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BEFORE THE COMPETITION COMMISSION OF INDIA

CASE NO. 13/2009

Information filed on 16.11.2009

Date of Order : 03.06.2011

Informant :	MCX Stock Exchange Ltd.
Through:	Shri A.N.Haksar, Senior Advocate alongwith Shri Anand Pathak, Advocate
Opposite Parties:	
1.	National Stock Exchange of India Ltd.
2.	DotEx International Ltd.
3.	Omnesys Technologies Pvt. Ltd.
Through:	Dr. Abhishek Manu Singhvi, Senior Advocate along with Ms. Pallavi S. Shroff & Shri M.M.Sharma, Advocates

ORDER (Dissent)

1.1 This case was initiated on the basis of information filed by MCX Stock Exchange Ltd. (MCX-SX) on 16.11.2009. The Commission passed an order under Section 26(1), on 30.3.2010 recording its opinion that there exists a prima facie case, and directed the Director General to investigate into the matter. The DG's report was submitted on 20.9.2010. Further process of inquiry was undertaken in accordance with the provisions of the Competition Act, 2002 and relevant regulations thereunder. Full opportunity was given to both MCX-SX and National Stock Exchange (NSE) and other parties for perusal of all relevant records and making their submissions, both in writing and orally, before the Commission. After completion of the entire process, the Commission, through a majority order, has found violation of Sections 4 (2) (a) (ii), 4 (2) (b) (i) & (ii), 4 (2) (c), 4 (2) (d) and 4 (2) (e) of Competition Act, 2002 (the Act).

1.2 It is noted that based on the aforesaid finding, a show cause notice had been issued to NSE for violation of the provisions of the Act, in pursuance of the majority view, seeking its response before taking a decision regarding penalties / remedies. Subsequently, consequent to the orders of Hon'ble High Court, Delhi, copy of the majority order dated 25.5.2011 (which at this stage naturally did not include the remedies / penalties) had also been furnished to NSE, who once again approached the Hon'ble High Court, Delhi seeking directions to the Commission to furnish a copy of the minority dissent order also. This dissenting order is being recorded with reference to the majority order dated 25.5.2011, and copies being furnished to the parties, including NSE, in pursuance of Hon'ble High Court's order dated 31.5.2011 on the subject.

1.3 We are recording this dissenting order as we do not find violation of any provision of the Competition Act, 2002. Since the detailed facts of the case and various issues have already been covered in the majority order of the Commission, for the sake of brevity, we are limiting ourselves to only a brief statement of facts, and largely focussing on the key issues of the case and the reasons which have led us to the above-mentioned finding, drawing upon all the material on record, including the DG's report and the submissions and arguments of the parties thereafter before the Commission. The facts of the case may be briefly recapitulated as below, with more details about some of these points being incorporated subsequently, as and when required, at the appropriate places:-

2. Information filed by MCX-SX

2.1 MCX Stock Exchange Ltd. (MCX-SX), a public limited company and a recognized stock exchange for trading in Currency Derivatives (CD) segment has filed the present information u/s 19 (1)(a) of the Act against the National Stock Exchange India Ltd. (NSE), DotEx International Ltd. (DotEx) and Omnesys Technologies Pvt. Ltd. (Omnesys), alleging abuse of dominant position in the market for stock exchange services in India u/s 4 of the Act.

2.2 It has been alleged that transaction fees, principal source of revenue for stock exchanges, has been waived off by NSE in its Currency Derivatives segment. Further, NSE has kept membership deposits unjustifiably low and waived the admission fee entirely. NSE, during and after floating of MCX-SX by its promoters, has taken vindictive action against Financial Technologies India Ltd. (FTIL), which is main provider of brokerage solution software, including by way of denial of its currency derivatives segment application program interface code (APIC), putting ODIN software of FTIL on watch list, and developing and offering competitive product called NOW free of cost through Omnesys, in which NSE has acquired interest of 26% for the purpose.

2.3 MCX-SX is promoted by Multi Commodity Exchange of India Ltd. (MCX) and Financial Technologies India Ltd. which together hold more than 90% shareholding of MCX-SX of India. As per SEBI regulations, new investors have to be brought in so as to bring down holding of MCX and FTIL to 5% each by September 2010; otherwise they will not be eligible to continue operating thereafter. Since NSE is not charging transaction fee for CD segment, MCX-SX is unable to levy such fee in its only segment i.e. CD segment leading to significant losses. In such a scenario, new investors are not likely to be attracted and it may not be possible to meet SEBI regulations.

2.4 It is also alleged that NSE is subsidizing their losses in CD segment from their revenues in Cash Segment, F&O and WDM Segments, thus leveraging its dominant position to protect its position in the CD Segment, in violation of Section 4(2) (e) of the Act. It is also alleged that the NSE along with DotEx and Omnesys has violated provisions of Section 4 of the Act by denying the integrated market watch facility to the consumers by denying access of Application Programme Interface Code (APIC) to the promoter of informant.

2.5 It is also alleged that various fee waiver and other concessions in CD segment have been adopted by the NSE as an exclusionary device to kill competition and competitors and NSE has, therefore, used its dominant position in the relevant market to eliminate competition and competitors.

2.6 The Commission considered the information in its meeting held on 30.3.2010 and formed an opinion that there exists a prima facie case. Consequently vide its order dated March 30, 2010, the Commission U/S 26 (1) directed the Director General (DG) to investigate into the matter.

3. Brief summary of responses filed by the opposite parties with the DG(as per DG report)

3.1 NSE has stated that the transactions fee waiver was done in the CD segment in order to encourage larger participation in trading as currency futures were at nascent stage, and has its genesis in the report of High Powered Study Group on Establishment of New Stock Exchanges. The Board of Directors of NSE have authorized the constitution of pricing committee to guide and decide on pricing related issues. The said committee in its meeting held on 10.06.2008, 03.03.2009 and 27.08.2009 decided to waive the transaction charges in respect of trades done in CD segment in order to encourage participation in trading, and considering the fact that the trading in currency futures was at a nascent stage.

3.2 Initially NSE did not levy admission fee for the admission as a corporate member in the CD segment, and at present also no admission fee is levied for the membership fee in this segment. NSE started levying admission fee of Rs.5 lakh plus application service tax for new membership in the capital market segment and F&O segment with effect from 01.08.2008. If a member applied for a membership in the CD segment in combination with other segments, no admission fee was levied. The waiver of admission fee has been given with the objective to develop the market, as the CD segment is at a nascent stage.

3.3 With regard to data feed fee waiver initially, for the same reasons as pointed in the case of transaction fee waiver i.e. in order to develop the market, encourage larger participation and growth of the CD segment, data feed fee is also not being charged by NSE. Vide letter dated 24.05.2010, NSE has submitted that DotEx (which is a 100% subsidiary of NSE) handles the data and information vending products of NSE and provides NSE market data in various forms – on line streaming data level 1 and level 2, intraday snapshot data feed, end of day data feed & historical feed. Currently, DotEx does not charge any fee to data vendors for subscription of feed for the CD segment. It had initially proposed to start charging for the real time data for the CD segment w.e.f. 01.10.2009. However, based on market feedback and requests from various clients, it was decided to defer levy of the charges till July 2010. NSE has also submitted copies of certain e-mails addressed to it by some vendors requesting for waiver of data feed fee for the CD segment.

3.4 NSE gained no special advantage in the CD segment by virtue of having additional resources in the F&O, CM or WDM segments and cross subsidisation cannot constitute an abuse of dominant position.

3.5 NSE, vide letter dated 27.01.2010 submitted its reply before the Commission onto the allegations of exclusionary denial of integrated market watch facility, states that it had received complaints from its members and their constituents relating to the functioning of FTIL's ODIN software. The act of NSE in placing the empanelment of FTIL on the watch list is bonafide act on the part of NSE. It is done in good faith on the basis of various deficiencies in the software products observed by the Trading Members and also by NSE which are affecting the integrity and reputation of NSE. The decision is also in the larger interest of the Trading Members and investors who are constituents of the Trading Members. The request of the FTIL for API for CD segment and for empanelment as CTCL vendor for the CD segment could not be considered by NSE for various reasons. FTIL as a vendor was required to maintain the standard of the products and failed to meet the expected level of performance thereby breaching the provision of the undertaking executed by FTIL in favour of NSE as a CTCL Vendor. FTIL is still an empanelled vendor of NSE in the capital market and F&O segment and has been put on watch list as a CTCL vendor for the CD segment.

4. DG's findings

4.1 The DG investigated the matter for two major issues:

a) Firstly, whether NSE is charging unfair or discriminatory pricing in purchase or sale of goods including predatory pricing of services by abusing the dominant position in the relevant market.
b) Secondly, whether the behavior of NSE falls within the ambit of section 4(2)(e) where the abuse of dominant position is considered if an enterprise or a group uses its dominant position in one relevant market to enter into, or to protect, other relevant market.

4.2 After considering all factual, documentary, and examination issues, DG submitted an investigation report holding NSE in breach of the Competition Act, 2002. DG's findings are summarized below:

a) DG rejected NSE's position that equities, equity derivatives, debt and CD segment fall into different segments and OTC market and CD segment form part of the same market. DG endorsed MCX-SX 's position that the relevant market in the present case is the market of stock exchange services.

b) NSE is a dominant player in the relevant market of stock exchange services. DG also concluded that NSE holds dominant position even if CD segment is assessed in isolation of other segments.

c) Waiver of transaction charges, data feed charges, admission fees and also reduction in deposit levels by NSE in the CD segment are evidence of predatory pricing and have been resorted to by NSE with a view to lessen and /or eliminate competition and hence in violation of Section 4 (2) (a) (ii) of the Act.

d) DG rejected NSE's argument that AVC is the appropriate cost benchmark in this case and concluded that there is strong case for following Average Total Cost (ATC) or at least Long Run Average Incremental Cost (LRAIC). DG concluded that NSE has earned zero revenue from CD segment, while it has incurred costs under various heads, which though not allocable, have been incurred to keep CD segment running. Any costs incurred by NSE to keep CD segment running would amount to its pricing conduct being predatory.

e) DG rejected NSE's argument of fee waivers being linked to develop the market as CD segment was in a nascent stage. The Report concluded that analysis of NSE's behavior in various segments and sub-segments makes it clear that fee waivers in CD segment are not linked to development of the market, but rather have been resorted by NSE with a view to lessen and/or eliminate competition.

f) DG concluded that NSE has abused its dominant position in the equity, F&O and WDM markets to protect its monopoly in the CD market. NSE is subsidizing its conduct in CD segment through the revenue it earns from other segments, there is no competition as yet in some of which (like F&O segment).

g) Thus, the report concluded that NSE has abused its dominant position in the relevant product market of stock exchange services by directly imposing unfair and discriminatory pricing in the sale of services including predatory pricing in the CD segment. NSE has also used its dominant position and original monopoly in equity, F&O and WDM markets to protect its monopoly in the CD market. NSE has, therefore, violated the provisions of section 4(2)(a)(ii) and section 4(2)(e) read with section 4(1) of the Act.

5. Issues for Determination

5.1 In the light of the DG's Investigation Report, and written submissions as also arguments during hearings of both the parties, we consider the following as key issues for determining whether there has been any violation of Section 4 of the Act in this case;-

(I) What is the relevant market in the context of Section 2 (r), (s) and (t) read with Section 19 (5)/ (6)/(7))of the Competition Act, 2002?

(II) Whether NSE is dominant in the relevant market and whether it has directly or indirectly imposed unfair or discriminatory price (including predatory price) in sale of services, thereby violating Section 4 (2) (a) (ii) of the Act?

We have further defined the following sub-issues to facilitate determination of this issue:-

(i) Whether NSE is dominant in the relevant market?

(ii) Whether in setting the zero price, NSE can be said to have directly or indirectly imposed unfair / predatory price in sale of services?

(III) Whether NSE is dominant in one relevant market and has abused this dominance to enter or protect the other relevant market in terms of Section 4 (2) (e) of the Act?

We have further defined the following sub-issues to facilitate determination of this issue:-

(i) Which are the two relevant markets for this purpose, whether they need to be related / associated for application of Section 4(2)(e) and whether these two markets fulfil such a criterion? Whether NSE is dominant in one of these markets?

(ii) Whether NSE has set a zero price in CD segment with predatory intent using its dominance in the other relevant market in violation of Section 4(2) (e) of the Act?

(IV) Whether in this case, there has been any other violation of the provisions of the Act?

6. Nature / Attributes of the Market

6.1 Before examination of the issues framed above, it would be useful to discuss the nature and characteristics of the market, which is the stock exchange in the present matter, as these may have significant bearing on the analysis and determination of some of the key issues in this case.

6.2 The purpose of securities /capital market, of which stock exchange is an integral part, is to enable allocation and reallocation of financial resources to foster economic development. Stock exchanges provide transaction platform to investors and thus help discover the price of securities traded thereon. Apart from providing the platform for executing trades, a stock exchange performs a number of other functions viz; issuer regulation, member regulation, trading regulation, investor protection and product design. A peculiar feature of a stock exchange is that it is a platform for providing trading facilities, where a minimum critical mass in terms of trading activity is essential. In fact, liquidity is an important confidence building consideration for an investor / trader. In fact, larger is the liquidity in a stock exchange, greater is the volume of trading and vice- versa. Liquidity provides competitive edge to a stock exchange and hence, competition in stock exchange industry implies basically fight for liquidity.

6.3 The stock exchanges in India offer the facility to trade in the following major segments: equity, equity futures and options, interest rate futures, exchange traded funds, debt, currency derivatives, among others. Each segment has its own unique characteristics and features and thereby is a distinct product. It is pertinent to note that a stock exchange may be permitted by SEBI to offer services in any particular segment(s) or in entirety; in other words SEBI's permission is required for adding segments / products in a segment, while offering a new stock exchange service.

6.4 Stock exchanges, as the name implies, are meant to provide trading platforms for stocks. Stocks have been given a wider definition to include derivatives. Derivative is a security, whose price is derived from one or more underlying assets, called the underlying. The most common underlying assets include equities, bonds, commodities, currencies, interest rates and market indexes. The derivative itself is essentially a contract between two or more parties, whose payoff depends on the behaviour of the underlying. Derivatives can be used for speculation, hedging or to mitigate risk in the underlying, discover price and obtain exposure to the underlying where it is not possible to trade in the underlying. The most common derivatives are futures, options, and swaps. For example, companies buy currency forwards in order to limit losses due to fluctuations in the exchange rate of two currencies. Derivatives can be traded either in an exchange or over the counter (OTC) market. The derivative products with the underlying may be designed by issuing companies, institutions, sometimes by exchanges, but in India, they have to be approved by SEBI (RBI also in case of foreign currency, interest rate and related areas) before they are permitted for trading.

6.5 Stock exchange industry (including the CD segment) displays the characteristics of a network industry. The economics of network industries sets it apart from other non-networked industries in terms of their attributes that result in network effects (externalities). Simply stated, network effect implies that value to the users in an industry increases with increase in the number of its users. Consumers are willing to pay a higher price for the value they get from operating in this network benefitting from this value creation.

6.6 The attributes of network industry specifically in relation to stock exchanges which may have bearing on the determination of issues are briefly discussed below:

6.6.1 In a financial exchange, two obvious externalities are: a) Externalities that arise in the act of exchanging assets or goods and b) Externalities that arise in the array of vertically related services that compose a financial transaction starting from a broker to settlement. The second externality is common to all vertically integrated industries whether networked or not. It is the first externality which is of critical importance in a stock exchange.

6.6.2 The defining feature that sets network industries apart from other industries is that of complementarity (dependency) between the various users (nodes) connected to each other. Complementarity between users leads to network effects or network economics. In stock exchanges, this refers to complementarity between buyers and sellers as a transaction cannot be completed without each other. In a stock exchange, the act of exchanging assets/goods brings together a trader who is 'willing to sell' with a trader who is 'willing to buy'. Two complementary goods, willing to sell known as the offer price and the willing to buy known as the counteroffer price together create a composite good, the 'exchange transaction'. The two original goods were complementary and each had no value without the other and more significantly without a counteroffer, no transaction would take place. This implies that minimal liquidity becomes essential for the transaction to occur and for the market to operate. Higher liquidity increase trader's utility and traders have a preference for markets with depth and liquidity, which indicates numbers of users –sellers and buyers in the stock exchange. This reduce bid – ask spread and reduces risk and uncertainty in the market and makes it attractive for players on the exchanges. This implies that market players would be always looking for business strategies to increase the size of their user base so as to increase liquidity in the exchange and make it more useful to both sellers and buyers in the market. In capital market terms, this is defined as 'depth' and 'liquidity' in the market,

6.6.3 The demand curve in a network industry (including stock exchanges) is upward sloping on account of network effects resulting in positive externalities up to a point of market expansion, thereafter it behaves like a normal downward sloping demand curve and looks more like an inverted 'U' The upward slope denotes increasing returns to scale in consumption, which is called "expectations fulfilled demand" curve as users expectations of network benefits are fulfilled.

6.6.4 Behaviour of prices and costing dimensions among networks do not follow predictable paths and cannot be predicted and analysed through traditional economic tools, including normal supply-demand curve leading to market price determination. Economics of traditional industries offers little insights. Furthermore, pricing strategies differ not only among firms within a network industry, but also between network industries. Moreover, pricing does not follow the traditional profit maximization rule as the platform over which services are delivered is largely composed of relatively more substantial fixed / sunk cost and very little or negligible variable cost that may be attributable to a single or a batch of transactions. This type of cost structure makes it difficult to apportion the fixed cost among various services. Further, with regard to costs, there can be no accurate or predictable pattern. Widely differing costs arise largely on the spread of the network and on account of technological developments in computer usage and availability. Divergent costing and pricing approaches suggest prevalence of diverse business strategies between incumbents while enabling multiple options to new entrants. Implications of upward sloping demand curve for pricing strategies and on market structures will be examined subsequently suffice to state that at this point those strategies of pricing for expanding the initial market can vary between different firms in the exchange network.

6.6.5 Most network industries exhibit increasing returns to scale in production. That is, fixed costs may be high while marginal costs are negligible or zero. Increasing returns to scale is not a defining feature of network industries as there are several other non-network industries that display scale dimension. High fixed costs and low or negligible variable (marginal) costs can operate to permit low or zero pricing facilitating faster network expansion. In a sense increasing returns to scale add to operationalizing network effects.

6.6.6 Requirements of minimum participation especially in financial exchanges, may see the operation of the inverted 'U'coming into play after an initial start-up or transitory phase where the condition of minimum liquidity becomes significant requiring a strategy of low prices during the initial stages. In infrastructure industries where the marginal cost is low or zero, prices could be initially low or even zero to attract users in larger numbers. Higher participation in financial markets also known as market deepening enables better price discoveries of the securities traded. As a result, variance of the expected market price is reduced. Prospective risk averse traders also gets attracted to market. Once the stock exchange perceives that minimum sustainable liquidity has been created. Thereafter it can adopt appropriate pricing strategies.

6.6.7 There are several other features of a network industry arising largely out of network effects which have in the recent years brought to attention the difficulty in developing standardized business strategies based on uniform behavioral principles. To illustrate a few of these traits are presented without the rigor of analysis.

a) An inverted 'U' demand curve can have multiple equilibria allowing for sudden and significant expansions of network size. A constant or low marginal cost can see a new entrant expand his market with the introduction of new to better technology which further decreases his cost.
b) The pace of market expansion is much faster in network industries as compared to non-network industries, more on account of the explosive nature of network effects.

c) Market structure in a network industry is characterized by high inequalities of market shares and profits. Strong network effects normally tends to create natural oligopolies. This is why in spite of entry not being restricted, it has been observed that more than three- four firms would generally not operate in a network industry. Various studies have assigned a relatively high HHI index suggesting fewer numbers of players in these industries. While the firms incur substantial initial cost, it recovers the same by offering unique value added services or by diversifying the product offerings. Various business strategies to reap quick benefits include inter-alia fixed cost recovery through value added schemes, flexible pricing polices etc.

6.7 In such fluid and dynamic framework, anticipating or adjudicating on anti-competitive behavior carries the risk of being arbitrary defeating the purpose of intervention. Competition regulators have to keep these developments in view, while considering cases where they may be relevant. It is with these concerns that the present investigation into the alleged abuse of dominance of the opposite party, the National Stock Exchange of India by MCX-SX must be examined keeping in view the attributes of network industry applicable to stock exchange industry. Without comprehending the full implications of features of network industries for competition and the market structure, there is always a possibility that any intervention in such markets maybe counter-productive.

7 Issue (I): What is the relevant market in the context of Section 2 (r), (s) and (t) read with Section 19 ((5)/ (6)/(7))of the Competition Act, 2002?

7.1 Assessment of abuse of dominance under Section 4 requires establishment of dominant position. As per explanation to section 4 of the Act, "dominant position means a position of strength, enjoyed by an enterprise in the relevant market". Therefore, before assessing dominance, it is necessary to delineate the relevant market in which dominance is to be assessed.

7.2 Defining the relevant market is necessary to determine market power of enterprises by determining the set of products /services and geographical areas, which create competitive constraints on the enterprise. Relevant market is defined in section 2(r) of the Act, read with sub sections (s) and (t) of section 2. Further, while examining facts of a particular case, the Commission must give due regard to any or all factors mentioned in section 19 (6) with respect to "relevant geographic market" and section 19(7) with respect to "relevant product market".

7.3 The product, currency derivatives is traded on stock exchanges, whose operations cover entire country and hence geographical market extends to the whole of India. Thus, the Commission is required to consider relevant product market for the purpose of ascertaining relevant market, on which dominance of NSE needs to be evaluated, based on evidence and consequently, if there is any abuse of dominance as required by law.

7.4 According to the informant, the entire stock exchange services in India constitute the relevant market. NSE has contended that the relevant market, based on a legal and economic analysis, comprises the "CD segment and 'Over the Counter' (OTC) currency forwards". They have further argued that even if OTC market is taken to be a separate market, competitive constraint placed by OTC market on the CD segment would need to be recognized. DG however, has rejected NSE's position that equities, equity derivatives, debt and CD segment fall into different segments and OTC market and CD segment form part of the same market. DG has endorsed MCX-SX's position that the relevant market in the present case is the market of entire stock exchange services.

7.5 Therefore, there are three possibilities regarding relevant product market, namely, i) entire stock exchange services as contended by MCX and found by DG; or ii) CD segment and OTC currency forwards together as contended by NSE ; or iii) CD segment only.

7.6 Determination

7.6.1 In continuation of what has been mentioned earlier regarding stock exchanges, we note that the exchanges only provide the infrastructure (platform) for such products to be traded subject to regulations, rules, bye-laws, and operative procedures. Therefore, the technological support and the facilities offered by exchanges like easy access, easy execution, lower cost of transaction, efficient risk management, fail-proof settlement mechanism are very vital. A robust infrastructure mechanism with enhanced technological support definitely adds volumes necessary for the development of the market. The products which are traded in the exchanges need to be recognized for their characteristics across the segments independent of exchanges, as the exchanges simply facilitate the trade execution subject to regulatory requirements. Just because several products are traded in different segments of the same stock exchange and are categorized as exchange traded products, they do not loose their product differentiating features or their identity as representing different asset classes with different target customers / consumers. Thus, both the exchanges and the securities traded are the external trappings (forms) while, the real substance lies in the classes of assets that are traded as underlying.

7.6.2 However, we would not like to go in for any additional discussion on determining the relevant market, since we broadly agree with the logic and arguments contained in the majority order. For the sake of brevity, we would not like to repeat and go into the detailed reasons already covered in the majority view on this issue,

7.7 **Issue (I) - Conclusion:- In view of the above, we hold that the relevant market in the present case is currency derivatives (CD) segment of stock exchange services.**

8 **Issue (II): Whether NSE is dominant in the relevant market and whether it has directly or indirectly imposed unfair or discriminatory price (including predatory price) in sale of services, thereby violating Section 4 (2) (a) (ii) of the Act?**

8.1 For analysis and consideration of this issue, we may consider the following sub issues one by one:-

(i) Whether NSE is dominant in the relevant market?

(ii) Whether in setting the zero price NSE can be said to have directly or indirectly imposed unfair / predatory price in sale of service?

8.2 **Sub Issue (II) (i) Whether NSE is dominant in the relevant market?**

8.2.1 Dominance has been defined in the explanation below Section 4 as follows:-

"Explanation – For the purposes of this Section, the expression –

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

8.2.2 The Act provides for consideration of any or all factors mentioned in Section 19 (4), while inquiring whether an enterprise enjoys a dominant position or not under Section 4. MCX-SX has argued that market share purely based on volumes is not the right criteria for assessing dominance and has referred to size and resources of NSE including excess capacity, along with its economic power, vertical integration & service network, entry barriers in the relevant market etc. in arguing that NSE is dominant. DG Report has also concluded that based on assessment of parameters laid down in Section 19 (4) of the Act, and in view of the market share of NSE i.e. over 90%, in Stock Exchange services, its size and available resources, size and importance of NSE and its economic power and commercial advantage over MCX-SX and Bombay Stock Exchange (BSE), NSE is a highly dominant player in the stock exchange services market. By generalization, DG report concludes that NSE holds absolute dominance even if CD market is assessed in isolation of other segments on account of its incomparable economic power, size, resources, higher degree of vertical integration, absolute dependence of consumers and large degree of economies of scale in operating different segments with adequate scale in each of those segments.

8.2.3 NSE has argued that while it started with 100% of the CD Segment market in October, 2008 it is an admitted position that now it does not even enjoy the first position in terms of market share, and this itself indicates that NSE is neither able to operate independently of competitive forces nor affect its competitors. It has further argued that MCX-SX continued to increase its market share after entry, pushing NSE to second position and its market share had gone upto 60.47% by August, 2010 when USE entered the market in September, 2010 the respective share of NSE, MCX & USE stood at 32.48%, 42.77% & 24.75%. NSE have argued that the entry of MCX-SX and USE also clearly indicates that there are no entry barriers. NSE also advanced arguments to the effect that even as per other factors mentioned in Section 19 (4), NSE cannot be held to be dominant as on the basis of these factors, none of the three competitors have any particular relative advantage or disadvantage. NSE have further argued that, in any case, Section 19 (4) does not stand alone as factors mentioned therein can be applicable even for non-dominant entities, and has to be seen contextually as a means / tool to interpret Section 4. It has been further argued that apart from the market share, the real test is whether it can influence the market and as per this test, NSE cannot be held to be dominant.

8.2.4 We will take up the following factors for consideration and determination of whether NSE is dominant in the CD segment:-

(i) Following table in the Genesis report dated 30th October, 2010 submitted by NSE indicates the percentage of market share enjoyed by the different competitors for the period August, 2008 to October, 2010:-

	Month	NSE	MCX-SX	USE
1.	August, 2008	100.00%	0.00%	0.00%
2.	September, 2008	100.00%	0.00%	0.00%
3.	October, 2008	65.57%	34.43%	0.00%
4.	November, 2008	50.51%	49.49%	0.00%
5.	December, 2008	50.40%	49.60%	0.00%
6.	January, 2009	49.01%	50.99%	0.00%
7.	February, 2009	48.22%	51.78%	0.00%
8.	March, 2009	51.60%	48.40%	0.00%
9.	April, 2009	50.86%	49.14%	0.00%
10.	May, 2009	54.09%	45.91%	0.00%
11.	June, 2009	52.55%	47.45%	0.00%
12.	July, 2009	52.23%	47.77%	0.00%
13.	August, 2009	50.03%	49.97%	0.00%
14.	September, 2009	49.57%	50.43%	0.00%
15.	October, 2009	49.55%	50.45%	0.00%
16.	November, 2009	49.36%	50.64%	0.00%
17.	December, 2009	49.10%	50.90%	0.00%

18.	January, 2010	48.64%	51.36%	0.00%
19.	February, 2010	40.12%	59.88%	0.00%
20.	March, 2010	41.69%	59.31%	0.00%
21.	April, 2010	46.71%	53.29%	0.00%
22.	May, 2010	44.03%	55.97%	0.00%
23.	June, 2010	41.56%	58.44%	0.00%
24.	July, 2010	38.29%	61.71%	0.00%
25.	August, 2010	39.53%	60.47%	0.00%
26.	September, 2010	32.48%	42.77%	24.75%
27.	October, 2010	33.17%	38.82%	28.01%

8.2.5 It is seen from the table that NSE started with 100% market share in August, 2008. When MCX-SX entered in October, 2008, it was able to capture 34.43% of the market in the first month itself and raise it to more than 50% by January, 2009 in a short span of 4 months. From September, 2009 to August, 2010 i.e. just before the entry of USE, MCX-SX continuously enjoyed the first position in the market with more than 50% share. When USE entered the market in September, 2010 it started with a share of 42.77%. By October, 2010, the respective market shares of NSE, MCX & USE stood at 33.17%, 38.82% & 28.01%.

8.2.6 The above facts conclusively establish that NSE does not enjoy the number one position in the CD segment in terms of market share. In terms of nature of stock exchanges (as a network industry), none of the competitors enjoy any special power vis-a-vis others. Consequently, it is not clear as to how dominance can be established based on the current position of the market. Even as regards potential competitors, there are no major regulatory barriers, as evident from the entry of MCX-SX itself and later on USE, that will restrict entry. The actual growth and play of the respective market shares of NSE, MCX-SX and USE further confirms the normal characteristic of somewhat oligopolistic markets present in network industry, manifesting itself in this case also.

8.2.7 It is also noted that considering the market shares of the three competitors in October, 2010, all of them seem to have the necessary size and resources for effective competition in the market. As regards the other points on defining dominance, MCX-SX has argued that NSE enjoys economic power reflected in its ability to maintain zero price over the long run, and to sustain the losses in CD segment from other segments. All of these could perhaps have under different circumstances translated into a competitive advantage. However, in a networked industry, a new comer could have easily overcome the competitive advantage of the incumbent by offering innovative product with value added services. Further, the CD segment does not seem to derive any specific benefit from other segments of the stock exchange, as evident from standalone and successful instances of stock markets in several economies that provide services in CD segment exclusively.

8.2.8 Arguments have also been put forward by the DG in terms of section 19(4) of the Act to substantiate his views on NSE's dominance. The DG has argued about NSE's dominance on the basis of vertical integration of the enterprises. Of the two types of stock exchange, market structures i.e. vertical silos and horizontal integration, NSE has adopted the former as business model. As an alternative, several of these activities can be outsourced, thus implying that dominance is not on account of vertical integration. Another issue raised by DG is that of entry barrier arising out of regulatory compliance and initial investment in creation of infrastructure. The perceived entry barrier in the present case does not seem to be operative. The alleged regulatory barrier of minimum net-worth requirements are for prudential purposes, which have to be complied. Other stated barriers like minimum number of members and infrastructure cost cannot be termed as entry barriers, as these have the intention of ensuring a minimum trading base, without which adequate liquidity would not come through and the very purpose of starting the exchange would be defeated.

8.2.9 We now move to what is perhaps the most important characteristic of the definition of dominance in Section 4, without at this stage linking it to the question of abuse, which would become relevant only after dominance is established. This key characteristic is captured in the words "............in its favour" in the definition. In the present case, NSE started with a market of 100% share of CD segment in August, 2008 and retained this share till entry of MCX-SX in October, 2008. By October, 2010 i.e. within a period of two years (during which time USE also entered the market)), NSE's market share had come down to 33.17%. This fact itself establishes beyond doubt the NSE's inability to influence the market or its competitors in its favour. In fact, the very concept of dominance arises from the idea that a dominant enterprise will use its dominance to either enjoy a stable high market share, or continuously increase it's market share. We are not aware of any case in the history of competition jurisprudence globally, where a firm's market share has been reduced drastically (to less than one third in this case) in a relatively short period (two years in this case), and yet it has been found to be dominant by a competition regulator or a court.

8.3. Sub-Issue (II) (i)- Conclusion:- We, therefore, conclude that NSE is not dominant in the relevant market.

8.4. Sub Issue (II) (ii) Whether in setting the zero price NSE can be said to have directly or indirectly imposed unfair / predatory price in sale of services?

8.4.1 It is important to take a view on this question to help determine, whether NSE has violated Section 4 (2) (a) (ii) of the Act.

8.4.2 Before analyzing this issue, however, it is pertinent to understand the concept of what is below cost or predatory pricing amounting to unfair price in our Act. Predatory pricing refers to conduct, where a dominant undertaking incurs losses or foregoes profits in the short term with the aim of foreclosing its competitors. Broadly speaking, it consists in one competitor setting a price which is "too low", such that competitors find themselves unable to compete at that price.

8.4.3 Features of predatory pricing

8.4.3.1 What is it that distinguishes predatory pricing from vigorous competition? Predatory pricing poses a dilemma that has perplexed and intrigued the antitrust community for many years. On the one hand, history and economic theory teach that predatory pricing can be an instrument of abuse, but on the other side, price reductions are the hallmark of competition, and the tangible benefit that consumers most desire from the economic system. The dilemma has been intensified by recent legal and economic developments. The reason is that predatory price cuts are particularly hard to distinguish from vigorous competition. If prices are low enough, they can undermine competition under some circumstances, However, low prices may be a consequence of legitimate competitive behaviour. Furthermore, the semblance between vigorous competition and predation may indeed be a prima-facia enticement to inefficient firms to obtain protection from antitrust agencies from the competition that they are incapable of meeting or indisposed to meet in the market.

8.4.3.2 The aim of a strategy of predatory pricing is to remove existing competitors, as well as prevent new competitors from entering the market, so as to give the dominant enterprise increased market power. The dominant enterprise can then use that stronger market position, once the consumer's choice has been severely restricted or completely removed, to charge high prices. Predatory pricing is often defined in economic terms as a price reduction that is profitable only because of the added market power, the predator gains from eliminating, disciplining or otherwise inhibiting the competitive conduct of a rival or potential rival. The anticompetitive effects of predatory pricing are higher prices and reduced output (and often reduced innovation), achieved through the exclusion of rival (s) or potential rival (s). But such a definition does not state an operational legal rule. It is, therefore, necessary to base the legal rule on tractable measures such as market structure, cost, and recoupment.

8.4.3.3 It is also useful at this stage to have a look at the position in two major jurisdictions, US and EU to understand the underlying principals involved:-

a) United States (US): In United States, beginning with the 1986 Matsushita decision (Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 1986) , the Supreme Court has required plaintiffs in predatory pricing cases to meet stringent conditions to prevail on their claims. The Brooke decision (Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) established a new framework for predatory pricing analysis. First, a price could not be predatory unless it was below some measure of cost or even "some measure of incremental cost.". Second, and most strikingly, predatory pricing required proof of recoupment—a dangerous probability, or under the Robinson-Patman Act a reasonable prospect, that the predator can later raise price sufficient to recoup its investment in below cost pricing. As a result, in the United States, predatory pricing cases have become "rarely tried and even more rarely successful,". The Supreme Court's point of view appears to have been motivated by a concern with the chilling (discouraging) effects on price competition that "false positives" in predatory pricing cases would have, combined with a strong scepticism, from both a theoretical and practical point of view, about whether predatory pricing is a rational business strategy. Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. It must be noted that for the investment in predatory pricing to be rational, the predator must have a reasonable expectation of recovering in the form of later monopoly profits, more than the losses suffered. Thus, recoupment is the ultimate object of an unlawful predatory pricing scheme. It is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. The recoupment requirement sharply differentiates predatory pricing from other predatory or exclusionary conduct, where the inference of injury to competition is drawn from the exclusionary conduct and market structure. Recoupment requires the added showing that the predatory conduct will be profitable.

In the most recent decision in US, in linkLine case (Pacific Bell Telephone Co. v. linkLine Communications, Inc., No. 07-512, 555 U.S. __. 2009), Supreme court reconfirmed the analytical framework stated in Brooke Group, i.e. a plaintiff must prove: (1) the alleged predator's prices were "below an appropriate measure of its rival's costs;" and (2) that the suspected predator had a "dangerous probability of recouping its investment in below-cost prices." The second element has also been characterized as requiring a "market structure that makes predation plausible." This essentially requires an organization to have the ability to control prices during and after the period of predation, recouping losses sustained during the predation period by increasing prices after competition for a suitably long period.

b) European Union (EU): The EU position on predatory pricing cases has been different as compared to United States. The traditional EU case law on predatory pricing, based on the AKZO case (Case 62/86, AKZO (1991) ECR I-3359) has set a substantially lower bar to prevail on a predatory pricing claim than has the U.S. Supreme Court. Approach has been confirmed in Tetra Pak I and II and most recent case, Wanadoo (C-202/07 France Télécom, S.A. v Commission [2009]. In these cases, the ECJ established that a detailed cost/price analysis is necessary to determine predation, prices below average variable costs must be regarded as abusive, while prices below average total costs, but above average variable costs, may be abusive if it is proven that the dominant undertaking's intention was to eliminate a competitor. This stood in contrast to the United States, where generally a price above AVC is lawful without condition. Regarding recoupment, in Tetra Pak II and Wanadoo, the ECJ confirmed its earlier position that recoupment of losses is not necessary to establish predatory behavior. The ECJ held that Wanadoo's pricing strategy would lead to the elimination of rivals "with a view, subsequently, to profiting from the reduction of the degree of competition still existing in the market." But the court was silent as to how this "profiting" would materialize from the predator's perspective. The ECJ's decision in Wanadoo case appears to be in line with the Commission's recent Guidance Paper of 2008 on abusive exclusionary conduct by dominant under-takings, in which the Commission confirmed the shift from its traditional per-se analysis of abuse of dominance cases towards an effects-based enforcement approach, where the effects of the dominant undertaking's behavior on consumers are the main focus. In this case, the ECJ has confirmed that all the possible effects of the conduct should be analyzed to see if the conduct in question caused harm to consumers.

8.4.3.4 Because predatory pricing is difficult to distinguish from legitimate price competition, the principle of procedural economy and the prevention of vexatious litigation require the adoption of a sufficiently high standard of proof. The test for predatory pricing should prevent the possibility of harming the competitive process by penalizing companies which are actually engaging in legitimate price competition – however harsh. Predatory pricing claims must be subject to stringent substantive requirements because "it would be ironic indeed if the standards for predatory pricing liability were so low that anti-trust suits themselves become a tool for keeping prices high".

8.4.3.5 Position regarding recoupment of losses is thus different in EU from US as ECJ has consistently held that it is not a precondition to prove predation. It, however, held that the Commission can consider the possibility of recoupment as a factor when assessing if the practice concerned is abusive or not - to show predatory intent. Thus, while in US the probability of recoupment has to be established to conclude predatory intent, in EU, it is one of the factors, which could be examined to prove abuse.

8.4.3.6 The attempt to reduce or eliminate so-called predatory pricing might only eliminate competitive pricing, which is beneficial to consumers. To this end, courts and commentators have largely defined predation as "sacrifice" followed, at least plausibly, by "recoupment" at consumers' expense. Sacrifice may be termed "an investment in monopoly profits."Schematically, predatory activities can be thought of as occurring in two phases:-

a) In the predation phase, a dominant firm; now the predator, reduces its prices for the requisite period of time, so that its competitors exit the market and others are deterred from entry.
b) In the recoupment phase, the predator takes advantage of the fact that its rivals have been undermined, and diminishes its value proposition to consumers to a point below the efficient scale, making unjustifiably high profits in the process.

8.4.3.7 Therefore, there is need for the analysis of abusive predatory pricing in its full strategic context covering both phases, and devote attention to the consequences the conduct at stake may have on competition in the relevant market. We believe that standards for predation claims should be appropriate to minimize the possibility of false positives, and avoid discouraging genuine competition benefiting consumers. Therefore, it is clear that recoupment would be an important element for consideration in the present context. Without an expectation of recoupment through unjustifiably high prices, called supra-competitive prices in economics lexicon, consumers generally gain from low prices, and there is no anticompetitive harm. At the same time, the mere fact that prices are low; even below some of the measures of cost (extensively quoted by both the parties in the present matter), cannot by itself constitute predation even if it results in some exit from the industry, or results in some parties deciding not to enter. Such prices may be profit-maximising in the long run for a whole host of pro-competitive reasons. Furthermore, because not all entry or exit is efficient, instances of exit or failure of entrants (or failure to enter) may not necessarily be indicative of anticompetitive conduct. Thus, the simple fact of harm to competitors is not sufficient to determine whether pricing is predatory. Harm to competitors is at times a natural consequence of competitive behaviour and is, in fact, part of the logic and philosophy of having competition in the market. Recognising this, courts, economists and policy makers have accepted that the purpose of competition policy is to protect and promote competition, not competitors.

8.4.3.8 Before a predatory pricing violation is found, it must be demonstrated that there has been a specific incidence of under-pricing and that the scheme of predatory pricing makes economic sense. The size of defendant's market share and the trend may be relevant in determining the ease with which he may drive out a competitor through alleged predatory pricing scheme-but it does not, standing alone, allow a presumption that this can occur. To achieve the recoupment requirement of a predatory pricing claim, a claimant must meet a two-prong test: first, a claimant must demonstrate that the scheme could actually drive the competitor out of the market; second, there must be evidence that the surviving monopolist could then raise prices to consumers long enough to recoup his costs without drawing new entrants to the market.

8.5. Facts of the Case

8.5.1 Now we turn to examination of facts, circumstances, investigation report and submissions made by both the parties in order to assess, whether NSE has set zero price in CD segment with predatory intent and abused Section 4 (2) (a) (ii) of the Act.

a) The predatory price under the Competition Act, 2002 has been contemplated as an aspect of direct or indirect imposition of unfair or discriminatory price in purchase of goods or services by a dominant enterprise in the relevant market.
b) According to Section 4,..... "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors."
c) Thus, as per Competition Act, 2002, to find a dominant enterprise guilty of predatory pricing, the following requirements need to be fulfilled.
   (i) Enterprise is selling goods or providing services at a price which is below cost of production of goods or provision of services.
   (ii) The said below cost pricing is done with a view (read intent) to reduce competition or eliminate competitors.

d) The said two requirements are seemingly compulsory and it would be legally untenable to consider them as alternative requirements i.e. out of two, even one is sufficient, if found to exist in a case, to hold an enterprise guilty of predatory pricing. Thus, what seems plausible is the fact that even below- cost pricing would not necessarily amount to breach of the Competition Act, 2002, unless such pricing is coupled with exclusionary intent either against competitor or competition.

8.5.2 *Submission of MCX-SX*

a) MCX-SX has submitted that NSE is engaging in below-cost pricing with a view to drive MCX-SX out of market and thus kill competition. Not only transaction fee, but even CD segment deposit fee has been kept at an unusually low level compared to other segments. No admission fee is being collected in the CD segment, while fee is charged in all other segments. No data feed fee is being charged from the CD segment, while normally Data fee is charged on a segment specific basis. Waivers have been implemented without any issuance of circular for quite some time now.

b) Past conduct of NSE vis a vis BSE involved waiving of transaction fee, and then raising the same after liquidity in BSE practically became nil. This is indicative of NSE's real intention in present case also, as NSE will raise prices after MCX-SX is ousted from the market.

c) Rapid increase in trading volumes in CD segment and maturity of the Indian CD market indicates that CD segment is not nascent. At global level, CD is small percentage of OTC market but in India, it is already a significant percentage of OTC market. This shows that CD market in India is quite mature now. Further, OTC and CD segment are different markets offering different products and waivers cannot attract business from OTC markets. Therefore, continuation of waivers is not justified.

d) It is submitted that AVC is not the right bench mark to measure cost for predatory pricing. Relevant measure is LRAIC. Since relevant costs are not zero, NSE's policy of charging zero prices are predatory. An efficient competitor would not be able to survive in this market and will be forced to exit. This will allow NSE to extent its existing dominance.

e) No substantive analysis or evidence has been provided by NSE to justify its zero pricing. No reference to any business plan, internal modeling or projections has been provided by NSE to show zero pricing policy to be profitable in the absence of anti-competitive exclusion of MCX-SX.

8.5.3 *Findings o DG's Investigation Report*

a). As per the DG's report, there is strong case for following average total cost (ATC) or at least long run average incremental cost (LRAIC) based on Richard Whish's book, EC discussion paper, Wanadoo decision etc. in industries with network effects (stock exchange services being one of them) as it captures dynamics of all cost factors associated with such industries.

b) NSE's argument that its CD segment is run without incurring any variable cost is not acceptable as NSE incurs various costs – advertisements and publicity, clearing and settlement charges and depreciation - all attributable to CD segment. NSE has been using its facilities from other segments without appropriating costs to CD segment. NSE has been making significant IT assets addition since 2007-08, which indicates incurring IT costs on CD segment after its introduction. Going by the short lives of IT assets, NSE expenses on IT assets are variable costs for the purpose of LRAIC. Therefore, NSE's pricing in CD being zero is below any cost measure recognized under competition law.

c) Various waivers are therefore evidences of predatory pricing, which have been resorted with a view to lessen and/or eliminate competition as briefly given below:

(i) Transaction Fee Waiver: DG finds NSE's intention to eliminate competition and has rejected promotional role of fee waivers argument by NSE. NSE has resorted to waivers on need basis, imposed fees whenever competition is absent and reduced/waived fees at the first sight of competition. Thus, imposition/waiver of transaction charges is not linked to market development. Rather, it has been used as an exclusionary device only to grab the market share and oust competitors.

(ii) Admission and deposit level waivers: NSE has failed to substantiate its argument that deposit structure is laid down keeping in mind the nature of segment and the risk associated. Reduction of admission fees appears to be a part of larger scheme of arrangement to keep all revenues stream in CD segment to almost zero level, to drive out competitors.

(iii) Data feed waivers: NSE waived the data feed fee completely under the garb of vendor's request to capture the market. Despite approval of the board on one occasion, data feed fee was not levied. Waiver was clearly aimed at consolidating the market share of NSE.

d) As waivers have been continuing for more than two years, without having any reasonable relationship with costs and without any developmental basis, these amount to predatory pricing.

e) Past behavior of NSE in various segments coupled with its exclusionary behavior in CD segment would foreclose possibility of any competition in the Indian capital market. Network effect in stock exchange services market makes re-entry extremely impossible as observed in the case of F&O segment, where BSE after being driven out could not re-enter. While profits and financials of NSE have been progressively increasing, the net worth of MCXSX has been eroding and it is likely to be wiped out completely in foreseeable future.

8.5.4 *Submission of NSE*

a) NSE's position is that the two requirements for predatory pricing: i) pricing below cost and ii) intent to reduce competition or eliminate competitors are not satisfied in the present case.

b) Under CCI cost regulations, default cost benchmark to determine whether NSE has priced below cost is average variable cost (AVC). Use of average total cost (ATC) by DG is inappropriate. Internationally, there is ample regulatory and legal precedent for using AVC or AAC as bench mark and virtually, there is no support for using ATC for predation. LRAIC has only limited support and only in circumstances, which vary significantly from this case. Since, default cost measure for predation under Indian Regulations is AVC, AVC or at best AAC could be used.

c) It is NSE's position as elaborated by Genesis report that AVC for NSE is zero and AAC is also quite low, which will continue to fall as volumes increase. Therefore, NSE has not priced below - cost.

d) On the issue of intent, there exists no subjective or objective basis for finding that NSE's pricing policies were employed with a predatory intent. On the contrary, all evidence including internal circulars, public documents and statements issued by NSE's competitors (both MCX-SX and USE) establish good intent (pro-consumers and market). Examples of fee waivers by the Chicago Mercantile Exchange and the New York Stock Exchange establish that fee waivers to encourage wider market participation is an accepted and legitimate business practice for stock exchanges.

e) Purpose of transaction fee waiver is market development. CD segment was launched at a time of economic downturn and transaction fee waiver was imperative in this context. Transaction fee waivers are a part of the introductory pricing strategy, rather than being predatory. Waivers are needed to attract business from OTC especially that of SMEs. It is a normal practice adopted as a matter of policy for all segments.

f) Intent is not elimination of competition, but promotion of growth of CD segment, which is nascent at present as supported by continuing high historical growth, scope for further growth, large degree of latent demand, USE's view that there is great scope for development in CD market etc. DG has failed to analyze, whether CD segment is really at a nascent stage.

g) Waiver of fees by NSE is a form of penetration pricing and both in terms of duration and market expanding justification and meets the internationally recognized tests for penetration pricing. Penetration Pricing is a rational strategy for firms to expand a nascent market like the CD segment. DG has also failed to analyze, whether NSE was objectively justified in waiving fees in CD segment. Based on legal and economic analysis and recent entry of USE, NSE was and continues to be justified in adopting its pricing policy.

h) There is no general consensus on the length of time within which pricing can be termed promotional or penetrating. For instance, in General Foods, the FTC concluded that seven years of below cost pricing qualified as promotional.

i) Fee waivers in CD segment have not resulted in anti-competitive foreclosure. Despite fee waivers, rivals like MCX-SX and USE have not been prevented from entering and expanding. MCX-SX has been able to maintain the leading position for more than two years.

j) Importance of keeping cost of transaction low in a nascent market is shown by the fact that levy of stamp duty by Government of Delhi sometimes back has decreased trading volumes at the NSE CD segment i.e. trading volume in CD segment are greatly affected by any increase in cost of trading and hence continuation of waivers is needed.

k) Thus, it is clear that DG has failed to provide objective basis for determining that NSE's conduct was with a view to reduce competition or eliminate competitors.

8.6 Determination

8.6.1 To assess, therefore, whether NSE has indulged in predatory pricing, two elements need to be analyzed as per Section 4 of the Act:-

a) Below- cost pricing or unfair / predatory pricing
b) Intention to reduce competition or to eliminate competitors

8.6.2 **a) Below -cost pricing or unfair predatory pricing:-** The basic argument advanced by DG and others against NSE's conduct is that since an enterprise providing any service inevitably incurs a costs in the process, zero price, almost by definition, is bound to be below-cost price and unfair / predatory. We find this to be a rather simplistic assumption, which does not take into account the nature of certain markets, like the network industry. Free provision of service by the search engine ' google', as also service by e-mail providers like yahoo, gmail, hotmail, etc. are well known examples of primary consumers getting free service. Obviously, the concerned enterprises are making profits through a business model, which enables them to provide the service free of charge to the primary consumers. Therefore, we need to examine the pricing in the context of the relevant market and its characteristics, before coming to any conclusion in this regard.

8.6.2.1 In the instant case, we have considered the following relevant features of the network industry for analyzing whether the zero price should be treated as unfair / predatory.

(i) As mentioned earlier, stock exchanges are subject to network externalities due to which with increase in size of network (liquidity in this case) the network becomes more valuable to other users. It is evident that if there were only a few sellers and few buyers in the market, completion of a transaction would be difficult since each transaction requires a seller and a buyers, with both agreeing on a price. Therefore, minimal liquidity becomes essential for the transactions to occur, and for the market to operate, due to complementarity between buyers and sellers. Higher liquidity increases trader's utility and traders have preference for markets with depth and liquidity. Therefore, Stock exchanges aim to increase liquidity, even if they have to charge very low prices as a trade-off as this increases the value of their network.

(ii) Most network industries exhibit increasing returns to scale in production i.e. fixed costs may be high, while marginal costs are negligible or zero. High fixed costs and low or negligible variable (marginal) costs can operate to permit low or zero pricing facilitating faster network expansion. In a sense, increasing returns to scale add to operationalising network effects.

(iii) When network externalities are present, a profit maximizing firm might initially price a product below cost in order to establish a large installed base of users, and thereby increase demand for its product. Alternatively, a firm may initially charge a low or zero price since its marginal cost is zero allowing for minimum liquidity before shifting to higher price as part of legitimate business model.

(iv) Further, in network industries like stock exchanges with network externalities, consumers are willing to pay a higher price for benefitting from value creation due to increase in size of network. As demand expands, prices rise resulting in an upward sloping demand curve, unlike the normal demand curve for non-network industries, where the demand curve is downward sloping, network industries may have inverted 'U' demand curve which may allow multiple equilibria on the curve allowing sudden and significant expansions of network size. A constant or low marginal cost can see a new entrant expand his market with the introduction of new products, which further decreases his cost. The pace of market expansion is much faster in network industries, as compared to non-network industries, more on account of the explosive nature of network effects.

(v) The pro-competitive rationale for below-cost pricing in cases involving network externalities bears similarities to both promotional pricing and learning-by-doing. The rationale is similar to that for promotional pricing, because future demand increases with added current sales. The rationale is similar to learning-by-doing because demand depends on cumulative sales.

(vi) Both NSE and MCX-SX have pointed out that transaction fees is a very small component of cost of trading, and even a smaller component of cost of acquisition of underlying assets. In fact, pricing of services may not be a major issue, given extremely low share of transaction fee in total transaction of buying the derivatives. Therefore, it may not be the primary factor influencing consumer decision as to which assets to buy, and which service providers to use, though where exchanges compete head to head in same assets classes, market users may well be sensitive to level of trading fees particularly for large and frequent traders.

(vii) The fact that MCX-SX and USE have been able to take away original market share from NSE at same price, i.e. zero price, indicates that enterprises are competing on non-price parameters. Indeed, common sense suggests that in this market, with price so small a component, quality, product differentiation and innovation could well be important competition factors

(viii) Given the distinctive features of a network industry, it may not be possible for any one competitor to hold a dominant position in the relevant product market for a very long time. It has been observed that there are typically two or three firms in a network-industry that share major portion of the market, so that each player posses attributes that are considered dominant in a non-networked industry(oligopolistic market structure).

(ix) It has been observed that in a networked industry, at times the pricing strategy is such that revenue is generated from value added services and people are induced to join the network for creating value to the existing customer base. Also, due to lock-in and switch-in cost in a network industry, the service provider may give benefits to join the network, which may be in the form of zero fee. Given such a scenario, each player has to adopt a unique pricing strategy best suited to its business model.

(x) It is observed that the traditional argument of liquidity advantage of the incumbent does not hold good in networks because new entrants can often reap the benefits of better technology and lower operating cost.

(xi) The Bolton Test which gives conditions for market expanding efficiency to justify future gains of investment require three conditions:

i. Efficiency gain: increased output resulting from sub-competitive prices results in plausible efficiency.

ii. Restrictive alternatives: the efficiency gained cannot possibly be achieved by restricting competition. With the opening of stock exchange CD segment, the ratio of business transacted in the CD segment to those in the OTC market is manifold times the global average, which means that lower prices have been able to attract players in the CD segment.

iii. Recoupment by gaining efficiency: recoupment arises from efficiency-enhancing measures.

8.6.2.2 On the basis of above, we draw the conclusion that efficiency (i.e. production as well as consumption externality) results from growing volumes in the CD segment. Thus, it may be a prudent commercial strategy to offer services of CD segment at sub-optimal prices.

8.6.2.3 The basic conclusion we draw from the foregoing discussion is that in network industries, including stock exchanges, the traditional system of pricing related directly to costs at that particular time may not be relevant. Instead, network industries would tend to adopt business models where prices at any time are linked to the value of the service at that point of time. We may term this as 'value- based pricing' in contra-distinction to traditional' 'cost-based pricing' model. Since initially, the value of the product is insignificant because of very low liquidity, the price could well be zero regardless of the quantum of initial and recurring costs involved. As the liquidity increases, the value of the product would increase, enabling the enterprise to start charging (or increase the price) correspondingly. Thus, the network industry characteristics of a stock exchange provide a robust business model with initial zero pricing.

8.6.2.4 The allegation of unfair / predatory pricing by NSE is at the core of this entire case. In this context, it is important to understand that distinguishing between predatory pricing and genuine competitive pricing in a network industry is at times a difficult and complex task, because of the superficial similarities in the visible manifestation in terms of pricing behaviour. In both cases, the initial price is low (may even be zero at times) and increases over a period of time. At first glance, therefore, it is easy to mistakenly take the low / zero price in a network industry for predatory pricing. However, the two are fundamentally and structurally different, with different underlying characteristics. In predation, the business strategy is to deliberately incur losses by setting low prices initially to kill competition, and then (once competition is killed) set unjustifiably high (super-competitive) prices to not only off-set these losses, but to make huge profits to the detriment of the consumers. In a network industry, the initial value of the consumers is low on account of little / low market share of the service-provider, and consumers would not be willing to pay a price determined on cost considerations. A sound business strategy, therefore, first focuses on creating liquidity even at low / zero prices, so that the product has appreciable value for the consumers, and once enough liquidity is achieved corresponding price is charged, thereby leading to off-setting of any earlier losses and making of reasonable profits. In considering allegations of predatory pricing in network markets, therefore, we must fully inquire into the underlying characteristics of the market and undertake requisite (even if complex) analysis to clearly distinguish predatory pricing from vigorous competition.

8.6.2.5 It is evident from the foregoing that the zero price set by NSE initially in the CD segment could well be part of a sound business strategy. This conclusion is further strengthened by the fact that two more competitors, namely, MCX-SX and USE, have also entered the market subsequently with zero pricing. Both the competitors entered the market fully knowing that the prevailing price in the market was zero. It would be naive to argue that their business models did not factor in this important consideration, in the hope or expectation that existing competitor (s) would start charging so that they did not suffer losses after entry. The fact that MCX-SX did not furnish information regarding their business model, despite being specifically asked by the Commission to do so, establishes this conclusion further.

8.6.2.6 We, therefore, conclude that zero price set by NSE for transactions cannot be said to be unfair or predatory.

8.6.3 **b) Intention to reduce competition or to eliminate competitors:** Having concluded that zero pricing by NSE is not unfair, we would still like to examine the 'intention' for the sake of completeness of our scrutiny. As stated above, under Indian Competition law, proving predatory intent is the second essential requirement to prove predatory pricing. Under-cutting a rival's prices in order to "steal" its business is a hallmark of the competitive process. Therefore, one of the trickiest parts of a predatory pricing case can be to distinguish competitive from anti-competitive intent. In order to prove predatory intent, both direct and indirect evidence may be used. One example of direct evidence includes company documents, which clearly show the dominant company's intention to eliminate a competitor. When there is direct evidence of intention to eliminate, no other elements need to be shown. However, this kind of evidence is seldom available. When direct evidence of predatory intent is not available, intent needs to be proved based on indirect evidence.

8.6.3.1 On the issue of intent, sufficient evidence on record is not available in this case, which could indicate directly, or from which it could be inferred, that NSE's pricing policies were employed with a predatory intent to eliminate its competitors from the CD segment. DG has also failed to provide convincing evidence, subjective or objective, for determining that NSE resorted to waivers with a view to reduce competition or eliminate competitors. On the other hand, internal circulars, public documents and statements issued by NSE as well as NSE's competitors (both MCX-SX and USE) indicate good intent (pro-consumers and market development) in giving waivers. It is also noteworthy that both MCX-SX and USE, while waiving transaction charges, mentioned in their circulars that "it was necessary to encourage active participation in the CD segment". Therefore, there may be truth in arguments given by NSE that waiver was done as a promotional measure to develop the market. Examples of fee waivers by the Chicago Mercantile Exchange and the New York Stock Exchange also indicate that fee waivers to encourage wider market participation may be an accepted and legitimate business practice for stock exchanges. We also find weight in NSE's submission that there is no general consensus on the length of time within which pricing can be termed promotional or penetrating. For instance, in General Foods, the FTC concluded that seven years of below cost pricing qualified as promotional. The argument of NSE that growth of CD segment indicate that monthly average growth is approximately 30%, and has remained consistent from August 2008 to October 2010, not only carries weight but also hints that the so called zero pricing in the CD segment may have resulted in the volume and growth of CD segment, although it cannot be established conclusively.

8.6.3.2 We now move to examine whether zero price charged by NSE could be part of a predatory business strategy. The question arises, whether predatory intent can be established without the possibility of recoupment?

8.6.3.3 As discussed above, apart from appropriate measure of costs, the role of recoupment has often been at the heart of debates about predatory pricing enforcement. If a firm can never raise its prices to supra-competitive levels, in order to recoup the losses incurred from the below-cost prices, then even if the predatory pricing successfully drives out a competitor, customers will only be benefited by the low prices. The market dynamics of last two years makes it amply clear that competition in this segment is feasible and actually happening even at zero prices. Question arises whether Competition authorities should deprive the market and consumer of lowest possible prices in the market based on notions of predatory pricing.

8.6.3.4 In the present case, there does not appear to be much possibility of recoupment of stated current losses. Even if competitors were to leave the market due to alleged predatory pricing, NSE is likely to be able to charge only reasonable prices. As demonstrated by easy entry of USE and MCX-SX, higher prices to recoup would lead to supernormal profits and attract new players, which will again force NSE to lower the prices. Therefore, in the face of low entry barriers, recoupment is not very probable. As such, zero pricing cannot be part of a predatory business strategy.

8.6.3.5 We have also considered the conduct of NSE in continuing the zero pricing in CD segment till date, though the original decision was for a shorter period. It has been submitted by NSE that the decision was duly reviewed from time to time, and in the prevailing circumstances, it decided to continue with zero price. We have noted that

NSE started operating with zero price in August, 2008 and MCX-SX also adopted the same policy on entering the market in October, 2008. Even USE which entered after two years in September, 2010, decided to adopt the same price. In this situation, continuation of zero price by NSE, when its competitors also had the same price is logical and understandable, and cannot in any way be put forth as an argument to allege predatory intent in its part.

8.6.3.6 In view of the above, we conclude that NSE has not set zero prices with the intention to reduce competition or eliminate competitors.

8.7 Sub-Issue (II) (ii)- Conclusion:- In view of the above, in setting the zero price NSE cannot be said to have directly or indirectly imposed unfair / predatory price in sale of services.

8.8 Issue (II) Conclusion:- Keeping in view the aforesaid findings on sub-issues (i) & (ii), in regard to Issue (II) we come to the conclusion that NSE is not dominant in the relevant market and the zero price set by it for transactions does not directly or indirectly impose unfair / predatory price. As such, since NSE is neither dominant in the relevant market nor has it imposed an unfair or predatory price in sale of services, it has not violated Section 4(2)(a) (ii) of the Act.

9. Issue (III). Whether NSE is dominant in one relevant market and has abused this dominance to protect other relevant market in terms of Section 4 (2) (e) of the Act?

9.1. **MCX-SX** has alleged that NSE is subsidizing the CD Segment from their revenues in other segments, and, thus, in the event CD segment is held to be the relevant market, this amounts to leveraging of its dominant position in the Cash Segment, F&O Segment and WDM Segment to protect its position in the CD Segment, in violation of Section 4(2)(e) of the Act. MCX-SX has stated that this strategy would allow NSE to protect its existing dominant position by preventing MCX-SX from growing to a size where it could challenge NSE.

9.2 MCX-SX in its written submissions dated 10.3.2011 has contended that NSE may not be dominant on the market that Genesis report defines (OTC inclusive or not inclusive). However, NSE is dominant on other markets from which it is leveraging market power on to the market for trading services in currency derivates, and this strategy would allow NSE to protect its existing dominant position by preventing MCS-SX from growing to a size where it could challenge NSE. It has been further stated that as Section **4(2) (e)** does not require the markets to be associated, different segments of stock exchange need not be closely related; and that NSE has the ability to cross-subsidize CD segment from its other profitable segments, and has actually used cross subsidization for predatory practice.

Section 4(2) (e)of the Act states that:

"There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group]- (e) uses its dominant position in one relevant market to enter into, or protect, another relevant market".

9.3 **The DG** has concluded that NSE has "abused its dominant position in the equity, F&O and WDM Segments to protect its dominant position in the CD Segment." The DG finds that NSE is subsidizing its conduct in the CD segment through the revenues it earns from other segments, in some of which (like the F&O Segment) there is no competitor as yet.

9.4 **NSE** has objected to the findings of the DG on Section 4(2)(e) of the Act mainly on the following grounds:

(a) DG has not defined two separate relevant markets.

(b) Section 4(2) (e) presupposes associative links between the alleged two markets. Such relationship does not exist between the CD Segment and other segments of the NSE;

(c) The DG has wrongly concluded cross-subsidization as an abuse in itself; and

(d) The NSE has gained no special advantage by virtue of its existence in other segments

It is contended that NSE is not dominant in any market relevant to this case and therefore cannot be held guilty of leveraging its dominant position in context of section 4(2)(e).

9.5 *Leveraging of dominance (market power) as a competition concept*

9.5.1 Before assessing whether NSE is guilty of abuse under section 4 (2) (e), it is pertinent to discuss the concept of leveraging of market power as understood in competition regulation.

9.5.2 'Leverage of market power' or 'Leveraging of dominance' is a complex area of competition law. Leveraging occurs when a dominant firm uses its power in one market to induce or foreclose sales in the second market and thereby exercise its market power in that market. It is a general term comprising a variety of strategies, which a firm might use to extend its market power from one market to another, for instance by tying, giving rebates, predatory pricing etc. It is most frequently discussed in analyzing tying cases, but has been identified in other varieties of antitrust cases also. Concern about leveraging focuses on structural changes in the secondary market, which occur not due to a superior product offered by an alleged abuser but due to its market power in another market. The resulting existence of market power in the second market does not come from the merits of competition, but through leveraging of market power in the first market.

9.5.3 It would be useful to take a look at leveraging of monopoly power in the two major jurisdictions, viz, United States and European Union to understand the principles involved and differences in approaches:-

a) **United States:-** Leveraging of market power has always been a paramount concern of American antitrust policy. However, during last fifteen years, the United States Supreme Court has cut back considerably on leveraging claims. Now the clear trend in decisions is either to reject monopoly leveraging claims altogether, or else hold that "leveraging" claims can be sustained only if the alleged anti-competitive conduct (i) strengthens the dominant firm's monopoly position in its primary market; or (ii) threatens monopolization of a secondary market. Most US courts have held that it is not unlawful for a firm with a monopoly in one market to use its monopoly power in that market to gain a competitive advantage in the secondary market, unless by so doing it serves either to maintain its existing monopoly or to create a dangerous probability of gaining a monopoly in the secondary market as well. US approach towards leveraging is best stated by the 2nd Circuit Court in the classic case of leveraging in US in Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (1979) "so long as we allow a firm to compete in several markets, we must expect it to seek the competitive advantage of its broad-based activity – more efficient production, greater ability to develop complementary products, reduced transactions costs, and so forth" and that allowing it to do so ultimately benefits consumers. In its 2004 Trinko decision (Verizon Communications Inc V Law Offices oj Curti~ V.Trinko540 U.S. 398, 2004) , which involved a refusal to deal, the United States Supreme Court expressly refused to apply any theory of monopoly leveraging, stating two things: i) the leveraging theory presupposes that there is a dangerous probability of monopolization in the secondary market; and ii) leveraging "presupposes anticompetitive conduct," and in this particular case the conduct "could only be the refusal-to-deal claim we have rejected."

b) **European Union:-** Regarding leveraging of market power, the classic and famous case in EU is Tetra Pak II (Case C-333/94P Tetra Pak International SA v Commission, ECR I-595,1996). In this case, the European Court (5th chamber) said, 'An undertaking which enjoys a quasi-monopoly on certain markets and a leading position on distinct, though closely associated, markets is placed in a situation comparable to that of holding a dominant position on those markets as a whole. Conduct by such an undertaking on those distinct markets, which is alleged to be abusive may therefore be covered by Article 86(now 82) of the Treaty without any need to show that it is dominant on them." In nearly all the cases in which the doctrine has been applied, the injury in the secondary market has been very substantial, leading to substantial competitive foreclosure in that market. Further, in the Tetra Pak case, the Court of First Instance has stated that "*In the case of distinct, but associated, markets, application of Article 86 to conduct found on the associated, non-dominated, market and having effects on that associated market can only be justified by special circumstances*." Thus, the courts have generally set the bar higher for leveraging abuses across markets requiring that in addition to proof of dominance and abuse, there are extenuating circumstances that justify a finding of abuse. Nevertheless It could be said, however, that EU law might be somewhat less strict than U.S. law in requiring a "dangerous probability" that the secondary market will be monopolized (dominated). EU approach is also indicated by the DG Discussion paper on exclusionary abuses (2005), which places, great emphasis on foreclosure in the secondary market. Further, DG Competition's Guidance paper on exclusionary abuses (2009) indicates general enforcement approach towards abuse of dominance, i.e., "The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. It further states Anti-competitive foreclosure is defined as a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking...."

9.5.4 Based on above, we believe that when assessing cases of leveraging, certain aspects of market behaviour have to be kept in mind. First, behaviour of a dominant firm in adjacent/related market is different from the direct exercise of market power in the market where it is dominant. Second, involvement in multiple markets is a normal and usually innocent form of industrial activity that frequently creates real value for consumers; for example, using the knowledge and expertise acquired in one market to enter another market, or taking advantage of synergies and economies of scope between the production in the two markets, is both profitable for the firm and desirable for consumers and the society as a whole. Thirdly, given wide acceptance that competition law is meant for protection of competition and consumers, not competitors, leveraging of market power in one market may be seen as violating Section 4 (2) (e), only when its exercise on the second market leads to entering or protecting the second market in such a way that its leads to sufficient anti- competitive foreclosure and ultimately harm to consumers.

9.5.5 Now, we turn to the examination of issue at hand, i.e. whether NSE is dominant in one relevant market and has abused this dominance to protect other relevant market in terms of Section 4 (2) (e) of the Act? For analysis and consideration of this issue, we may consider the following sub-issues:-

(i) Which are the two relevant markets for this purpose, whether they need to be related/associated for application of Section 4 (2) (e) and whether these two markets fulfill such a criterion? Whether NSE is dominant in one of these markets?

(ii) Whether NSE has set a zero price in CD segment with predatory intent using its dominance in the other relevant market in violation of Section 4 (2) (e) of the Act?

9.6 Sub-Issue (III) (i):- **Which are the two relevant markets for this purpose, whether they need to be related/associated for application of Section 4 (2) (e) and whether these two markets fulfill such a criterion? Whether NSE is dominant in one of these markets?**

This sub-issue may be further sub-divided into three parts:

a) Defining the two relevant markets.

b) whether the relevant markets mentioned in Section 4 (2) (e) need to be related/associated and whether these two markets fulfil such a criterion in this case?

c) Whether NSE is dominant in one of the relevant markets?

9.6.1 a) **Defining the two relevant markets:-** For application of Section 4 (2) (e), two separate relevant markets need to be defined. As discussed in the majority order under definition of relevant market, relevant market needs to be defined in terms of Section 2 (r) read with (s) and (t) of Section 2 giving due regard to factors mentioned in Section 19 (6) with respect to relevant geographical market and Section 19 (7) with respect to relevant product market. We have already defined CD segment of stock exchange services as a relevant market in the present matter. Other segments of stock exchange services are equity, F&O and WDM segments. Each of the equity, F&O and WDM segments are distinct in terms of product/service characteristics, their intended use and price and are not substitutable by the consumer with each other just like CD segment being a distinct segment. Therefore, each one of these may be taken as a separate relevant market. Therefore, in terms of Section 4 (2) (e), there are three relevant markets each independently qualifying to be "one relevant market" in the context of MCX-SX's allegation, while CD segment is the "other relevant market"

9.6.2 b) **Whether the relevant markets mentioned in Section 4 (2) (e) need to be related/associated and whether these two markets fulfil such a criterion in this case?**

9.6.2.1 **MCX-SX** has submitted that the words of Section 4(2)(e) of the Act, which are precise and unambiguous, do not refer to any link between the markets to find an enterprise's conduct in breach of Section 4(2)(e). Even the European Courts have evolved the jurisprudence with respect to leveraging from associative links to neighbouring markets and to adjacent markets. These concepts cannot be imported into the Indian enactment unless the makers of the statute had clearly included such a requirement. It has been further submitted that, notwithstanding the absence of any requirement contained in the Act to establish a relationship between the markets, the CD Segment is closely associated and interconnected with the other segments of stock exchange services, particularly the F&O Segment as is clear from the following:

a) The NSE does not follow segment-wise accounting as required under AS 17.
b) The NSE applies its F&O Segment regulations to the CD Segment on a mutatis-mutandis basis, which proves that both the segments are closely related to each other.
c) As found by DG, around 92% of the members of the NSE's CD Segment and 73% of the members of the Informant are members of the NSE in its F&O, CM or Debt Segments.

9.6.2.2 Applying the test used by the European Court of Justice in Tetra Pak II, MCX-SX has argued that the majority of both Informants and NSE's customers in currency derivatives services are also "potential customers" (if not actual customers) in cash equities and equity derivatives, and, therefore, CD Segment is closely related and interconnected with others segments of the NSE, if not in the same relevant market.

9.6.2.3 **NSE** has submitted that there must be a link between the dominant position in one market and the alleged abusive conduct in a second market. Without such a link, dominance would not be a central requirement for the abuse to occur, and the "abusive" strategies could be replicated by competitors, who would not need any special market power to engage in this strategy. It has further submitted that leverage must occur across two different markets – these could be related either horizontally or vertically. Such associated markets don't exist in the present case.

9.6.3 *Determination*

9.6.3.1 Section 4 (2) (e) has been designed to cover the situations, where an enterprise is dominant in one market and is leveraging its dominance in that market to indulge in anti – competitive behavior in another market (to enter into, or protect).

9.6.3.2 Globally, requirement of associative links is not part of the statute, yet leveraging is generally applied to linked markets only. For there to be an opportunity for leveraging, some form of link between the dominant market and the non-dominant market is required. As quoted by NSE and MCX-SX both, in Tetra Pak II, the EC acknowledges that a link between dominance and abusive conduct is presupposed by Article 102 as follows: "It is true that application of Article [102] presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market". NSE has placed reliance on OFT 's November 2010 decision in alleged abuse of a dominant position by Flybe Limited which held: "Competition law recognizes that abusive conduct will not necessarily be confined to the market in which the undertaking in question is dominant, but may take place on a market 'closely associated' to the dominated market". MCX-SX has, however, submitted that European courts and the UK OFT have deviated away from the strict requirement "associative links" to downstream neighboring or associated markets and quoted UK Competition Appeal Tribunal (CAT) in the same case, the CAT noted in Genzyme that "Cases such as Commercial Solvents, Telemarketing and Tetra Pak II demonstrate that it may well be an abuse for an undertaking which is dominant in one market to act without objective justification in a way which tends to monopolize a downstream, neighboring or associated market.....". It is noted that even this case indicates the requirement of some kind of link between the two markets, be it associated , neighboring or downstream markets.

9.6.3.3 In Tetra Pak II, the ECJ has confirmed that an undertaking in a dominant position in a market could, in special circumstances, abuse that position in another market where it is not dominant, provided the two markets have close associational links. There must be a link between the dominant position in one market and the alleged abusive conduct in the second non- dominated market. Without such a link, dominance in one market would not be a central requirement for the abuse to occur. Therefore, we don't agree with MCX-SX submission that Section 4 (2) (e) does not require the two markets to be associated.

9.6.3.4 We hold that the two markets should have some kind of link for leveraging dominance in one market to another. Without this link, leveraging of dominance in one market to another is not feasible. As such, the two related markets need to be related / associated.

9.6.3.5 Having clarified the existence of two markets necessary for examining section 4(2)(e) and also taken the view that these markets should be related / associated, we now need to examine if the markets identified in the instant matter are related / associated.

9.6.3.6 First Genesis report on behalf of NSE has argued that although different stock exchange services are supply side complements and substitutes, they are not sufficiently close substitutes and complements to be considered closely related. In particular, they are not sufficiently close supply-side substitutes to justify their inclusion in the same market. We agree with LECG report on behalf of MCX-SX that if such a test were used then, the only services which could be considered as closely related are those which are included in the same relevant market. In that case, Section 4(2)(e) of the Act would not apply (since it only applies to situation where dominance in one market is abused in a separate market) and the Section would in fact become inoperable. Such a high hurdle is therefore not consistent with the Act.

9.6.3.7 The NSE applies its F&O Segment regulations to the CD Segment on a mutatis mutandis basis, which proves that both the segments are closely related to each other. NSE also does not maintain separate accounting for CD segment vis–a-vis other segments. An exchange operating in one product will be well placed to provide trading services in another service. These services appear to be supply-side substitutes and, therefore, these segments are related from supply-side also as same /similar resources can be used to supply services in both the markets.

9.6.3.8 There is also some commonality of brokers and traders in other segments and CD segment. Applying the test used by the European Court of Justice in Tetra Pak II, many a customers of both Informants' and NSE in currency derivatives services may be "potential customers" (if not actual customers) in other segments. Thus, markets are also to some extent related from demand side.

9.6.3.9 In light of the above, it may be said that the two relevant markets have associational links, which is what would normally be expected in a platform set-up. Therefore, CD segment and other segments of stock exchange services individually are distinct and related / associated relevant markets in this case.

9.6.3.10 In view of the above, we conclude that the relevant markets mentioned in Section 4(2) (e) need to be related / associated, and are actually related / associated in this case.

9.7 c) **Whether NSE is dominant in one of the relevant markets?**

9.7.1 As mentioned in DG's investigation report, NSE is dominant in each of these three segments with approximately 71% market share in equity, 99% in F&O and 90% market share in WDM segment. Since we have already held that NSE is not dominant in CD segment, it may be taken that NSE is dominant in one of the two relevant markets defined for the application of Section 4 (2) (e). It is a different matter that such dominance does not give any unique advantage to NSE in its operations in the CD segment.

9.7.2 Sub-Issue (III) (i)- Conclusion:-Based on our findings in the above these sub-issue, we conclude that for the purpose of application of Section 4 (2) (e), the other segments of NSE namely equity, F&O and WDM are three relevant markets each independently qualifying to be 'one relevant market', while CD segment is the "other relevant market". We also conclude that these three segments and CD segment of stock exchange services are two distinct related / associated relevant markets in this case, and that NSE is dominant in the equity, F&O and WDM segments.

9.8 Sub-issue (III) (ii):- Whether NSE has set a zero price in CD segment with predatory intent using its dominance in the other relevant market in violation of Section 4 (2) (e)?

9.8.1 **NSE:**NSE has submitted that while examining this issue, particular care needs to be taken to ensure that foreclosing effects in one market are proven to directly resulting from dominance in another market. NSE also placed reliance on the Tetra Pak Il case (relied upon by MCX-SX as well) to demonstrate the requirement of special circumstances. In the Tetra Pak II case, the Court of First Instance has stated that "In the case of distinct, but associated, markets, application of Article 86 to conduct found on the associated, non-dominated, market and having effects on that associated market can only be justified by special circumstances." Thus, bar in leverage cases is higher, requiring that in addition to proof of dominance and abuse, there are extenuating circumstances that justify a finding of abuse.

9.8.2 In Tetra Pak II, these special circumstances included particular cumulative requirements:

(i) That Tetra Pak was a quasi-monopolist in its dominant market (for asceptic cartons) with a 90% market share.

(ii) That Tetra Pak was in a leading position (acknowledged to be possible dominant) in the distinct but closely associated non-dominant market (non-asceptic cartons) as evidenced by growing market shares, a market share of around 50%, and the fact that they were substantially larger than the next largest competitors.

(iii) The two above requirements were seen by the court as allowing for Tetra Pak to be seen as dominant on the market as a whole.

(iv) That Tetra Pak's competitors were present in both the dominant and non-dominant markets.

9.8.3 NSE has submitted that based on international case precedents and economics, the "special circumstances" under which leverage has been found to constitute an abuse are not present in this case for several reasons, namely:-:

(i) Firstly, and importantly, NSE is not leading in the non-dominated market. As such, one of the three necessary conditions of this judgment is not met. NSE is in fact a secondary competitor.

(ii) Secondly, there are no obvious links between the markets that clearly allow for a leverage of dominance, nor special circumstances. The leading position in the second market is held by MCX-SX, a company that is not even present in the associated markets. As such, the idea that dominance in associated markets can be leveraged becomes untenable in the instant case.

(iii)Thirdly, the associations between the two markets are more tenuous than in the Tetra Pak case: a)the customer overlap is not similar, and while there is some customer overlap, the top 20 brokers across both markets are largely dissimilar, b) the products do not have the same use and the same firms are not active over all markets, including the leading firm MCX-SX.

9.8.4 It has also been stated that the actual circumstances of the Tetra Pak case were quite different to this case, particularly as they were accused of a range of practices, including tying and enforcing numerous problematic contractual terms that were seen to impact competition in the market. In Tetra Pak II case, what makes these circumstances special is that the dominance on one market was an integral part of the abuse. Competitors on adjacent markets would not have been excluded but for the fact that customers preferences were affected as they needed the product sold on the dominated market (because the supplier was dominant). This allowed the dominant firm to exert influence over customer decisions. Without dominance on one market, customers would not have been swayed to the same extent, would have had greater choice, and thus exclusion of competitors would have not occurred. In addition, the foreclosing effects of their behavior (evident from market shares and their leading position) became one of the special circumstances used to justify a finding of abuse.

9.8.5 It has been further submitted that this form of leverage does not apply to the NSE case. While the NSE markets under consideration could be termed adjacent, NSE's alleged dominance on them has not provided them with an advantage that they can leverage or have managed to leverage in the manner contemplated by Section 4(2) (e). This is clear from the following :

a) Dominance does not provide the NSE with the ability to impact competitors in the CD market by affecting the availability, price and terms of their inputs.

b) Secondly, dominance does not provide the NSE with the ability to impact competitors through impact on customer behavour on the CD market. This is because they have not and do not intend to tie, bundle, or create loyalty rebates or discounting that forces customers that are currently dependant on the products in their dominant markets to purchase their CD products;

c) Thirdly, as discussed above, there are several differences with the Tetra Pak ll case (including the key fact that NSE is not leading in the CD Segment), the special circumstances in the Tetra Pak 11 case do not apply in this instance;

d) Finally, in any case, there has been no foreclosure in this case as would be required by any effects-based approach to competition law. Instead, despite any purported dominance in adjacent markets, the NSE has not managed to sustain a leading position, and new entrants have been able to rapidly grow and pick up market share. Furthermore, this has not had an adverse effect on consumers, but has broadened market choice and lowered prices.

Submission by MCX-SX

9.8.6 The Informant MCX-SX has objected to the NSE's submission that it has gained no special advantage by virtue of having additional resources in the equities, F&O, CM or WDM Segments. Further, entry of the Informant and the USE is in no way relevant to existence or non-existence of special advantage enjoyed by the NSE. NSE was able to sustain its losses in the CD Segment only by virtue of its existence and operation in the other segments.

9.8.6.1 MCX-SX has further argued that NSE's contention that its AVC for the CD Segment was zero as it had excess capacity from other segments, which it had deployed for the CD Segment operations without incurring any further variable costs, itself shows the phenomenal economies of scale enjoyed by NSE, which it has abused for predatory exclusion of the Informant and USE. Moreover, despite both the firms offering identical services, the costs incurred by the NSE in the CD Segment are significantly lower than that of the Informant due to NSE's overwhelming operations in other segments and economies of scope enjoyed by NSE. The LECG Report also confirms that "...higher cost reflect the fact that unlike NSE, MCX-SX is a single product firm. MCX-SX therefore suffers greater losses from the zero-pricing constraint that NSE".

9.8.6.2 MCX-SX has further submitted that the pertinent question with respect to the advantages possessed by the NSE is – would the NSE be able to cover its cost had it operated only in the CD Segment with complete waivers for a prolonged period? Had the NSE been a single product firm (i.e., CD Segment only), it would have suffered losses similar to that of the Informant and the USE. NSE meets all expenses of the CD Segment out of profits made in the other stock exchange segments of NSE as a) NSE holds 100% share of F&O Segment and 75% share of Equity Segment and makes phenomenal profits from there; b) NSE has no other line of business other than stock exchange services, which provides significant revenue of a comparable magnitude; c) NSE refuses to maintain segmental accounts and stoutly refuses to part with its segmental cost details. Indeed, there is negative pricing as the CD Segment services are bundled with free distribution of NOW software acquired from Omnesys.

9.8.6.3 MCX-SX have argued that for more than 30 months, NSE has been using the revenues from F&O and CD segments to subsidize the activities of CDS segment. This also establishes the causal link between the NSE's dominance in other segments and the abusive strategies in the CD Segment. It is submitted that the financial strength of the NSE is such that it could continue with the CD Segment waivers indefinitely. On the other hand, the Informant has recorded a cumulative loss of around INR 140 Crore since its inception and commencing of services in the CD Segment. This implies that the NSE has been using its overwhelming dominance in F&O and Equity segments to enter and to protect/defend its position in the CD Segment in an anticompetitive manner.

9.8.6.4 It has been further stated that the position of USE, is also similar to that of the Informant, wherein the net worth of the USE was only INR 111 Crores as on 'March 31, 2011. The minimum net worth required for operating the CD Segment is INR 100 Crore as per the SEBI Guidelines. If the minimum net worth of the USE goes below INR 100 Crore, then it would be forced to exit the market. It is submitted that while the Informant has been a loss making company on account of the fee waivers, the NSE's waivers are without any financial hindrance to the NSE. This has been possible only by virtue of the NSE's exclusive/near monopoly operations in the F&O, CM and Debt Segments. Thus, it is futile for the NSE to argue that it does not enjoy any special advantage by virtue of additional resources in the F&O, CM or WDM Segments. In fact, the operations and monopoly profits of the NSE in other segments are the economic power and strength of the NSE giving it commercial advantages over the Informant and the USE.

Findings of DG's Investigation Report

9.8.7 The DG had defined the relevant market as the entire stock exchange market. As such, the DG's report has not dealt with the question of applicability of Section 4 (2) (e) and related issues very meaningfully. Whatever points have been made by the DG are suitably covered in our consideration of this issue in this order.

Cross Subsidization

9.8.8 NSE has submitted that DG report has characterized cross subsidization as amounting to an abusive act in itself which is wrong in law. Cross subsidy is not an abuse in itself. The European Commission decision in Deutsch Post was that abuse consisted of predatory pricing, not of cross subsidy. In the Tetra Pak II, the Commission decision, upheld by the courts, found that Tetra Pak had committed a number of abuses, but it did not find that cross subsidy in itself was an abuse.

9.8.9 Regarding issue of cross subsidization, MCX-SX has submitted that the DG has not concluded that cross-subsidization is an abuse in itself. The actual issue dealt by the DG is the NSE's strategy of subsidizing exclusionary "below cost pricing" in sectors open to competition. In this context, the DG had referred to the decisions adopted by the European Courts in Tetra Park II and Deutsche Post AG (Case No. COMP/35.141), wherein the undertakings were found dominant in the non-competitive segment and guilty of predatory pricing in the competitive segment.

9.8.10 As per NSE, Prof. Whish in his opinion(submitted by NSE to the Commission) states that cross subsidization should not be treated as an abuse itself. MCX-SX has submitted that while the Informant generally could agree with Prof. Whish that cross-subsidy should not be treated as an abuse in itself, the present case as demonstrated above is not limited to mere cross-subsidy but cross-subsidy, of an anticompetitive and predatory pricing strategy only in competitive segments.

9.9 *Determination*

9.9.1 Section 4(e) of the Act finds an abuse if a company "uses" its dominant position to enter or protect another market. As submitted by NSE, the use of the term "uses" suggests that some lever is being utilized to allow dominance in one market to affect another. In order for NSE to be leveraging dominance in this instance, it would be necessary to show that NSE's dominance in the market for equities / E&O / NDM Segments provides NSE with some lever or special circumstance which allows them to affect outcomes on the CD segment.

9.9.2 We agree with the view taken in Tetra PAK II case that application of Section 4 (2) (e) can only be justified by special circumstances. In the instant case, NSE is not leading on the non-dominated market i.e. the CD segment. The products in both markets do not have the similar use and the same firms are not active over all markets, including the leading firm MCX-SX.

9.9.3 The statement of MCX-SX that NSE has excess capacity from other segments which it has employed for the CD segment operations without incurring any further variable costs, which shows economies of scale enjoyed by NSE, only means that NSE may be enjoying certain competitive advantages in terms of its costs. The same holds true for MCX-SX statement that the cost incurred by NSE in the CD segment are significantly lower than that of informant due to NSE's overwhelming operations in other segments, and NSE has inherent advantages as a multi-product company. Such competitive advantages enjoyed by the enterprises are at the heart of competition process, which provide the incentive to firms to compete more efficiently and ultimately benefit consumers. There is no way in which the competitive advantages of NSE indicated in the statements of MCX-SX can be construed as leveraging dominance in violation of the competition principles, unless there are additional / special factors which have not been established in this case.

9.9.4 Dominance in non–CD segments has not provided NSE with the ability to impact competitors through impacting customer behaviour on the CD market. This is because it has not tied, bundled, or created loyalty rebates or discounting that forces customers currently dependant on the products in its dominated dominant markets to purchase its CD products. Finally, in any case, there has been no foreclosure in this case. Instead, despite the purported dominance in related markets, the NSE has not managed to sustain a leading position in the CD Segment, and new entrants have been able to rapidly grow and pick up market share. These facts seem to endorse view that in a network industry benefits may arise from innovations by competing firms in products offered and delivery mechanisms that capture network externalities. Furthermore, this did not have an adverse effect on consumers, but has rather broadened market choice.

9.9.5 As regards cross subsidization of CD segment through profits of other segments , cross subsidization is not abuse in itself as admitted by MCX-SX. In fact, it is the cross-subsidization of an anticompetitive and predatory pricing strategy only in competitive segments, which amounts to abuse. Cross subsidisation itself has no connection to leveraging by dominance in one relevant market, as it is basically a fiscal or financial transfer from any source.

9.9.6 This brings us to the core issue in this case, namely whether the zero price set by NSE can be said to be predatory. This issue has been examined at length earlier in this order. We had reached the clear conclusion that the zero price set by NSE does not directly or indirectly impose unfair / predatory price. The question of leveraging dominance in other segments through predatory pricing does not, therefore, arise and, inter alia, the question of cross subsidization of predatory conduct also does not arise in the instant case. All the factors leading to the conclusion that zero pricing by NSE is not predatory have already been discussed at length, as also the fact that during the period in which NSE is alleged to have been guilty of anti-competitive predatory pricing it has come down from being the only service provider in the market to being in the second position (from 100% market share in beginning October, 2008 to 33.17% in October, 2010 by which time two other competitors had entered the market.

9.9.7 Sub-Issue (III) (ii)- Conclusion:- In view of the above analysis relating to sub issue (III) (ii) we conclude that NSE has not set a zero price in CD segment with predatory intent using its dominance in the relevant markets of equity/ F&O/WMD segments to protect the 'other relevant market' of CD segment in violation of Section 4 (2) (e) of the Act.

9.10 Issue (III) Conclusion:- In view of our conclusions on sub issues (III) (i) & III (ii) we conclude that NSE is dominant in one relevant market (equity/F&O/WMD segments, each independently), but has not abused this

dominance to protect the other relevant market (CD segment) in terms of Section 4(2) (e) of the Act.

10. Issue-(IV) : Whether in this case there has been any other violation of the provisions of the Act?

10.1 The informant has alleged that NSE acquired 26% stake in Omnesys, (a technology vendor providing software for financial/securities market) through DotEx a 100% subsidiary of NSE soon after the news of FTIL group floating MCX-SX became public. DotEx/Omnesys created a new product known as "NOW" intended to substitute for software called "ODIN" developed by FTIL and offered it to all NSE members free of cost for 3 years and placed ODIN on watch list across all its segments. It is stated that NSE simultaneously refused to share its CD segment Application Programme Interface Code (APIC) with FTIL thus disabling the users of ODIN (who include about 85% of NSE's own members) from connecting to the market watch of NSE's CD segment trade through their preferred mode.

10.2 MCX-SX has further stated that the product thus thrust upon the consumers desirous of the NSE CD segment was the product "NOW" developed by DotEx / Omnesys, in place of ODIN. NSE is using "NOW" on a separate computer terminal for accessing its CD segment. Advantage of ODIN software was that a trader could view multiple markets using the same terminal and take appropriate calls. Shifting between different terminals (NOW and ODIN) severely hampers the traders trading ability. The expected response from a common trader will be to confine to one terminal, which connects to the dominant player only i.e. to use the "NOW" terminal (free of cost) and confine himself to the NSE CD segment, which has both a first mover advantage in CD segment as well as dominant player advantage in stock exchange business.

10.3 The above conduct has allegedly caused difficulties, as clients had been using ODIN for all other segments in the past. As a result, FTIL clients have been forced to establish a separate terminal for trading on CD segment of NSE using the newly developed NOW. Furthermore, it is stated that DotEx has denied APIC to ODIN and NSE has put FTIL on watch list, which amounts to exclusion of MCX-SX from the market.

10.4 MCX-SX has alleged that this conduct of NSE is in breach of Competition Act, 2002 but the informant has not sought any explicit relief in terms of software programme.

10.5 NSE has submitted that it had placed ODIN on watch list due to complaints of its members and their constituent clients. In support, NSE submitted 10 complaints against ODIN, the first such instance being dated 10.4.2006.

10.6 The DG's report has found that APIC is an essential facility to connect front end application of NOW with any other application such as ODIN, which constitutes the electronic trading platform of the stock exchanges. This has allegedly caused difficulties, as clients had been using ODIN for all other segments in the past. As a result, FTIL clients have been forced to establish a separate terminal for trading on CD segment of NSE using the newly developed NOW. Further, it found that while the essential facility of APIC is still available to ODIN for other segments, the same has not been given for the CD segment.

10.7 Upon examination of correspondence made available by NSE, the Informant and FTIL, the DG concluded that complaints against ODIN had been few and far between. On the whole, end users of ODIN appear to be generally satisfied, which is reflected in the fact that a vast majority of NSE members are still using ODIN for all other segments. ODIN is also being used by several other exchanges in the country. No evidence was found to justify the claim of NSE that ODIN was put on watch list due to performance issues. At the same time, investigation and statement of one of the Board of Directors of Omnesys revealed that even NOW suffered from problems. Approximately 200 different types of complaints were received in respect of the software during 1st to 14th July, 2010 alone.

10.8 Based on the facts gathered, the investigation report concluded that the actions of NSE are suspect from the point of view of harm to the competition as it results in exclusionary denial of integrated market watch facility.

10.9 Determination

10.9.1 In our opinion, an enterprise is free to choose any software for its business or other needs and no law can interfere with such choice, least to think about application of the Competition Act, 2002. It is not for the competition regulator to ascertain which is a better software out of two, and unless explicit competition issues are highlighted within terms of section 3 or 4 of the Competition Act, 2002, it remains beyond jurisdiction of competition regulator.

10.9.2 Since NSE is neither the vendor of the software nor it is shown on record that dominance of NOW vis-à-vis ODIN is worked out for establishing dominant position, it would not be correct to infer that NSE created barriers for users of ODIN software by not providing APIC to it. In a network industry, the network effect of APICs and their compatibility is not an issue since the focus should be on platforms and not on Operating Systems (OS). For a user, the availability of APIC is more important than compatability.

10.9.3 The requirements of exclusionary denial must be tested within the terms of legal framework. There is no assessment as to relevant market of so called/used software, and unless a relevant market and dominant position is found, a finding on exclusionary behaviour would not be correct in law. As far as software is concerned, neither the entire market nor the volume has been ascertained in such circumstances.

10.9.4 We find that evidence on record does not support the allegation of exclusionary conduct by NSE, and NSE cannot be held in breach of sections 4(2)(b)(i) and (ii); 4(2)(c) and 4(2)(d) of the Competition Act, 2002. There is also no evidence of any other violation of the provisions of the Act.

10.10 Issue (IV) Conclusion:- In view of the foregoing we conclude that there has been no other violation also of the provisions of the Act.

11. CONCLUSION

11.1 Based on the foregoing discussion, our conclusions on the key issues relating to alleged violation of Section 4 of the Act by NSE and others are as follows:-

Issue-(I): **What is the relevant market in the context of Section 2 (r), (s) and (t) read with Section 19 ((5)/ (6)/(7))of the Competition Act, 2002?**

Conclusion: The relevant market in the present case is currency derivatives (CD) segment of stock exchange services.

Issue –(II): **Whether NSE is dominant in the relevant market and whether it has directly or indirectly imposed unfair or discriminatory price (including predatory price) in sale of services, thereby violating Section 4 (2) (a) (ii) of the Act?**

Conclusion: NSE is not dominant in the relevant market and the zero price set by it for transactions does not directly or indirectly impose unfair / predatory price. As such, since NSE is neither dominant in the relevant market nor has it imposed an unfair or predatory price in sale of services, it has not violated Section 4(2)(a) (ii) of the Act.

Issue-(III): **Whether NSE is dominant in one relevant market and has abused this dominance to protect other relevant market in terms of Section 4 (2) (e) of the Act?**

Conclusion: NSE is dominant in one relevant market (equity/F&O/WMD segments, each independently), but has not abused this dominance to protect the other relevant market (CD segment) in terms of Section 4(2) (e) of the Act.

Issue-(IV): **Whether in this case there has been any other violation of the provisions of the Act?**

Conclusion: There has been no other violation also of the provisions of the Act.

11.2 Having dealt with the key issues for determining whether there was violation of Section 4 by NSE and others as per MCX-SX's allegations and DG's investigation report, we move to a more fundamental issue of difference with the majority view, since we feel that the approach in regard to analysis of some of the issues in the majority order does not seem to be in tune with the scheme of the Act.

11.3 In this context we would like to refer to the analysis relating to investigation of the allegation of zero / unfair pricing by NSE in paras 10.70 to 10.77 of the majority order, parts of which are extracted below:-

> "10.73 The term unfair mentioned in Section 4 (2) of the Act has to be examined either in the context of unfairness in relation to customer or in relation to a competitor.......It has to be seen whether, in this case, zero pricing by NSE can be perceived as unfair as far as MCX-SX is concerned.
>
> 10.74 As discussed above, NSE has a position of strength which has enabled it to resort to zero pricing since August, 2008. MCX-SX does not have such strength or deep pockets..............
>
> 10.75 MCX-SX which operates only in the CD segment, has no other source of income. This is a major constraint. In these circumstances, the zero price policy of NSE cannot be termed as anything but unfair. If this Commission were to treat it as fair, it would go against the grain of the Competition Act and betray the economic philosophy behind it. If even zero pricing by dominant player cannot be interpreted as unfair, while its competitor is slowly bleeding to death, then this Commission would never be able to prevent any form of unfair pricing including predatory pricing in future.
>
> 10.76 Had NSE and MCX-SX been on equal footing in terms of resources directly available, spectrum and scale of operation, nationwide presence, length of existence etc. perhaps perception of unfairness would not have been so blatant and impossible to ignore but in this case, the sense of the two being equal or even almost equal does not exist. **Therefore, this Commission concludes that the zero price policy of NSE in the relevant market is unfair**"

11.4 Thus the case has (at least partly) been considered as an "adversarial" case in which the relative strengths of NSE and MCX-SX have been compared. Para 10.73

mentions that "it has to be seen whether, in this case, zero pricing by NSE can be perceived as unfair as far as MCX-SX is concerned". The order repeatedly refers to 'its competitor" MCX-SX and, indeed, the above extracts give an impressions that if MCX-SX had some "other source of income" or "deep pockets" (the economic strengths of any sister companies or promoters have not been examined in the order) and had not been "slowly bleeding to death", the majority might well have arrived at some different conclusions. Be as it may, since state of the competition in the market is the major concern, and protecting competition a duty of the Commission, it is equally necessary in this case to consider the position of the third competitor, namely United State Exchange (USE) and its conduct.

11.5 The basic information regarding USE is indicated as below on its website,:-

"USE Overview

A United Endeavour From India's Most Trusted Institutions

United Stock Exchange (USE), India's newest stock exchange, marks the beginning of a new chapter in the development of Indian financial markets.

USE represents the commitment of ALL 21 Indian public sector banks, respected private banks and corporate houses to build an institution that is on its way to becoming an enduring symbol of India's modern financial markets.

Sophisticated financial products such as currency and interest rate derivatives are exciting introductions to Indian markets and hold immense opportunities for businesses and trading institutions alike. Consequently, USE's strong bank promoter base allows a build-up of a highly liquid marketplace for these product. It also provides the necessary expertise to reach out to Indian businesses and individuals educate them on the benefits of these markets and facilitate easy access to them.

USE also boasts of Bombay Stock Exchange, as a strategic partner. As Asia's oldest stock exchange, BSE lends decades of unparalleled expertise in exchange technology, clearing & settlement, regulatory structure and governance. Leveraging the collective experience of its founding partners, USE has developed a trustworthy and state of the art exchange platform that provides a truly world class trading experience.

In the years to come, USE aims to become India's most preferred stock exchange, providing a range of sophisticated financial instruments for diverse market participants to trade on and manage their risks efficiently."

11.6 It is noted that USE has been promoted by institutions who have state-of-the art knowledge and huge experience of the functioning of the financial markets. As such, important conclusions can be drawn from the conduct of USE itself. In this context the following points are noteworthy:-

a) The USE has been launched at a time when zero pricing by both NSE and MCX-SX was continuing for almost two years and it was clear that USE would also have to charge zero pricing, yet USE entered the market. Evidently it expected to do well in this market, and had a robust business plan for this purpose
b) MCX-SX had already approached CCI against NSE alleging predatory pricing and leveraging of dominance to drive MCX-SX out of market. Yet, USE did not join MCX-SX in this matter at that time, and later also.
c) The entire case of MCX-SX rests on the premise that due to zero pricing, MCX-SX is bleeding and will soon be driven out of market, when its net worth will fall below Rs 100 crores, being the minimum required to operate in CD segment as per SEBI regulations. MCX-SX says due to losses new equity will not come. However, USE, in spite of being placed in circumstances similar to MCX-SX has been getting new equity.

11.7 The fact that the very important factor of USE's conduct has not been considered in the majority order, and no cognizance is taken of the fact that, notwithstanding this case being under consideration of the Commission, and USE being aware of the issues under consideration, at no stage did USE come forward to claim any abuse of dominance by NSE or claim any relief. On the contrary, media reports brought on record by parties indicate that the CEO and MD of USE expressed confidence in their ability to be a strong, active competitor with the intention to start charging transaction fees in due course. However, media reports are not important; what is important is the undisputed fact that MCX-SX entered the relevant market a few weeks after NSE when price was already zero, and that USE chose to enter when the zero price had been operating for more than two years (a fact which the promoters would have obviously fully factored in).

11.8 As pointed out, the majority order seems to have followed an adversarial approach. In our view, however, the scheme of the Act does not follow an adversarial approach and, instead, envisages elimination of practices having adverse effect on competition, promoting and sustaining competition, protecting the interests of consumers and ensuring freedom of trade carried on by other participants, in markets in India as the purpose and duty of the Commission, as evident from perusal of the Preamble and Section 18 of the Act.

11.9 It is for this reason that the Act provides for filing of 'information', and not 'complaint' for alleged violation of Sections 3 & 4 of the Act. Thereafter, it is the responsibility of the Commission to take all further action as deemed appropriate. The fact that the word 'complaint' in the original Competition Act, 2002 was substituted with the word 'information' in Competition (Amendment) Act, 2007 amendment underlines this important aspect of competition law in India. Once an information is filed, all parties and stakeholders assist the Commission in discharge of its duties. At the same time, the principles of natural justice are followed, and those alleged to be violating the provisions of the Act are given full opportunity to present their case before the Director General during investigation, inspect all relevant records (and take copies thereof) and make submissions before the Commission in writing and / or orally in all cases of alleged violation of Section 3 or 4 of the Act.

11.10 This interpretation of the scheme of the Act finds further support from the fact that in case CCI finds someone to be in violation of these provisions, and passes orders under Section 27, anyone who claims to have suffered loss / injury on account of such anti-competitive conduct, and wants compensation for the same, has to approach not the Commission but Competition Appellate Tribunal under Section 53N of the Act, partly extracted below:-

> "..............any enterprise or any person may make an application to the Appellate Tribunal to adjudicate on claim for compensation that may arise from the findings of the Commission......................and to pass an order for the

recovery of compensation from any enterprise for any loss or damage shown to have been suffered............................."

11.11 The proceedings before CCI are, therefore, not meant to be adversarial with a view to give relief to the informant, but are meant to inquire into the competition related issues in the market, and whether the facts revealed in the information and during further inquiry indicate anti-competitive conduct in the considered opinion of the Commission. It is a principle well established in international competition jurisprudence that the purpose of competition regulation is to protect the competitive process and competition, and not the competitors . In this process if anti-competitive practices are discovered, requisite remedial measures are ordered / taken by the competition regulator, which are expected to suitably correct the market (giving automatic consequent relief to all those being harmed by such anti-competitive processes, including the informant if applicable), and also penalize the violators. A plain reading of Section 27 of the Act shows that powers under this Section basically relate to penalising and issuing directions to, the party(s) violating the provisions of the Act, with no powers to give direct relief to individual parties who may have suffered on account of the anti-competitive conduct. It is only under Section 33 that in certain circumstances the Commission may give a temporary respite to individuals through interim restrain orders, but even there the final order must bring out the market malady and suggest / enforce corrective remedies to set the market right.

11.12 It is useful to recall that the case started with an 'information' being filed by MCX-SX, inter alia, alleging that zero pricing of transaction fees by NSE in the Currency Derivatives (CD) segment, and some other actions of NSE mentioned therein, have led to huge losses for MCX-SX and have created a situation in which continuing losses would, inter alia, not only eliminate MCX-SX but also other existing and potential competitors, thereby violating Section 4 of the Competition Act, 2002. In keeping with the scheme and provisions of the Act, the Commission is required to consider the "information" with reference, inter alia, to eliminating practices having adverse effect on competition, sustaining competition and protecting the interests of consumers. These are the major tests which need to be applied to the facts of this case while coming to final findings. This is in line with the internationally accepted competition principle that the purpose of competition regulation is to protect the process of competition and not the competitors, and to serve the interests of the consumers. In our view the 'information' and all the facts subsequently brought on record by the DG in his report and by the parties need to be, inter alia, subjected to the following two major tests:-

(i) Whether there is an operating competitive market in place?

(ii) Whether the interests of consumers are protected or call for regulatory intervention?

11.13 We now turn to subjecting the facts of the case to the above tests. The first test has to be applied with reference to the allegation against NSE of using its dominance for imposing unfair / predatory prices, in the backdrop of the empirical facts that in the two years from October, 2008 to October, 2010, during which period also transaction fee in CD segment was zero, NSE's market share came down from 100% to 33.17%. We do not know of any case, in any country of drastic reduction in market share of a firm over a relatively short period, in which the firm had been found guilty of predatory pricing and abuse of dominance / leveraging dominance. However, our finding must stand on it's own legs while applying the Indian law to the facts of this case. Recapitulating the facts briefly, the CD segment (the relevant market) was established by NSE in August, 2008. At the time of establishment itself, NSE decided to waive the transaction fees and some other charges prevalent in other segments. MCX-SX entered the CD segment in October, 2008 fully knowing this position. They also decided to commence operations with the waivers already being given by NSE. It is natural and logical to assume that the business model adopted by MCX-SX took these waivers into account. No material to the contrary has been furnished by MCX-SX, despite being clearly asked to furnish details of their business model.

11.14 NSE and MCX-SX continued to operate and compete in the CD segment as the only two service providers till the entry of United Stock Exchange (USE) in September, 2010. As per data available, by August, 2010 the share of NSE declined from 100% to 39.53%, while that of MCX-SX increased from 0% to 60.47%. After the entry of USE, there was some further redistribution of the market share amongst the three competitors, and the data on record indicates the respective market share of NSE, MCX-SX and USE as 33.17%, 38.82% & 28.01% respectively in October, 2008. Thus, starting from a market share of 100% in beginning October, 2008 the share of NSE had declined to 33.17% by October, 2010 with MCX-SX enjoying the highest market share.

11.15 During this period, all the three competitors continued to provide the services at zero price and their respective market shares varied from month to month, as indicated in the table at para 8.2.4. Since the pricing was same, the market share evidently depended on other factors, which were decisive enough for MCX-SX to take away NSE's customers and acquire more than 50% share in the market, before the entry of USE. USE also demonstrated confidence in its ability to take away market from the two established competitors.

11.16 It is evident that the CD segment market has been competitive from almost the beginning, and zero price has in no way deterred entry and continued operations. The possible reasons for this have been deliberated upon in earlier discussion on network industry and its characteristics. The free services provided by "google" as a search engine, and by gmail, yahoo etc. for e-mails, are well known examples of network industry providing service globally to the primary users at zero price. It's a moot question whether, as a general proposition, you can consider a price to be predatory when multiple competitors are entering and competing actively at the same price, in an evidently vibrant and growing market. In such a market, if the common price charged by all the competitors is to be considered unfair or predatory, what is the basis of arguing that any particular competitor is predating or charging unfair price, while others are the victims. Nor can it be argued that it is the responsibility of one of the competitors to start charging a 'fair' price,, and then only the others would be in a position to charge accordingly. In a normally competitive market, if a particular price is being maintained by all the competitors, there is no logic in competition regulation to find one of the competitors as violating the competition law, on the ground that this price is unfair or predatory. Even in this case, it could as well be argued that NSE had meant to keep the price at zero for a limited period, but the fact of zero pricing by later entrants left it with no option but to continue with this price. Further, adopting MCX-SX's logic, the last entrant USE could argue that both NSE and MCX-SX are indulging in predatory pricing. On the other hand, it could also be argued that if the significant shifting of market share to the new entrants is because of their superior product, why did the new entrants not start charging for the service, even if the first one is keeping the price at zero? It has not been argued at any stage that MCX-SX or USE had tried to levy a charge, which had resulted in shifting of their customers to NSE. Considering the earlier discussion on the nature of the market, it is clear that the pricing of transaction fees etc. is not necessarily a determining feature in the customers choice of the service provider, zero pricing is not unfair or predatory, and the factors for competition may be different in this case from normal / traditional markets, in which pricing could be a major determining factor.

11.17 It is quite clear from this brief account of empirical observations about actual operation of the CD segment in India that, as far as the first major test is concerned, there is a freely operating competitive market in place, and no intervention by the Commission is called for.

11.18 Turning to the second test mentioned above, namely protecting the interests of consumers, it is evident that the customers have been and are getting good quality service at zero price, with the choice of shifting from one service provider to either of the other two. The transparency of the system, which is IT based, also enables the consumer (customer) to make informed choices. Any intervention by the Commission, and directing NSE to levy charges for services being provided free at the moment, would evidently be based on the hypothesis, not supported by any robust theory of harm in this case, , that over a longer term non-intervention would lead to charging of unjustifiably high or super-competitive prices by NSE However, as has been established earlier, the pricing in this case cannot be treated as unfair / predatory, and there is no evidence to justify the apprehension that any of the service providers could charge super-competitive normal prices after killing competition. The Commission's intervention, in effect, would mean that NSE would have to start charging transaction fees (and charges will also be levied for some of the services mentioned earlier). MCX-SX would naturally also start charging, as would USE. Considering the fact that all the three competitors in the market have so far decided to keep the same price, it is logical to assume that after such an intervention by the Commission, they will all shift to the price fixed by NSE. We would not like to comment on what this price would be as this point will be decided by the majority after receiving the reply to the show-cause notice, order but hypothetically in this a situation the Commission can either: (i) direct NSE to fix a particular price – or at least indicate the floor price- in which case the Commission might be seen to be substituting its judgment as a tariff setting body, instead of allowing the market to do so; or (ii) ask NSE to start charging without indicating any particular level, in which case MCX-SX could still claim that the new price is also predatory since no benchmark would be available. However, regardless of what price is fixed, the consumers will now be required to pay for a service which NSE, MCX-SX and USE are currently providing free. This would be against the interests of consumers.

11.19 It is, therefore, evident from the foregoing that the second test also indicates that any intervention by the Commission would, in fact, cause consumer harm.

11.20 We have considered every aspect of DG's report, arguments, rebuttals and submissions of both the parties and applied our minds to facts, circumstances and nuances of the arguments. Having done so, and in the light of the foregoing discussion, we are of the opinion that no violation of provisions of Section 4 of the Competition Act, 2002 has been established against National Stock Exchange (NSE) or any other party.

11.21 Secretary is directed to inform the parties accordingly.

Sd/-
Member (GG)

Sd/-
Member (AG)