[March]

Competition Act Today

[2012]

[India in year 2012 has enacted its Competition Act for nearly a decade, yet its implementation has been extremely recent. This paper aim to provide a brief but comprehensive understanding of what has yielded the competition policy adapted to the Indian economic scenario. Details of the provisions will be discussed as well as real cases will be further analyzed.]

[An Indian Overview]

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List of abbreviations

AVC – Average variable costs
ATC – Average total costs
DG – Director General, under section 16 of the Act
ECJ – The Court of Justice of the European Union
FEMA – Foreign Exchange Management Act, 1999
FIIs – Foreign Institutional Investors
FTC – Federal Trade Commission
F&O – Futures and Options
INR – Indian rupees
MCX-SX – MCX Stock Exchange Ltd.
NRIs – Non-Resident Indians
NSE – National Stock Exchange Ltd.
RBI – Reserve Bank of India
SCRA – Securities Contract (Regulation) Act, 1956
SEBI – Securities and Exchange Board of India
SME – Small Medium Enterprises
The Act – The Competition (Amendment) Act, 2007 of India

1. OBJECTIVES OF COMPETITION LAW

Everyone should agree that competition promotes efficiency including dynamic efficiency, increases consumer welfare, and contributes to the progress of the economy as a whole. On the other hand, firms tend to restrict competition through means such as collusive agreements to fix prices and outputs, and exploitative and exclusionary measures, and seek mergers or any form of combinations to gain or expand market power. Competition law is the legal device to prohibit such market failures which undermine the benefits of free and fair competition in an economy. There is a broad agreement that the principal objective is to make the market economy work better by stopping private interests from obstructing markets.

Competition law may subserve some supplementary objectives. One of which is the developing stage of a country. The Indian Competition Act, 2002, in its preamble, specifically provides for the Act to keep in view the economic development of the country[1]. Another objective is freedom of trade, which has been viewed as the economic counterpart of political democracy. This has the aim of preserving pluralism and distribution of market power; both these objectives reflect the once prevailing fear of economic concentration in the hand of a few private market agents. In recent years, the objective has expanded also the adverse effects of Government intervention in the market place.

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[1] The preamble to the Competition Act, 2002 No. 12 of 2003 states ‘An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto’.

2. COMPETITION LAW AND ECONOMICS

Economics provides a theoretical basis for the competition law, providing also the tools with which to analyse markets and competition within them. It is an economic law about the economic behaviour of agents.

Before the collapse of Soviet Union or China's effort to have its market economy recognized within the WTO framework, the debate about the relative merits of a market based economy versus a state controlled and planned economy that raged for decades. Now it seems to have been broadly settled in favour of the former. Across the globe countries are reforming their economies, undertaking privatization and deregulation. As they do so, the forces of competition come increasingly into the centre stage of the economy; competition has never been at the heart of the market based economy as before.

A perfect competitive market should be with a large number of players, each one having only a small share of the market. Further, the products are homogeneous, there are no entry or exit barriers or information asymmetries, and each seller or buyer should have access to the market. Such market, no one is price-marker, and the price of a product equals its marginal cost; each supplier makes almost zero profit.

Allocative efficiency and product efficiency are achieved by a perfectly competitive market. The combined effect of the efficiencies is that society's welfare overall is maximized. Consumer welfare is also maximized in such a situation. Allocative efficiency takes place when the goods are produced in the quantity desired by the society; and it is not possible to make anyone better off without making someone else worse off. Product efficiency is possible when goods are produced at the lowest marginal cost or the lowest society wealth is expended in the production. Competition also enhances dynamic efficiency, spurring innovation, development of new products, and technological growth.

The perfect antithesis of the perfect competition is monopoly. The monopolist has many buyers while it is the only provider of a service or good in a market; therefore it is in position to increase prices and reduce the volume of supply. It generates allocative inefficiency also referred to as dead-weight loss. Indeed from the economic theory point of concern, the biggest problem of a monopoly is its inefficiency. Inefficiency may caused by higher costs or waste of recourses; maintaining excess capacity or indulging in excessive product differentiation. This situation is also referred to as X-inefficiency (Liebenstein 1966).

The competition theory, however, does not describe the real world; neither perfect competition nor a perfect monopoly exists. Nevertheless, perfect competition model is still a useful benchmark to the real market imperfections[2]. Another weakness in competition theory is that not always competition may yield the best result in terms of efficiencies. Economies of scale support the existence of only one firm or the 'network effect' (the utility of a product or service increases with the increase number of consumers or users) is required in certain industries.

In the US, two important economic thought are born influencing greatly competition law and policy. The Harvard structural school dominated economic thinking about competition policy from the 1940s through the 1970s and had a very considerable influence on antitrust policy. In the 1950s, the Mason/Bain paradigm for industrial competition constituted a formal attempt to relate an industry's structure to its 'performance', with performance referring to degree of competitiveness. Concentrated markets are regarded as more eager to economic power and its exercise. Antitrust law

[2] Short of perfect competition other more realistic concepts have evolved over the years. Clark, J. M. (1940). "Toward a Concept of Workable Competitition." American Economic Review **3**(2): 241-256.

has evolved the concept of 'workable competition'; market situation in a high degree of monopolistic power exists but there is sufficient competition between near-monopolies to protect the buyers from monopolistic abuse. Baumol, W. J., J. C. Panzar, et al. (1982). "Contestable Markets and the Theory of Industry Structure." The American Economic Review, **72**(1): 1-15.

have firstly advanced the theory of 'contestable market'. It holds that there exist markets served by a small number of firms, which are nevertheless characterized by competitive equilibria (and therefore desirable welfare outcomes) because of the existence of potential short-term entrants. "The EC competition law uses the expression 'effective competition' though what is meant by the term has not been spelt out" is regarded as an important tool to protect the market. The school stresses the importance of the interventionist role in competition law and places less confidence in the markets. The school saw concentration as the evil. Competition policy should be concerned with structural remedies rather than behavioral remedies.

In the 1970s and 1980s, the ascendancy of the Chicago school of economics produced a revolution in antitrust thinking. The Chicago school of thought focuses on the pursuit of allocative efficiency and productive efficiency as the sole goal of antitrust. According to this view, most markets are competitive, and entry barrier are more theoretical than real; a monopoly position is temporary and firms are rational in pursuing their profit maximization. The Chicago school believes that competition policy should be less interventionist than demanded by the structure-conduct-performance paradigm and does not worry about concentration. The school thinks government intervention is usually inefficient and clumsy. The nonintervention is the foundation, unless the plaintiff can show price rising outcomes from specific conduct or transactions[3].

The European tradition of competition law comes from the German ordo-liberal Freiburg school. It believes the competition law as part of an ‘economic constitution’ necessary for economic welfare and political freedom is archived by the economic freedom. It emphasizes the necessity to disperse private economic power so as not to collude with the political power. The ordo-liberal school has deeply influenced the early decisions in European competition law (the freedom protection of competitors to

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[3] The Chicago school came under attack in the wake of the financial crisis of 2007–2010. The school has been blamed for growing income inequality in the United States. Economist Brad DeLong of the University of California, Berkeley says the Chicago School has experienced an "intellectual collapse", while Nobel laureate Paul Krugman of Princeton University, says that recent comments from Chicago school economists are "the product of a Dark Age of macroeconomics in which hard-won knowledge has been forgotten." Critics have also charged that the school's belief in human rationality contributed to bubbles such as the recent financial crisis, and that the school's trust in markets to self-regulate has offered no aid to the economy in the wake of the crisis. Wikipedia. "http://en.wikipedia.org/wiki/Chicago_school_of_economics." Retrieved 5th September, 2011.

compete on merits).

Competition law employs various economic tools in analyzing different economic scenarios. For example in determining the relevant product market the SSNIP (Small but Significant and Non-transitory Increase in Price) test[4] is used to determine the demand side or supply side substitutability of the product. Competition authorities usually carry out a concentration analysis using the concentration ratio or the Herfindahl-Hirschman Index (HHI)[5].

Competition policy and competition law are both required to maintain competition in the economy; they are mutually complementary. The former try to promote a market based economy by way of government measures that enhance competition, give primacy to market forces, facilitate entry and exit, reduce administrative controls, and minimize regulation. The latter try to remove impediments that may be placed by market players in the functioning of the economy.

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4 For further discussion see footnote page 19

5 For further discussion see p.

3. INTRODUCTION TO THE INDIAN COMPETITION ACT, 2002

The Competition Act, 2002 (hereinafter referred to as the Act), is India's new competition passed in Parliament in December 2002. It has received Dr. Abdul Kalam's assent, the 11th President of India, on 13th January 2003, thereby becoming the law of the land from that date.

A new competition order was created after the financial crisis in June 1991 which has endured for about a year. India has responded opening up its economy when Narasimha Rao was at the government who recruited the current Prime Minister (then Finance Minister) Dr. Manmohan Singh to play a critical role in regaining control of the economy. The Sikh Finance Minister ended the Licence Raj system swiftly replacing piecemeal reform with a systematic approach to improve competition efficiency and remove barriers to economic growth.

Before the era of market oriented economy, from the national independence in 1947 through the 1980s, India pursed a planned economic model for development where a Planning Commission is still in charge for the Five-Year Plan. The first Prime Minister, Jawaharlal Nehru as one of the founder of the Non-Aligned Movement, believed toward a socialist path of economic development, in the aftermath of the British Rule as the legacy of capitalism.

A massive bureaucracy was needed to implement the planned economy, nicknamed the "Permit Raj". The Central Government instead of controlling the output of production like the Soviet model, created a system of complicated licensing processes that created significant delays, prohibitions, and as a consequence, barriers to entry. Besides the nationalized industries, also the private sector was highly (in lesser extent also nowadays) regulated. High tariffs and quotas on imported goods and materials were imposed, forcing domestic companies to buy more expensive, yet inferior quality, domestically-produce goods, further compromising their competitiveness.

The first competition law was born in a period of inefficiency, slow growth and technological stagnancy. The Monopolies & Restrictive Trade Practices Act (MRTP Act) was enacted in 1969. Section 66 of the Competition Act provides for repeal of the MRTP Act and for connected matters.

3.1 The Monopolies and Restrictive Trade Practices Act, 1969

The preamble to the MRTP Act was: *"An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolies and restrictive trade practices and for matters connected therewith or incidental thereto"*.

The Monopolies and Restrictive Trade Practices Act, 1969 was followed by the recommendations of the Monopolies Inquiry Committee (MIC) sought to provide structural remedies to curb monopolistic behavior since it presumed that size beyond a threshold would affect competition adversely. The MIC's Terms of Reference (TOR) was confined only to the private sector because the public one was presumed to exhibit acceptable behavior; it was expected to bring contestability into the markets. The MIC was against the idea to impose competitive constrains by dismantling of the license system or import liberalization.

More effective changes were considered in 1984, when a High-Powered Expert Committee (Sachar Committee) was set up. The Sachar Committee addressed the small number of references to the Monopolies and Restrictive Trade Practices Commission (MRTPC) under provisions dealing with monopolistic trade practices and recommended that for certain cases should be mandatory referred to the MRTPC to pass the final orders. But this was not accepted by the Government. The Sachar Committee was convinced that consumers had no protection against unfair practices like misleading and disparaging advertisement. The Committee suggested to introduce the concept of deemed illegality to a host of specific trade practices.

The Government constituted a High Level Committee on Competition Policy and Law (Raghavan Committee) in 1999[6] to examine the MRTP Act for shifting the focus of the law from curbing monopolies to promoting competition and to suggest a modern competition law in line with international developments to suit Indian conditions. The Raghavan Committee observed that the MRTP Act is not complete in its sweep and has outlived its utility in the changed business and trade scenario in the domestic as well as global markets.

The MRTP Act represents an era of aggressive government interventionist policy reflected unambiguously in controls, licensing, permits and promotion of public sector.

The dawn of liberalization in 1991, following a financial crisis, rendered some laws inconsistent with new economic policies. One of them was MRTP Act, which did apply to an undertaking either owned by the Government or by a Government-owned company until 1991. An effort at redefining this Act, through major amendments, worked for a while. The need for change was urgent and the resultant is the new law.

Before going into the findings and recommendation of the Raghavan Committee, a brief description of the MRTP Act, as it exited may be helpful.

Banking and insurance companies were excluded from the provisions of the MRTP Act as these are covered under specific provisions of laws dealing with them. The MRTPC was empowered to inquire into monopolistic as well as restrictive trade practices. Any trade practice authorized by any law or agreement with the Central Government, or to meet defense requirements or to ensure supply of essential goods and services from being termed monopoly trade practices (MTP). MTP had the following elements:

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[6] Order no. 1/9/99-CL-V of 25th October 1999.

- Practice of maintaining price at unreasonable high level by limiting or reducing or controlling production, supply, or distribution of goods or supply of services.
- Unreasonably preventing or lessening competition in production, supply, or distribution and limiting technical development.
- Unreasonable increase in cost of production or charges for providing services
- Unreasonable increase in prices or charges or profits and adoption of unfair methods or unfair or deceptive practices.

Restrictive trade practices (RTP) was defined as a trade practice that has or is likely to prevent, distort or restrict competition in any manner. The obstruction to flow of resources into production and manipulation of prices or delivery conditions so as to impose unjustified costs or conditions on consumers constitutes a particular mention of RTP.

The MRTPC's powers are rather restricted in terms of remedies. For instance, for the structural remedy of division of an enterprise it had only non-binding recommendatory powers yet the Central Government had the authority to order such division. Behavioral remedies against MTPs are no better. The MRTPC is left with only an advisory role and the remedies can be sanctioned only by the Government. Chapter V of the MRTP Act deals with RTPs and unfair trade practices (UTPs) interpreted by the Supreme Court of India as an inclusive list in view of the general definition of RTP in section 2 (o). Registration of agreements deemed to be RTP is compulsory[7].

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[7] Chapter V, section 33 of the MRTP act:

Registrable agreements relating to restrictive trade practices.

Every agreement failing within one or more of the following categories shall be deemed, for the Purposes of this Act, to be an agreement relating to restrictive trade practices and shall be subject to registration in accordance with the provisions of this Chapter namely:--

(a) any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

The Raghavan Committee's TOR is the following:

"A suitable legislative framework, in the light of international developments and the need to promote competition, relating to competition law, including law relating to mergers and demergers. Such a legislative framework could entail a new law or appropriate amendments to the MRTP Act, 1969".

The word 'competition' was barely used in the MRTP Act and efficiency finds place only at two places[8]. The general definition of a restrictive trade practice was seen as not specifically covering the numerous categories of contemporary anti-competitive agreements and abuses ; viz. abuse of dominance, cartels, collusion and price fixing, bid rigging, boycotts and refusal to deal, and predatory pricing. Lack of precise definitions has led to different judicial interpretations, sometimes contradictory,

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(b) any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(c) any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(d) any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers;

(e) any agreement to grant or allow concessions or benefits, including allowances, discount, rebates or credit in connection with, or by reason of, dealings; any agreement to sell goods on condition that the prices to be charged on re- sale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;

(g) any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal of the goods;

(h) any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods;

(i) any agreement for the exclusion from any trade association of any person carrying on or intending to carry on, in good faith the trade in relation to which the trade association is formed;

(j) any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;

> (i) any agreement restricting in any manner, the class or number of whole-sellers, producers or suppliers from whom any goods may be bought;
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> (ii) any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement whereby any party thereto agrees to abstain from bidding at any auction for the sale of goods;

(k) any agreement not hereinbefore referred to in this section which the Central Government may, by notification specify for the time being as being one relating to restrictive trade practice.

[8] Section 2 (o) and section 38 (1) (h).

becoming binding precedents for future amendment to the MRTP Act. The MRTP is constrained to fit anti-competitive into one or more of the provisions of the law in the absence of precise definitions. The MRTP Act was not adequate to deal with implementation of the WTO agreements nor have merger control provisions since 1991. Provisions dealing with UTPs overlap with similar provisions in the Consumer Protection Act, 1986. The Raghavan Committee emphatically stated that “the MRTP Act, in comparison with Competition Laws of many countries, is inadequate for fostering competition in the market and trade and for reducing if not eliminating, anti-competitive practices in the country’s domestic and international trade”. Based on the above analysis, pursuant to the recommendations of the Committee, the Competition Act was enacted to eliminate anti-competitive practices, to promote and sustain competition in the markets with the objective of protecting interest of consumers.

4. ANTI-COMPETITIVE AGREEMENTS

Worldwide competition law prohibits three kinds of economic activities, viz. anti-competitive agreements, abuse of dominance (or monopolization), and anti-competitive mergers. The Chapter II (sections 3-6) of the Act make provision for prohibition of certain agreements, abuse of dominant position and regulation of combinations.

In particular the section 3 prohibits agreements which are anti-competitive for the Indian economy. Any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of service, which causes or is likely to cause an appreciable adverse effect on competition within India shall be void (sub-section 2).

Anti-competitive agreements between enterprises that restrict competition fall into two categories: 'horizontal agreements' which are those between enterprises at the same stage of the supply chain e.g., same product manufactures; and 'vertical agreements' which are between enterprises at different stage of the supply chain e.g., from a distributor to a retailer. Normally competition authorities are much more concerned about horizontal agreements. Although not specifically written in words in this section, sub-section 3 deals with anti-competitive horizontal agreement while sub-section 4 with vertical agreements. It shall be presumed to have an appreciable adverse effect on competition any horizontal agreement which (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding[9]. The principle of "shall presume" has been explained by Indian courts[10] for over a century to convey that they lay down a counterargument presumption in respect of matters with reference to which they are used, yet not laying down a rule of conclusive proof. The Indian judicial lore does not consider the presumption in itself evidence, but it makes a prima facie case for the party in whose favour it exists. It indicates where the burden of proof lies. The presumption when is conclusive, the production of any other evidence is unnecessary. But when the presumption is rebuttable, it points out which party has the duty digging deeper on the evidence on the fact presumed.

A cartel is defined in section 2 (c) which is an association of the players in the value chain who limit, control or attempt to control their economic activities. A cartel is a horizontal agreement to fix prices, allocate customers or territories, restrict output or rig bids. Although differences exist among different national legislation, if there is one feature that unites them, it is that they all condemn 'hard-core' cartel agreements. There is the widespread consensus that the cartel is the most pernicious from of violation of competition law since it undoubtedly damages consumers welfare and causes loss to the economy, even if worldwide may differ in the ways in which such agreements may be prosecuted and punished.

Adam Smith was prescient. In 1776 writing The Wealth of Nations, he has famously remarked that:

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices".

The tendency of competitors to meet in cigar club rooms is just as strong today as it was in the Industrial Revolution era.

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[9] The agreements just cited entered into by way of joint venture shall not apply if these increase efficiency in respect of activities included in subsection 1 (production, supply, distribution, storage, acquisition or control of goods or provision of service).

[10] Sodhi Transport Co. v. State of Uttar Pradesh [AIR 1980 SC 1099] and R. S. Nayak v. A. R. Antulay [AIR 1986 SC 2045]

Clearly if any agreement causes or is likely to cause an appreciable adverse effect on competition in India, amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of the activities included in sub-section 1, including (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an agreement in contravention of sub-section 1.

The respondent to these anti-competitive agreements according to sub-section 1 and 3 are enterprise or association of enterprises or person or association of persons. According to the definition contained in section 2 (h), an enterprise could be a person or a department of the Government which does not include Government's activity relatable to sovereign functions or activities carried on by departments of the Central Government dealing with atomic energy, currency, defence and space. A person (section 2 (l)) includes (i) an individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956); (vii) any body corporate incorporated by or under the laws of a country outside India; (viii) a co-operative society registered under any law relating to cooperative societies; (ix) a local authority; (x) every artificial juridical person, not falling within any of the preceding sub-clauses. Sub-section 3 includes cartels engaged in identical or similar trade of goods or provision of services.

Sub-section 5 states the prima facie Intellectual Property Rights (IPRs) are not considered anti-competitive though they have the characteristic of monopoly. It states that nothing in the section 3 shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary, for protecting any of his rights which have been or may be conferred upon him under (a) the Copyright Act, 1957 (14 of 1957); (b) the Patents Act, 1970 (39 of 1970); (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999

(47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000); (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000). The restrictions must be reasonable and necessary to protect IPRs, as an incentive to creativity and economic growth. In support of the export effort of Indian domestic companies and thereby increase national export earning or because anti-competitive agreements harming overseas consumers are not concerns for Indian national authorities, sub-section 5 exempt the provision of section 3 for export operations. Thus, the exemption does not intend to cover the effect that an export related agreement might have in the domestic market.

4.1 Case study: Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Association of India & Ors.

The informant, Uniglobe Mob Travels Pvt. Ltd.[11], is an International Air Transport Association (IATA) accredited travel agent and member of Travel Agent Federation of India (TAFI) and Travel Agents' Association of India (TAAI). The opposition parties are TAFI, TAAI, IATA Agents Association of India (IAAI). It is important to be a member of TAFI, TAAI and IAAI in order to benefit:

The submission of passport forms in the passport office.

Acquirement of tourist license from Department of Tourism, necessary for getting airport passes from Department of Civil Aviation.

Registration at Embassies as well as to submit visa forms.

In July-August 2008 Singapore Airlines (SQ) including several international airlines issues a notice to the travel agents that they would stop payment of commission to travel agents on sale of their tickets. The travel agency can charge instead a service fee or a transaction fee on sale of tickets based on the kind and level of service it provides. Trade association either overtly or tacitly

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[11] The Commission's order in the present case is identical in *FCM Travel Solutions (India) Ltd., New Delhi v. Travel Agents Federation of India & Ors.* The informant is the largest corporate travel company in India and member of the opposite parties which are the same.

have been threatening its members, including the informant to boycott business and commercial dealings with Singapore Airlines and not to sell its air tickets to their clients. Suspension and expulsion of membership threats has used to reinforce the boycott; in fact the informant has been suspended from its membership because it did not participate in the boycott.

Trade associations has operated in a cartel-like manner and its “collective boycott” actions are indicative of a horizontal agreement which limits supply of Singapore Airlines tickets and hence has a harmful market effect in India. Thus, the Commission has concluded the above mentioned trade associations have contravened section 3 (3) (b) read with section 3 (1) of the Act[12].

In the Commission’s view the trade associations’ conduct is liable of twofold anti-competitive conduct. A trade association is responsible for breach of section 3 of the Act embodied in a decision take by that association, additionally the constituent enterprises of association may be held liable for contravention of section 3 arising from a concerted practice between them. The section 3 (3) is a presumptive section; once the existence of prohibited agreement, practice or decision is established, it may not be necessary to show an effect on competition, thereby the burden of proof is shifted to the opposite parties to show that impugned conduct does not causes appreciable adverse effect on competition. It has pointed out that after the effecting of

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[12] Section 3:

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

shall be presumed to have an appreciable adverse effect on competition.

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

"transaction fee", the price of Singapore Airlines tickets have been reduced significantly, thus benefiting its consumers.

The opposite parties[13] failed instead to proof the ultimate benefits for consumer by taking the "collective bargaining" campaign as they have defined. The opposite parties contended that Travel Agents Association are not covered under the definition of 'enterprise[14]', therefore the provisions of the Act do not apply to their activities. The Commission satisfactorily contested that the members of respective opposite parties are travel agents who provide travel agency services to the consumers. Therefore, the members fall squarely within definition of 'enterprise'. Section 3 (3) cover also the practice carried on or decision taken by any association of enterprises engaged in identical or similar trade of goods or provision of services. It cannot be deniable that TAFI, TAAI, and IAAI are association of enterprises which are engaged in providing identical or similar kind of travel agency services to the consumers.

The Commission examining the contention whether travel trade associations in India have the ability to control or limit the supply of air tickets is aware of any simplistic

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[13] The trade association has argued about the legality of "payment of commission" by airlines to the travel agents which lost force when the Ministry of Civil Aviation, Government of India has been made amply clear that if the airlines do not pay any commission to the travel agents it will not be a violation of Aircraft Rules, 1937.

[14] Section 2 (h): enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation for the purposes of this clause,—

(a) "activity" includes profession or occupation;

(b) "article" includes a new article and "service" includes a new service;

(c) "unit" or "division", in relation to an enterprise, includes—

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service.

analysis of sales data will not be fully able to capture the dynamics of the industry. With regard to the fact the total sale of SQ dropped by 29% in 2009 as against the previous year.

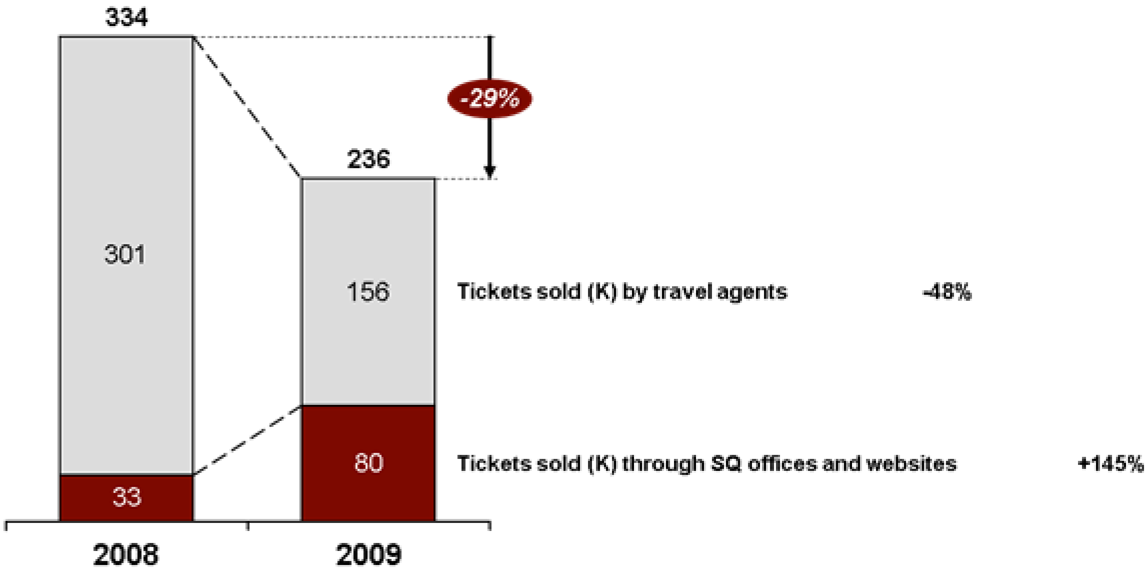

Figure 1: Singapore Airlines tickets sale

The impact of boycott has shifted the booking channels, although it has been estimated that almost 90% of airline tickets booking in India is done through travel agencies. The overwhelming dependence of consumers on travel agencies has special significance because a considerable proportion of air travellers reside in towns and villages that do not have airline offices. Access to internet is limited and electronic payment mechanism is not widely spread. The Commission has taken surely into account the preamble of Act to keep in view the economic development of the country to promote competition, to protect consumers' interest and to ensure freedom of trade.

5. ABUSE OF DOMINANT POSITION

Section 4 prohibits enterprise; in 2007 also the group was added in the Act amendment (explanation to section 5 in clause (b)), from abusing its dominant position. The term ‘dominant position’ has been defined within the section as ‘a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour’.

The relevant market has been self-defined in the Act in section 2 (r) ‘with the reference to the relevant product market or the relevant geographic market or with reference to both the markets’ which may be determined by the Commission. The relevant geographic market is defined in section 2 (s) as ‘a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas’. According to section 19 (6) the Commission shall determine the relevant geographic market having due regard to all or any of the following factors, namely: ‘(a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services’. Regulatory trade barriers are is still a feature between Indian states. The local government octroi on inter-state movement of goods leads to segmentation of the market. Local specification requirements may arise for legal or cultural difference being Indian a multiethnic and multi-religious country; language barrier in case of newspaper (each state in Indian can enact their official language). Sometimes national procurements policies give preference to local industries. The inadequate and fragmented infrastructure system could cause problem to the distribution facilities or after-sales service in remote areas, generating high transportation cost that could lead to market segmentation. Consumer preference may also play a big role in for a particular brand. Coca-Cola has ownership of the Indian brand Thumbs up; however, Thumbs Up is still more popular in India.

Similarly, the relevant product market is defined in section 2 (t) as 'a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use'. The Commission according to section 19 (7) shall determine the relevant product market according to (a) physical characteristics or end-use of goods; (b) price of goods or service; (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialized producers; (f) classification of industrial products. Some products even similar are not interchangeable for the same consumer. A banana is more suitable as infant product than an apple. The market for Jaguar (Tata Motors) is totally different from a Tata Nano which is a low end inexpensive car. In-house production of goods most of the time is not suitable for the general mass market and specialized producers may not be able to switch their current plant without divesting in assets.

Once the relevant market has been determined, the Commission's next task will be to inquire whether the enterprise enjoys a dominant position. The Act does not prohibit the mere possession of a dominant position that could have been achieved through superior economic performance, but only its abuse. Section 19 (4) provides that while inquiring whether an enterprise enjoys a dominant position or not under section 4, the Commission shall have due regard to all or any of the following factors, namely: (4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely: (a) market share of the enterprise; (b) size and resources of the enterprise; (c) size and importance of the competitors; (d) economic power of the enterprise including commercial advantages over competitors; (e) vertical integration of the enterprises or sale or service network of such enterprises; (f) dependence of consumers on the enterprise; (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; (i) countervailing buying power; (j) market structure and size of market; (k) social obligations and social costs; (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; (m) any other factor which the Commission may consider relevant for the inquiry. Discretion has been given to the Commission for the factors to be taken into account in the last point (m), for example, technical advancement of the enterprise, which has not been listed.

Unlike in some other international jurisdictions, there is little scope of any arbitrariness or discretion under the Act; it not only gives a formula definition of "relevant market" but also specifies factors which have to be considered while determining the market.

Section 4 (2) of the Act defines whether there has been an abuse of dominant position within the meaning of section 4 (1). It lists the anti-competitive practices of imposing unfair or discriminatory trading conditions or prices or predatory prices, limiting the supply of goods or services, or a market or technical or scientific development, denying market access, imposing supplementary obligations having no connection with the subject of the contract, or using dominance in one market to enter into or protect another relevant market. The list of abuses is exhaustive, and not merely illustrative.

The explanation to section 4 (2)(a) exempt unfair or discriminatory conditions in purchase or sale or predatory pricing of goods or service from being considered an abuse when such trading condition are adopted to meet competition. The rational behind is that an enterprise must respond to the market trend. When an enterprise is engaged in bona fide competition and adjusts its price according to the terms of offer of competitors in an evolving market, there is no such abuse. If the market price falls for reasons not related to the dominant position of the dominant enterprise, a reduction in pricing to match the market fair value cannot be considered unfair pricing or predatory pricing. The explanation contained within the section for predatory price refer to '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'. The purpose of predatory pricing is to eliminate competitors in the long term. Offering low price, lower than the variable cost, viz. below the average variable cost of production, the dominant enterprise may occur losses in short term. When the competition has been reduced or eliminated in the market, it could raise the price to abnormal level recouping the initial loss. The existence of an intention to damage competition is presumed when the price is below the average variable costs. Under section 64 the Commission is entitled to make regulations consistent with this Act and rules made thereunder to carry out the purpose of this Act. The Commission has authority to determine the cost of production under the sub-section 2 (a).

A group enjoying a dominant position who limits or restricts the production of good and services or R&D causing prejudice of consumers under section 4 (b) shall be void according to section 3 (3) if its effect cause or is likely to cause an appreciable adverse effect on competition within India. Abusing a dominant position to deny the market access, 'in any manner' was amended in 2007, is very harmful in the case of an essential facility, where its access is vital for a competitor to compete effectively. Imposing supplementary obligation in contracts unrelated to the main object of supply, like tie-in, exclusive supply arrangement, limits the contracting part the ability to compete, therefore there shall be an abuse.

The practices stated in section 4 (2) are just prohibited under section 4 (1), but these are not declared void as in section 3 dealing with anti-competitive agreements and in section 6 dealing with the regulation of combinations. Any practice falls in section 4 is treated as anti-competitive and it is subject to regulation by the Commission under section 27 and where necessary, under section 28, the Commission may order the division of enterprise enjoying dominant position.

The word ‘group’ has been amended in the section 4 in 2007, which has the same meaning in the case of a combination. According to the explanation (b) contained in section 5 a group ‘means two or more enterprises which, directly or indirectly, are in a position to (i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise’. In this case a group could be interpreted as a cartel under section 3 (3), More in general according to the provisions contained in the section 3 in a broad interpretation any agreement between or among members of a group which result in an abuse of dominant position shall be void if it causes or is likely to cause an appreciable adverse effect on competition within India.

5.1 Case study: MCX Stock Exchange v. National Stock Exchange of India

In the case n. 13/2009 MCX Stock Exchange Ltd. & Ors. vs National Stock Exchange of India Ltd. & Ors. the informant has alleged the main opposite party of abuse of dominant position in the relevant market. The Commission had opinioned prima facie that a case exists for referring an investigation of the matter to the Office of Director General under section 26(1)[15] of the Act.

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[15] Procedure for inquiry under section 19.

26.(1)On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter: provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous

Before the examination of relevant market, 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 the case.

MCX Stock Exchange Ltd. (MCX-SX) is a public limited company incorporated in 2008. It is a stock exchange recognized by the Securities and Exchange Board of India (SEBI) under section 4 of the Securities Contract (Regulation) Act, 1956 (SCRA). MCX-SX has regulatory approvals to operate an exchange platform for trades in currency derivatives (CD segment, in October 2008). The approval permits "currency futures" in USD-INR, GPB-INR, EUR-INR and JPY-INR for trading on MCX-SX platform. It has also got the necessary authorization from Reserve Bank of India (RBI) under section 10 of the Foreign Exchange Management Act, 1999 (FEMA) to undertake above activities. MCS-SX has also applied to SEBI for permission to operate in the equity and equity derivatives, futures and options (F&O) segments. It has communicated its willingness to SEBI to commence the small and medium enterprises (SME) segment and also applied for permission to introduce interest rate futures.

National Stock Exchange (NSE) was incorporated in 1992 and was recognized as a stock exchange in 1993 under SCRA. It runs operations in the following relevant product market segments identified by the DG in its investigation: (i) equity, (ii) equity F&O, (iii) debt segment, (iv) CD and (v) OTC market for trades in foreign currency.

The purpose of capital market, of which the stock exchange is an integral part, is to enable allocation and reallocation of financial resources to foster economic development. Stock exchanges provide transaction platforms supplying securities to

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information received, then the new information may be clubbed with the previous information.

(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

investors. Apart from executing trades, the stock exchanges offer a number of other functions viz; issuer regulation, member regulation, trading regulation, investor protection and product design. A minimum critical mass in terms of trading activity is essential as peculiar feature of the stock exchange. Liquidity is an important confidence building consideration for an investor or 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.

The Commission has considered the *RBI-SEBI Standing Technical Committee Exchange Trade Currency Futures report (RBI-SEBI report) of 2008* which was one of the most important documents where the policy decision was taken to start a new segment of capital market in India, namely exchange traded currency and derivatives segment:

"Exchange traded futures as compared to OTC forwards serve the same economic purpose, yet differ in fundamental ways... The counter party risk in a future contract is further eliminated by the presence of Clearing Corporation. Further in an exchange traded scenario where the market lot is fixed at a much lesser size than the OTC market, equitable opportunity is provided to all classes of investors whether large or small to participate in the futures market..."

The same document advocated a clear separation of CD segment from other segments in any recognized stock exchange where other securities are also been traded. Membership of the segment must also be separate and the CD segment must have a separate governing council; no trading or clearing member should be allowed simultaneously to be on the governing council of the CD segment and the equity derivatives segment. Further restriction before the start of the CD segment is the prior approval of SEBI. Foreign Institutional Investors (FIIs) and Non-Resident Indians (NRIs) would not be permitted to participate in currency futures markets.

MCX-SX was initially authorized by SEBI in October 2008 to operate an exchange platform in trades in CD segment for currency futures in USD – INR of different tenures up to 12 months. NSE was already trading in the CD segment on the 29th August, 2008. The latest entrant into the segment, United Stock Exchange (USE) got SEBI's approval in January, 2009. The information in this case has been filled by MCX-SX which is only permitted to operate in the CD segment. The competition concerns which may arise for any enterprise would be in respect of the market in which it is operating and not in context of a market that does not concern its operation.

Based on the above facts, the Commission has established three indicators:

1. In the mind of policymakers, the CD segments is different from other segments (also differed from OTC) in *"fundamental ways"*. The policy recommended strict segregation of the CD segment.
2. Before 2008, the exchange traded capital market in India did not have exchange traded currency forwards segments.
3. Any competition concerns have to be examined in the segregated and new market where the informant is operating.

The three indicators clearly point out the market consciously created by policymakers as new and distinct market, thus it cannot be said to be part of a market that existed. Moving on from indicators to evaluation of the facts, according to section 2 (t), "relevant product market" means a market comprising of those products or services which are regarded as interchangeable or substitutable by consumers, by reason of characteristics of the production or services, their prices and intended use.

In terms of the products traded in the exchanges, there is a clear differentiation from the equity, F&O and WDM segments in terms of underlying assets. For example the CD market is a futures derivative market where underlying securities are currencies. OTC market, on the other hand, includes various products such as forwards, swaps and options for hedging the currency risk. CD and OTC products could be considered as similar, but they are quite different in terms of characteristic as well as participants. OTC segment is different in terms of settlement on maturity, settlement period, counter party risk, size of market lot and participation.

In terms of participation CD segment is primarily for speculators of currency values and short term hedgers who want to cover their economic exposure but require greater liquidity. Participant in other segments are speculators who seek to gain form price movements of equities or importers or exporters having contractual exposures and who try to hedge their risks emanating from fluctuations of exchange rates. OTC products are not even traded on exchanges and only specified entities can participate in this market.

In absence of historic data prices the Commission finds rather unnecessary to dive into SSNIP technical test, which is an econometric analysis tool to evaluate competitive constrains between two products. It is used for assessing competitive interaction between different or differentiated products. Ideally, time-series data or trend should be examined to see whether a small but significant non-transitional increase in price has led to switching of consumers from one product to another[16]. In the instant case, firstly, the CD segment did not exist prior to August, 2008 and secondly, right since inception, transaction fees, and data feed fees etc., which may be said to constitute price, have not been charged by any market player. In such a scenario, an attempt to determine even hypothetical competitive prices would be nothing more than pure indulgence of intellect and unwarranted misuse of an econometric tool, which in itself, is not error-proof[17]. The proportion of transaction value that a broker pays as transaction fees and accessories fees is so small and insignificant that it would have practically no bearing on substitutability effect. Moreover there is little point in going into any extended debate to distinguish the

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[16] International jurisdictions have not reposed excessive faith in this test. The US Horizontal Merger Guidelines, 2010 considers SNIPP test as solely a methodological tool for performing hypothetical monopolist test for the analysis of mergers. Similarly, in its notice published in the Official Journal C 372, 09/12/1997 P, 005 – 0013, the European Commission advises action on the applicability of SSNIP test for determining market definition in terms of Article 82 of the European Union Treaty.

[17]Such an attempt is bound to attract the criticism drawn in the United States v/s El du Pont de Nemour & Company (Case No. 351 US 377 – 1956), notorious in the competition lexicon as the “Cellophane Fallacy” case where the SNIPP test exaggerated the breadth of the market by the inclusion ofthe false substitutes.

words “interchangeable” from “substitutable”, due to the different aspects of capital market in India. Such an exercise in the instant case may be of some intellectual value within rarefied groves of academe but are neither necessary nor useful for a competition authority mandated to bear the responsibility of enforcing the law keeping in view the economic development of the country and to prevent practices having adverse effect on competition, to promote and sustain competitions in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India. Therefore SSNIP would be irrelevant for the above mentioned reasons.

To sum up a product over CD segment exchange cannot be said to be either interchangeable or substitutable by a product in segment like equity and F&O for the purchaser because it underlines currencies and the related derivatives, it is traded on the platform of derivatives which is a different market from the assets platform.

The technical, infrastructural or financial capability of any stock exchange operating in some segment, to start the operating in another has no relation to determination of supply substitutability between the segments. In this case, **the stock exchange services in respect of the CD segment in India is clearly an independent and distinct relevant market.**

The informants alleged the opposite parties of abusive behavior in respect of four measures contravening the section 4 of the Act:

a. Transaction fee waiver;
b. Admission fee and deposit level waivers;
c. Data feed fee waiver; and
d. Exclusionary denial of “integrated market watch” facility.

The Commission has ruled that:

“NSE has abused its dominant position in terms of Section 4(2)(a)(ii) and 4(2)(e) of the Competition Act. The intention of NSE was to acquire a dominant position in the C.D. segment by cross subsidizing this segment of business from the other segments

where it enjoyed virtual monopoly. It also camouflaged its intentions by not maintaining separate accounts for the C.D. segments. NSE created a façade of the nascence of market for not charging any fees on account of transactions in the C.D. segment. The competitors with small pockets would be thrown out of the market as they follow the zero transaction cost method adopted by the NSE and therefore in the long run they will incur huge losses".

In order to understand the background of the allegations and consequently the Commission's decision, forewords should be spent about the relevant market scenario before the order under section 27[18].

NSE announced through its circular in August, 2008 the transaction fee waiver in respect of currency futures trades executed on its platform. Initially various circulars extended the transaction fee waiver month by month, then the fact was fee waiver was kept implicitly according to NSE under its Board of Directors Pricing Committee under the influence of the **High Powered Study Group on Establishment of New Stock Exchanges** report[19].

[18] 27. Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—
(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;
(b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:
(d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
(e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any:;
(g) pass such other order or issue such directions as it may deem fit.

[19] http://www.nseindia.com/content/us/us_organisation.htm, last retrieved on the 12th January, 2012.

NSE collects admission from corporate member in equity, F&O, and debt segment but charges no admission fee it its CD segment. It does not collect any subscription charges and advance charges in respect of CD segment.

NSE is not charging any data feed fee in respect of its CD segment right from the beginning. Data feed refers to providing prevailing market prices and data for the segment by the stock exchange for significant consideration, which is a significant source of income. DotEx International Ltd. (DotEx), the opposite party 2, a 100% subsidiary of NSE, provides the data feed service for NSE in various forms. However NSE charges a substantial fee for data fee for other segments.

Since NSE is not charging any transaction fee, admission fee, deposit level fee and data feed fee, also MCX-SX has not been in a position to charge any fee starting from the relevant market entry. The informant claimed also the exclusionary denials of integrated market watch facility of NSE.

NSE has acquired through DotEX a 26% stake in Omnesys which is a technology vendor providing software for financial and securities market. DotEx and Omnesys created a new product named NOW which is substitute software of ODIN developed by Financial Technologies of India Ltd. (FTIL), informant’s promoter. FTIL provides software solutions to brokers and other market intermediaries for the purpose of dealing in securities through exchanges. NSE 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. APIC is an essential facility to connect font end application of NOW with any other application such as ODIN, which constitutes the electronic trading platform of the stock exchanges. FTIL clients have been forced to establish a separate terminal for trading on CD segment of NSE using the NOW, which is free of cost for years to all NSE members. ODIN has been placed on watch list across all its segments by DotEx due to complaints of NSE members, while APIC is still available to ODIN for other segments.

Details of the Commission's rational in taking such order are discussed hereafter. The Commission after having delineated the relevant market has examined facts to determine whether the opposite party has the "dominant position" in the relevant market. According to the Commission in the context of India, dominant position is a "position of strength"; such strength should enable it to operate independently of competitive forces; or to affect its competitors or the relevant market itself in its favour. Unlike in some international jurisdictions, the evaluation of this 'strength' is to be done not merely on the basis of the market share of the enterprise but on the basis of a host of stipulated factors such as size and importance of competitors, economic power of the enterprises, entry barriers etc., as mentioned in section 19 (4) of the Act. The Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at conclusion based upon such inquiry.

The investigation by the DG has thrown up several facts which, when viewed holistically, project a clear image. Only the most important are mentioned below which are not disputed on any substantive ground:

a. In the equity, F&O, WDM segments NSE has been almost the monopolist in past years.
b. In the CD segment itself, NSE accounts a market share of 48% according to the DG report.
c. NSE has been established in 1994 as against incorporation of MCX-SX in August, 2008.
d. As at 31st March 2009, reserves and surplus of NSE stood at Rs. 18.64 million, deposits at Rs. 9.17 billion and profit before tax at Rs. 6.89 billion.
e. NSE has presence in 1486 cities and towns across India. MCX-SX has only about 450 centers and operates only in CD segment.
f. NSE has high degree of vertical integration ranging from trading platform, front-end information technology, data information products, index services etc.

g. Stock exchange services in India are highly regulated and require approvals of SEBI to start a new exchange.

The relevant market has only three market players, viz. NSE, MCX-SX and USE. The Genesis[20] report dated 30th October, 2010 submitted by NSE indicates the percentage of market share enjoyed by different competitors for the period August, 2008 to October, 2010 which is disclosed only in the dissent order.

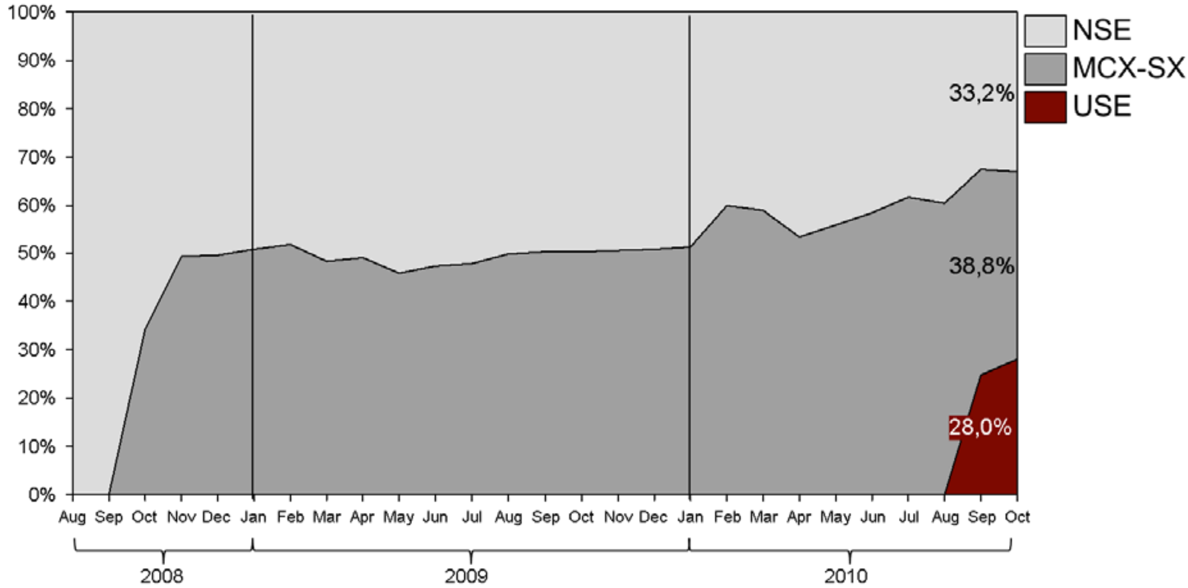

Figure 2: Indian currency derivatives market monthly market share

It is seen from the graph that NSE started with 100% market share in August, 2008. In October when MCX-SX entered in the market it was able to gain almost 35% of the market share. When USE entered in the relevant market in September, 2010 it started with a market share of almost 25%. By October, 2010, the respective market share of NSE, MCX-SX and USE stood at 33,2%, 38,8% and 28,0%.

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[20] On its website: Genesis is the first and, so far, the only economics consulting firm with a competition economics team based in India. From its office in New Delhi, Genesis is playing a pioneering economics role in the development of competition policy in the country. Our locally-based team provided expert economic analysis in the most prominent early cases investigated by the Office of the Director General of the Competition Commission of India (CCI), and continues to do so in cases now awaiting adjudication by the CCI. For additional information about the present case: http://www.genesis-analytics.com/content.asp?cpid=104&cpcurid=108. Retrieved 31th December, 2011.

The stock exchange is a very dynamic market and market share could vary with time, having just three players, each would have a least some ability to affect its competitors or the relevant market in its favour. Notwithstanding each player is not capable of operating completely independent of competitive forces or affecting consumers in the relevant market. In terms of explanation (a) of section 4 of the Act, "the position of strength" is not a prescribed mathematical index or equation that can be measured; rather, it has to be a rational analysis of relevant facts, interpretation of seemingly unconnected statistics or information and application of several aspects of the Indian economy holistically. The Commission is in the opinion that what has to be verified in a relevant market is whether a particular player has clear comparative advantages in terms of financial resources, technical capabilities, brand value, historical legacy etc. to behave affecting its competitors who, in turn, would be unable to react on a sustained basis. Such player can force its competitors into taking a certain position in the market which would make the market and consumers respond or react in a certain manner which is beneficial to itself but detrimental to the competitors. The Commission has concluded that:

"it would be wrong to conclude that NSE does not enjoy such a position of strength as one of the only three players in the relevant market delineated as above… We can first ascertain whether NSE has a position of strength which enables it to affect MCX-SX as a competitor in its favour".

Firstly the Commission has questioned whether NSE can sustain zero pricing policy in the relevant market long enough to outlive effective competition. The Commission has kept in mind the rationale for any business is to earn profit out of it, with diverse strategies such as output optimization, turnover maximization, profit maximization, positioning etc.. Earning of zero profit or accumulating losses for indeterminate period could not be the goal of any firm.

"No enterprise would spend an eternity on selfless development of any market without any prospects of making profit. The greater the financial and commercial strength of an enterprise, the longer it can wait and the greater risks it can take… It cannot be

argued that the capacity of NSE to defer profits or to bear long term risk of possible market failure is lesser than that of MCX-SX in the relevant market. ***This is clearly a position of strength****”*.

Secondly the Commission tried to establish whether there is any indication that NSE is aware of its capability based on its conduct. The Commission has opined that a professionally managed modern firm cannot afford such financial complacency for the sake of competition unless it has strategy of waiting the competition to die out. The complacence means the awareness of its own strength that sooner or later once the competition is sufficiently reduced; it would be possible to start generating profits from the business.

Thirdly the Commission has assessed whether in absence of the aforesaid strengths, NSE would be able to or want to continue with zero pricing indefinitely. The Commission has evaluated relevant aspects of the financial statements of the party involved, HHI index in the CD segment (2009-10), and other key indicators. The Commission has also interpreted all the facts contextualizing the typical features of Indian capital market regulations and historical perspective of stock exchange services in India. Due consideration is given to important international jurisdictions cases such as AKZO[21], United Brands[22], Du Pont[23] amongst others also guidance papers, where other authorities have taken a very wide and varied range of market shares as indicators of dominance, going down to 40%. In the view of the three points just discussed, **the Commission is of the firm opinion that NSE has a position of strength and consequently enjoys dominant position in the relevant market in the context of section 4 read with the section 19 (4) of the Act.**

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[21] *AKZO Chemie BV v. Commission of the European Communities*

[22] *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities*

[23] *United States v. El du Pont de Nemour & Company*

The Commission has rejected the defence of opposite parties in respect of the dominant position because the latter has included in the relevant market also the OTC segment, while the former has narrowed the definition to CD segment only.

NSE has argued that the zero pricing policy is aimed to develop the nascent market. The Commission has denoted the word ‘nascent’ as the state of existence at the time of immediately after birth, even if the market cannot be considered fully developed, it cannot be taken as ‘nascent’ anymore.

“The extraordinary measures required to keep the new-born market alive are no longer necessary in this stage. Excuses for ‘promotional’ or ‘penetrative’ pricing will lose their innocence of intent and start veering towards suspicious, if not mala fide conduct and have to be assessed accordingly”.

The Commission argued that promotional or penetrative pricing is understandable for a period of few months. Such pricing into the third year of existence has been considered an instance of astute strategy far from naive for market capture or extreme commercial self-interest, which is not found in the history of other segments rise by NSE. Therefore, **the defense of development of nascent market is not tenable.**

In brief **the Commission** also **finds no merit in the justification given by the opposite parties regarding data feed fee waiver** on the basis of customer request. It is noted that the same magnanimity is not evidenced in respect of other segments where data feed has not been waived.

Regarding the APIC denial of integrated market watch facility for ODIN (FTIL) only in the CD segment trading on NSE due to program vulnerabilities and client complaints, investigation has revealed that even NOW (DotEx) has generated complaints. The Commission deducted dubious anti-competitive intent of NSE and DotEx by putting FTIL on their watch list.

Software applications such as NOW and ODIN are essential facilities since the trading on stock exchanges is being done extensively on internet through electronic applications. In fact for any segment, there is an aftermarket for market watch and data feed services. Since ODIN and NOW are competing in the aftermarket, the

Commission has concluded that denial of APIC for CD segment foreclose competition of electronic platform for the CD segment for NSE traded derivatives and tantamount to exclusionary conduct in the main relevant market.

NSE denied the charges of predatory pricing on the ground that no fixed costs were incurred on CD segment. DG's findings and arguments of the opposite parties has been going whether should be the best method evaluating predation, viz. average variable cost (AVC), average total cost (ATC), long run average incremental cost (LRAIC or LAIC), average avoidable cost (AAC). As NSE does not follow segment accounting and since it has not given any segment figures to the DG, the Commission is in the opinion that any attempt to arrive at a costing benchmark would be an exercise in futility. DG revealed that MCX-SX operating only in the relevant market in its financial statement incur in variable costs (advertising, promotional activities, clearing and settlement, conveyance, communication and insurance expenses)[24]. The CD segment does require some variable cost to be incurred by the stock exchange which is not zero as claimed by NSE[25]. Section 4 (2) (a) (ii) deals with unfair or discriminatory price in purchase or sale (including predatory price) of goods or service. The fact of zero pricing has remained undisputed, from the wording of the provisions, it can be clearly concluded that "predatory price[26]" is considered as a subset of "unfair price". The term 'unfair' has not been defined anywhere in the Act, this fairness has to be determined case specifically. The Commission has examined the context of 'unfairness' in relation to customer or in relation to a competitor. In the present context, unfairness of pricing (as distinct from the concept of the predatory pricing) cannot be determined by selecting cost benchmark. Since MCX-SX has no

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[24] In the financial year 2008-09 and 2009-10, MCX-SX has incurred total expenses of Rs. 37,33 crores (373,3 million) and Rs. 85,78 crores (857,8 million) respectively.

[25] The DG has estimated NSE's total cost for the CD segment based pro rata system. It indicated for 2008-09 and 2009-10 the total cost of Rs. 4,42 crores (44,2 million) and Rs. 37,07 crores (370,7million) respectively.

[26] Explanation (b) 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.

other source of income, the NSE's zero price policy cannot be termed anything but unfair as far as the informant is concerned.

"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…Therefore, ***this Commission concludes that the zero price policy of NSE in the relevant market is unfair… It can be termed as annihilating or destructive pricing****".*

The Commission then identified necessarily two distinct relevant markets to examine the provisions of section 4 (2)(e) of the Act to assess the charge of NSE leveraging its dominant position in one relevant market to enter into, or protect, other relevant market. Observation has been made in defining the concept of 'leveraging' as applied in international jurisdictions (particularly in the European Commission) and the wording of the Act in the Indian context. Nowhere in the Act indicates that there has to be a high degree of associational link between the two markets being considered for this sub section because **competition concerns are much higher in India due to historical lack of competition policy and regulation.** It is possible for an enterprise to use its position of strength derived in one market to leverage its position to gain unfair advantage in the other market. The fact that the dominant player uses its strength from the first market to wrongfully enter into or protect the second market is independently considered harmful to competition under the Act. The intent of the explanation (a) about the "relevant market" applies equally for section 4 (1) and (2) but in respect of clauses (a) to (d) of section 4 (2) the relevant market can be different than the one for the purpose of clause (e). In the present case the relevant market for the clauses (a) to (d) of section 4 (2) is the stock exchange services for currency derivatives in India, whereas the relevant market for clause (e) of the section 4 (2) is the stock exchange services for the non CD segment. Section 4 (2) (e) does not exclude the possibility that an enterprise is dominant in both, the relevant market as well as the "other relevant market", which is the situation of the present case. Without prejudice to view that section 4 (2) (e) does not require associational links, the Commission examined the commonality of the two markets. Brokers and traders in both markets are highly the same. MCX-SX is waiting approvals to operate in the other relevant market, becoming also NSE's competitor in other segments.

The Commission is in the opinion that *"the two relevant markets have associational links. Therefore, it is concluded that NSE has used its position of strength in the non CD segment to protect its position in the CD segment… Denial of APIC for ODIN and distribution of NOW for free are clear acts of protecting its position in the CD segment and are possible due to its position of strength in the non CD segment"*, this would not lead to improvement in the technical development of all such software due to week competitive forces in the aftermarket. Therefore, *"the conduct of NSE and DotEx in denying APIC to ODIN and putting FTIL on watch list is an exclusionary conduct both, in the aftermarket for software for trading on NSE as well as in the relevant market delineated in this case"*.

The Commission has concluded that NSE is in a position of strength which is the context of section 4 of the Act enjoys the dominant position. NSE has violated:

1. Section 4 (2) (ii)[27] regarding waivers of transaction fees, admission fees or data feed fee waiver because the zero price policy in the relevant market is unfair.
2. Sections 4 (2) (b) (i) and (ii); 4 (2) (c) and 4 (2) (d)[28] in denying APIC to ODIN and putting FTIL on watch list as exclusionary conduct in the aftermarket for software for trading on NSE as well as in the relevant market.

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[27] There shall be an abuse of dominant position 4 under sub-section (1), if an enterprise or a group directly or indirectly, imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or service.

[28] There shall be an abuse of dominant position 4 under sub-section (1), if an enterprise or a group

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

3. Section 4 (2) (e)[29] for using the position of strength in the non CD segment to protect its position in the CD segment.

The Commission has ordered to NSE in exercise of powers under:

1. Section 27 (a)[30] to immediately cease and desist from unfair pricing, exclusionary conduct and unfairly using its dominant position in other market(s) to protect the relevant CD market.
2. Section 27 (g)[31] to maintain separate accounts for each segment with effect from the 1st April[32], 2012.
3. Section 27 (g) to modify the zero price policy in the relevant market and ensure an appropriate transaction costs are levied within 60 days of the date of this order.
4. Section 27 (g) to put in place system that would allow NSE members free choice to select the trading software (ODIN, NOW or any other) on the CD segment of NSE, under the overall supervision of SEBI if necessary. NSE shall ensure DotEx and Omnesys' full cooperation in this regard.

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access in any manner; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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

[30] Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be.

[31] Where after inquiry the Commission finds that any action of an enterprise din a dominant position, is in contravention of section 4, as the case may be it may pass such other order or issue such directions as it may deem fit.

[32] The Indian fiscal year is from 1st April to 31st March.

The Commission having considered that *there was a clear intention* on the part of NSE to eliminate competitors in the relevant market but also the fact that the Act is anew, under section 27 (b)[33] directed NSE to pay penalty of 5% of its 3 years average annual turnover.

The dissenting opinion offers interesting different rationale of the Commission's minority which is relevant in the present case to be discussed. The minority members stressed the characteristic of network effect in the stock exchange industry (including the CD segment). In a network industry the value to the users 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. In a financial exchange the externality that arises in the act of exchanging assets or goods is of critical importance in a stock exchange. The complementary property between users leads to network effects or network economics. Applying the complementary (dependency) between the buyers and sellers (nodes) to the stock exchanges, the act of exchanging assets or goods brings together a trader (offer) who is 'willing to sell' with a trader (counteroffer) who is 'willing to buy' creates a composite good, the 'exchange transaction', originated from the two complementary goods. This implies that minimal liquidity becomes essential for the transaction to occur and for the market to operate. Higher liquidity creates higher utility to traders, creating preferences for markets with depth and liquidity. This reduces bid-ask spread and reduces risk and uncertainty in the market making it more attractive ceteris paribus. The 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.

The demand curve of the stock exchange (as any of network industry) is upward sloping on account of network effects resulting in positive externalities up to a point

[33] The Commission may pass the order to impose penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

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 “expected fulfilled demand” curve as users expectations of network benefits are fulfilled.

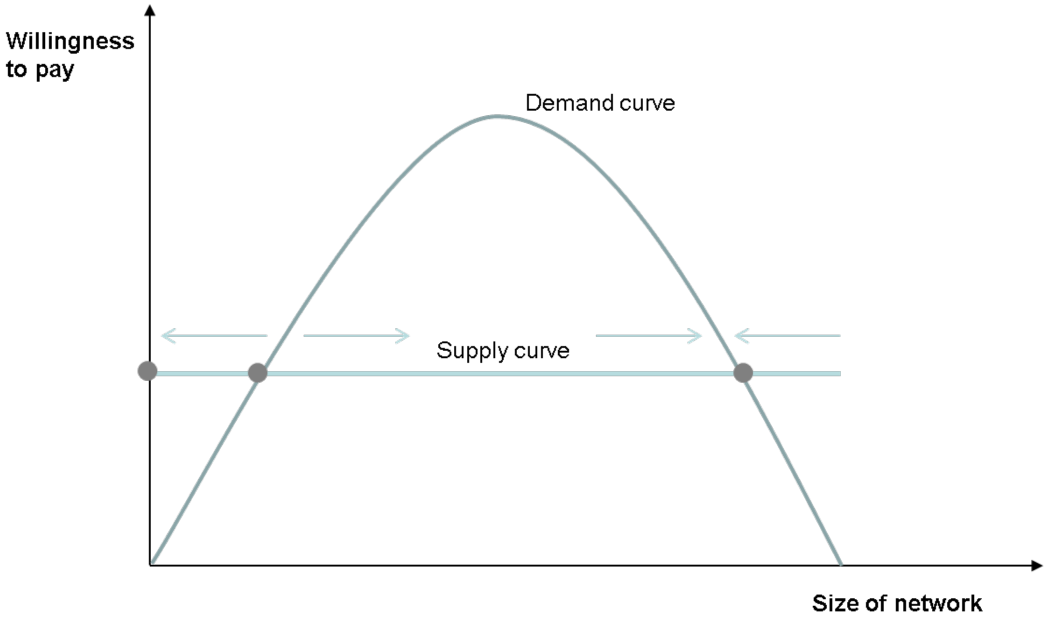

Figure 3: Network externalities (Katz & Shapiro, 1994)

Traditional economic tools cannot predict behavior of prices costing dimension among network such as normal supply-demand curve leading to market price determination. Pricing strategies not only differ among enterprises within a network industry, but also between network industries. Furthermore, pricing does not follow traditional path of profit maximization rule since the platform over which services are delivered is mainly constituted of relatively more substantial fixed or sunk cost and very little or negligible variable cost that may be allocated to a single or a batch of transactions. Different costs arise largely on the spread of the network and on account of technological developments in computer usage and availability. The diverse business strategies between incumbents are suggested by divergent costing and pricing approaches while enabling multiple options to new entrant. Thus, strategies of pricing for expanding in the initial market can vary between different enterprises in the exchange network.

When fixed costs are high while marginal costs are negligible or zero, in most network industries have increasing returns to scale in production. Such phenomenon permits low or zero pricing facilitating faster network expansion. In a sense increasing returns to scale add to operationalizing the network effects. Several other features of a network industry have brought to attention the difficulty in developing standardized business strategy based on uniform behavioural principles.

a. An inverted ‘U’ demand curve allows multiple equilibria for sudden and significant expansions of network size. New market entrants appear because of low marginal cost combined with the introduction of new and better technology with further cost decreasing.
b. The market expansion has a much faster pace in network industries compared to non-network industries.
c. Network industry is characterized by high inequalities of market shares and profits which tend to create natural oligopolies.

In a fluid and dynamic framework, anticipating or adjudicating on anti-competitive behaviour carries the risk of being arbitrary defeating the purpose of intervention. The minorities bearing in mind attributes of network industry applicable to stock exchange industry, agree with the relevant market definition of the main order, but they concluded that **NSE in not dominant in the relevant market** and NSE’s **zero price set does not directly or indirectly impose unfair or predatory price** thus it has not violated section 4 (2) (ii) of the Act.

Going into details of the dissenting opinion, in assessing NSE’s dominant position in the relevant market, it established that NSE enjoyed 100% market share in August, 2008, which is not the case anymore in October, 2010. The already above mentioned Genesis report indicates market share of 33,17%, 38,82% and 28,01% respectively for NSE, MCX-SX and USE. In terms of nature of stock exchange as network industry, none of the competitors enjoy any special power vis-à-vis others. There are no major entries or regulatory barriers since from the entry of MCX-SX and later on USE. The actual growth and play of their respective market share confirms fairly the oligopolistic characteristic in network industry. The minority has interpreted **NSE's ability to keep the zero price policy in the long run as competitive advantage**. This not implies the exclusion of a newcomer who can easily overcome the competitive advantage of the incumbent by offering innovative product with value added services. As alternative to NSE's vertical integration business model, several of these activities can outsourced, implying that dominance is not on account of vertical integration. The perceived entry barrier of minimum net-worth requirements are for prudential purposes.

The minority members *"are not aware of any case in the history of 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 year in this case), and yet it has been found to be dominant by a competition regulator or a court"*.

To understand if the zero price policy have directly or indirectly imposed unfair or predatory price in sale of services, it is worth to analyse the concept of what is below cost or predatory pricing amounting to unfair price in the Act. History and economic theory teach that predatory pricing is not only an instrument of abuse, but also tangible benefit that consumers most desire form economic system. The dilemma has been intensified since predatory price cuts are particularly hard to distinguish from vigorous competition. Looking at the US[34] jurisdiction, the minority touched the proof of recoupment in predatory pricing scenario for the first time. Evidence of below-cost pricing does not suffice an inference of probable recoupment and injury to competition. The investment in predatory pricing needs to be rational and the predator must have a reasonable expectation of recovering in the form of later monopoly profits, more than the losses suffered. Without recoupment the predatory pricing produces lower aggregate prices in the market over the time enhancing consumers' welfare. In the EU[35] jurisdiction, a detailed cost/price analysis is necessary to

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[34] *Matsushita Electric Industries Co., Ltd. v. Zenith Radio Corp.*
Pacific Bell Telephone Co. v. LinkLine Communications, Inc.

[35] *AKZO Chemie BV v. Commission of the European Communities*

determine predation, prices below AVC must be regarded as abusive, while prices below ATC, but above AVC, may be abusive if it is proven that the dominant undertaking's intention was to eliminate a competitor. This stood in contrast to the US, where generally a price above AVC is lawful without condition. The ECJ[36] confirmed that recoupment of losses is not necessary to establish predatory behaviour, but held that pricing strategy that would lead to the elimination of rival in the content to profit from the reduction of the degree of competition still existing in the market. How the profiting would materialize from the predator's perspective was not defined.

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".***

Without an expectation of recoupment through unjustifiably high prices, consumers generally gain from low prices, and there is no anticompetitive harm. The mere fact that prices are low; even below some of the measures of cost, 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-maximizing in the long run for a whole host of pro-competitive reasons. Furthermore, because not all entries are efficient, not all exits are inefficient, instances of exit or failure of entrants (or failure to enter) may not necessarily be indicative of anti-competitive conduct. Harm to competitors is at times a natural consequence of competitive behavior as part of logic of having competitors in the market. Thus, the purpose of competition policy is to protect and promote competition, not competitors.

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

a) Below-cost pricing or unfair/predatory pricing;

Tetra Pak International SA v. Commission of the European Communities (Tetra Pak I)

[36] *France Télécom SA v.. Commission of the European Communities*

Tetra Pak International SA v. Commission of the European Communities (Tetra Pak II)

b) Intention to reduce competition or to eliminate competitors.

a) The dissent opinion finds simplistic assumption the DG's argument that as NSE providing the platform to trade inevitably occurs costs, and by definition is bound to below-cost price and unfair or predatory. The DG does not take into account the nature of the network industry and the concerned enterprise's business model of making profit (i.e. Google provides free email service). The following features of the network industry is considered for analyzing whether the zero price should be treated as unfair or predatory:

1. Minimal liquidity in the stock exchange is essential for the transaction to occur and for the market to operate.
2. Increasing returns to scale in production of stock exchange, high fixed cost and negligible variable (marginal) costs permit low or zero pricing facilitating faster network expansion.
3. Profit maximizing firm might initially price a product below cost to establish a large installed base of users when network externalities are present, and thereby increase demand for its product.
4. Consumers are willing to pay higher price due to benefitting the value creation from the increased size of network, the inverted 'U' demand curve allows multiple equilibria on it creating sudden and significant expansion of network size. The constant low marginal cost permit a new entrant expands his market with new products, which further decrease his cost. The pace of market expansion is much faster on account of the explosive nature of network effects.
5. Below-cost pricing involves pro-procompetitive rational similar to both promotional pricing (added current sales increase future demand) and learning-by-doing (cumulative sales increase the demand).
6. Transaction fees is a very small component of cost of trading (admitted by NSE and MCX-SX), and even a smaller component of cost of acquisition

of underlying assets. Market users may well be sensitive to level of trading fees particularly for large and frequent traders.

7. MCX-SX and USE have been able to take away original market share from NSE at same price, indicates that the competition is on non-price parameters. Product differentiation and innovation could well be important factors.
8. As 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.
9. Revenue in the network industry is generated from value added services and people are induced to join the network for creating value to existing customer base. The pricing strategy of the service provider may be in the form of zero fees to benefit more customer base in the network.
10. Incumbent's liquidity advantage does not hold in the network industry because new entrant can often reap the benefits of better technology and lower operating cost.
11. The Bolton Test[37] which gives conditions for market expanding efficiency to justify future grains 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. The ratio of business transacted in the CD segment to those in the OTC market is manifold time the global average with the opening its opening. Lower prices have been able to attract players in the CD segment.
    iii. Recoupment by gaining efficiency – recoupment arises from efficiency-enhancing measures.

[37] http://www.ftc.gov/os/sectiontwohearings/docs/BoltonPPTPredatoryPricing.pdf, last retrieve 12th January, 2011.

From the above facts the minority has drawn the conclusion that efficiency results from growing volumes in the CD segment. Thus, offering services of CD segments at sub-optimal prices might be a prudent commercial strategy. Network industries would tend to adopt business models where prices at any time are linked to the value of the service at that period of time. It may termed as "value-based pricing" in contrast to the cost-based pricing model. 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. The network industry characteristics provide a robust business model with initial zero pricing. NSE argued that growth of CD segment indicate that monthly average growth of approximately 30% has remained consistent from August 2008 to October 2010.

In our present case, it is easy to mistakenly take the low or zero price in a network industry for predatory pricing. In predation, the business strategy is to deliberately incur losses by setting low prices initially to kill competition, and once the competitors are out of the market set unjustifiably high prices to not only off-set cumulated losses, but to make huge profits to the detriment of the consumers. In the network industry the initial consumers' willingness to pay could be enhanced by low or zero prices in order to create liquidity first. Once an appreciable value is created it would be reasonable to make profits. It would be naive to argue that MCX-SX has entered in the relevant market without the awareness of the business model in the hope that NSE would start charging so that they did not suffer losses after entry. Not to mention that USE entered in the market after two year of zero price policy.

b) The dissent opinion having concluded that NSE's zero price policy is not unfair, it intended for the sake of completeness to demonstrate whether NSE is in the intention to reduce competition or to eliminate competitors.

   Internal circular, public documents and statements issued by NSE, MCX-SX and USE indicate the pro-consumers and market development intent in giving waivers.

In particular noteworthy that MCX-SX and USE, while waiving transaction charges, mentioned in their circular that *"it was necessary to encourage active participation in the CD segment"*. There is no general consensus on the length of time within which pricing can be termed promotional or penetrating. In General Foods, the FTC concluded that seven years of below cost pricing qualified as promotional. 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 low prices. The minority is in the opinion that 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. At 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. Higher prices to recoup would lead to supernormal profit making the market attractive again to new players which is demonstrated by easy entry of USE and MCX-SX forcing again NSE to lower the prices. Should Competition authorities deprive the market and consumer of lowest possible prices in the market based on notions of predatory pricing?

If only the Commission could have investigated more about the scheme that could actually drive MCX-SX out of the market and provide evidence that NSE could then raise prices to consumers long enough to profit from the reduction of competition degree, the main order would be flawless under the violation of section 4 (2) (ii).

In assessing 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, the minority discussed about the concept of leveraging of market power in competition regulation.

Leveraging occurs when a dominant firm uses its power in one market to induce or foreclose sales in the second market and thereby uses its market power in that market.

Comprising a variety of strategies a firm might use its market power from one market to another for instance by tying, giving rebates, predatory pricing etc. Competition authorities' concerns are focused on structural changes in the secondary 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.
The United States Supreme Court has cut back considerably on leveraging claims in the last fifteen year. The leveraging claims can be sustained only if the anti-competitive conduct (i) strengthens the dominant firm's monopoly position in its primary market; or (ii) threatens monopolization of a secondary market[38]. Most US courts have held that 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 the existing monopoly or to create a dangerous probability of gaining monopoly in the secondary market as well.
The US[39] approach of leveraging allows firm to compete in several markets expecting the spread of competitive advantage from its broad-based activity.
The class and famous case in EU is Tetra Pak II in which the ECJ 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"*. The doctrine has been applied in the secondary market where the injury has been very substantial, leading to serious competitive foreclosure in that market. The Court of First Instance stated that only under special circumstances distinct but associated markets, the application of the Article 82 on the non-dominated associated market and having effects on that associated market can be justified. Thus it requires that in addition to proof of

[38] Verizon Communications, Inc. v. Law Offices of Curtis vs. Trinko, LLP

[39] Berkey Photo, Inc. vs. Eastman Kodak Co.

dominance and abuse, there are extenuating circumstances that justify a finding of abuse.

Bearing in mind the arguments above, the minority stressed certain aspects of market behavior to be considered in this case:

1. Behavior of a dominant firm the related market is different from the direct exercise of market power in the market where it is dominant.
2. Involvement in multiple markets is a normal and usually innocent from of industrial activity that frequently creates real value for consumers.
3. Acceptance that competition law is meant to protect competition and consumers, not competitors, leveraging of market power in one market may be seen an abuse 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.

The minority has identified three different relevant markets each independently qualifying to be “one relevant market” in term of section 4 (2) (e), while CD segment is the “other relevant market”. Equity, F&O and WDM are the three relevant markets in the context of MCX-SX’s allegation since each segment is distinct in terms of product or 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.

Having delineated the relevant markets mentioned in section 4 (2) (e), do they need to be associated and do these two markets fulfill such a criterion in this case?

The concept of leveraging from associative links to neighboring markets and to adjacent markets cannot be imported into the Act unless the markers of the statute had clearly included such a requirement. Notwithstanding the absence of any requirement contained in the Indian enactment 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:

1. Segment-wise accounting as required under AS 17 is not followed by NSE.
2. F&O segment regulations are applied to the CD segment by NSE on a mutatis mutandis basis.
3. In DG's findings, around 92% of NSE's members in CD segment and 73% of members of the informant are members of the NSE other segments.

These F&O and CD segments appear to be supply-side substitutes and, therefore, these segments are related from supply-side which could use similar resources to supply services in both markets. There is also some commonality of brokers and traders in other segments and CD segment. Many customer of both informant and NSE in CD segment may be potential customers (if not actual customers) in other segments. Thus, markets are also to some extent related from demand side.

Globally, requirement of associative links is not part of the statute, yet leveraging is generally applied to linked markets only. The minority hold that 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. In the view of the above, CD segment and other segments of stock exchange services individually are distinct and associated relevant markets in this case.

From the 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. Having 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 in section 4 (2) (e). Surprisingly that such dominance does not give any unique advantage to NSE in its operations in the CD segment.

In assessing whether NSE has set a zero price in CD segment with predatory intent of leveraging its dominance in the other relevant market NSE placed reliance on the Tetra Pak II case (relied upon by MCX-SX as well) to demonstrate the requirement of special circumstances, which are particularly cumulative requirements:

i. Tetra Pak was a quasi-monopolist in the aseptic cartons market (dominant market) with 90% market share.

ii. Tetra Pak was market leader (acknowledged to be possible dominant) in non-aseptic cartons (non-dominant market) with a market share of roughly 50% and the fact that it was substantially larger that the next largest competitor.

iii. Tetra Pak's dominant position on the market was seen as a whole by the court based on the above two requirements.

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

The actual Tetra Pak II case was different under some circumstances; it was accused of a range of practices, including tying and enforcing numerous problematic contractual terms that were seen to impact competition in the market. What makes these circumstances special is that 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. This allowed the dominant firm to exert influence over customer decisions. Without one market dominance, 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, Tetra Pak's foreclosing behaviour effect became one of the special circumstances used to justify a finding of abuse. NSE markets under consideration could be termed adjacent, yet its alleged dominance on them has not provided any advantage that it can be leveraged or managed to leverage in the contemplated section 4 (2) (e), clearly:

1. NSE's dominance does not provide the ability to impact competitors in the CD segment by affecting the availability, price and terms of their inputs.
2. NSE's dominance does not provide the ability to impact consumer behaviour in the CD segment.
3. NSE's non-dominance in the CD segment is just one of the several differences with Tetra Park II, the special circumstances in the latter case do not apply in this instance.

4. The effects-based approach to competition law has not been in this case. Instead, despite any purported dominance in adjacent markets, NSE has not been able to sustain the leading position, and new entrants have been capable to rapidly grow and expand their market share. Most importantly this has not had adverse effect on consumers, but has broadened market choice and lowered prices.

The fact that NSE running operation in the CD segment without incurring any further variable cost, which shows economies of scale enjoyed by NSE, only means that NSE may be enjoying certain competitive advantage in terms of its costs. The same holds true for MCX-SX stating that the costs incurred by NSE in the CD segment are significantly lower due to the latter overwhelming operations in other segments, inherent advantage of a multi-product company. Such competitive advantages enjoyed by an enterprise are at the heart of competition process, which provide the incentive to firms to compete more efficiently and ultimately benefit consumers. Dominance in non-CD segments has not provided NSE with the ability to impact competitors through impacting customer behaviour on the CD market. NSE has not been able to tie-in, bundle, or created loyalty rebates or discounting that forces customers currently dependant on the products in its dominated dominant markets to purchase its CD products. Regarding the allegation of cross subsidization of CD segment through profit of other segments, it does not hold since the anticompetitive and predatory pricing strategy is only in competitive segments, which amounts to abuse. Cross subsidization as already admitted by MCX-SX and confirmed by EU jurisprudence is not about itself. It has no connection to leveraging by dominance in one relevant market, as it is basically a fiscal or financial transfer from any source.

In conclusion the dissent order is in the opinion 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.

Last but not least the minority evaluated whether has been any other violation of the provisions of the Act.

NSE use 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 or ODIN) would 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 NOW terminal free of charge and confine the user to the NSE CD segment. Such conduct has allegedly caused difficulties, as FTIL's customers had been using ODIN for all other segments in the past, forcing them to establish a spate terminal for trading on CD segment of NSE. MCX-SX has not sought any explicit relief for the denial of APIC and the removal of FTIL on watch list.

NSE has submitted that it has placed ODIN on watch list due do complaints of its members, but DG has concluded that complains again ODIN had been few and far between. Overall ODIN's end users appear to be generally satisfied and even NOW suffered from problems.

The minority has opined that it is not for the competition regulator to ascertain the free choice of software for a business, unless explicit competition issues are highlighted within the terms of section 3 or 4 of the Act. NSE is neither the vendor of software nor it is dominant with NOW. It would not be correct to infer that NSE created barriers for users of ODIN software by not providing APIC to it. The network effect of APIC and their compatibility is not an issue since the focus should be on platforms and not on operating systems. For a user, the availability of APIC is more important than compatibility. No legal framework is tested in the exclusionary denial. There is no assessment as to relevant market of so called software, and unless a relevant market and dominant position is found, a finding on exclusionary behaviour would not be correct in law.

The minority in the view of the foregoing concludes that there has not been breach of sections 4 (2) (b) (i) and (ii); 4 (2) (c) and 4 (2) (d) of the Act.

The dissent opinion went through the analysis of part of the extracted majority order. The order gave the impressions that if MCX-SX had some "other source of income" or "deep pockets" and had not been "slowly bleeding to death", the majority might well have arrived at some different conclusions. Since the state of competition in the market is the major concern, the minority has rightly thought the necessity in this case to consider USE, the third competitor and its conduct. From the date of the dissent order, 3rd June 2011 till the last retrieve the basic USE's overview[40] has not been changed on its website:

> A United Endeavour From India's Most Trusted Institutions
>
> "United Stock Exchange, 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 products. 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

[40] http://www.useindia.com/showstatic.php?pageId=25, retrieved 3rd January, 2012.

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".

It is worthy to note that USE has been promoted by institutions that 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:

1. It was firmly clear to USE that would have to charge zero pricing when it entered in the market since NSE and MCX-SX has been competing on the same ground for the past two years. USE must have a robust business plan and expectation of doing well in the CD segment.
2. USE has not joined MCX-SX against NSE alleging predatory pricing and leveraging of dominance.
3. The minimum required to operate in CD segment as per SEBI regulations is Rs. 100 crores, which is the MCX-SX's premise that it will soon be driven out of the market. However USE in spite of being placed in similar circumstances has been getting new equity.

The majority order has never considered USE's conduct and no cognizance is taken of the fact that, USE being aware of the issues that concerned itself was under consideration of the Commission, at no stage it 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 intention to start charging transaction fees in due course.

The minority has advanced that the majority order seems to have followed an adversarial approach. In the Competition (Amendment) Act, 2007 the word 'information' was replaced instead of the word 'complain' in the original Competition Act, 2002. The Act provides for filing of 'information' and not 'complaint' for alleged violation of sections 3 and 4. The amendment underlines the important aspect of competition law in India that once information is filed, all parties and stakeholders assist the Commission in discharge of its duties under section 18[41] of the Act. 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 DG during investigation. The interpretation of the logic scheme of the Act would support the fact that in case the Commission pass orders under section 27, anyone who has suffered loss or injury on account of such anti-competitive conduct, and wants compensation for the same, has to approach the Competition Appellate Tribunal under section 53N[42] of the Act. The proceedings before the Commission is 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. The principle is well established in international competition jurisprudence that the existence of

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[41] Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:
Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

[42] Without prejudice to any other provisions contained in this Act, the Central Government or a State Government or a local authority or 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 or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A or under sub-section(2) of section 53Q of the Act, and to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise.

competition policy and regulation is to protect the market competitive process and competition, and not the competitors. A plain reading of section 27 of the Act shows that powers under this section can merely penalize and issue directions to the party(s) violating section 3 or 4 with no power to give direct relief to individual parties. Only under certain circumstances under section 33[43] the Commission may give a temporary relief through interim restrain orders. MCX-SX has filed an application for interim relief because it was in imminent danger of exiting the market which may cause irreparable harm to the fair competition in the sector. The Commission considering that DG's investigation was near completion did not deem it fit to pass any order under section 33.

The minority has recalled that MCX-SX filling the information against NSE, it has alleged despite the probability of being eliminated, also the danger for other existing and potential competitors. On the contrary the minority evidenced the operating market in place in the CD segment has been competitive from almost the beginning, and zero price has in no way deterred entry and continued operations. The fact that MCX-SX and USE gained market share giving the same pricing, evidently the share depend on other factors. The possible reasons for this have been deliberated upon in earlier discussion about the feature of network industry. Example of free services by Google or Yahoo! as research engine or emails provider are example of network industry supplying service globally to the users at zero prices. Multiple competitors are entering in an evidently vibrant and growing marketing and competing actively at the same price, it is a moot question whether the price can be considered predatory. If the common price charged by all competitors is to be considered unfair or predatory, there is no purpose of arguing who is the competitor charging predatory or unfair price, and who are the victims. It cannot be argued that one competitor should be

[43] Where during an inquiry, the Commission is satisfied that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.

responsible to start to charge a ‘fair’ price, and then the others would be in position to do the same accordingly. In a competitive environment, if a price is maintained in equilibrium, there is no logic of authorities’ intervention. NSE may have meant to keep the zero prices for a limited period, but the entry of other two competitors left NSE with no choice but to compete. It could be also argued that if significant NSE’s market share has shift since the competitors’ entry is because of their product superiority, then still consumers will be willing to pay a premium price instead of the zero price. It has been never mentioned that MCX-SX and USE ever tried to charge resulting in shifting of their customers to NSE.

From the consumer interest point of view, it is evident that the customers have been and are getting good quality service at zero prices. They are free to shift from one service provider to another. The IT based system is transparent, well informing the customers. Any Commission’s intervention is based on the probability that on the long run NSE would be able to charge unjustifiably high prices by NSE. However the minority has established that the price is not unfair or predatory and no evidence can demonstrate higher price charging after killing the competition by NSE. The Commission’s order means inevitably that NSE would have to charge transaction fees and so MCX-SX and USE. What would be the non-unfair or non-predatory price to be charges? The Commission can either (i) direct NSE to fix a particular price or at least the floor price: the Commission might be seen as a tariff setting or regulatory body instead of a market competition authority; or (ii) ask NSE to charge without any specific indication; in which case MCX-SX could still claim of predatory pricing since it has major cost and no benchmark is available. Regardless what will be the possible outcome, the consumers’ interests are not considered.

I would like to go to dig deeper in assessing MCX-SX rather than NSE.

Who are the MCX-SX shareholders? From its website the following shareholders are provided[44]:

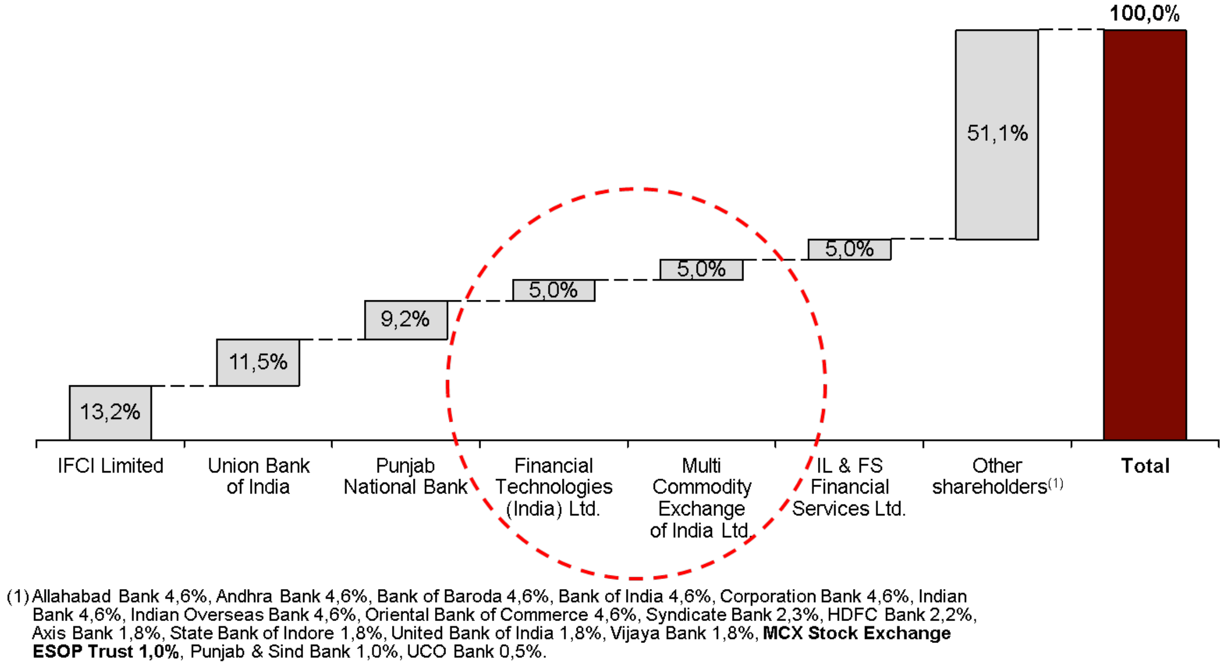

Figure 4: MCX-SX shareholders

Financial Technologies (India) Ltd. (FTIL) and Multi Commodity Exchange of India Ltd. (MCX) are the promoters[45] of MCX-SX as indicated in the introduction to the case. MCX is in turn promoted by FTIL as well. MCX-SX filling its information has alleged that it will soon or later be driven out of the market since it cannot sustain the zero pricing models indefinitely. NSE was able to compete with such aggressive pricing because it is cross-subsidizing from its other segments. If NSE had organized its CD segment with a total independent business entity, being just promoter detaining 100% of share, would have had the Commission ruled differently? Would be the equity of the newly created NSE's subsidiary being considered a form of indirect subsidizing? Based on the above concluded rational can we consider if MCX-SX's shareholders are cross subsiding with their revenue generated in their respective industry since no association is required under section 4 (2) (e)?

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[44] www.mcx-sx.com/abt_us.htm last retrieved on the 7th January, 2012

[45] The definition of 'promoter' is given in regulation 2(h) of SEBI (Substantial Acquisition of Shares and Regulations, 1997.

An interesting assessment that the Commission failed to investigate the application of 'group' definition contained in the clause (b) of the explanation to section 5 and therefore if it has abused its dominant position in one market to enter into other relevant market. Obviously my observation is extremely provocative, but here it follows the conclusion. According to the FTIL's company overview[46] and corporate brochure[47], it uses group companies and business as synonym.

FTIL group companies/business	Market Share(1)	Ranking
MCX (Multi Commodity Exchange)	82%	#1
IEX (Indian Energy Exchange)	87%	#1
NSEL (National Spot Exchange)	99%	#1
Trading Licenses (over 646,000 cumulative	80%(2)	#1

Figure 5: FTIL market leadership

(1) For 9 months in FY 2011
(2) For FY 2010-2011

Table 1: FTIL group market leadership in the exchange business

The table above shows FTIL's absolute dominant position is the exchange business of commodity, energy and spot and exchange technology (ODIN) for its cumulative licenses. FTIL is market absolute leader also in other business and it operates also outside India, but the analysis of exchange business and exchange technology is far enough for a discussion in the academic context.

The Commission's has proposed the analogy of grain *mandi* (wholesale market) to also start a wholesale spice *mandi* to argue that it does not mean that grain and spices are interchangeable and substitutable nor does it mean that the platforms of the two *mandis* is interchangeable or substitutable. Based on the *mandi* analogy the Commission has concluded that the CD segment is an independent and distinct relevant market. If the grain *mandi* analogy to MCX-SX's and spices *mandi* to MCX, IEX and NSEL, probably the Commission would have concluded that MCX-SX has

[46] http://www.ftindia.com/aboutus/CorporatePresetation.htm

[47] http://www.ftindia.com/corporatebrochures/CorporateBrochure.pdf

an independent and distinct relevant market and MCX, IEX and NSEL have their other relevant markets. Can we conclude that FTIL is subsidizing MCX-SX through other subsidies companies and MCX-SX itself is keeping on purpose the zero pricing policy? However MCX-SX has never mentioned that it has ever tried to charge any price above zero.

From the stock exchanges respective websites, in the period February-July 2011, NSE was not in a dominant position anymore in the CD segment, neither in any currency pair. NSE and MCX-SX started to charge prices starting from August 2011, was it really the right thing to do considering the given market share here below?

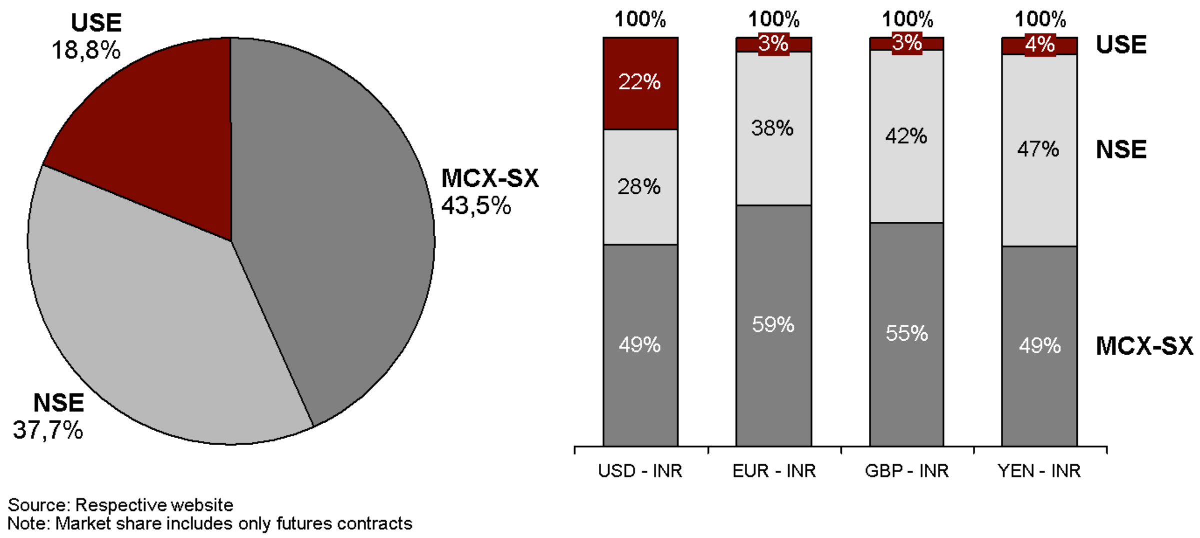

Figure 6: Market share of CD segment, February - July 2011.

Furthermore the media has reported that CD segment has lost momentum[48] starting from October 2011, and USE hit the hardest. It is legitimate to question whether the market was mature enough to have its product being priced and why USE has not been able to meet the competition continuing the zero prices policy.

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48 http://www.moneylife.in/article/currency-derivatives-lose-momentum-use-hit-hardest/22430.html, posted online the 26th December, 2011.

6. REGULATION OF CONCENTRATIONS

In exercise of the powers conferred by sub-section (3) of section 1 of the Act, the Central Government appointed in March 2011 the 1st June, 2011 as the date on which sections 5, 6, 20, 29, 30 and section 31 shall come into force.

The Act provides provisions for regulation of combinations in section 6, while section 5 defines combination as: (a) acquisition of control, shares, voting rights or assets of one or more enterprise by one or more persons; (b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods, or provision of a similar or identical or substitutable service; (c) any merger or amalgamation. The Act does not define the term combination. Only the conditions are listed.

The only mean of acquisition in the Act is provided by section 2 (a) which ‘means, directly or indirectly, acquiring or agreeing to acquire (i) shares, voting rights or assets of any enterprise; (ii) control over management or control over assets of any enterprise’.

For the purpose of this section, the control ‘includes controlling the affairs or management by (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise’. The combinations contained in section 5 are relevant for the Commission only if these exceed certain size-related thresholds. The threshold after the combination, jointly or would jointly have, is: Rs. 1,000 crores in term of assets or Rs. 3,000 crores in terms of turnover in India, being the assents or turnover, as the case may be, jointly of the parties to the combination. In case of an enterprise operating also overseas, the assets and turnover within and outside India should be respectively US$ 500 million or US$ 1,500 million. In case of a combination taking place between or among a group of enterprises (the definition of the group is within the section, which is already clarified in case of abuse of dominant position), the correspondence threshold, after the combination, jointly or jointly have, is Rs. 4,000 crores of assets or Rs. 12,000 crores of turnover in India. Enterprises or groups having assets or turnover within and outside India, the threshold are US$ 2 billion of assets or US$ 6 billion of turnover. The amendment to the Act, in addition to the threshold in US dollars, included at least Rs. 500 crores and Rs. 1500 crores respectively of assets and turnover in India for enterprises or group of enterprises. The thresholds are showed in tabular form in the table below.

Thresholds	Indian	Worldwide	Indian Group	Worldwide Group
Assets	Rs. 1,000 crores	US$ 500 million Rs. 500 crores	Rs. 4,000 crores	US$ 2 billion Rs. 500 crores
Turnover	Rs. 3,000 crores	US$ 1,500 million Rs. 1,500 crores	Rs. 12,000 crores	US$ 6 billion Rs. 1,500 crores

1 crore = 10 million
EUR 1 = Rs 64.1441 (approximately) monthly average in April 2011.
US$ 1 = Rs 44.3954 (approximately) monthly average in April 2011.

Table 2: Thresholds in case of combination

In March 2011, the Ministry of Corporate Affairs of India, under the provision of section 54 (a) has exempted the application from the provision of section 5 for five years starting from the 1st June, 2011 for groups exercising less than fifty per cent of voting rights in other enterprise and enterprise, whose control, shares, voting rights or assets are being acquired has assets of the value of not more than Rs. 250 crores or turnover of not more than Rs. 750 crores.

Section 20 (3) provides that these thresholds are subject to enhancement or reduction every two-year revision by the Central Government, in consultation with the

Commission, ‘on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, the value of assets or the value of turnover’. In fact in **March 2011, the value off asset and turnover has been increased by fifty per cent** on the basis of the wholesale price index.

Section 5 (c) explain how the value of assets shall be determined by the book value of the assets, reduced by any depreciation. It is computed including intangible assets like the value of goodwill, copyright, patent and trademark in the date proposed merger. However the term “asset” has not been defined by the Act. By virtue of section 2 (z), words and expressions not defined in this Act, shall have the same definition assigned to it under the Companies Act, 1956.

Section 2 (y) explain the turnover as the value of sale of goods or services.

Section 5 does not make specific reference to joint ventures. Clearly if a joint venture would be caught in the condition of combination set out in section 5, it must be scrutinized by the Commission. The anti-trust body has received a fresh set of recommendations from several law firms. The terms of "joint venture" and the existing multiplicity of regulatory frameworks with divergent disclosure requirements is an area that needs to be addressed by the Commission[49].

While the section 5 contains the definition of combination, the regulation thereof is provided in section 6. To apply this section, the combination should be one that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. Such a combination shall be void.

Before the amendment, section 6 (2) provides for a notice to be given to the Commission disclosing the details of the proposed combination within seven days of approval by the board of directors of the enterprise concerned or execution of any

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[49] http://www.hindustantimes.com/CCI-norms-on-M-amp-A-this-week/Article1-692471.aspx

agreement for acquisition or acquiring of control. The Act did not ask compulsory notice to the Commission, leaving to the choice to any person or enterprise engaged in the combination. In most of countries the notification of a proposed merger is mandatory. The current updated Act made the notice to the Commission mandatory within thirty days. Section 6 (2A) was amended giving the Commission two hundred and ten days to pass an order or issue direction to the notified combination. On the expiry of this period, if no order is passed by the Commission, the combination shall be deemed to have been approved by the Commission.

The provisions of section 6 does not apply to a public financial institution, foreign institutional investor, bank or venture capital fund to subscribe share or finance facility or any acquisition pursuant to any covenant of a loan agreement or investment agreement. They shall file with the Commission within seven days from the date of the operation the details of the acquisition, control, circumstances for exercise of such control and the consequences of default occurring from the loan agreements.

The procedure to determine the relevant market is necessary to assess if the combination would appreciable adverse effect on competition in India, thus void for the section 6 (1). The exercise is similar to that determining the relevant market for the abuse of dominant position, expect for the fact that this case is forward-looking. The concern is whether the amalgamation would lead the price above the competition price. Once the relevant market has been defined, the Commission under the provisions set out in section 20 (4) shall have due regards to which factors would influence the effect of or is likely to have an appreciable adverse effect on competition. The Act does not declare that any of these factors by itself will cause an appreciable adverse effect on competition. The factors listed contain both negative and positive; sub-section (n) states ‘whether the benefits of the combination outweigh the adverse impact of the combination, if any’. This recognizes that a merger could have also positive impact in the economy such as economy of scale or access to know-how. Thus, a rule a reason approach is needed in inquiring into a combination. The factors to be considered by the Commission could be summarized in:

1. Barriers to entry.

Barriers to entry to the relevant goods or provision of service market are significant factor to be considered. The existing firms have a sunk cost advantage that would deter the new comers to entry. The highly initial investment could have been done by a local government without considering properly financial e economic rational behind. This could be a feasible scenario in case of infrastructure, where the state government in financial deficit divests a project to a private company. This would inevitable lead to an advantage to the existing firms which can enjoy their limited competition.

2. Market share in the relevant market of the persons or enterprise in a combination, individually and as a combination.

The market share by itself is not conclusive, but considered within the context of other facts, it could be a useful tool to identify the potential adverse effect on competition. A firm or a group of enterprises which enjoy already a relevant market position in a combination with its next competitor would probably cause adverse effect on competition, especially considering the likelihood of the combination resulting in the removal of a ‘vigorous and effective competitor or competitors’ in the market. The more the market share is concentrated, more the combination would tight the competition.

3. Availability of substitutes or through imports.

If a consumer is freely to switch to a substitute product, the combination could be driven by other reason rather than cause appreciable adverse effect on competition. Similarly, if the products of combined firms could be substitutes with imported goods, the impact on the market will be less serious.

4. Degree of countervailing power in the market.

A further combination between the buyers or suppliers which enjoy already strong bargaining power, it would be considered to adversely affect competition in the relevant market.

5. Potential to increase prices or profit margins.

An increase of profit margins would shift the social surplus from consumers to few players, resulting in Pareto inefficiency. The Commission shall evaluate the 'likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins'.

6. Nature and extent of vertical integration in the market.

A vertically integrated firm has more probability to harm the competition.

7. Possibility of a failing business

This could be the case of a target company which is no more a competitor. Whether an enterprise suggested being failing business intents to cease its operation and exits from its business because there will be no assets to carry on its business or it is not possible to restructure it financially are questions of fact to be determined in each case.

8. Benefits that may outweigh adverse impact of the combination, etc.

Combinations that would increase innovations in production, supply, distribution, storage, acquisition or control of goods or provision of services are mostly welcome by the competition authority. If the proponents of a combination are able to substantiate significant specific benefits that the combination would bring (i.e. in the nature and extent of innovation), outweighing the adverse effect of the combination, the combination would not be anti-competitive.

The procedure for inquiry into a combination is laid down in sections 29, 30, 31 of the Act. Under the provisions of section 29, if the Commission is of the prima facie opinion that a combination could or has already caused on competition, it shall issue a notice explaining why such combination should not take place to the parties involved calling upon them to respond within thirty days. The Commission afterwards should respond within seven days from the date of receipt of the response directing the parties to publish combination details within ten working days of such direction in order to bring the combination into the public knowledge. The Commission may invite any person affected or likely to be affected by the combination, to file his written objections within fifteen days of the information disclosure. The Commission may call for additional information from the parties according to the information gained in the objections, which shall be submitted in fifteen days. After receipt of all information, the Commission shall proceed to deal with the case in accordance with the provisions in section 31.

The Commission could by order approve a combination or if its opinion that the competition is or is likely to be affected, it shall direct that the combination shall not take effect. Where the Commission thinks that the adverse effect on competition could be solved by suitable modification, it may propose appropriate modification to the combination. The parties who accept the modification order shall carry out its content by the period specified by the Commission. If the parties fail to carry out the modification in time, the combination is deemed to be anti-competitive and the Commission shall direct that it shall not take effect. In case the parties do not accept the modification of the Commission, they have thirty working days to submit amendment. The approval of the amendment by the commission results into the combination acceptance. If the amendment gets rejected, the parties have thirty working days to accept the original modification proposed by the Commission. Expired the last thirty days, the combination shall be deemed to be anti-competitive. When a combination is ordered not to take place, because it is deemed to have an appreciable adverse effect on competition, therefore the Commission may order that the acquisition; the acquiring of control; the merger or amalgamation shall not be given effect to.

The term for the Commission is always two hundred and ten days to pass an order to the parties, if more time is passed, the combination shall be deemed to have approved. Before the 2007 amendment the deadline was ninety working days. The Confederation of Indian Industry (CII) has flayed the 2007 amendment. The industry body said that the move would negatively affect the growth of the Indian economy as, "over-regulation and procedural hurdles such as pre-notification of all mergers could prove to be counter-productive and thwart India's economic growth".

The CII has the opinion that regulating combinations may be justifiable in a matured economy, however in a developing economy like India, regulation of 'size' per se, may not be an economically sound proposition.

The chamber pointed that some provisions of the law need to be reconsidered. It said that firstly, the period of 210 days is extremely long and in such a long duration, other suitors of the target company might bag the deal, as no target company would be willing to wait for such a long time[50].

Up to the 12th January 2011, the Commission has always approved notice case under section 5 and 6. Here below a comprehensive list is provided.

Combination Registration No.	Notice Description	Date of Order
C-2011/12/12	Notice for merger filed by TCL and Wyoming I	28/12/2011
C-2011/12/15	Notice for Acquisition filed by SCB India	28/12/2011
C-2011/12/11	Notice for Merger filed by AN India Ltd., AN Chemicals Ltd., AN Cars Ltd., and AN Coatings Ltd.	28/12/2011
C-2011/10/07	Notice for Merger filed by Nippon Steel Corporation and Sumitomo Metal Industries Ltd.	27/12/2011
C-2011/11/10	Notice for Acquisition filed by KKR FII	13/12/2011
C-2011/11/09	Notice for Merger filed by SL, SVAI and Morgan	13/12/2011
C-2011/10/05	Notice for Acquisition filed by NHK Automotive Components India Private Limited and NHK Spring Co., Limited	4/11/2011
C-2011/10/06	Notice for Merger filed by AHIL and APIL	19/10/2011
C-2011/09/04	Notice for Acquisition filed by AICA Kogyo Company Limited and Aica Laminates Indian Private Limited	30/09/2011
C-2011/08/03	Notice for Acquisition filed by G&K Baby Care Private Limited	15/09/2011
C-2011/08/02	Notice for Acquisition filed by The Walt Disney Company (Southeast Asia) Pte. Limited	25/08/2011
C-2011/07/01	Notice for Acquisition filed by RIL and RIIL	26/07/2011

Table 3: List of mergers approved under the Act

[50] http://www.financialexpress.com/printer/news/253583/, posted online the 24th December, 2007

7. CONCLUSION

The Indian Competition Act, in the new 2012 world order, as one of the most important economic players (EU, USA and China) surely will attract the interest of many scholars and competition authorities especially from developing countries. The Act is applied to 1.2 billion of Indian consumers and by few decades the Commission would be the competition authority of the world most populated country. Under such economic and demographic scenario, the Commission, besides the obvious task of ‘surveillance’ on the Indian economy, needs to increase further its advocacy role. Most importantly the Commission has the obligation to spread the competition awareness among India citizens. In the case *Balaire Owner’s Association v. DLF Ltd*[51] clearly the average middle-high income consumer and their advocate in filling the information consider the Act as a consumer protection law instead of a guarantor of the competition. More information has been filled since the reduction of filling fee which has allowed the general public to participate actively in market monitoring. The media channels are also playing an important role in spreading the Commission’s important task and showing interest in important competition issues.

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[51] Same opposite party and Commission’s order in *DLF Park Place Residents v. DLF Ltd.* The Commission is in the opinion that DLF has abused of its dominant position.

7.1 Relevant Commission's order

Case Number	Case Description	Date of Order
RTPE 09/2008	**FCM Travel Solutions (India) Ltd., New Delhi v. Travel Agents Federation of India & Ors.**	17/11/2011
03/2009	**Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Association of India & Ors.**	04/10/2011
18,24,30,31,32, 33,34 & 35/2010	**DLF Park Place Residents v. DLF Limited**	29/08/2011
19/2010	**Belaire Owner's Association v. DLF Limited and HUDA**	12/08/2011
13/2009	**MCX Stock Exchange Ltd. & Ors. v. National Stock Exchange of India Ltd. & Ors.**	23/06/2011
01/2009	**FICCI - Multiplex Association of India v. United Producers/ Distributors Forum & Ors.**	25/05/2011
07/2010	**Vijay Gupta v. Paper Merchants Association, Delhi & Ors.**	24/03/2011

Table 4: Selected orders of the Commission under section 3 and 4

Index of the Competition Act, 2002

Chapter IV

DUTIES, POWERS AND FUNCTIONS OF COMMISSION

Chapter VIIIA

COMPETITION APPELLATE TRIBUNAL

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