Counter Point - IV: First successful case of predatory pricing in India
- Imposition of Penalty on National Stock Exchange

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Amongst various dimensions of the Competition Law violations across the world, the action against violations relating to predatory pricing are vey limited in comparison to other types of violations. Not that instances of predatory pricing can not be found. They can be found dime a dozen. Almost every other day every competitor, or all the competitors together bring such allegations agains an efficient player a bit too often. However, the difficulty to analyse and reach a definitive conclusion without having an egg on its face by any competition agency is the challenge which is a potent factor justifying the limited jurisprudence on the subject.

Seen in this background, having successfully fined an instance of predatory pricing in the stock exchange secrtor which stands confirmed by the appellate body, the Competition Appellate Tribunal (COMPAT), has added another feather to the cap of the new competition agency in India, the Competition Commission of India (CCI/Commission). Continuing with the series on dissenting and separate orders of different members of the Commission, in this write up the focus is on the intersting case of predatory pricing brought by MCX-SX against NSE wherein the Commission successfully penalised NSE with a penalty of INR 55.5 Cr.

The author, who analysed the report of the DG for the Commission, as the then Head of the Antitrust Division of the Commission and who had previously also served as the very first Director General of the functional Competition Commission of India to lay down the competition law investigation framework in the country looks at this order from a neutral commentator's perspective.

The Competition Law enforcement is a serious business more so in developing economies of transition. If not taken seriously, it can come to haunt the competition agency or its officials themselves in addition to hurting the economy of the country. The arrest of Muhammad Iqbal, Competition Commissioner of Indonesia of the Indonesian Competition Agency(KPPU) in September, 2008 and subsequent conviction in June, 2009 with a four year jail sentence for accepting a bribe of 500 million rupiah (Approx. $66,275) by the country's anti-corruption court is not too old.

Along with Mr Iqbal, a senior executive of the company that owns Direct Vision,

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Billy Sundoro, was also arrested in the raid after an anonymous tip-off to the powerful Corruption Eradication Commission. Mr Sundoro was alleged to have handed Mr Iqbal the cash in a black briefcase in a hotel elevator, as the two headed for a traditional fast-breaking ceremony - the high point of the day for Muslims during the holy month of Ramadan - just after sunset on Tuesday night.

The KPPU had, in the previous month only, ruled the Direct Vision network not guilty of monopoly practice in broadcasting the English Premier League on its pay-TV channel Astro Nusantara. The Direct Vision, at that time, was owned by the Lippo Group, one of Indonesia's biggest conglomerates. It had vast property, education and media interests, as well as significant social influence through the Riady family, its owner. The monopoly case against Direct Vision was brought by a group of competing networks. The KPPU chief Syamsul Ma'arif admitted tearfully, after the arrests, that "if (the allegations) are true, this will be a great trial for us". He said commissioners were "certainly often given envelopes (of money) but these are always returned". This revisit to history would show that all the competition agencies have to evaluate the evidence before them diligently. One slip, here and there, and the consequences will have to be borne by the economy and the competition agency both.

Back home, more than once, the appellate body, the Competition Appellate Tribunal (COMPAT), did not agree with the views of the majority and held the minority opinion of the Commission as the right interpretation of the Competition Law. Therefore, we have to appreciate that the dissenting orders hold a very important key to the evolution of Competition Law jurisprudence in the country.

In the series of analyses of dissent orders, we see that the order passed by the Commission imposing a penalty of Rs. 55.5 Crores on National Stock Exchange (NSE) for violation of Competition Act, 2002 ("Act") for predatory pricing, in a new market segment of Currency Derivatives(CD) in stock exchange, in which the only other meaningful competitor was MCX-SX is an intersting order. In this matter two Members differed from the majority view of the Commission. It was quite obvious,during the course of inquiry into this matter, that MCX-SX was the only existing meaningful competitor in the CD segment of stock exchange operations in India. In this case, an information was filed by MCX–SX under Section 19 of the Act against NSE of India and others for abuse of dominant position. The allegation of MCX-SX against NSE and others essentially related to wavier of admission fee as well as charging zero transaction fee only in CD segment whereas nowhere either in present or in the past had NSE followed any such promotional practice in other segments. In this segment no annual subscription charges were being charged while charging the same in all other segments all the time. Keeping membership deposits exceptionally low compared to other segments, not charging for data fee in respect of CD segment, not sharing the application programme interface code or, in simple language, the interface software with FTIL which happens to be promoter of MCX-SX were some other allegations against NSE.

This may be mentioned that FTIL, which was the promoter of MCX-SX, also happens to be a dominant player in the market of software technologies connecting brokers and the other intermediaries for dealing with securities through the exchanges. The FTIL is not only a dominant player in the market of software technologies but also uses a software by brand name ODIN. The allegations further stated that the opposite parties were indulging

in this anti-competitive conduct for the simple reason that while the Opposite Party can afford to subsidise transactions in the segment of CD on account of having income in other segments and, therefore, having a possibility of cross subsidisation but the new competitor MCX-SX did not have any such luxury as this was the only source of income for MCX-SX. This, according to the Informant, hinted towards the intent and motivation of the NSE to display great generosity and be so benevolent so as not to charge any fee from transactions in this segment only.

Showing the financials, the Informant pointed out and impressed upon the Commission to take a note of the fact that it was virtually on a death bed and and its very existence was threatened in such an environment, where the existing dominant player is not only abusing its dominant position but also ensuring that the competitor does not succeed and bleeds away to death. This was like hurtling towards a sure death. It was also successfully pointed out by the Informant that the waiver of transaction fee, by all accounts, looks to be as a reaction to the entry of a new player in the market and not as a competitive response to meet the existing competition in the market. They could prove with documentary evidence that, in meetings after meetings, the transaction fee was not just waived but the duration of wavier was extended from time to time. The only possible inference drawn by the Informant and told to the Commission was that, perhaps, the OPs were waiting for the Informant to fail and only to start charging any transaction fee after that anticipated collapse. This appeared true indeed as the circumstances indicated that the transaction fee waiver could not have been without any purpose.

This case took quite some time for resolution. There were many reasons for this. Both the parties to the issue viz. Informant and the Opposite Party engaged economic analysis through different sources giving different outcomes. The Opposite Party also presented opinions of some of the known experts in the field. The informant pointed out that these expert opinions were oloured and contrary to the known position of these very same experts/authors in their widely circulated texts on the subject. Both the parties engaged a battery of lawyers and arguments stretched for quite some time. It was particularly intetesting to note that the economic firms hired by competing parties could give competing opinions on the same set of facts.

The end result of this exercise was that finally the Commission came with a divided opinion. The majority opinion, holding OP reponsible for predatory pricing, obviously prevailed but the minority of two Members held that there was no violation of the competition law and there was no need to penalise NSE. The majority passed an order in which the NSE was held to have violated the provisions of the Act and, accordingly, imposed a penalty of Rs. 55.5 crores on NSE.

The first issue for determination before the Commission was as to what was the relevant market. The majority held that since MCX-SX can only operate in CD derivative segment, the competition concerns must be specific to that segment only. Thus the relevant market definition of the majority considered CD segment as relevant market. Therefore, the Stock exchange market in respect of CD segment in India was held to be the relevant market. The distinguishing features on which the majority relied between OTC market of stock exchange and CD market, as taken from the majority order, are given below, for a ready reference, in a tabular form below :

OTC Market	CD Derivatives
OTC deals with varied products which inter alia includes currencies.	The CD segment deals with currencies as underlying securities.
Market participant includes importers and exporters who want to hedge their risk. Widespread participation.	Market participant includes speculators and hedgers.
Not traded under exchange	Traded under exchange
More risk	Risk is mitigated by clearing corporations
Maturity period is much longer	Maximum maturity period is of 12 months

CD Derivatives	Other equity exchange segments
Underlying asset is currencies	Underlying asset is equity

Though having defined the relevant market, the majority of the Commission did not consider it really very effective to apply SSNIP test in this case, especially, in view of the fact that the CD segment is relatively new and no costs had been charged to the transactions in this segments by any market player till that time. This was true as there were only two players - one was NSE and the second was known as MCX-SX and no other meaningful market participant. The existing player NSE was not charging any fees and, following the competitive pressure, despite incurring expenditure, MCX-SX was also not charging any fee. Thus none of the two players was charging any fee and, therefore, the applicability of SSNIP test was indeed quite limited. The limited applicability of SSNIP test in developing economies in transitions, in view of the dearth of reliable cost and pricing data is otherwise also quite well known. In this case,the lack of reliable data and not charging of any fee by any of the players also made it beyond the help from SSNIP test.

After determining the relevant market, the next issue before the Commission,was determination of the question whether the OP/NSE is in a dominant position in the relevant market, in terms of Section 19(4) of the Act, or not. On this issue, the majority evaluated all the data gathered by DG in his report and held that the facts show that NSE was in a very good position in view of its un-precedent growth. However the Commission was conscious of the fact that dominant position under Section 19(4) of the Act cannot just be attributed on the basis of market share alone. What is needed to be considered is the competitive advantages in terms of brand value, size and resources. After going through all the relevant factors, the Commission reached the conclusion that NSE has a position of strength/edge over others not only because of its market share in all other segments of the stock exchange market in India but also because of its geographical and segment coverage and deep range of vertical integration in all the connected services. The fact that zero pricing policy adopted by NSE was a clear execution of its position of strength because of which the other market players had been forced to adopt the same to barely ensure survive and not for any other reason also influenced thinking of the Commission. The Commission also took note of the ruthless competitive streak seen by NSE's past conduct. Based on all these factors, the Commission took a view that this kind of commercially un-viable policy of not charging any transaction fee was not adopted by NSE for any altruistic reasons other than to endanger the existence of its competitors.

The dissent order passed by Member (AG) and Member (GG) stated that definition of dominant enterprise has to stand on two

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equally important legs. These legs are not only the position of strength which has to be ascertained by the Commission but also whether the mighty enterprise, because of its position of strength, can swing the competitor and consumers in its favour. This means that minority substantially relied on the fact that it is not just the position of dominance but also its ability to influence competitors and consumers in its favour that has to be dealt with while dealing in the case of abuse of dominant position. Based on this, dissenting Members questioned attributing dominant position to NSE, in the CD segment of the stock exchange market in India, on the ground that it is dominant in the rest of the stock exchange market and has resultantly gathered a substantial amount of good will. That being so, the minority expressed the view that it is not necessary to punish NSE for being good at its job. The reasons given by the minority for this are as under:

a) NSE does not hold the majority of market share despite being in the segment since 2008.

b) MCX-SX has increasingly augmented its market share, sometimes by pushing NSE to a distant second.

c) When USE entered the market in 2010, it was able to gather a total of 42.77% market share in a short time.

Based on the above logic, the minority stated that neither one of the three payers viz. NSE, MCX-SX or USE (entered in the market in 2010) had any advantage or disadvantage over the other. Minority also, further, held that all the three payers had necessary resources to outlive each other in the light of constantly changing fluctuation in market shares. The minority also noted that neither the majority of the Commission nor the DG have pointed out a single instance where NSE could influence market or the consumer in its favour. The dissenting order goes in detail into functioning of network industry and claiming that the crucial factors in the network industry is the increasing returns to scale and that the average cost decreases with increasing scale of production.

In view of this, the Minority held that, for starting generating dividends any enterprise needs to increase participation. Larger the network, larger number of participating connections. Having said that, the minority further stated that an industry has to find out innovative ways to drive profits as well as to provide value added services and NSE was just following the laws of the trade to gather more liquidity. Next issue was whether there was abuse of dominant position in relevant market by NSE. The majority view was that it was hard to believe that refusal to share the interface code with FTIL, which was the promoter of MCX-SX, was devoid of any malicious intent since the denial was specific only to the CD segment and not to the any other segment. The Commission also pointed out that alternative terminal NOW was certainly not a better alternative.

The Majority view of the Commission also interpreted "predatory pricing" to be a subset of unfair pricing and proceeded to categorise practice of NSE in CD segment as unfair. The Commission also stated that DG's report had clearly established that NSE is spending various costs to CD segment

and it is not anybody's case that it is cost free. It further stated that its cost would be effecting the liquidity of NSE and it could not have been afforded by OP, had it not been dominant in other segments and this practice of charging no fee for the transactions has survived only account of cross subsidisation. In view of the Commission, this not only showcases a position of strength but also its intent to abuse the same. The Commission further held that unfair pricing as reflected in Section 4 of the Act must effect either the customers or the competitors and NSE's attitude resulting from its un-ending resources had the potential to drive every other enterprise such as Informant out of the market. The Commission attributed "intent" to NSE on the basis of above reason and therefore 'zero pricing policy' of NSE was held to be treated as an abuse of dominant position.

The minority held a different interpretation of the terms 'predatory'. It wanted to explain 'predatory' in economic terms and in legal terms. In economic terms any price reduction which is profitable to an enterprise in the long run due to added market power acquired by the eliminating existing and potential competitor is known as 'predatory pricing'. They also stated that there cannot be such a simplistic interpretation, when it comes to define it legally and three factors which are important to do so are market power, cost and recoupment. In the view of the minority, ideally, the standard of proof should be a holistic assessment of all these factors and in the view of the minority there is very fine line distinguishing 'predatory pricing' and cut through price competition. They also discussed the differences in the concept of predatory pricing in EU and USA. This is being summarised here under for a ready reference:

US	**EU**
Any price which is above average variable cost doesn't attract the radar of predatory pricing. There is relatively less importance placed on cost analysis.	Any price below average variable cost is definitely predatory in nature. Prices above average variable cost but below average total cost may be predatory in nature. Cost analysis is a major price of determination of predatory pricing.
It is absolutely necessary to prove a high likelihood of the predator recouping the losses incurred qua the market structure.	There is no necessity to prove recoupment strategy to prove predatory pricing.

The minority order further stated that the network industry defeats the law of demand and supply and in such an industry each player, by adopting a unique pricing strategy and providing various services, can acquire dominance and a new one can easily gain acceptance by using better technology and providing varied services. In view of this, the minority held that all the three players were giving cut through competition to one another in spite of their zero pricing strategy. In view of this background, pricing, in view of the minority, was a minuscule trigger which influenced the consumer decisions. On 'intent', the Minority claimed that nothing has come on record to showcase the presence of intent in the present case and they also pointed out that all the three players in CD segment had,through various circulars and public statements, advocated the logic behind zero pricing policy to be market development. Thirdly, as regards the possibility of recoupment, the minority held that CD segment had been anything but competitive in the last three years and there are not any entry barriers as clearly evidenced by successful entry of USE with the same zero pricing strategy. In view of this, the minority had the belief

that even if MCX-SX exits the market due to extensive competition, it can re-enter the market. Thus, the minority went on to hold the view that the NSE zero pricing policy was nothing but a sound business strategy.

Looking at these two different views, it is true that all the players were following the same zero pricing strategy but it was mostly market compulsion imposed on MSE-SX by market leader NSE. No history could be brought out by NSE to show that this practice or pattern was followed earlier in other segments also. It is indeed very simple to say that MCX-SX can exit and re-enter the market, perhaps, without any appreciation of the huge costs associated with this entry and exit. It does not require a superior intelligence to not appreciate the two sides of the network industry-the first side has been adequately discussed by Minority as well as Majority. What has been left to be discussed by the Minority is that network industry is the one which has got long gestation periods and need deep pockets which by themselves are an entry barrier. Therefore, only taking one side of the advantages of network industries and not looking into the kind of entry barriers they inherently produce may not be really a practical idea.

Another thing largely missed by minority of the Commission is too much emphasis on ' brought of record'. In the scheme of things as per the Act, nothing prevents the Commission in directing any improvement in the investigation done by DG. However, not really directing the DG as to what exactly is missing in the report and needs to be incorporated and investigatied but just letting go of any violations of competition law unpunished would be a travesty of justice. It would be like throwing baby with the bath water.

Therefore, it is really great for a new competition agency to have established itself as one of the few agencies which has taken note of and penalised a predatory pricing conduct of an enterprise despite the rigours expected in the analysis This has also to be admitted to be a remarkable feat for any new competition agency and the Commission needs to be complimented for that.