

Dominance and its Abuse in the Stock Exchange Scenario

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Globalization has changed the face of worldwide economy bringing with it several opportunities and challenges. The erstwhile Monopolies and Restrictive Trade Practices Act, (“MRTP Act”) failed to completely address complex competition issues in light of the emerging market economy and thus arose the need for a stricter framework to regulate competition regime in India. The Competition Act, 2002 (“Act”) primarily aims at regulating three kinds of practices (i) preventing anti-competitive agreements, (ii) prohibiting abuse of dominant position by a market player through unfair or discriminatory prices or conditions and (iii) regulation of combinations and mergers in addition to protecting consumer’s interest, promoting competition

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and ensuring freedom of trade in Indian markets.

Dominance per se is not prohibited under the Act, however its abuse is. There has been no objective criterion set to establish whether a market player is dominant but several factors are looked into as specified under the Act to adjudicate a player's market position. The high standards set for market players under the Act have brought all their activities within the scrutiny of the Competition Commission of India ("CCI") whereby the acts of leveraging their position in one market to enter another for expansion purposes could also lead to violation of the provisions of the Act. In the case of *MCX Stock Exchange Ltd. ("MCX") vs. National Stock Exchange of India Ltd ("NSE")*², CCI relying on the provisions of the Act and several tests has attempted to analyze whether NSE occupies a dominant position in the market and if at all, whether NSE has resorted to abusing its dominant position thereby violating the provisions of the Act. CCI in one of its very first judgments on dominant position analyzing the concepts of relevant market held NSE to be a dominant player, abusing its position in the stock exchange market, imposing a penalty of INR 55.50 crores. In this article, we have attempted to analyze the issues discussed in the above mentioned judgment to understand CCI's rationale in adjudging abuse of dominant position by market players.

Stock Exchange Scenario-Analysis

In the present case, CCI has dealt in detail with the concepts of "dominant position", *relevant market*, *predatory pricing and abuse of dominant position in one market to enter another market* in the context of the stock market services. CCI relying on the host of factors provided under the Act has attempted to determine whether NSE's activities amounted to indulgence in abusing of its dominant position and violation of the provisions of the Act.

MCX, operating as an exchange platform for trading in currency derivatives alleged NSE of indulging in wrongful and abusive exercise of market power eliminating competition from the currency derivative segment and discouraging potential entrants from entering the relevant market through leveraging, waiver of transaction fees, annual subscription charges, data feed fees and adopting exclusionary devices to kill competition. The major issue for analysis before the CCI was whether NSE merely occupying a position of strength in the other markets, could be considered a dominant player in the currency derivative market wherein it occupied only 33.17% of the market share with the entry of several other market

players. It may be pertinent to note that the market share of MCX in comparison was higher in the said market.

Relevant Market

Dominance cannot be assessed without delineating the relevant market in which dominance is to be assessed. The cyclical manner in which 'dominance' has been defined under the Act makes 'relevant market' a prime determinant in analyzing the realm of Section 4. '*Relevant Market*' is defined in terms of substitutability / interchangeability of products *inter se* and is based on both product and geographical market. The primary focus in delineating a "**relevant market**" is to pinpoint both the sphere and the periphery of practices³ and activities⁴ that are said to have *an appreciable adverse effect on competition*⁵.

In discussing the issue related to "*relevant market*", in the case at hand, the CCI assessed all the segments of the stock exchange market including equity, futures and options, WDM segment dealing with government securities alongside the currency derivative market. It effectively delineated different sectors of the stock market and interestingly did not club the other sectors of the stock market in arriving at its determination. The CCI was of the opinion that the other segments of the stock market were not 'adequate substitutable or interchangeable products' for the currency derivative ("CD") segment. Since the CD segment was 'distinctly different' from other segments requiring separate approvals, it was considered an independent and distinct relevant market. The boundaries of relevant market freeze when the products involved cease being practically interchangeable or substitutable; thereby the CD segment in India was found to clearly be an independent and distinct market.

In foreign jurisdictions, the concept of relevant market is examined through the Small but Significant Non Transitory Increase in Price Test, ("SSNIP Test") wherein a demand substitution can only be found by considering a speculative experiment, postulating a hypothetical small, lasting change in relative prices and evaluating the likely reactions of consumers to that increase⁶. The CCI has not objected to adopting technical tests for determining relevant market, however in the present case CCI held that there being no pricing in the CD segment, any test based on pricing for determining demand substitutability was not applicable. The pricing aspect was discussed at length to determine whether waiver of fees amounted to predatory pricing or penetration pricing.

² Case No. 13/2009

³ "Practice" includes any practice relating to the carrying on of any trade by a person or an enterprise; as per Section 2 (m) of the Competition Act, 2002.

⁴ "Activity" includes profession or occupation; as per Article 2 :Explanations (a) of the Competition Act, 2002

⁵ Section 3(1) of the Competition Act, 2002

⁶ Section 19 (7) of the Competition Act, 2002

Dominant Position

The Act defines “dominant position” as “a position of **economic strength** enjoyed by an undertaking in **the relevant market in India**, enabling it to operate independently of the competitive forces prevailing in the relevant market; or affect its competitors or consumers⁷. Both the factors as mentioned above are inter-related and need to be read together and not in isolation. However, unlike other jurisdictions, in India “**strength**” is not evaluated only on the basis of market share of the enterprise but on the basis of a host of stipulated factors including size and importance of competitors, economic power of the enterprise, entry barriers etc. as enumerated under Section 19 (4) of the Act⁸. The Act primarily aims at regulating the activities of dominant players which could amount to abuse, preventing competition in the market and creating entry barriers for other players.

CCI has analyzed dominant position from the context of position of strength, ability to operate independently and affect competitors or consumers in the relevant market on the basis of the analysis of several reports and adopting a holistic approach in line with the several factors mentioned under the Act.

The Commission held that position of strength is not some objective attribute that can be measured along a prescribed mathematical index or equation, but needs to be assessed whether **a particular player in a relevant market** has clear comparative advantages in terms of financial resources, technical capabilities, brand value, historical legacy etc based on a holistic interpretation of seemingly unconnected statistics or information and application of several aspects of the Indian economy. It was concluded that NSE obtained undeniable advantages from its operations in other markets, allowing them to provide stock exchange services for free in the CD segment, thereby occupying a dominant position in the market. The acts of NSE amounted to leveraging its position in other markets to its benefit to capture the CD segment market.

The Commission rightfully stresses on the areas of ‘strength’ and does not propagate a straightjacket formula to assess the same. However, the bigger question to determine is to whether the assessment of strength is limited to the affected relevant market. On a plain reading of the definition of the term ‘dominant position’ it is plausible to arrive at a conclusion that ‘dominance’ is limited to the relevant market in which relevant market is to be assessed. In other words, the Act may seem to suggest that the determination should be limited to whether the accused is dominant in the affected relevant

market without reference to any other related relevant market that such entity may occupy a dominant position in. The emphasis on the fact that dominance is a position of economic strength enjoyed by an undertaking in the relevant market in India as opposed to a relevant market in India could mean that the position of dominance in one market cannot succumb such a player to rigours of Section 4 on another relevant market. Consequently, in the instant case, after having arrived at the conclusion that the relevant market was limited to the CD segment, one might suggest that the CCI’s determination of NSE’s dominance should have been limited to the CD market alone and the CCI should have considered, on a stand alone basis and without reference, whether the NSE was truly dominant therein. However the CCI seems to have taken a difference approach, in its interpretation, rightly or wrongly, should an entity, who can use its resources of market share or high net worth in one market to function in another, such an entity has demonstrated a position of strength, leading it to be dominant in such other market as well.

Abuse of Dominant Position

Once the parameters of ‘relevant market’ and ‘dominance’ have been arrived at the next logical question is whether the acts complained of constitute an ‘abuse of dominance’ or a not to determine the contravention of Section 4. The allegations of the MCX were that the acts of the NSE constituted ‘predatory pricing’. Predation is exploitative behavior and can be indulged in only by enterprises(s) having dominant position in the concerned relevant market⁹. The preliminary object of predatory pricing is to capture and dictate the terms of market. In referring to definition of predatory pricing the NSE contended that the primary ingredient of predatory pricing was pricing below cost with a view to reduce competition. The NSE further contended that cost would mean average variable cost and that since it is not incurring any “variable cost” for running the CD segment, the concept of pricing below cost i.e. predatory pricing did not arise. However, the DG Report submitted in this case analyzed the factors considered by other jurisdictions, several judicial precedents and various reports to determine predatory pricing. It also posed a hypothetical question in challenging the NSE’s ‘no cost theory’ in that had the NSE not had income from other segments it would not be able to sustain the pricing model it currently followed in the CD segment. The defense of nascent market taken by NSE was completely set aside and the act of waiving transaction charges,

⁷ Section 4, Explanation (a)

⁸ Market share; Size and resources of the enterprise; Size and importance of competitors; Economic power of the enterprise; Vertical integration; Dependence of consumers on the enterprise; Extent of entry and exit barriers in the market; Countervailing buying power; Market structure and size of the market; Source of dominant position viz. whether obtained due to statute etc.; Social costs and obligations and contribution of enterprise enjoying dominant position to economic development.

⁹ Report on Predatory Pricing: A Strategic Analysis available at <http://www.cci.gov.in/images/media/ResearchReports/CharuReport260411.pdf>. Last visited on September 25, 2011

admission fees, data feed charges was held to constitute to violation of Section 4 of the Act.

The Commission held that zero pricing as adopted by NSE was a clear method of leveraging done with the intention to impede future market access to potential competitors and foreclose existing competition, which is completely unfair from the competition perspective. The claims of penetrative pricing fall apart as it is understandable for the initial few months but not for three years reflecting strategy for market capture. Looking into the aspects of dominance, the CCI concluded that it is undeniable that NSE has several advantages owing to operations in other market and adopted predatory pricing technique to carve a superior position in the CD segment. NSE used its position of strength in other market having associational links to leverage on the CD market. The instant decision has taken a broader perspective and considered CD segment to be an independent and distinct market. However, NSE being operative in other segments had the benefit of capturing the other relevant market. Two relevant markets have associational links and using a position of strength in non CD segment to protect its position in CD segment does amount to abuse. Denial of access to software on different platforms does amount to an exclusionary conduct in the delineated relevant market.

Minority Opinion

The dissenting opinion to the present matter has agreed to the concept of relevant market and the analysis adopted by the majority opinion, though differed on the aspect of abusing its dominant position in the relevant market. The CCI held that NSE is not dominant considering other players are involved and have an equal amount of market share. Therefore, zero pricing was not considered unfair or amounting to predatory pricing. The minority clearly stated that an adversarial view has been taken considering if MCX had other source of income or not facing losses, a separate view could have been taken. It is imperative to consider other players in the CD seg-

ment viz. United State Exchange and the fact that no claims of abuse of dominance or any relief were put forth by them.

The role of competition authorities is not meant to be adversarial but to inquire into competition related issues was the reasoning for their dissent. The entire opinion stresses on the fact that MCX entered into the markets knowing the market and adopted the business plan considering the waivers into account. All the players did not charge any kind of fees and there has not been a bone of contention by other competitors, demonstrating that it's a freely operating competitive market in place and interests of consumers are protected.

Conclusion

The CCI has analyzed the abuse of dominant position by various entities involved in different sectors by relying on the factors mentioned under the Act. However, the same is subject to appeal, by NSE before the Competition Appellate Tribunal ("COMCAT") within 60 days of the order and further before the Supreme Court. The new judgment seems to be a positive move in the right direction of detecting abusive practices from both legal and economic perspective. However, it is pertinent to mention that the CCI has adopted a narrow outlook in interpreting the provisions of Section 4 of the Act pertaining to abuse of dominant position leading to ambiguity for big players with high market share. Lack of clarity on the concept of relevant market might lead to more confusion and complexities in adjudging market position of players. The interpretation would vary from case-to-case basis depending on several factors prescribed under the Act with the sole intention of benefiting the consumers and the market at large. Though the proactive approach by the CCI has laid down the path for deterrence in the markets against anti-competitive activities, welcomed in the larger interests of the economy, enterprises may be wary to leveraging on their strengths in one market to function competitively in another.

