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App based Ride Services – An Appraisal of Regulatory & Antitrust Issues

Subodh Prasad Deo

App-based cab aggregators, such as Ola and Uber, like to define themselves as 'ride sourcing and ride sharing platforms' and not as providers of urban 'transport services'. The cab aggregators contend that they do not own or lease any vehicles, employ any drivers, but merely act as a mobile platform for customers to connect with drivers. On the other hand, traditional taxi operators argue that the cab aggregators are functionally providing taxi transportation service and as such are obliged to follow the regulatory requirements governing conventional taxis. They claim that cab aggregators are reaping unfair competitive advantages by claiming to be outside the taxi regulatory architecture. Apart from the above, allegations of unfair pricing, both predatory and surge pricing, have also been levelled against the cab aggregators. Lack of legislative clarity surrounding classification of such serviceshas raised questions across several

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jurisdictions that range from labour laws to those connected with competition laws, consumer protection laws etc.

In its first preliminary ruling of December 2017, the European Court of Justice ("CJEU"), based on a reference by the national Court of Spain, has opined on the issue as to whether the nature of activity of Uber amounts to "transport services" or "information society services", that are subject to separate set of rules. The CJEU[1] ruled that Uber should be considered as a "genuine organiser and operator of urban transport services". In its analysis, the Court distinguished between the two main constituents of Uber's activity, namely, the 'intermediation service', which enables the transfer of information concerning the booking of a transport service between the passenger and Uber driver, through a smartphone application, and the 'trans¬port service'. In reaching its conclusion, the Court observed that the intermediation service provided by Uber is based on the selection of drivers, using their own vehicle, and that it is essential for both the drivers and the users to use its smartphone application to be led to each other.

The Court further observed that Uber exercises decisive influence not only over the conditions under which the transport service is provided by the drivers but also exercises a certain control over the quality of the vehicles, the drivers and their conduct. According to the Court, given the electronic nature of the intermediation, the service provided by Uber would generally fulfil the criteria of an information society service; however, in terms of the elements mentioned above, the Court reasons that the same would imply that the service carried out by Uber is more than that and must be regarded as formingan integral part of an overall service whose main component is a transport service, and as such, must be classified as "a service in the field of transport,"subject to the common transport policy. Pertinently, the Court seems to have drawn heavily from the opinion of the Advocate General ("AG"), who in his opinion had defined the activity of Uber as a composite service, i.e. comprising of electronic and non-electronic elements.

The AG had opined that the electronic service is not the main one and is not economically independent of the non-electronic service. He had further observed that considering that Uber imposes numerous terms and conditions in the contract covering both the taking up and the pursuit of the activity and the conduct of drivers when providing services, in addition to setting the final price, these elements would exclude Uber services from being classified as 'information society services' and should be considered a "genuine organiser and operator of urban transport services," i.e. a traditional transport service. Member states can therefore regulate the conditions for providing that service.

Those who are dissatisfied with the CJEU decision argue that the application of taxi regulations to Uber and other similar entities would eliminate most of the key efficiencies related to the platform itself, such as the ability to match demand and supply, and the dynamic pricing system. Others have welcomed the decision on the ground that the decisive influence exercised by platforms over the underlying service would prevent regulatory arbitrage by digital companies.

Apart from the issue of non-compliance with the extant regulatory architecture as applicable to transport service providers, consumers and competitors have also mounted price fixing claims against the cab aggregators on the key question whether the setting of prices by centralised ride-sourcing and ride-sharing platforms, resulting in thousands of independent drivers operating in the same market and seeking the same consumers and all charging the exact same prices, can amount to an infringement of competition law. The leading case in this regard is Meyer v. Uber[2] in the US. The whole premise of the case is that if Uber is not an employer of its drivers under labour law, then it should not be able to set and coordinate prices among those independent contractors and evade liability under antitrust law. Pertinently, Uber has

[1]*CJEU, Judgment of December 20, 2017, AsociaciónProfesional Élite Taxi v. Uber Systems Spain SL, C-434/15, ECLI:EU:C:2017:981.*

[2]*Meyer v. Kalanick, 200 F. Supp. 3d 408, 408 (S.D.N.Y. 2016)*

[3]*Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc., 17-1871 (3rd Cir. 2018)*

[4]*Desoto Cab Company, Inc. v. Uber Technologies, Inc., Case 3:16-cv-06385 (N.D. of California, San Francisco division)*

[5]*OECD unclassified document DAF/COMP/WP2/WD(2018)23, dated 9th of May 2018*

acknowledged in various labour law litigations that the drivers are not Uber employees. The employment classification of rideshare drivers has been a matter of controversy since the business model of cab aggregators relies on the independent contractor classification for their drivers, whereby they are not obligated to bear the liability to pay for or insure their cars or provide minimum wage or overtime.

In many jurisdictions, drivers and state authorities have sued cab aggregators to force them to reclassify drivers as employees, based on longstanding statutory tests for whether a business's control over workers creates an employment relationship. Those classification suits have largely settled in cab aggregators favour and theyhave been able to retain the independent contractor classification for their drivers, in exchange for small concessions and settlements. In Meyer v. Kalanick, Mr. Spencer Meyer, an Uber customer, asserted that in operating an app that coordinates price-setting among hundreds of thousands of ride-sharing drivers, Uber's business model violates both Sections 1 and 2 of the Sherman Act. The Court denied defendant's motion to dismiss and found that plaintiffs had sufficiently pled a hub-and-spoke conspiracy. However, on being appealed before the Second Circuit on arbitration issues, the Court has remanded it back to the Southern District of New York on arbitration issues and barred an appeal by the plaintiffs on the merits of antitrust arguments.

In somewhat similar vein, the Philadelphia Taxi Association challenged a 2016 Pennsylvania state legislation that authorized operation of Transportation Network Companies ("TNCs"). The Taxi Association alleged that Uber entered the market illegally, operated at a lower cost, and was close to achieving monopoly power, by failing to comply with the regulation

and hiring drivers from traditional operators. In appeal, the Third Circuit[3] rejectedall claims by the appellant Taxi Association and ruled that the appellants failed to set forth a plausible claim, as the Taxi Association did not allege any evidence of the elements necessary to affirm an attempt to monopolize within the meaning of Section 2 of the Sherman Act, such as the harmful effectson competition, the specific intent to monopolize, and the dangerous probability of achieving monopoly power.

The Third Circuit also affirmed that "Uber's presence in the market created more competition for medallion taxicabs, not less, and thus Uber's so-called 'predation' – operating without medallions or certificates of public convenience - does not give rise to an antitrust injury". The Court reiterated that appellants have no right to exclude competitors from the taxicab market, even if those new entrants have failed to obtain medallions or certificates of public convenience. The Third Circuit reasoned that Uber's knowledge of the regulation, which it was allegedly violating, was not sufficient on its own to constitute a specific intent to monopolize the market. In this regard, it may be added that even if it was held that regulation applied to a competing app-based ride-share service, there would still be the need to evidence that avoiding the regulation allowed Uber to dominate the market. The Third Circuit specified that vague claims that Uber's conduct would raise barriers to entry and drive out competition were insufficient to allege that there was a dangerous probability of achieving monopoly.

Predatory pricing claim has also been brought against Uber. Amongst others, Uber has been sued by San Francisco's oldest cab company, DeSoto (now known as 'Flywheel') for 'predatory practices', in addition to several other allegations[4]. The plaintiffs claimed that Uber's large source of venture capital funding allows it to price below cost until competitorswere forced out of the market, at which time it could charge supra-competitive prices. In essence, Flywheel says that Uber's practice of subsidizing its rides to keep fares cheap is unfair and anti-competitive, because Uber can rely on its vast reserves of venture capital to do so. In this regard, it may be noted that evidence that Uber is losing money overall and that their prices are below the competing taxi companies would not show that they are pricing below cost. In any case, Uber responded in its motion to dismiss that barriers to entry in the ride-hailing market are so low that a new entrant would quickly appear to undercut the overcharge, defeating the purpose of such a scheme. It further submitted that newer companies such as Lyft, Via, Wingz, Juno, and others have sprung up in cities around the world and have been directlycompeting with Uber, which evidences that Uber would not be able to recoup its losses on account of the alleged predatory prices by charging supra-competitive prices.

At this juncture, it may be apposite to discuss the issue of barriers to entryand network effects in such markets. A new entrant would need to attract first the drivers, operating on one side of the platform, to reach critical mass necessary to involve the passengers on other side of the platform. Successful entry would thus depend on creating incentives for users to switch to different platforms and to search for alternative trips. An incumbent may have an incentive to prevent the practical feasibility of switching or multi-homing to reduce the competitive threat. An incumbent may make the drivers single-home by undercutting rivals, by offering cheaper prices to passengers. If the dominant platform can capture sufficient drivers from its competitors, it may exclude them from the market and enable it to raise its prices to the ultimate detriment of consumers. It has been alleged that Uber developed its Hell software with the intention to track competitor's drivers (Lyft), identify multi-home drivers (e.g. drivers working for Uber and Lyft) and provide them with incentives (monetary rewards) to drive exclusively for Uber - so as to reduce the number of active drivers working for Lyft, increase the waiting time of Lyft's passengers for a car and thereby drive them to use Uber.

Further, it has also been alleged that Uber booked and cancelled thousands of rides on Lyft - to raise rivals' costs by wasting their time, increasing the costs of Lyft drivers while increasing the customer waiting time on Lyft. In practice, however, the scheme broke down because it became too expensive to pay out to drivers as both the Lyft network and the number of multi-homing drivers grew. Be as it may, competing for drivers by offering them discounts or charging exclusive drivers a price below cost does not necessarily amount to an exclusionary practice.

However, incumbents with market power, by offering loyalty discounts that depend on an exclusive relationship rather than volume for example, can cause anti-competitive effects.

Therefore, the competition authorities, amongst others, look at the market share of the dominant firm, including whether it can meet all the demand and the extent of market left to new entrants/competitors. They also look at the impact of asymmetries - the ability to raise rivals' costs by denying rivals economies of scale, or access to key inputs. Further, they may also like to consider costs and prices on both sides of market, as the terms and conditions offered by platforms to one side are interdependent with those to other sides, to determine whether the alleged exclusionary conduct constitutes a temporary entry strategy or not. All this makes any assessment of market power a complex exercise.

Cases have also been filed against cab aggregators regarding their controversial practice of surge pricing, which is purportedly applied when the demand for the service is higher than the supply. Higher prices give incentives to the drivers to increase supply to meet the unserved segment of the demand, making them earn a higher tariff than usual. They also benefit those customers who are willing to pay more. Further, with increase in the number of rides and the price, the platform's profit also increases.

While dynamic/surge prices might involve excessive pricing that infringe competition law, determining when a price is unfair is often controversial. Competition law enforcement is often considered to be an inappropriate tool for dealing with such concerns. Competition authorities rarely act against excessive prices, as this phenomenon, in the absence of cartels or exclusionary conducts, is seen as a temporary and self-correcting issue. Higher prices provide signal that profitable entry opportunity exists. Alternatively, the

competition authorities consider it to be a problem to be addressed by the sector regulator.

In the context of excessive/surge prices, it may be relevant to note that big data techniques permit the analysis of users' behaviour at a highly granular level, which allows for personalised price discrimination. However, the effect of personalised pricing on consumer surplus is ambiguous. Price discrimination, in general, reduces consumer welfare in the short term, but price discrimination can often be pro-competitive. It allows for setting lower prices for a group of consumers that would otherwise not purchase. It increases incentives for investment and innovation and hence increase dynamic efficiency. Price discrimination is also an important way for firms to compete for consumers which makes it more difficult to engage in tacit collusion. However, firms with market power may use behaviour-based price discrimination to maximise rent extraction, thereby reducing consumers' surplus.

The issues/questions which have been raised in the context of the cab aggregators across jurisdictions have also been raised in India ever since Ola, a domestic online cab aggregator and Uber, a global cab aggregator, entered the Indian markets in 2010 and 2013 respectively. The existence of a legislative vacuum regarding the classification of their services surfaced when a woman traveller reported molestation by an Uber Driver in December, 2014. The issue of ascribing liability for such incidents and of culpability of Uber arose. The Ministry of Road Transport and Highways issued advisory to State governments in 2015 to modify their existing city taxi schemes to bring online cab aggregators within their ambit. Furthermore, the government also sought to amend the Motor Vehicles Act, 1988 vide Motor Vehicles (Amendment) Bill, 2016, so as to address various issues, including regulation of taxi aggregators. The bill, which defines aggregator as a digital intermediary or market place for a passenger to connect with a driver for the purpose of transportation, has been passed by the Lok Sabha but is yet to be passed by the Rajya Sabha.

Various cases also got filed in different High Courts on issues such as surge pricing, passenger safety, environmental concerns etc. Based on a Delhi High Court order, the Ministry of Road Transport and Highways came up with 'New Policy Guidelines to Promote Urban Mobility' in Dec 2016, which inter-alia provided for inclusion of cab-aggregators within the same market definition as radio taxi operators and traditional city taxis, empowered State regulators to fix the minimum and maximum Tariff/fares for cab aggregators, sought to regulate surge pricing by prescribing that the maximum tariff permitted cannot exceed three times the minimum tariff during day time and four times during night hours, mandated audit of algorithmsof cab aggregators used for calculating fares by authorised organisations, provided for seat sharing in the cabs subject to express consent of passengers, provided for mandatory fitting of GPS panic devices in the taxis, facility of SOS alerts by the passengers, mandatory requirement of display board in the cab with identification of driver along with the photo and the registration number etc, provided for audits and firewall for enhanced user data security of the passengers, etc. These policy guidelines are, however, only recommendatory in nature. Be as it may, many experts believe that such regulatory interventions are largely perception based, and that there is a need to have evidence-based assessment for such intervention.

A large number of cases related to predatory pricing, as well as surge pricing, were also filed before the Competition Commission of India ("CCI") by the traditional taxi/radio taxi companies. Most of these cases were closed by the CCI at the prima facie stage itself as none of the cab aggregators were found to be dominant in the relevant market except one case, concerning abuse of dominant position by Ola in the relevant market of Bengaluru, which was sent for investigation. In other words, the CCI has not found it to be appropriate to interfere in the functioning of the app-based market, owing perhaps to the relentless disruptions caused by technology and innovation, the benefits accruing to the passengers and, importantly, the need to fully understand the market and issues related to surge pricing. In light of the above, the CCI deemed it rather expedient to undertake a research/study on 'Competition and Regulatory Issues related to Taxi and Cab Aggregator Industry'.

CCI's evaluation of the Ola case, which it

had referred for detailed investigation, reveals that its approach in such matters is nuanced. Pertinently, the investigative arm of the CCI hadnot found Olato be dominant, owing largely due to the competitive constraints posed by Uber. In considering the investigation report and assessing dominance of Ola, the CCI disregarded the high market share held by Ola, by holding that market share cannot be seen in isolation. It emphasized the necessity to examine the totality of the market characteristics and its dynamics, such as the nature of competition, technology and innovation dimensions and competitive strategies of firms. The CCI also looked at factors such as strength of network effect, entry barriers and strategies adopted by the players to assess dominance. It noted that in two-sided markets, such as the platforms of cab Aggregators where drivers and customers operate on respective sides of the market, 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. It, however, noted that despite Ola having the largest network, the network effect was not strong enough to deter entry and there was rapid expansion of 'Uber', which was competing fiercely with Ola. It also observed that there are no significant switching costs for consumers between different radio taxi apps, given that such apps are offered for free and can be easily downloaded on smartphones and can co-exist on the same handset. It also noted that multi-homing was possible for both drivers and riders. Most importantly, the CCI observed that competition in the relevant market was still unfolding and is yet to fully evolve. Accordingly, it held that Ola did not hold position of dominance in the relevant market for 'radio taxi services in Bengaluru' and was not able to act independent of the competitive forces in the market.

The CCI is currently learnt to be examining certain cases[5] wherein Ola and Uber have been alleged to enjoy a position of dominance collectively as part of the same 'group', pursuant to common shareholding. Though the concept of collective dominance is not recognised under the Competition Act, the possibility of their conduct being examined under abuse of dominance as a 'group' cannot be ruled out.

It is evident from the above discussion that the ride-sourcing and ride-sharing services have been at the top of competition authorities' agenda across several jurisdictions. However, most authorities seem to agree on the consumers' benefits generated by these new companies. The endeavour of traditional taxi operators to bring the cab aggregators under regulatory net and/or to bring cases of unfair competition – such as predatory pricing, surge pricing as well as price fixing, has not found favour with national competition authorities. Pertinently, the Competition Council of Luxembourg, by a decision of 7th June 2018, has granted an exemption to a horizontal agreement (price fixing agreement) between member drivers and Webtaxi S.à.rl, a taxi booking platform that uses a pricing algorithm to set its rates in the prior reservation market. Thus, while both the traditional taxi operators and cab aggregators seem to be competing fiercely, the consumers for the time being are enjoying their rides.

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