in



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such cases were significantly lower than the alleged dominant entity. Rather, in some of these cases (*e.g. Michelin, United Brands etc.*), the dominant entities' market shares were multiple times those of its competitors. Further, the *AstraZeneca's* case relied upon by the Informants, the European Commission was faced with the situation where high market share, which was much higher than those of its competitors, was held by AstraZeneca for many years in a row.

87. In this regard, the Commission notes that Section 19(4) of the Act emphasizes on the size and importance of the competitors, rather than the market shares of competitors. As a matter of record, in the present case, OP does not have an edge over all its competitors in terms of the size and resources. Interestingly, the investigation revealed that that Uber Inc., which is the parent company for Uber had a total capital investment of about 15 to 20 times of OP's financial resources.
88. Based on the foregoing observations, the Commission is of the view that competitive constraints in the relevant market are to be assessed in a holistic manner, not solely on the basis of market shares of the alleged dominant entity. Market shares must be interpreted in the light of all the relevant market conditions. The cases relied upon by the Informants, when tested in the light of prevailing competition conditions in the relevant market, are found to be not applicable to the facts of the present case.
89. The Informants have argued that because of the strong network that OP has, it is difficult for other players to enter into the market. In this connection the Commission notes that, these sectors are often characterized by network externalities. The Informants have alleged that the network effects, posed by the platform-based model of OP, act as a barrier to entry and/or expansion. Existence/absence of entry barriers is also one of the relevant factors enshrined under Section 19(4) of the Act,



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while determining dominance of an enterprise. Accordingly, the issue of network effects and its bearing on dominance would merit careful attention.

90. In two-sided markets, 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 the large incumbent. The strength of network effects thus becomes a key factor in the determination of dominance in such market. However, the strength of network effects will vary depending upon the nature of platform market under consideration. Generally, the number of participants or consumers using a platform is positively correlated with the value they get from their use of the platform. In other words, large networks offer more value to users than small networks. Thus, platforms de-facto have to reap network effects to get a viable critical mass. In these markets, competition is often for control of the market by way of having a large and strong network. Aggressive competition in the early stages of network creation takes place, until the market settles in favour of a few enterprises. In such markets, market leadership position can be fragile or transient during the initial stage of evolution of the market.
91. A successful network/platform requires that at both sides the platform's network is wide and dense, *i.e.* larger the number of participants to both sides of the network/platform, greater the possibility of each participant having 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.
92. In the relevant market under scrutiny, there are certain countervailing market forces that reduce the ability of even a very large platform to insulate itself from competition. The Commission agrees with the Informants that in a two/multi-sided market, network effects have a role



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to play in determining the competition dynamics and relative position of strength held by market players. The transportation service networks are likely to exhibit indirect cross-side network effects because increase in the number of riders attracts drivers and increase in the number of taxis/drivers benefits the riders. However, whether the network effects would act as an entry barrier in the relevant market depends on various factors.

93. In the present case, both OP and Uber 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. Despite OP having the largest network, the network effect was not strong enough to deter entry and rapid expansion of Uber.
94. Further, there are no significant costs preventing consumers from switching between different radio taxi apps. The radio taxi apps are offered for free and can be easily downloaded on smartphones and can coexist on the same handset. Thus, availing the services of one aggregator's network does not preclude the use of another. Once these apps are installed on a device, riders can switch from one app to another in no-time. In fact, both drivers and riders can have applications developed by multiple service providers and can 'multi-home'. The DG has clearly brought out in its report that the drivers/fleet owners connected to various aggregators through apps, can easily switch between different aggregators depending on the incentive scheme *etc.* by simply switching off or switching on their mobile handsets. The possibility and ease of multi-homing constrains the power of the platforms to act independently of the market forces. Absence of switching costs between different networks in the relevant market limits the constraints exerted by the established networks on newer entrants. The Commission is, therefore, of the view that the network effects in the



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present case do not seem to affect entry or expansion by the players equipped with strategies capable of attracting drivers/riders to new/existing networks. Moreover, as of now, competition in the relevant market is still unfolding and the market certainly has not tipped in favour of OP, as claimed by the Informants.

95. While examining entry conditions, it would be pertinent to also delve into other factors relevant for entry. In the erstwhile asset/ownership-based model, to be able to compete with the incumbent firms, an entrant needed to possess a significant number of cars in order to attract consumers. The new model, *i.e.* matching demand for and supply of rides *via* a platform, has obviated this requirement because a large number of individual drivers can be easily reached. Platform-based players hence find it easier to enter the market than traditional entrants given the reduced upfront costs of starting a business. Further, the entry of these enterprises does not necessarily have to split existing demand. Instead, innovative pricing and other business strategies allow them to increase demand and supply in an existing market.
96. Massive amount of capital mobilized by OP has also been pointed out as a key constraint faced by the smaller competitors or potential entrants in the relevant market. The Informant has relied upon certain case laws to argue that requirement of huge finances in this market, for funding discount/incentive schemes, act as a barrier to entry/expansion. In this regard, it is important to note that though a very high capital requirement may have been perceived as an entry barrier traditionally, in new economy sectors, the traditional concept of 'capital requirements' may not be applicable in totality. What is notable and of significance in this context is the existence of a level-playing field in access to finance. This is evidenced by the experience of technology start-ups across sectors in the country which could access funding from various sources such as venture capital, angel networks, private equity funds *etc.* Recently,



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network industries financed by capital markets have observed very intense competition in innovative activities in India. The key to success in this fiercely competitive environment is fast adaptation to changes and constant innovation in business models, technology, pricing models to shake the markets out of equilibrium, and render old ways of doing business uncompetitive, dislodging the existing market leaders.

97. The Commission further notes that the Informants have stressed upon the circular approach to dominance and have suggested that the conduct of OP, *i.e.* predatory pricing, is an evidence of dominance in itself. Relying on international jurisprudence and the order of the Commission in the case of *MCX Stock Exchange Ltd v. NSE and other*, the Informants have suggested that abusive conduct of the enterprise can also be relied on as a factor in assessing dominance. In this regard, the Commission observes that the conduct of the enterprise can only be used as a complement rather than a substitute for comprehensive analysis of market conditions. Most firms, dominant or not, can engage in practices, such as exclusive dealing, below cost pricing, loyalty discounts *etc.* New entrants commonly engage in such practices to gain a toehold in the market and holding them dominant based on simple observation of conduct may have the undesirable result of chilling competition. On the issue of interpretation of dominance based on the ability to affect consumers/competitors/relevant market, it is to be borne in mind 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. The narrow interpretation of the concept of dominance offered by the Informant would mean that an entrant armed with a new idea, a superior product or technological solution that challenges the *status quo* in a market and shifts a large consumer base in its favour would have to be erroneously held dominant. To preclude possibilities of such anomalies in approach in assessing dominance, the Act lays down a holistic framework for



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assessing dominance and lists out the relevant factors including relative strength of competitors, entry conditions and countervailing power. Thus, the Commission is not convinced that conduct of OP, in the absence of other important factors that determine dominance, can be accepted to be indicative of dominance.

98. Besides the aforesaid arguments, the Informants have also contested DG's finding on dominance, being solely based on the entry and presence of Uber in the relevant market. It is argued that there has not been any effective entry in the relevant market post 2013, which shows the state of competitive interactions amongst the players in the market. The Commission finds these arguments are bereft of the correct understanding of basic tenets of competition law. Competition is not an end in itself; it is a means towards a greater end which presumes that competition in or for the market *inter alia* leads to desirable outcomes for the consumers ensuring wide variety of quality products/services at best possible prices. Towards that end, 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. 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.

99. 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. Although, the



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Commission is not inclined at this stage to go into an analysis of pricing strategies of the players in the market, it will be unfair not to take into account the following data which has been revealed during the investigation:

<b>Average Indexed margin per month : Aggregator Model</b>				
<b>Month</b>	<b>OP</b>	<b>Uber</b>	<b>Meru</b>	<b>Mega</b>
Sep-13	8.04	29.21	-	31.02
Oct-13	8.51	-495.31	-	31.37
Nov-13	9.52	-44.20	-	28.99
Dec-13	7.69	-85.56	-	27.39
Jan-14	14.06	-281.24	-	29.76
Feb-14	10.18	-42.73	56.96	30.65
Mar-14	9.21	-79.78	22.19	32.26
Apr-14	7.32	-44.94	13.42	32.44
May-14	3.06	-46.76	26.86	32.14
Jun-14	-2.11	-57.31	18.14	38.56
Jul-14	-9.43	-52.91	14.50	39.23
Aug-14	-19.47	-51.93	12.05	35.76
Sep-14	-35.32	-45.00	14.61	47.65
Oct-14	-36.25	-50.04	19.07	28.01
Nov-14	-43.40	-61.35	16.55	29.71
Dec-14	-99.75	-66.20	14.41	28.11
Jan-15	-135.91	-121.32	8.82	29.20
Feb-15	-61.03	-151.82	9.08	28.50
Mar-15	-36.94	-229.07	15.41	29.32



Apr-15	-32.92	-118.00	23.07	27.76
May-15	-23.96	-123.75	22.42	25.60
Jun-15	-24.33	-126.29	26.85	27.07
Jul-15	-16.44	-114.62	26.07	30.08
Aug-15	-9.94	-100.54	27.43	31.02
Sep-15	-26.90	-41.07	17.99	31.39
		<i>*Meru started functioning on aggregator model from February 2014</i>		

100. The aforementioned table, collated by the DG, compares the monthly indexed margin of important players in the relevant market on a common scale of index of 100 so as to assess the relative pricing behaviour of the parties. For this, OP's and Uber's monthly margins have been calculated on the index of 100. Since Meru Cabs and Mega Cabs work on hybrid model (owned fleet model and aggregator's model), their figures pertaining to only aggregator's model have been taken into account by the DG to work out the indexed margin. The above table demonstrates that from September 2013 to May 2014, OP's average monthly indexed margin was positive. However, as noted by the DG, Uber's monthly indexed margins has been negative from September 2013 till September 2015. On the other hand, OP was accounting for positive indexed margin from September 2013 to May 2014 followed by negative indexed margin since June 2014.

101. Two key observations can be safely made from this data: first, OP did not initiate the strategy of aggressive pricing strategy and its negative indexed margin since June 2014 seems more to be a reactive strategy to Uber's aggressive pricing. Second, the loss of Uber in the relevant market has remained substantially higher than OP's loss except for a brief period from December 2014 to January 2015.



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102. Further, OP's response to the aggressive pricing strategy of Uber in the relevant market since June 2014 is indicative of the competitive constraint put by Uber to OP in the relevant market. Though the Commission has already rejected the Informant's (Fast-Track) objection with regard to the period of investigation being stretched beyond January 2015 earlier in the order, the instant observations show that even during the period up to January 2015, there were sufficient competitive constraints that affected the ability of OP to act independent of the market forces.
103. It can be inferred from the aforesaid observations that competition in the relevant market was intense during the period of investigation and the DG's reliance on the entry and presence of Uber in the relevant market cannot be criticized for being overly emphasized.
104. Further, the Informants' argument that decline in market share is not an indication of absence of dominance is not relevance in the current discussion as this was not the sole criteria for the Commission's assessment of dominance. It is not only the decline in OP's market share, but also the competitive constraints present in the relevant market that guided the Commission's determination on the allegation of OP's dominance.
105. In conclusion, based on collective consideration of the facts that the competitive process in the relevant market is unfolding, market is growing rapidly, effective entry has taken place thereby leading to gradual decline in OP's market share, entry barriers are not insurmountable, there exist countervailing market forces that constrain the behavior of OP and the nature of competition in dynamic, innovation-driven markets, the Commission is of the considered view that OP's dominance in the relevant market remains unsubstantiated.



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

*Section 27 (b): Impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:*

[....]

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

108. The Commission observes that there are various provisions in the Act



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that signify the intent of the legislature that there cannot be more than one dominant enterprise in the relevant market at a particular point of time.

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

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

*"dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to –*

- (i) operate independently of competitive forces prevailing in the relevant market; or*
- (ii) affect competitors or consumers or the relevant market in its favour.*

(emphasis supplied)

111. The usage of words '*operate independently*' appearing in the aforesaid definition clearly shows that the concept of 'dominance' is meant to be ascribed to only one entity. Further, the underlined words in the above explanation indicates that the whole essence of Section 4 of the Act lies in proscribing unilateral conduct exercised by a single entity or group, independent of its competitors or consumers. In the presence of more than one dominant entity, none of those entities would be able to act independent of one another.

112. Further, Section 19(4) of the Act, which enlists factors assessment of



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

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

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

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

(emphasis supplied)

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

116. Based on the foregoing discussions, it can be concluded that the Act does not allow for more than one dominant player under Section 4. Rather the existence of two strong players in the market is indicative of competition between them, unless they have agreed not to compete,



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which also can be only be looked into under Section 3 of the Act, not Section 4. Hence, the present argument of the Informant regarding the collective dominance of OP and Uber is rejected herewith.

117. The in-depth analysis in the preceding paragraphs clearly demonstrates that, during the period under investigation, OP did not have the ability to act independently of its competitors or consumers in the market. In the absence of dominance of OP, examination of abuse or any analysis of pricing strategy by OP is neither warranted nor permitted under the provisions of the Act.

118. However, for the sake of completeness, the Commission deems it appropriate to briefly touch upon the allegations with regard to low pricing strategy of OP in the relevant market.

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.



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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.

123. At this stage, it is difficult to determine with certainty the long-term impact of this pricing strategy as the market is yet to mature. Without going into the legitimacy of OP's pricing strategy, suffice to say that besides statutory compulsion of non-intervention in the present case, as OP is not dominant in the relevant market, the Commission is hesitant to



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interfere in a market, which is yet to fully evolve. Any interference at this stage will not only disturb the market dynamics, but also pose a risk of prescribing sub-optimal solution to a nascent market situation.

124. Based on the foregoing reasons, the Commission is of the view that the evidence on record does not establish the dominance of OP and its consequent abuse within the provisions of Section 4 of the Act. Hence, the cases are thus hereby closed.

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

**Sd/-**  
**(Devender Kumar Sikri)**  
**Chairperson**

**Sd/-**  
**(S. L. Bunker)**  
**Member**

**Sd/-**  
**(Sudhir Mital)**  
**Member**

**Sd/-**  
**(Augustine Peter)**  
**Member**

**Sd/-**  
**(U. C. Nahta)**  
**Member**

**Sd/-**  
**(Justice G. P. Mittal)**  
**Member**

New Delhi  
Date: 19/07/2017