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NAVIGATING PREDATORY PRICING IN THE MCX V. NSE CASE: A COMPREHENSIVE CASE COMMENT

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ABSTRACT

This paper contrasts predatory pricing approaches in the U.S. and EU, applying them to MCX v. NSE. In the U.S., predatory pricing claims rarely succeed due to the high recoupment standard, while the EU deems prices below average variable costs abusive without requiring proof of recoupment.

The MCX v. NSE case highlights NSE's zero pricing, straining MCX-SX's sustainability. The CCI viewed NSE's selective fee waivers as anti-competitive, but the minority opinion disagreed, citing no predatory intent and noting that competitors, including USE, thrived despite zero pricing.

The dissent emphasizes the Competition Act's focus on market conditions, arguing NSE's declining market share reflects a competitive market. It also stresses that zero pricing benefits consumers and raising prices would harm consumer welfare.

The paper concludes NSE's pricing did not violate the Competition Act, as it did not deter competition or harm consumers, highlighting the need for nuanced analysis in predatory pricing cases.

KEYWORDS: *Predatory Pricing, Competition Law, Market Dominance, Regulatory Frameworks, Market Competition.*

I. Introduction

In the Mcx Stock Exchange Ltd. & Ors vs National Stock Exchange of India Ltd[1] case, the decision revolved around allegations of predatory pricing and abuse of dominant position. The Commission found NSE in violation of multiple provisions of the Act[2], specifically Sections 4 (2) (a) (ii) (unfair prices), 4 (2) (b) (i) & (ii) (restricting services), 4 (2) (c) (denying market access), 4 (2) (d) (dissimilar

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1 CCI, CASE NO. 13/2009, Dated: 23 June, 2011.
2 Competition Act, 2002

conditions for similar transactions), and 4 (2) (e) (protecting other markets). The majority decision, upheld by COMPAT, resulted in a ₹55 lakh penalty.

MCX-SX filed the complaint regarding NSE's August 2008 circular waiving transaction fees for currency futures trades and not charging fees in the Currency Derivatives (CD) segment. This forced MCX-SX, the sole competitor in the CD market, to waive its fees, resulting in significant losses. NSE was also accused of retaliatory actions against Financial Technologies India Ltd. (FTIL), including denying access to APIC, blacklisting FTIL’s ODIN software, and offering a free competing product through Omnesys, in which NSE held a 26% stake.

1. Determination of the Relevant Product Market

The Director General (DG) considered the entire Stock Exchange business as the relevant product market (RPM), stating that product differentiation had minimal impact and the segments shared a common user base.

In contrast, the Competition Commission of India (CCI) identified the Currency Derivatives (CD) segment as the RPM, noting it catered specifically to importers and exporters hedging against currency fluctuations, making it distinct from other segments like equities, debts, and futures.

The Competition Appellate Tribunal (COMPAT) disagreed with both, stating that the NSE provided services, not products, offering a trading platform rather than a product. COMPAT rejected international judgments cited by opposing parties, such as those from the TSX Group Inc.-Bourse de Montreal and Australian Stock Exchange-SFE Corporation merger cases, noting that these focused-on mergers where RPM definitions are narrow for assessing future impacts. This ex-ante approach contrasts with abuse of dominance cases, which are reviewed ex-post.

2. Facts and Allegations of the case

Multi Commodity Exchange of India Ltd. (MCX) and Financial Technologies India Ltd. (FTIL) promotes MCX-SX, holding more than 90% of its shares. According to SEBI regulations, new investors must be brought in to reduce MCX and FTIL's holdings to 5% each by September 2010, or else they will no longer be eligible to operate. Due to NSE's policy of not charging a transaction fee for the CD segment, MCX-SX is unable to levy such fees in its sole segment, resulting in significant losses. This scenario makes it difficult to attract new investors and comply with SEBI regulations[3].

Additionally, it is alleged that NSE subsidizes its losses in the CD segment using revenues from the Cash Segment, F&O, and WDM Segments, thus leveraging its dominant position to maintain its status in the CD Segment, violating Section 4(2)(e) of the Act[4]. Furthermore, NSE, along with DotEx and Omnesys, is accused of violating Section 4 of the Act by denying consumers the integrated market watch facility by withholding access to the Application Programme Interface Code (APIC) from the promoter of the informant. It is also alleged that the fee waivers and other concessions in the CD segment have been used by NSE as exclusionary tactics to eliminate competition and competitors. The Commission, upon reviewing these allegations, directed the DG to investigate, concluding that a prima facie case existed.

3. National Stock Exchange's Justifications

NSE did not charge an admission fee for corporate membership in the CD segment to encourage market growth, while it levied a fee of Rs. 5 lakhs for new members in the capital market and F&O segments from August 1, 2008. Members applying for the CD segment alongside others received a fee waiver.

Similarly, the data feed fee for the CD segment was waived to foster market development. DotEx, an NSE subsidiary handling market data, initially planned to charge for real-time CD data from October 2009 but deferred fees until July 2010 due to vendor feedback. Emails from vendors supported the fee waiver.

NSE denied gaining undue advantage through cross-subsidization from other segments and argued that cross-subsidization is not abuse of dominance. It placed FTIL on the watch list due to software deficiencies impacting NSE's integrity, denying FTIL’s request for API access in the CD segment. FTIL remains an empanelled vendor in other segments but is on the watch list for CD as a CTCL vendor.

4. Director General's Investigation

The Director General (DG) investigated two key issues:

3 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015

4 Competition Act, 2002, s. 4.

1. Whether NSE engaged in unfair or predatory pricing by abusing its dominant position?
2. Whether NSE used its dominance in one market to protect another, violating Section 4(2)(e)?

The DG rejected NSE's claim that different segments (equities, derivatives, debt, CD) were separate markets and agreed with MCX-SX that the relevant market was stock exchange services. The DG found NSE dominant in this market[5], including the CD segment. Evidence of predatory pricing included NSE's waivers of transaction charges, data feed fees, admission fees, and lower deposit levels in the CD segment, all aimed at eliminating competition, violating Section 4(2)(a)(ii).

NSE earned zero revenue from the CD segment but incurred costs to keep it operational, indicating predatory pricing. The DG concluded that NSE used revenue from other segments (equity, F&O, WDM) to subsidize the CD segment, protecting its monopoly and abusing its dominance, thus violating Sections 4(2)(a)(ii), 4(2)(e), and 4(1) of the Act.

5. Commission's Determination of the Relevant Product Market

Both the majority and minority agreed that the relevant product market (RPM) is the currency derivatives (CD) segment of stock exchange services.

5.1 NSE's Dominance and Pricing Practices

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

MCX-SX argued that NSE's dominance is not just about market share but also its size, resources, vertical integration, and entry barriers, citing factors under Section 19(4). The DG's report concluded that NSE, with over 90% share in stock exchange services, was highly dominant due to its economic power, consumer dependence, and economies of scale.

NSE countered by highlighting its market share drop from 100% in October 2008 to 32.48% by August 2010, as MCX-SX and USE gained ground. NSE argued that this decline shows it cannot operate independently of competitive

[5] Kumar, Vikash, MCX Stock Exchange Ltd. & Ors V. National Stock Exchange of India: Case No_13/2009 (June 22, 2021). Available at SSRN: https://ssrn.com/abstract=3872612

forces, and there were no significant entry barriers. It asserted that the factors in Section 19(4) should be contextually interpreted, and the real test of dominance is the ability to influence the market, which they claimed they could not.

6. Dissenting Opinion

The dissenting opinion in this case raises several key points regarding the National Stock Exchange's (NSE) market position and alleged predatory practices.

6.1 Market Share and Dominance

- In August 2008, NSE held a 100% market share in the currency derivatives (CD) segment, but following MCX-SX's entry in October 2008, it quickly captured 34.43% and surpassed 50% by January 2009. By October 2010, NSE's share fell to 33.17%, while MCX-SX held 38.82% and USE had 28.01%.
- These changes indicate that NSE was not dominant[6] in the CD segment, with low entry barriers allowing competitors like MCX-SX and USE to enter the market successfully. The fluctuating market shares suggest a competitive, oligopolistic environment.

6.2 Vertical Integration and Entry Barriers

- The claim that NSE's dominance arises from vertical integration is questioned, as such structures do not inherently lead to dominance; many activities can be outsourced.
- Concerns about entry barriers, such as regulatory compliance and infrastructure costs, are addressed. Regulatory requirements are for prudential reasons, and other barriers ensure liquidity and effective trading rather than restrict entry.

6.3 Conclusion on Dominance: NSE is not Dominant

- NSE's market share decline from 100% to 33.17% over two years reflects its inability to maintain dominance. A stable or increasing market share is indicative of dominance, which NSE does not possess, leading the minority opinion to conclude that NSE is not dominant in the relevant product market (RPM).

6.4 Dissenting View on Predatory Pricing

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6 Payel Chatterjee & Simone Reis, “Dominance and its Abuse in the Stock Exchange Scenario” *Legal Services Newsletter, Us-India Business Council* 18 (September 2011)

- Predatory pricing involves a dominant company incurring losses to eliminate competition through unsustainably low prices. Distinguishing between competitive pricing and predatory intent is challenging.
- The minority opinion emphasizes the need for clear criteria—market structure, costs, and recoupment—when evaluating predatory pricing. Without evidence of NSE engaging in predatory practices, the conclusion is that its competitive behavior in the CD segment does not constitute predatory pricing.

7. Position in United States

The US Supreme Court, beginning with the decision of *Matsushita Electric Indus Co. Ltd vs. Zenith Radio Corporation 1986 US*[7], required the plaintiff in predatory pricing cases to meet stringent conditions to prevail on their claims. In *Brooke Group Ltd. Vs. Brown and Williamson Tobacco Corporation 1993 US*[8], held that to prove a claim of predation, the following element should be complied: First, a price cannot be predatory unless it was below some measures of costs. Second and most strikingly, predation requires the proof of recoupment i.e., a reasonable prospect that the predators can later raise price sufficient to recoup it's investment in below-cost pricing under the Robinson-Patman Act, 1936.[9]

As a consequence, in the United States, predatory pricing cases are infrequently brought to trial and even less frequently successful. Merely demonstrating evidence of pricing below cost is not enough to infer the likelihood of recoupment and harm to competition. Recoupment is the ultimate objective of predation. It is the mechanism through which a Predator profits from predation. In the absence of the same predatory pricing produces lower aggregate prices and consumer's welfare is enhanced.

7.1 Position in European Union

The position of the EU on predatory pricing cases has been different as compared to the United States. The traditional EU case law on predatory pricing has set a substantially lower bar to prevail on a predatory pricing claim than has the U.S.

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7 Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986 Supreme Court of the United States).

8 Brooke Group Ltd. Vs. Brown & Williamson Tobacco Corporation, 509 U.S. 209 (1993, Supreme Court of the United States).

9 Patrick Bolton,Joseph F. Brodley and Michael H. Riordan, Predatory Pricing: Strategic Theory And Legal Policy, U.S. Department of Justice, available at https://www.justice.gov/archives/atr/predatory-pricing-strategic-theory-and-legal-policy

Supreme Court. Approach has been confirmed in Tetra Pak IM and II[10] and the most recent case, Wanadoo (C-202/07 France Télécom, S.A. v Commission [2009]).[11] The ECJ requires a detailed cost and price analysis to identify predatory pricing. Prices below average variable costs (AVC) are abusive, while those below average total costs (ATC) but above AVC may be abusive if intent to eliminate competitors is shown. Unlike the U.S., the ECJ does not require proof of recouping losses to establish predatory pricing, as seen in the Tetra Pak II and Wanadoo cases.

The ECJ, aligned with the Commission's 2008 Guidance Paper, shifted from a per-se analysis to an effects-based approach, assessing the actual impact on competition and consumers. To prevent vexatious litigation, claims of predatory pricing require a high standard of proof. The test ensures legitimate price competition is not penalized, as overly low standards for predatory pricing could ironically lead to higher prices by encouraging antitrust suits.

7.2 Contrast Between the US and EU Positions

The approach to "recoupment"[12] differs between the US and EU. The ECJ does not require proving recoupment to establish predation, though it can be considered to show intent. In the US, proving likely recoupment is essential to establish predatory pricing.[13]

Predatory pricing involves two phases: the predation phase, where a dominant firm lowers prices to drive out competitors, and the recoupment phase, where it raises prices to exploit reduced competition. Recoupment is critical, as without it, low prices benefit consumers and don't cause anticompetitive harm.

Low prices, even below certain costs, aren't inherently predatory and can be part of pro-competitive strategies. Market exits or deterred entry don't always indicate anticompetitive behavior. Harm to competitors alone isn't proof of predation, as competition policy aims to protect competition, not individual competitors.

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10 Tetra Pak II, Italiana of Modena v. The Commission of the European Communities, 92/163/EEC, 1991.

11 France Télécom SA v. Commission of the European Communities, C-202/07 P, Judgment of the Court (First Chamber) of 2 April 2009.

12 The act of regaining or getting something back, especially the equivalent of an amount invested, lost, etc.; recovery.

13 Shrijita Bhattacharya and Gargi Bohra, “Is Zero Pricing Predatory Unfair: MCX Stock Exchange Ltd. v. National Stock Exchange” Vol. 1 Issue 2 *RGNUL Student Research Review* 92 (2015)

II. Analysis on Predation in the MCX Vs. NSE case

To establish a predatory pricing violation, it must be shown that pricing is below cost and that the strategy is economically viable. The claimant must demonstrate a two-prong test: first, that the scheme can drive a competitor out of the market, and second, that the monopolist can subsequently raise prices to recoup losses without attracting new competitors.

The minority opinion states that the Competition Act 2002 requires two parameters:

(1) below-cost pricing and;

(2) intent to reduce competition or eliminate competitors.

Both must be met, meaning below-cost pricing alone does not violate the Act without exclusionary intent.

The informant argued that NSE's behavior toward BSE, where it waived transaction fees only to raise them once BSE's liquidity declined, indicates NSE's intentions to do the same with MCX-SX. The maturity of the Indian CD market suggests that it can no longer justify fee waivers. An efficient competitor would struggle to survive in this environment, allowing NSE to strengthen its dominance.

The Director General (DG) concluded that NSE engaged in anti-competitive practices to eliminate competition, rejecting NSE's claim that fee waivers were promotional. The DG found that NSE selectively imposed fees when competition was absent and waived them at the first sign of competition, indicating exclusionary tactics rather than genuine market development.

The DG also refuted NSE's argument that its CD segment operated without variable costs, pointing to various expenses like advertisements and clearing charges as attributable to the segment. The DG determined that NSE's zero pricing in the CD segment fell below recognized cost measures, indicating predatory pricing.

Additionally, the DG noted that NSE waived the data feed fee to capture market share, strategically consolidating its position without reasonable justification. The continuation of these waivers over two years, without cost basis, was deemed predatory. The DG emphasized NSE's exclusionary practices could eliminate competition in the Indian capital market, as re-entry becomes nearly impossible due to network effects.

NSE countered that, per CCI regulations, the benchmark for below-cost pricing should be Average Variable Cost (AVC), not Average Total Cost (ATC). NSE cited international precedents supporting AVC or Average Avoidable Cost (AAC) for predation assessments, arguing that the default measure under Indian regulations should be AVC or at most AAC[14].

III. Minority Opinion on Predatory Pricing

1. Impact on Competition

- **Fee Waivers:** Fee waivers in the CD segment have not resulted in anti-competitive foreclosure, as competitors like MCX-SX and USE have successfully entered and expanded in the market, with MCX-SX holding a leading position for over two years.

- **Transaction Costs:** Keeping transaction costs low is vital in a nascent market, highlighted by the negative impact of stamp duty on NSE’s trading volumes. Fee waivers are essential for maintaining these volumes.

- **DG’s Oversimplification:** The Director General's view that zero pricing is inherently predatory overlooks the complexities of network industries, where free services can be part of a viable business model.

2. Distinguishing Predatory Pricing from Competitive Pricing

- **Pricing Strategies:** It is difficult to differentiate between predatory and competitive pricing in network industries, as both may involve low initial prices. However, predatory pricing seeks to eliminate competition and recoup losses through higher prices, while competitive pricing focuses on enhancing market value and liquidity.
- **Legitimacy of Zero Pricing:** NSE's zero-pricing strategy could be a legitimate business approach, as evidenced by MCX-SX and USE also adopting zero pricing under similar market conditions.

3. Predatory Intent and Recoupment

- **Proving Intent:** Establishing predatory intent is essential under Indian Competition Law, often relying on indirect evidence. However, there is

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[14] Shrijita Bhattacharya and Gargi Bohra, “Is Zero Pricing Predatory Unfair: MCX Stock Exchange Ltd. v. National Stock Exchange” Vol. 1 Issue 2 *RGNUL Student Research Review* 85 (2015)

insufficient evidence to suggest NSE's pricing was predatory; competitors' statements indicate waivers were promotional.

- **Recoupment Possibility:** Without the prospect of recoupment, zero pricing cannot be considered predatory. Even if competitors exit, NSE would likely only charge reasonable prices due to low entry barriers.

4. Leveraging Dominance

- **Allegations by MCX-SX:** MCX-SX claimed NSE violated Section 4(2)(e) by subsidizing the CD segment with revenues from other segments, hindering MCX-SX's growth.
- **Minority View:** The minority found no concrete evidence supporting the allegation of leveraging market power across segments.

The minority opinion concluded that NSE's pricing strategies were focused on market development rather than predatory intent. Evidence indicates that zero pricing was part of a legitimate strategy to enhance liquidity and promote market growth, with no substantial basis for claims of predatory pricing or leveraging dominance.

5. Relevance of Section 4(2)(e) of the Act

5.1 Arguments by MCX-SX

MCX-SX argued that Section 4(2)(e) does not require a market link for establishing a breach, though it noted the CD Segment's close association with other stock exchange services.

5.2 Arguments by NSE

NSE contended that a link between the dominant position in one market and the alleged abuse in another is necessary; without this, dominance is not central to the abuse, allowing competitors to replicate strategies without special market power.

5.3 Case of Tetra Pak II

In Tetra Pak II[15], the Court recognized special circumstances that allowed applying Article 86 to a non-dominant market, including quasi-monopoly and competitor overlap.

5.4 NSE's Position and Minority View

NSE claimed it lacks a leading position in the non-dominated CD Segment, with weaker market links than in Tetra Pak. The minority noted that despite NSE's

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[15] Case C-333/94P, Tetra Pak International SA v. Commission ECR I-5941 (1997, EC).

dominance in related markets, competitors have thrived, enhancing market choice and lowering prices. They also found that cross-subsidization alone is not abusive unless part of a broader anti-competitive strategy.

Thus, the minority concluded that NSE did not engage in predatory pricing in the CD Segment using its dominance in other segments, finding no violation of Section 4(2)(e) of the Act.

IV. Dissenting Opinion on the Majority Decision

The dissenting opinion challenges the majority's interpretation of "unfair"[16] pricing under Section 4(2) of the Competition Act, highlighting that:

- Zero Pricing Unfairness: NSE's zero pricing since August 2008 creates an unfair advantage over resource-limited MCX-SX, undermining the Act's principles against unfair practices.
- Resource Disparity: MCX-SX's reliance solely on the CD segment makes it vulnerable to NSE’s pricing, which cannot be deemed fair.
- Third Competitor Consideration: The United Stock Exchange (USE) competes effectively despite similar conditions, indicating competition exists.
- Non-Adversarial Approach: The dissent criticizes the majority for an adversarial stance, emphasizing the Act's focus on market inquiry rather than individual complaints.
- Competitive Market Test: NSE’s market share dropped from 100% to 33.17% between October 2008 and October 2010, suggesting a competitive environment.
- Consumer Interest Test: Zero pricing benefits consumers, and forcing NSE to charge could harm them by leading to uniform pricing.

In conclusion, the minority finds NSE's pricing strategy compliant with Section 4 of the Competition Act, indicating a competitive market that supports consumer interests.

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16 Shrijita Bhattacharya and Gargi Bohra, “Is Zero Pricing Predatory Unfair: MCX Stock Exchange Ltd. v. National Stock Exchange” Vol. 1 Issue 2 *RGNUL Student Research Review* 81 (2015).

V. Conclusion

The MCX v. NSE case highlights the complexity of distinguishing aggressive competition from predatory pricing, especially given the resource disparity between NSE and MCX-SX. NSE's zero pricing strategy posed challenges for MCX-SX, and the Competition Commission of India found NSE engaged in anti-competitive practices through selective fee waivers.

However, the minority opinion argues that NSE's pricing doesn't show predatory intent, as new competitors like USE entered and thrived, indicating a competitive market. The dissent criticizes the majority for an adversarial approach and emphasizes that zero pricing benefits consumers, with forced pricing potentially raising overall prices.

In conclusion, while resource disparities and fee waivers are concerns, NSE's strategy hasn't deterred competition or harmed consumers, underscoring the need to focus on protecting competition and consumer welfare, not just competitors' interests.