



CASE STUDY 05

SEPTEMBER 2013

MCX STOCK EXCHANGE LTD. VS NATIONAL STOCK EXCHANGE OF INDIA LTD. & OTHERS***Forum:**

Competition Commission of India (CCI), New Delhi

Act/ Sections referred:The Competition Act, 2002¹

1. Section 2(r) *“relevant market”*
2. Section 4 *“Abuse of dominant position”*
3. Section 19 *“Inquiry into certain agreements and dominant position of enterprise”*
4. Section 26 (1) *“Procedure for inquiry under Section 19”*
5. Section 27 *“Orders by commission after inquiry onto agreements or abuse of dominant position”*

Parties:

1. **Informant- MCX Stock Exchange Ltd.**² MCX is a public limited company incorporated on August 14, 2008. MCX-SX is a stock exchange recognized by the Securities and Exchange Board of India (SEBI) under Section 4 of the Securities Contract (Regulation) Act, 1956. It has regulatory approvals to operate an exchange platform for trades in Currency Derivatives (CD segment). The promoters of the company are Financial Technologies of India Ltd. (FTIL) and Multi Commodity Stock Exchange of India Ltd. (MCX). FTIL is engaged in the business developing and supplying software for financial and securities market. The main software product of FTIL is marketed under the brand name 'ODIN' and is used by many members of NSE, BSE and IP company.
2. **Opposite Party (OP) - National Stock Exchange of India Ltd. & Ors.**³ NSE was incorporated in November 1992 and recognized as a stock

exchange in April, 1993 under SCR Act, 1956. NSE has its operations running in various segments including WDM, Equity, Options/Futures on Individual Securities and CD segment.

Omnesys is a software producer for financial and security market. NSE has 26% stake in it via **DotEx** which is a 100% subsidiary of NSE. The DotEx / Omnesys has introduced a new software known as 'NOW' to substitute a software called 'ODIN' developed by FTIL.

After taking the stake in Omnesys, DotEx intentionally wrote individually to the NSE members offering them 'NOW' free of cost for the next year. Simultaneously, NSE has refused to share its CD segment Application Programme Interface Code (APIC) with FTIL, thus disabling the ODIN users from connecting to the NSE CD segment trading platform through their preferred mode.

Allegations on NSE:

The informant alleged violation of Section 3 and 4 of the Act on account of anti-competitive behaviour and abuse of dominant position. According to the information, various fee waivers and the low level of deposit requirements only with respect to the CD segment of NSE were considered completely at a variance with its conduct in other segments and were aimed at eliminating competition and discouraging potential entrants. This included a transaction fee waiver on currency future trades executed on NSE, no admission for membership in its CD segment of NSE, no annual subscription charges, no fee for providing data feed in respect to its CD segment of NSE, refusal to share its CD segment APIC with FTIL, thus disabling ODIN users from connecting to the NSE CD segment.

Issues on which DG investigated the matter and the DG Report

- (a) Delineation of relevant market
- (b) Assessment of dominant position

¹ Hereinafter referred to as the Act.

² Hereinafter referred to as MCX-SX.

³ Hereinafter referred to as NSE.

* Date of Order by CCI: 23.06.2011, available at <http://cci.gov.in/May2011/OrderOfCommission/MCXMainOrder240611.pdf>, as accessed on September 1, 2013.

- (c) Abuse of dominant position
- (d) Applicability of Section 4 (2) (e) of the Act

ISSUES FOR DETERMINATION IN THIS CASE:

a) What is the relevant market, in the context of section 4 read with section 2 (r) and section 19 (5) of the Competition Act, 2002?

To determine the relevant market in the instant case, the Commission relied on the Report of the Internal Working Group of RBI, which had advocated a clear separation of CD segment from other segments in any stock exchange. CCI observed that as underlying assets, equities and currencies are entirely different; consequently related derivatives are also different. Trading platforms of stock exchanges for the two categories of products (assets or derivatives) are, therefore, also in different market. From any practical point of view, a product over CD segment exchange cannot be said to be either interchangeable or substitutable by a product in segments like equity and F&O for the purchaser.

The Commission decided that the stock exchange services in respect of the CD segment in India are clearly an independent and distinct relevant market.

(b) Is any of the OPs dominant in the above relevant market, in the context of section 4 read with section 19 (4) of the Competition Act?

The Commission examined the market share of NSE and its operations in other segments and found that it has high degree of vertical integration from trading platform, front-end information technology, index services, etc. *It was of firm opinion that NSE has a position of strength and enjoys a dominant position in the relevant market in the context of Section 4 read with Section 19 (4) of the Act.*

(c) Is there any abuse of its dominant position in the relevant market by the above party?

The Commission via the previous NSE circulars found that the informant has been facing the restraint of zero fees since the beginning. The pattern of behaviour of NSE suffered from inconsistency and the Commission concluded that nothing can be reliably derived from these behaviour patterns that would reasonably lead to the conclusion that they have consistently followed a philosophy of fee waivers in nascent market. However, the Commission concluded that the zero price policy of NSE in the relevant market is unfair and can be termed as destructive pricing.

On Monopoly leveraging: The Commission opined that NSE by not charging transaction fee is subsidising activities in CD segment which is open to competition and is using its monopoly profits to leverage its position. NSE is also creating barriers for users of ODIN software by not providing APIC to its own software 'NOW'.

It was held to be using its position of strength in the non CD segment to protect its position in the CD segment.

Order of the Commission

NSE was directed to modify its zero price policy in the relevant market and to cease and desist from unfair pricing, exclusionary conduct and unfairly using its dominant position in other market/s to protect the relevant CD market with immediate effect. The commission levied a penalty on NSE equivalent to 5% of their average turnover amounting to a total of INR 55.5 Crores (USD 12.23 Mn).

Analysis of the Order

The order articulates the core competition concepts viz. relevant market, dominance, and abuse of dominance, SSNIP test, predatory pricing and monopoly leveraging. However, in a case so complicated as this, CCI should have adopted a more comprehensive and rigorous analysis. The Commission seemed reluctant to go into the issue of predatory pricing. Lastly, on the issue of penalty, CCI must come up with comprehensive guidelines on how to calculate the penalties and on what grounds the penalties can be said to be aggravated or mitigated.

The present case went to COMPAT⁴ which granted a conditional stay on payment of the penalty, but on the condition that the NSE, if found guilty, will have to pay interest at the rate of 9 per cent on the amount from the date of the CCI order till the date of payment.

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⁴ Order passed by Competition Appellate Tribunal on September 8, 2011, available at <http://compat.nic.in/upload/PDFs/sep%20orders/8.9.11.pdf>, as accessed on September 6, 2013