BEFORE THE
COMPETITION COMMISSION OF INDIA

CASE NO. 13/2009

Information filed on 16.11.2009

In continuation of order dated 25.05.2011

Date of order under section 27 of the Competition Act, 2002:

23.6.2011

Informant: MCX Stock Exchange Ltd.

Through: Shri A.N. Haksar, Senior Advocate alongwith Shri Anand Pathak, Advocate

Opposite Parties:

1. National Stock Exchange of India Ltd.
2. DotEx International Ltd.

Through: Dr. Abhishek Manu Singhvi, Senior Advocate alongwith Ms. Pallavi S. Shroff & Shri M.M. Sharma, Advocates

Order

1. Background

1.1 The instant case relates to competition concerns arising in the stock markets services in India, which is an important part of the financial market in the country. Therefore, it is essential to outline a brief history and nature of this sector at the start for putting the market dynamics in a perspective.

1.2 Financial market can broadly be divided into money market and capital market. Securities market is an important, organized capital market where transaction of capital is facilitated by means of direct financing using securities as a commodity. Securities market can further be divided into a primary market and secondary market.

1.3 Primary market is that part of the capital markets that deals with the issuance of new securities. It is where the initially listed shares are traded first time, changing hands from the listed company to the investors. It refers to the process through which the companies acquire capital through the sale of new stock or bond issue to investors. This is typically done through a syndicate of securities dealers.

1.4 The secondary market is an on-going market, which is equipped and organized with its own infrastructure and other resources required for trading securities subsequent to their initial offering. It refers to a specific place where securities transaction among several and unspecified persons is carried out through the medium of the securities firms such as licensed brokers or specialized trading organizations in accordance with the rules and regulations established by the exchanges and the extant laws and regulations laid down by the regulators. Such an institution is called a stock exchange.

1.5 Stock exchanges are enmeshed in the economy of a nation and are the most important mechanism of transforming savings into investments. Over the ages, as economies developed, industrialization occurred and markets became more organized, a need for permanent finance was felt world over. Entrepreneurs needed money for long term whereas investors also required liquidity. The answer was development of the institution of stock exchanges.

1.6 A stock exchange is an entity that provides services for stock brokers and traders to trade stocks, bonds, and other securities or derivatives. Stock exchanges also provide facilities for issue and redemption of securities and other financial instruments,

and capital events including the payment of income and dividends. Securities traded on a stock exchange include shares issued by companies, unit trusts, derivatives, pooled investment products and bonds. To be able to trade a security on a certain stock exchange, it must be listed there. Usually, there is a central location at least for record keeping, but trade is increasingly less linked to such a physical place, as modern markets are electronic networks, which gives them advantages of increased speed and reduced cost of transactions. Trade on an exchange is by members only. There is usually no compulsion to issue stock via the stock exchange itself, nor must stock be subsequently traded on the exchange. Such trading is said to be *off exchange* or over-the-counter. This is the usual way that derivatives and bonds are traded. Increasingly, stock exchanges are part of a global market for securities.

1.7 A stock exchange is any body of individuals, whether incorporated or not, constituted for the purpose of regulating and carrying out the business of buying, selling or dealing in securities or derivatives. These securities broadly include:

(i) Shares, scrip, stocks, bonds, debentures stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ii) Government securities and

(iii) Rights or interest in securities.

1.8 The origin of the stock market in India goes back to the end of the eighteenth century when long-term negotiable securities were first issued. However, for all practical purposes, the real beginning occurred in the middle of the nineteenth century after the enactment of the Companies Act in 1850, which introduced the features of limited liability and generated investor interest in corporate securities.

1.9 An important event in the history of the stock market in India was the formation of the Native Share and Stock Brokers Association at Bombay in 1875, the precursor of the present day Bombay Stock Exchange. During that time trading in stock market was just a nascent concept and was limited to merely 12-15 brokers. The “stock market” was situated under a banyan tree in front of the Town hall in Bombay (now Mumbai). This was followed by the formation of associations/exchanges in Ahmadabad (1894), Kolkata (1908), and Chennai (1937). In addition, a large number of short lived exchanges emerged mainly in buoyant periods to fade into oblivion during subsequent economic downswings. After 5 decades of existence, the Bombay Stock Exchange was recognized

in May 1927 under the Bombay Security Contracts Control Act, 1925.

1.10 Recognizing the growing importance of stock exchanges and the consequent need to regulate their affairs, the Government of India passed the Securities Contract Act In 1956. With the start of the era of economic reforms and liberalization in the '90s, the Government revoked the outdated Capital Issue Act of 1947 and established The Securities and Exchange Board of India (SEBI) on April 12, 1992 in accordance with the provisions of the newly framed Securities and Exchange Board of India Act, 1992. The Preamble of the Securities and Exchange Board of India describes the basic functions of the Securities and Exchange Board of India as

".....to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto"

1.11 With time, new technologies and new systems were introduced in the Indian stock exchange. The decade of '90s saw considerable evolution of the stock exchanges and capital market products traded in India. Simultaneously, there was growth in the financial markets as well. Over the Counter (OTC) market was established in 1992 and National Stock Exchange (NSE) was

established in 1994. The National Security Clearing Corporation (NSCC) and National Securities Depository Limited (NSDL) were established in 1995 and 1996 respectively. In 1995-96 Options trading service was started. Rolling settlement was introduced in India in early 1998. By the onset of the new millennium, the derivatives markets also took off in India with the inclusion of exchange traded and OTC derivatives in the definition of securities. Future trading was started in June 2000. In February 2000, internet trading was permitted. In August 2008, the market for stock exchange traded currency derivative was opened on recommendation of RBI and SEBI. All these events changed picture of stock markets in India. Numbers of participation in stock exchange rose with new segments for trading, new products and new technology. Some of these are discussed in greater detail in the subsequent sections. New players were attracted to the sector to exploit increased and growing opportunities. The issues in the instant case have emerged as a result of this change in the dynamics of stock markets in recent past.

1.12 It is also pertinent at this stage to briefly go into the background of the parties to this case. The same is given below.

(i) MCX Stock Exchange Ltd. (MCX-SX), the informant

MCX Stock Exchange Ltd. (MCX-SX) is a public limited company incorporated on August 14, 2008. As per the information, 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 **('SCRA').** The initial recognition has been extended from time to time by SEBI vide gazette notifications. It is now understood that the renewal of recognition has further been extended for one more year. Further, as per the information, MCX-SX has regulatory approvals to operate an exchange platform for trades in currency derivatives (CD segment). The initial approval permitted only "currency futures" in USD-INR of different tenures up to 12 months for trading on MCX-SX exchange platform. However, IP has now been granted approvals for trading in GPB-INR, EUR-INR and JPY-INR pairs. MCX-SX 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/cash ("Equity") and equity derivatives - Futures and Options ("F&O") segments. MCX-SX has also communicated its willingness to SEBI to commence the SME

(small and medium enterprises) segment and also applied for permission to introduce Interest Rate Futures.

(ii) **<u>The promoters of the informant are Financial Technologies of India Ltd. ("FTIL") and Multi Commodity Exchange of India Ltd. ("MCX").</u>**

FTIL is engaged in the business of developing and supplying software for financial and securities market. FTIL is also the principal provider of software solutions for brokers and other market intermediaries for use in their front office, middle office and back office for the purpose of dealing in securities through exchanges. 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.

MCX is the commodity exchange in India promoted by FTIL.

(iii) **<u>National Stock Exchange (NSE) – Opposite Party 1</u>**

NSE was incorporated in November, 1992 and was recognized as a stock exchange in April, 1993 under SCR Act, 1956. NSE

commenced operations in various segments as per the following details:

Dates of commencement of trading by NSE in various segments

Table No.

Sl.No.	**Segment**	**Date of commencement of Trading**
1.	WDM	30 June, 1994
2.	Equity	3 November, 1994
3.	F&O-Options/Futures on Individual Securities	June 2001/November 2001
4.	CD segment	29 August, 2008

As per the information, NSE has floated some subsidiaries for clearing and technology related activities and jointly promoted or acquired significant stake(s) in certain other companies operating in related fields. These companies (the "NSE Group") include:

(a) **DotEx International Limited ("DotEx") – Opposite Party 2** is a wholly-owned subsidiary of NSE. It handles the data and information vending products of NSE. It currently provides NSE

market data in various forms namely; on line streaming data level 1, data level 2, intraday snapshot data feed, end of day data feed & historical feed. It is also registered with NSE as an application service provider for providing centrally hosted front office solution (NOW) to the members. It provides trading members of NSE one of the solutions that allow them to trade on NSE.

(b) **India Index Services & Products Limited ("IISL")** is a joint venture between NSE and CRISIL LTD. (formerly Credit Rating Information Services of India Limited) which was set up in May 1998 to provide a variety of indices and indices related services and products for the Indian capital markets. It has a consulting and licensing agreement with Standard & Poor's (S&P) – the world's leading provider of investible equity indices, for co-branding equity indices. IISL provides a broad range of services, products and professional index services. It maintains over 80 equity indices comprising broad-based benchmark indices, sectoral indices and customized indices. Many investment and risk management products based on IISL indices have been developed in the recent past, within India and abroad. These include index based derivatives traded on NSE and Singapore Exchange and a number of index funds. NSE owns 50.99% equity in IISL.

(c) **National Securities Clearing Corporation Limited ("NSCCL")** is a wholly owned subsidiary of NSE which was incorporated in August 1995. It was set up to bring and sustain confidence in clearing and settlement of securities; to promote and maintain, short and consistent settlement cycles; to provide counter-party risk guarantee, and to operate a tight risk containment system. NSCCL commenced clearing operations in April 1996. NSCCL carries out the clearing and settlement of the trades executed in the Equities and Derivatives segments and operates Subsidiary General Ledger (SGL) for settlement of trades in Government securities. It assumes the counter-party risk of each member and guarantees financial settlement. It also undertakes settlement of transactions on other stock exchanges like, the Over The Counter Exchange of India (OTCEI).

(d) National Commodities Clearing Limited ("NCCL") has been incorporated jointly between NSE and National Community and Derivatives Exchange Limited (NCDEX). Presently, the Company provides IT and process support in respect of clearing & settlement needs of NCDEX. NSE holds 64.99% stake in this company.

(e) NSE, IT Limited ("NSEIT") is a 100% subsidiary of the NSE. NSEIT is the information technology arm of the NSE.

(f) **NSE InfoTech Services Limited ("NSETECH")** is a subsidiary of the NSE. NSETECH is the exclusive service provider for all the information technology needs of the NSE and all its group companies. NSE holds 99.98% equity in NSETECH.

In addition to above, NSE has submitted that following companies forms part of NSE group based on the definition content under explanation (b) to section 5 of the Act.

(g) **Omnesys Technologies Pvt. Ltd. ("OMNESYS") –** provides software for securities trading and is a leading provider of OMS for multi-asset, multi venue trading systems. Omnesys software provides market data and connectivity solutions to both the buy-side and sell-side firms. Omnesys is head quartered in Bangalore since its inception in 1997 and DotEx has taken 26% stake in this company. The company is promoted by software professionals with financial background. As per the information, Omnesys is a competitor of FTIL and an empanelled front-office solution (software used by brokers to trade in stock exchange) vendor of NSE.

(h) **Power Exchange India Limited**

Power Exchange India Limited (PXIL) is India's first institutionally promoted Power Exchange.

2. Information

2.1 The present information was filed under section 19(1)(a) of the Competition Act, 2002 by MCX Stock Exchange Ltd. (MCX-SX) on 16 November 2009 against the National Stock Exchange India Ltd. (NSE), DotEx International Ltd. (DotEx) and Omnesys Technologies Pvt. Ltd. (Omnesys). The information relates to anti-competitive behaviour and abuse of dominant position by NSE aimed at (i) eliminating competition from the CD segment (ii) discouraging potential entrants from entering the relevant market for stock exchange services and (iii) achieving foreclosure of all competition in the market for stock exchange services.

2.2 The informant submitted that the informant and NSE are providing currency futures exchange services. The NSE through its circular dated 26.08.2008 announced a **transaction fee waiver** in respect of all currency future trades executed on its platform. NSE has continued to extend its waiver programme from time to time despite the fact that the Currency Derivatives (CD) segment is now mature and trading the CD segment has become high volume and potentially profitable.

2.3 It is alleged that due to transaction fee waiver by the NSE, the MCX was forced to also waive the transaction fee for the transactions on its platform for CD segment from the date of its

entry into the stock exchange business which results into losses to the MCX.

2.4 It is also alleged that NSE is charging **no admission fee for membership** in its CD segment as compared to charging of membership fee in the equity, F&O and debt segments. NSE also **does not collect the annual subscription charges** and an **advance minimum transaction charges** in respect of CD segment. The cash deposits to be maintained by a member in the CD segments are also kept at a very low level compared to its other segments.

2.5 It is also alleged that NSE is **not charging any fee for providing the data feed** in respect of its CD segment ever since the commencement of the segment. On account of this waiver by NSE, MCX has also not been in a position to charge the information vendors for the data feed pertaining to its CD segment, which is presently its only operational segment. It is alleged that this action of NSE is aimed at blocking the residual revenue stream of the MCX.

2.6 Omnesys is a software provider for financial and security market. The NSE has taken 26% stake in Omnesys through 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” develop by Financial Technologies India Ltd. (FTIL), which is the promoter of the MCX and the market leader in the brokerage solution sector.

2.7 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. The product thus thrust upon the consumers desirous of the NSE CD segment was the product “NOW” developed by DotEx / Omnesys, in place of ODIN. NSE is using “NOW” on a separate computer terminal for accessing its CD segment.

2.8 The main 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 and ODIN) severely hampers the traders ability to do so. Thus 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 the

"NOW" terminal (free of cost) and confine himself to the NSE CD segment, which has both a first mover advantage in CD segment as well as dominant player advantage in stock exchange business.

2.9 It is further alleged that the losses suffered by informant in the CD Segment is much higher than the loss suffered by the NSE because the NSE enjoys the economies of scale and has the ability to cross-finance the losses from the profits made in other segments and has the financial strength to fund its predatory practices based on massive reserves built through accumulation of monopoly profits over the years. In contrast, Informant is dependent solely on the revenues from the CD Segment and its losses are mounting in view of its transaction fee waiver, the continuation of which is compelled by the NSE's decision to continue with the fee waiver.

2.10 It is also alleged that the continuation of NSE's fee waiver would not only eliminate the business of the informant in CD segment but also eliminate potential and efficient competitors from the entire stock exchange services. Informant has alleged that the fee waiver and other concessions in CD segment have been adopted by the NSE as an exclusionary device to kill competition and competitors, and to eliminate the Informant from the market as a supplier of stock exchange services. NSE has therefore, used its

dominant position in the relevant market to eliminate competition and competitors. Informant has also alleged that the NSE along with DotEx and Omnesys violated provisions of section 4 of the Act by denying the integrated market watch facility to the consumers by denying access of Application Programme Interface Code (APIC) to the promoter of Informant.

2.11 The Informant further alleged that the NSE enjoyed a super dominant position and virtual monopoly in the relevant market for stock exchange services in India, which suffers from barriers to entry in the form of regulatory. structural and functional barriers. According to the Informant, the NSE is indulging in wrongful and abusive exercise of market power.

2.12 According to the information, the various fee waivers and the low level of deposit requirements only with respect to the CD segment of NSE are completely at a variance with its conduct in other segments and are aimed at eliminating competition and discouraging potential entrants. It has been alleged that the NSE has a history of acting vindictively against its competitors in a manner that publically sends strong signals to other potential competitors or promoters.

2.13 The Information provider has sought the following relief from the Commission:

(a) To investigate infringement of section 4 of the Act by NSE;

(b) To direct the NSE to discontinue transaction fee, data-feed fee and the admission fee waivers in respect of the CD segment and to impose transaction fees, data-feed fee and admission fee in the said segment equal to that in the other segments of NSE;

(c) To order NSE to require its members to maintain deposits for the CD segment at a level that is consistent with the levels of other segments;

(d) To grant an injunction restraining the NSE from continuing the transaction fee, data-feed and admission fee in respect of the CD segment in line with those in other segments; and (iii) mandate NSE to collect deposits from members at a level on par with those in its other segments, pending final disposal of the complaint;

(e) To order NSE to pay all of the complainant' costs and impose the highest level of penalties on the NSE in accordance with the Act, so as to have deterrent effect and ensure free and fair competition in the relevant market; and

(f) To pass such other order as the Commission may deem fit to ensure free and fair competition in stock exchange services market.

3. Reference to the Office of the Director General (DG):

3.1 The Commission in its meeting held on 30.03.2010 considered the information and opined that **prima facie,** a case exists for referring the matter to the Office of Director General for conducting an investigation into the matter under section 26(1) of the Act. The Commission, therefore, directed the office of Director General vide Order No. F.No. 1(20)2009-Sectt. dated 30.03.2010 to investigate the matter and submit the report to the Commission.

4. Application for interim relief

4.1 The Informant also filed an application for interim relief under section 33 on 6.7.2010. In its application, the Informant stated that the opposite party continues to offer its services in the CD segment free of cost despite a significant increase in turn over. Consequently, the Informant claimed to have suffered a combined loss of around Rs.100 crores (1 billion).

4.2 The Informant also submitted that the Commission had already formed a prima-facie opinion in this case and order investigation under section 26 (1) of the Competition Act, 2002. The predatory conduct of the opposite party had continued despite initiation of investigation. If the Informant is forced to exit market, it would result in irreparable injury. Therefore, the Informant pleaded that the balance of convenience is in favour of grant of interim relief against NSE and its associates. The informant also argued that

unless interim relief was granted, there was imminent danger of the applicant exiting the market which may cause irreparable harm to far competition in the sector.

4.3 Opposite parties No. 1 & 2 filed written submissions on 3.8.2010 in response to the application for interim relief filed by the informant, MCS-SX.

4.4 In the facts and circumstances of the case and considering that the investigation by the DG was near completion, the Commission did not deem it fit to pass any order under section 33 of the Act.

5. Investigation by the DG

5.1 The DG conducted an in depth investigation of various allegations made in the information. The investigation included examination of financial statements of NSE, details of all fees and charges and other costs incurred in different segments. Information regarding its capital formation, main business activities and shareholding pattern was also obtained from DotEx. Similar details were also obtained from Omnesys including the details of the software developed by them. For a more holistic picture, details of fees and charges as well as relevant costs were also obtained from

BSE/NSC. In addition, officials of SBICAP Securities Ltd. (SSL), Syndicate Bank, Abhipra Capital Limited and Alankit Assignments Ltd. were also examined to assess the functioning of CD market and the software used by these broking entities. The DG also studied several reports of regulations and circulars of expert committees and regulations/circulars issued by SEBI to understand the mechanics of various charges imposed by the stock exchange service.

Delineation of relevant market:

5.2 The Informant has argued that though several different products are traded on different segments of the stock exchanges, **the stock exchange business as a whole constitutes the relevant market** as product differentiation is not of much practical consequence and the demand – supply structure is similar across the segments and there is an obvious co-relation between the segments which are limited in number. Further, from the demand side, majority of stock brokers are members of all the segments and the users are also common. Each product is used with a common objective of profiteering of investment and trading.

5.3 On the other hand, NSE argued that stock exchange services cannot be a relevant market in this case. Each segment of the capital market and the debt market is a distinct market with

separate trade at stock exchanges. The derivative market is of recent origin and not interchangeable or substitutable from the demand side. Further, the CD segment is essentially for the importers and exporters who desire to hedge the currency fluctuation risk which is not the case in equities/debts/F&O segments. Without prejudice to this contention, NSE argued that if at all the question of interchangeability or substitutability arises, the CD market may be seen as a substitute of the OTC segment.

5.4 The DG has considered the following segments for arriving at a relevant product market:-

(i) Equity segment

(ii) Equity F&O segment

(iii) Debt segment

(iv) CD segment; and

(v) OTC market for trades in foreign currency.

5.5 The DG report observes that MCX-SX, NSE and BSE are all recognised exchanges under the Securities Contracts (Regulation) Act, 1956 (SCRA). After the issue of regulatory framework, both BSE and NSE could commence trading in CD segment immediately. This fact indicates that CD segment is part of the stock exchange market services. According to the DG report, since any exchange can easily start operations in any of the

segments of capital market, there is supply side substitutability between the segments. Therefore, **according to the DG report, the entire stock exchange market service is a single relevant product.**

5.6 Additionally, the DG report also looks at demand side substitution and concluded that it is not possible to ascertain substitutability between CD and other segments of stock exchange services. The report refers to several cases from international jurisdictions such as Case Nos. 351 US 377 (1956), ECR 1973 0215, ECR 1980 page 03775, ECR 1983 page 03461, ECR 1991 page I – 03359, ECR 1994 page II – 00755, ECR 1996 page I – 05951, ECR 1998 page I – 0779 and others. The report observes, *"In all the successive judgements, the courts have relied on the requirement of interchangeability rather than substitutability. Moreover, the courts have placed greater reliance on the characteristics of the products for the purpose of satisfying constant needs."*

5.7 With a view to examine the interchangability between CD, OTC and F&O segments, the DG has relied upon, Report of the Internal Working Group on Currency Futures by RBI dated April 2008 (Annexure 32 of DG Report). The said report describes the purpose of futures contracts as *"used primarily as a price setting*

mechanism rather than for physical exchange of currencies ……. such contracts do provide options to deliver the underlying asset or settle the difference in cash ……." The DG report concludes that from the very definition of futures contract, it is amply clear that the basic characteristics of the product are similar to the equity futures contract. Therefore CD and equity derivative segments have common characteristics. The DG further concludes that *"equity segment including equity F&O and CD segment/mainly which mainly comprise the stock exchange services market are substitutable on the product characteristics basis."*

5.8 In context of users/participants, the DG report observes that F&O market and CD market are used by similar type of participant, viz. speculators and hedgers.

5.9 The DG report also compares the CD segment with the OTC market. After considering relevant provisions of SCRA, RBI Internal Working Group Report, RBI – SEBI report on CD Market, FEMA etc., the DG has concluded that the CD market and OTC market cannot be considered as substitutable or interchangeable products based on the characteristics of its products and intended use.

5.10 The DG report further observes that the *"end to end operation and control mechanism for all the segments of stock*

exchanges is identical and indicate towards product substitutability." Thus, the DG report takes the position that similarity of operations of stock exchange services in relation to different segments traded in exchanges indicates that the products and indeed the segments are substitutable.

5.11 The DG report has also examined the membership patterns of MCX-SX and NSE and concluded that *"a very high commonality of members at NSE as well as IP (MCX SX) with the membership of other segments clearly establish that the existing members of other segments are primary traders in the CD segment.....This further implies that actual hedgers of foreign exchange do not see any substitutability or interchangeability in the CD market as against OTC market."*

5.12 During the course of the discussion on delineation of the relevant market, the DG report has examined the efficacy of using the SSNIP test for determining market definition. The report observes that *"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 increase. This test is known as SSNIP test.....even the European Commission advises caution on the applicability of SSNIP test for determining market definition."* The DG

report further observed, *"In the present case, NSE has completely waived transaction charges, admission fee and data feed fee in the CD segment..... in fact, there is no pricing in the CD segment. Therefore, the question of conducting any test based on pricing for determining demand substitutability is not possible in the present case .....in these circumstances, SSNIP test is not being considered in the present case for carrying out the test of demand substitution".*

5.13 In conclusion, the DG report takes stock exchange services in India including equity F&O, WDM and CD but excluding OTC market, as relevant market for the purpose of section 19 (6) & (7) read with section 2(f) and (t).

Assessment of dominant position

5.14 The report of the DG analyses the dominant position of the OP 1 with reference to explanation (a) to section 4 of the Competition Act, 2002. Having already identified the relevant market, the DG report examines the status of the OP 1 along with the following parameters:-

(a) Position of strength
(b) Ability to operate independently or competitive forces prevailing in the relevant market; and

(c) Ability to affect its competitors or consumers or the relevant market in its favour.

5.15 The report first assesses market power of the opposite parties along the lines indicated in section 19(4) of the Act. The assessment can be summarised as below:-

(i) Market share of the enterprise:-

Though the market share itself may not indicate dominance, however, it is one of the most important factors in determining dominance of an enterprise. Placing reliance on the Handbook of Statistics on the Indian Securities Market, 2009, it can be seen that when NSE commenced trading in November, 1994, there were 21 stock exchanges in India with BSE commanding a market share of 41.5% in the equity segment. By 2008-09, NSE had acquired 71.43% of the equity segment as against the vastly reduced share of 28.55% of BSE. In the F&O segment, NSE commenced trading in June, 2000 and has risen to over 99% market share since then. In the WDM segment, NSE commenced trading in June, 1984 while BSE started in June 2001. However, since 2001-02, NSE has consistently maintained market share of over 90% with a slight dip to 88.91% during 2009-10. As per the information available at the time of investigation, NSE had a market share of 47 – 48% in the CD segment as against 52 – 53% of MCX SX.

The combined market share of NSE for equity, F&O, WDM and CD segment rose to 92.53% in 2008-09 as compared to 5.01% in 1993-94. In view of this statistics, NSE is a dominant player.

(ii) Size and resources of the enterprise:-

Financial statements of NSE were examined for the financial years 2008-09 and 2009-10. As at 31.3.2009, equity capital of NSE stood at Rs.45 crores (450 million); reserves and surplus of Rs.1,864 crores (18.64 million) and deposits from trading members of Rs.917 crores (9.17 billion). During the year, NSE earned a total income of Rs.1042 crores (10.24 billion) with profit before tax of Rs.689 crores (6.89 billion). These figures indicate a very sound financial position and consequent market power of NSE.

(iii) Size and importance of the competitors:-

After commencement of trading by NSE in November, 1994, the remaining 19 original exchanges started collapsing due to intense competition from NSE. Even the incumbent market leader, BSE rapidly started losing out. As on 31.3.2009, BSE had a total income of Rs.421 crores (4.21 billion) only. Although MCX-SX started operations only on 14.8.2008 with a paid up capital of Rs.135 crores (1.35 billion), it ended the first year with a carry forward loss of Rs.29.87 crores (298.7 million). From these figures, it can be surmised that in terms of

financial resources and profitability, NSE enjoys a dominant position in the relevant market as compared to its competitors.

(iv) Economic power of the enterprise including commercial advantage over competitors:-

NSE has presence 1486 cities and towns spread across the country. Majority of investors, brokers etc. are connected with NSE and it has extensive infrastructure. During the investigation, NSE had argued that financial status of MCX, FTIL and MCX-SX should be valued together. However, the DG report stated that MCX and FTIL are two separate companies who only have less than 5% shareholding in MCX-SX. Moreover MCX is a stock exchange in commodity segment while FTIL is a developer of software and not competitors of NSE. Finally, MCX and FTIL cannot infuse further funds in MCX-SX due to restrictions imposed by Securities Contracts Regulation (manner of increasing and maintaining public shareholding in recognised stock exchange) Regulations, 2006) [SCR 2006]

No such limitation exists for NSE for raising both equity and debts to fund its requirements. The argument of NSE that the promoters of MCX-SX have the financial, technical and operational capabilities to match NSE is not acceptable because MCX and FTIL together hold barely 5% of stake in MCX-SX.

The argument that CD segment is commercially lucrative for existing as well as future exchanges is also not acceptable considering that the newly formed United Stock Exchange (USE) has not been able to operationalise its CD segment despite seeking approval of SEBI in January, 2009.

(v) Vertical integration of enterprises or sale or service net work of such enterprises:-

NSE has a high degree of vertical integration and has presence in all segments of stock exchanges related services. The NSE group companies include NSE-IT, NSE Infotech Services Ltd., DoT-Ex International Limited, India Index Services and Products Ltd., Power Exchange India Limited and Omnesys Technologies Pvt. Ltd. (26% equity). These carry out a gamut of stock exchange related activities such as IT solutions for investors and brokers, rating and indexing services, trading platforms, market watch etc. In contrast neither BSE nor MCX-SX have themselves or through group companies such wide array of activities related to stock exchange services. MCX SX is in about 450 centres only and operates merely in the CD segment. BSE is largely concentrated in Maharashtra and Gujarat and that to limited to the equity segment.

(vi) Dependence of consumers:

Due to its resources, market share, economic power, integrated operations, NSE dominates the consumers of stock exchange services in India. Stock exchanges work on the basis of network effect or network externalities. With a far greater number of buyers and sellers using NSE, it enjoys the benefits of network effects resulting from higher liquidity and lower transaction costs. These positive network effects attract even more buyers and sellers to NSE as a chain reaction. Thus an increasing numbers of consumers are depending on NSE not only in respect of trading but in respect of a host of related services.

(vii) Countervailing buying power:

Typically, the users of stock exchange services like stock brokers, sub-brokers, investors, traders or companies are individually too small to possess any countervailing buying power. This handicap is worsened in the light of comparative might of NSE as compared against its competitors.

(vii) Entry barriers:

Stock Exchanges in India are given recognition under the Securities Contracts (Regulation) Act, 1956 by the Central Government/SEBI. Securities (Contract) Regulation (manner of

increasing and maintaining public shareholding in recognised stock exchanges) Regulations, 2006 and a host of other guidelines, policies and regulations have made stock exchange services and area of high regulatory barriers. Coupled with this, the high capital cost of entry, financial risk, marketing and technical entry barriers further strengthens the already dominant position of NSE in the stock exchange services market in India.

Abuse of dominant position

5.16 The DG has examined the alleged abusive behaviour of the opposite parties in respect of four measures of NSE as below:

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.

Transaction fee waiver:

5.17 Informant MCX-SX alleged that NSE through its circular No.NSE/CD/11188 dated August 26, 2008 announced transaction fee waiver in respect of currency futures trades executed on its platform. Initially, this waiver was supposed to be for one month but

NSE has continued the same. Consequently, the Informant has been forced to continue zero transaction fee structure. According to the Informant, transaction fee is the source of funding for the existing exchanges on the total volume of trade done by the brokers/trader.

5.18 In response, NSE argued that the waiver was done in the CD segment to encourage larger participation as the currency futures were at a nascent stage. It was argued that this policy was influenced by report of the **High Powered Study Group on Establishment of New Stock Exchanges** which envisaged greater opportunities to investors from across the country. Lastly, it was argued that NSE's Board of Directors had constituted a Pricing Committee to guide and decide all pricing matters. The transaction fee waiver was the decision of that Committee.

5.19 The DG examined the transaction charges levied by NSE in various segments. For the capital market equity segment, it was observed that NSE has charged transaction fees ranging from Rs.9/- to Rs.12.50 per lakh (100,000) in the past. In F&O segment where both NSE and BSE commenced trading in June, 2000. NSE levied Rs.2/- per lakh of trading value (0.002% each side) or Rs.1.00 lakh annually whichever is higher. After two months, NSE waived transaction charges in this segment through a circular dated

July 31, 2000. Soon, this strategy brought results as NSE turnover outstripped that of BSE by mid 2001. By March, 2002, NSE turnover was Rs.1078 crores (10.78 billion) whereas BSE turnover was meagre Rs.2.52 crores (20.52 million). NSE did not extend the waiver. The waiver in options in sub-sections of F&O continued till 2005.

5.20 In WDM segment, NSE commenced trading in June 1994 and till June, 1995, levied transaction charges of Rs.1/- per Rs.1 lakh (Rs.1,00,000/-) of order value of trades. This clearly shows that NSE did not have a historical philosophy of waiving fee to develop a nascent market.

5.21 Another example to refute the development of nascent market theory of NSE indicated in the DG report is its conduct relating to Gold ETF. Transaction charges were levied in the Gold ETF segment from March 2007 till August 2009, when NSE was the only exchange trading in Gold ETF segment. It was only after February, 2010 that NSE waived/reduced transaction fee in Gold ETF segment. There appears to be a string strategy behind it. BSE entered into Gold ETF segment in September, 2009 and after a month it grabbed a market share of about 5% which rose to 19% by February, 2010. According to the DG report, this trend explains

why NSE introduced waivers/reductions in this sub segment from March, 2010 onwards.

5.22 The DG also examined various board minutes and agenda items of NSE and concluded that the Pricing Committee never went into factors such as cost of infrastructure, man-power, and risk containment measures etc. while deciding upon fee structure or waivers. The DG hence concludes that management of competition was the prime factor that influenced the transaction fee policy.

Admission fee and deposit level waivers:

5.23 The Informant alleged that NSE collects admission fee of Rs.5,61,800/- from a corporate member in the equity, F&O and debt segment but charges no admission fee in its CD segment. NSE does not collect any subscription charges and advance charges in respect of CD segment.

5.24 In its reply, NSE stated that it is not charging any admission fee for the CD segment but is charging admission fee for all other segments. The reasons for not charging admission fee were the same as for not charging transaction charges for the CD segment. As regards subscription charges, NSE argued that the same are levied only in the equity segment. As far as the debt

segment is concerned, it has waived only subscription charges from time to time.

5.25 As regards deposit level waivers, NSE argued that the requirement for deposit levels is made keeping in line the nature of the segment in terms of the risk associated and other factors. Though deposit requirement for CD segment were set lower, they cannot be said to be unjustifiably low.

5.26 Further, NSE stated that Informant had set a very low interest-free security deposit of only Rs.2 lakhs when it commenced business as against NSE requirement of Rs.10 lakhs. This forced NSE to reduce its own deposit fee. According to NSE, there was no justification for such move by MCX-ST when it was supposedly suffering losses.

5.27 However, from examination of documents, the DG report observes that NSE reduced deposit structure w.e.f. November 28, 2008 which was subsequently followed by MCS-SX from January 13, 2009. Thus, as per DG report, even here it was NSE that took the first step.

Data Feed Fee waiver:

5.28 The Informant had alleged that NSE is not charging any fee in respect of its CD segment right from the beginning.

Consequently, MCX-SX has also not been in a position to charge the fee. Data Feed refers to providing prevailing market prices and data for the segment by the stock exchange for significant consideration. The vendors display this information on their subscribers' terminals. The data fee is a significant source of income for the stock exchanges.

5.29 In its response, NSE stated that the reasons for not charging data fee were the same as those for not charging transaction fee for the CD segment. NSE informed that DotEx (a 100% subsidiary) provide the data feed service for NSE in various forms such as on-line streaming, intraday snap shot, end of day feed and historical feed. Since DotEx does not charge any fee for the CD segment and, therefore, NSE does not charge its clients. However, as per its own admission, NSE is charging a substantial fee for data fee for other segments.

5.30 The DG examined relevant agenda items and minutes of meetings of DotEx in this matter. Despite deliberations on the fee structure, no data fee was implemented which indicates that DotEx had waived the fee with the purpose of capturing the market.

5.31 NSE further contended that it had postponed imposition of data feed fee on the request of clients. However, according to the DG report, NSE produced only two such requests from Thomson

Reuters and Bloomberg which form a minuscule part of its client base.

5.32 The DG further observes that from examination of records produced by NSE, it can be seen that the issue of data feed fee was not discussed during any of the Board Meetings over the initial 16 months from the date of commencement of trading in CD segment. First time the Board of DotEx discussed levying of data feed fee was only after this period, by which time the CD market had developed considerably but even then the fee were not imposed.

Exclusionary denials of integrated market watch facility:

5.33 The Informant alleged that NSE has acquired a 26% stake in Omnesys which is a technology vendor providing software for financial and securities market. The stake was taken through DotEx a 100% subsidiary of NSE. According to the information, NSE had taken the stake soon after the news of FTIL group floating MCX-SX became a public. DotEx/Omnesys created a new product known as "NOW" which is intended to substitute software called "ODIN" developed by FTIL. NSE simultaneously 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 trade. APIC is an essential facility to connect front end application of NOW with any other application such as ODIN, which constitutes the electronic trading platform of the stock exchanges. This has allegedly caused difficulties, as clients had been using ODIN for all other segments in the past. As a result, FTIL clients have been forced to establish a separate terminal for trading on CD segment of NSE using the newly developed NOW.

5.34 DotEx offered NOW to all NSE members free of cost for 3 years and placed ODIN on watch list across all its segments. However, while the essential facility of APIC is still available to ODIN for other segments, the same has not been given for the CD segment.

5.35 In its reply, NSE submitted before the DG that it had placed ODIN on watch list due to complaints of its members and their constituent clients. In support, NSE submitted 10 complaints against ODIN, the first such instance being dated 10.4.2006.

5.36 Upon examination of correspondence made available by NSE, the Informant and FTIL, the DG concluded that complaints against ODIN had been few and far between. On the whole, end users of ODIN appear to be generally satisfied, which is reflected in the fact that a vast majority of NSE members are still using ODIN

for all other segments. ODIN is also being used by several other exchanges in the country. The DG also examined several representations of members of NSE and recorded their statements. Questions regarding the performance of ODIN and NOW were posed to these people. From the statements recorded, no evidence was found to justify the claim of NSE that ODIN was put on watch list due to performance issues. At the same time, investigation and statement of one of the Board of Directors of Omnesys revealed that even NOW suffered from problems. Approximately 200 different types of complaints were received in respect of the software during 1st to 14th July, 2010 alone.

5.37 Based on the facts gathered, the investigation report concluded that the actions of NSE are suspect from the point of view of harm to the competition as it results in exclusionary denial of integrated market watch facility.

Analysis of predatory pricing by NSE:-

5.38 The allegations of the Informant with regard to waiver of transaction charges in the CD segment, demand fee, deposit level and data feed fee have been examined by DG as discussed above.

5.39 The DG report has specifically examined allegation of all predatory pricing made by the Informant in context of explanation (b) of section 4 of the Act read with Competition Commission of India (determination of cost of production) Regulations, 2009 (hereinafter referred to as "cost regulations"). Explanation (b) to section 4 states "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.*

5.40 As per Regulation 3(1) of cost regulations, "cost" in the explanation to section 4 shall generally, be taken as average variable cost as a proxy for marginal cost.

5.41 In response to the allegation, NSE argued before the DG that it is not incurring any "variable cost" for running the CD segment and therefore, it is not indulging in predatory pricing within the meaning of the section 4 of the Act. The report of the DG observed that there is no price being charged for any services offered by NSE to its members for the CD segment. The charges are zero from NSE perspective as well as the perspective of the users. The DG report posed the question, whether in a hypothetical situation of NSE not having any other segment to support its income

could it survive? The answer, according to the investigation report, is definitely no.

5.42 NSE argued that pricing in CD segment was with a view to promote and expand the segment and are in the nature of "introductory" or "penetration pricing". Further, it is argued that, "the objective of predatory pricing is to oust or reduce competition, whereas the objective of introductory/penetration pricing is to open up newer market segments. There is no intention on part of NSE to oust or eliminate or reduce competition therefore the concept of predatory pricing is not applicable."

5.43 The DG report contends that even in introductory/penetration pricing, there has to be an element of pricing. According to the DG, in the submissions of NSE, *"the benchmark for assessing the cost has been taken on the premise that costs are fixed if they would not change, were output to* ***double*** *from current levels."* In other words, NSE has argued that if prices do not change even if output is doubled, then it indicates that the cost structure of the product is wholly fixed in nature and, therefore, variable cost can be considered to be approximately zero. NSE contended that for assessing predation, the correct benchmark is average variable cost and since, in this case, that cost is approximately zero then even zero cannot be said to be predatory pricing.

5.44 NSE submitted that average variable cost should be taken as a basis for defining the cost. The cost structure of the CD segment is only fixed in nature and, therefore, variable costs can be considered to be approximately zero. Hence, there is no element of predatory pricing.

5.45 The DG report counters this reasoning of NSE by observing that NSE could run operations in the CD segment only due to substantial fixed cost it has already incurred for all the segments. If the pricing of any segment is to be linked only to the variable cost, NSE should have zero pricing for all the segments because none of them would have any variable costs. The investigation has already established that the claim of NSE that waivers were carried out for other segments in the initial period is not substantiated by facts.

5.46 The DG report refers to the report of RBI – SEBI Standing Technical Committee on exchange traded currency future where chapter 5 specifically deals with eligibility criteria for exchanges for obtaining approval to operate in currency futures segment. The criteria very clearly require investment in fixed assets. The DG further refers to the statement of Director (Finance & Legal) of NSE who confirms that additional expenditure was incurred for machinery, manpower, IT support, disaster recovery etc. in respect

of the CD segment system. NSE had also admitted that surveillance system for the CD segment was also set up. The DG report observes that there were many dedicated employees for the CD segment and NSE paid substantial amount to these employees. Under the circumstances, the DG concludes that the contention of NSE that none of these costs constitute variable costs cannot be accepted.

5.47 The DG report has also examined the views taken by international jurisdictions such as US Department of Justice and DG Competition of European Union in respect of appropriate cost to be considered while determining predatory pricing. Based on documents such as the 2008 report of US Department of Justice on Single Firm Conduct under section 2 of the Sherman Act and Review of Article 82 EC and the publication by DG Competition (European Commission) of 2005 Discussion Paper on EC Exclusionary Abuses, the DG report observes that average variable cost (AVC) is not taken as a reliable method of costing. More reliance is placed on average avoidable cost (AAC) which represents losses that could have been avoided by not producing that output which was charged lower during the referred period.

5.48 As yet, there is no complete unanimity in international jurisdictions over what may be the best cost measure to evaluation

predation claims. The limitations of AVC and AAC forced an inclination towards long run average incremental cost (LAIC or LRAIC) as an appropriate cost measure for assessing predation. Unlike AVC, LAIC includes all products specific fixed costs whether recoverable or sunk. It also includes costs incurred before predation period.

5.49 The DG report further states that the Indian stock exchange services, which is the relevant product market in this case works on the basis of high level of network externalities. Such network effect industries work on very high sunk costs.

5.50 The DG report refers to the Wanadoo Interactive SA (WIN) case of the European Commission where the concept of average total cost (ATC) was applied. The court in first instance rejected the appeal by WIN against the ruling of the European Commission and ruled,

"If the prices are below average total costs but above average variable costs, those prices must be regarded as all abuses are determined as a part of the plan for eliminating a competitor."

5.51 Based on international practices, the DG report states that there is a strong justification for following ATC or at least LAIC in

the instant case for determining predatory pricing in the relevant market of stock exchange services which will affect the industry.

5.52 NSE was asked to provide comprehensive details of allocation of all fixed and variable costs for the CD segment for the last two years. However, NSE submitted that it does not prepare accounts in which separate profit and loss account statements are provided for either the CD or any of the other four segments.

5.53 NSE contended that this is because there are many difficulties in allocating common costs across a multiple products firm. NSE cited the UK Competition Commission investigation into Northern Ireland personal banking. The UK Competition Commission concluded that the allocation of common costs down to product level was impossible and would be misleading.

5.54 The DG has countered these arguments of NSE by examining certain trends in the balance sheet and profit & loss accounts of NSE. The investigation report points out that there has been a quantum increase in fixed assets in general and IT hardware/software, since the CD segment started, in particular, after financial year 2007-08. During 2006-07, the increase in fixed assets was only Rs.31.472 crores (314.72 million). In comparison, the increase during 2007-08 was Rs.133.671 crores (1.33 billion),

during 2008-09, it was Rs.93.475 crores (937.45 million) and during 2009-10, it was Rs.90.1 crores (901 million).

5.55 Although NSE expressed inability to provide segmented costs, the DG report has looked at the details of overall capital costs, expenses, segment-wise long run incremental cost (LAIC) etc. to construct an estimated but reliable indicator of affect on costs subsequent to start of CD segment. It is observed that the total cost for 2008-09 works out to Rs.4.42 crores (44.2 million) and for 2009-10, which is the first full year of operation, Rs.37.07 crores (380.7 million). The report has estimated total cost for CD segment on a percentage based pro rata system. The total cost for CD segment estimated for 2009-10 is to the tune of Rs.37.07 crores (370.7 million) whereas for 2008-09, it is estimated at Rs.4.42 crores (44.2 million). Based on pro rata assumption, about 72% of the total cost is allocable to F&O segment, 17% to equity segment, 2% to WDM segment and about 1% to corporate debt segment and 7% to CD segment for 2009-2010.

5.56 The DG report makes a reference to European Commission notice – 98/C 39/02 wherein it is stated,

"The operators (of postal services) should not use the income from such reserved areas to cross-subsidise activities in areas open to competition ..... the price of competitive services offered

.....should, because of the difficulty of allocating common cost, in principle be at least equal to the average total cost of provision. This means covering the direct costs plus the appropriate proportion of the common and overhead cost of the operator ....."

5.57 The DG report, therefore, makes a strong argument for appropriating proportions of common costs for the CD segment of NSE. Further, the DG has relied on Kelco Disposal I & C v/s Browing-Ferris Indus OfVt. Inc.845.2d 404, 408 (2(d) Cir.1988), of the Second Circuit Court (USA) where it was held that *"the general legal rule is for depreciation caused by use is a variable cost, while the depreciation through obsolescence is a fixed cost."* The DG has, therefore, estimated depreciation of Rs.5.63 crores (56.3 million) during 2009-10 increase from Rs.0.79 crores (7.9 million) during 2008-09 in relation to the CD segment.

5.58 NSE has conducted several seminars, workshops and road shows across regions for promoting operations in CD segment. As per details submitted by NSE, it had conducted 1163 promotional activities in 103 locations across India. Although NSE has not provided details of expenditure incurred on these activities, it is understandable that considerable expenses would have been incurred. The financial statements of NSE reveal that Rs.4.20

crores (42 million) was spent on this head during 2009-10 and Rs.10.22 crores (102 million) was spent during 2008-09.

5.59 The DG report examines the pattern of clearing and settlement charges incurred by NSE. Clearing is the process of determination of obligations after which the obligations are discharged by settlement. As per RBI/SEBI advisory these activities should be done by an independent clearing corporation. NSE, therefore, executes these activities through NSCCL which is a wholly-owned subsidiary of NSE. Being independent entity, NSCCL or any other clearing agency would charge for the services. As far as F&O and equity segments are concerned, the NSCCL is charging NSE at about 15% of transaction charges in equity and F&O segment, for its services. NSE had submitted complete details of the charges paid to NSCCL since August, 2008 to the DG. Clearing and settlement charges vary in direct proportion to transaction charges and the DG has observed that in percentage terms, clearing and settlement charge has been gradually declining from about 24% in 2005-06 down to about 10.69% in 2008-09. This indicates that as transaction volumes increase the related clearing and settlement charges increase but do not increase at the same pace. However, it can clearly be seen that transaction charges are a variable cost linked to the volume of transaction.

5.60 DG also examined copies of resolution passed by the Board of NSE in 2006-2010 in context of settlement charges to be paid to NSCCL. It was observed that since 2005-06, as volumes of transaction for F&O and equity segments increased, the clearing and settlement charges were determined along a downward trend. This was justified by the NSE Board on factors such as compulsory D-mat settlement, strengthening of risk containment mechanism, volumes increase, automation etc.

5.61 The DG report observes that despite there being no adverse change in any of these factors, the NSE Board passed a resolution in June, 2010 to enhance clearing and settlement charges in the F&O segment. This was clearly a strategy for loading settlement charges for the CD segment on to the F&O segment.

5.62 The DG report has considered the nature of clearing and settlement services involved in CD segment as being identical to those involved in F&O segment and, therefore, presumes that as an independent entity, NSCCL would notionally be incurring expenses in relation to CD segment, such as computer stationery, manpower, computer time, power etc. Accordingly, DG has applied a notional clearing and settlement charge for the CD segment at 15% of transaction charge and has notionally taken transaction charge at

Rs.400/- per crore (10 million) of turnover which is prevailing in respect of F&O segment. Based on this, the DG report makes a notional estimate of Rs.13.74 crores (137.4 million) which would represent charges payable to NSCCL for the periods from August 2008 to April, 2010.

5.63 To get a clearer picture of cost factors involved in running CD segment, the DG called for financial statements of Bombay Stock Exchange. The report observes that from 1st October, 2008 to 31st October, 2010, BSE incurred Rs.2.01 crores (20.1 million) for 2008-09 and Rs. 4.69 crores (46.9 million) for 2009-10 as direct and shared cost for running the CD segment.

5.64 The Informant MCX-SE is only operating in the CD segment and examination of its financial statements of 2008-09 and 2009-10 reveals that it is incurring variable costs. The operating expenses include advertising, promotional activities, clearing and settlement, conveyance, communication and insurance expenses. For 2008-09, MCX-SX has incurred total expenses of Rs.37.33 crores (373.3million} and for 2009-10, it has incurred Rs.85.78 crores (857.8 million).

5.65 Looking at the costs incurred by BSE and MCX-SX, the DG observes that the cost structure of NSE cannot be any different. It cannot be accepted, therefore, that NSE does not incur any variable cost for running the CD segment.

5.66 DG report makes a reference to judgement of Ontario Supreme Court, Canada in Regina vs Hoff Mann La Roche Ltd. In the case, the matter went up to Supreme Court where the court observed distribution of free valium in this case was a business transaction modified exclusively by the hope of long term profits and, thus, there was selling going on at zero price.

5.67 Based on the above facts and the circumstances surrounding those facts, the report of the DG concludes that waiver of transaction charges, data feed charges and admission fees and reduction of deposit levels by NSE in the CD segment are actions which violate section 4 (2) (a) (ii) of the Competition Act, 2002.

Applicability of section 4(2)(e) of the Act:

5.68 In addition to the violations mentioned in the foregoing paras, the DG report has also held that NSE has used its dominant position for leveraging. Section 4(2)(e) of the Competition Act, 2002, says, “there shall be abuse of dominant position if the

enterprise uses its dominant position in one of the relevant market to enter into or to product, other relevant market."

5.69 The investigation report of the DG states that NSE holds 100%, 75% and 90% of the business in F&O, the equity and WDM segment respectively. In these segments, NSE is earning monopoly profits and NSE is using this profit to leverage this position in the CD segment where the Informant, MCX-SX, is competing with it. By not charging transaction fee, data feed fee etc., NSE is subsidising activities in CD segment which is open to competition.

5.70 The report of the DG refers to Tetrapak II Case and Deutsche Post AG (DPAG) / United Parcel Service (UPS) case where the strategy of cross subsidies from other business activities was found to be anti competitive by the European Commission.

5.71 According to the DG report, in the instant case, NSE is charging zero fees in the CD segment but is having substantial earnings from other segments. These aspects have been discussed in detail in the foregoing paras. NSE is also creating barriers for users of ODIN software by not providing APIC to its own software NOW.

5.72 According to the DG report, these conducts of NSE are aimed at leveraging its near monopolistic dominance in F&O, equity

and WDM segment for protecting its position in the CD segment. Therefore, NSE is in violation of section 4(2) (e) of the Act.

5.73 The DG has concluded that the aforementioned acts of NSE have harmed competition in the Indian Capital Market, particularly in the CD segment. The behaviour of NSE is clearly exclusionary and the facts gathered during investigation indicate that they have been done with the intent to impede future market access for potential competitors and to foreclose existing competition. The harm of this anti competitive conduct is enhanced because the relevant market of stock exchange services is a network effect of market. Any advantage gained by NSE would have manifold adverse impact on its competitors due to the network effect.

6. Forwarding of investigation report:

6.1 The Commission considered the investigation report submitted by the Director General and passed an order dated 30th September, 2010 to send a copy of the report to opposite parties No. 1 and 2 for filing their reply/objections. Comments of the DG on some additional submissions filed by the Informant, received in the Commission on 7.10.2010 were also forwarded to opposite parties No. 1 & 2 vide order dated 11.10.2010. The Informant also moved

applications dated 24.9.2010, 7.10.2010 and 8.10.2010 for supply of copies of DG report. Accordingly, the Commission issued an order dated 15.10.2010 conveying its decision to provide a copy of the DG's (public version) to the Informant and directing it to file comments/objections, if any, in the matter.

6.2 The case came up before the Commission for hearing wherein the parties concerned were given several opportunities to make oral and written submissions before the Commission. The parties were represented by their Advocates. Shri A.N. Haksar, Senior Advocate alongwith Shri Anand Pathak, Advocate for the Informant, Dr. Abhishek Manu Singhvi, Senior Advocate alongwith Ms. Pallavi S. Shroff & Shri M.M. Sharma for the opposite party no. 1 & 2 and Shri Siddhartha Jha, Advocate for Omnesys Technologies Pvt. Ltd. appeared before the Commission from time to time and made oral submissions followed by written submissions. The opposite parties no. 1 and 2 filed their main reply subsequent to the DG report on 01st November, 2010 along with annexures. Subsequently, several letters and submissions were filed by the opposite party nos. 1 & 2 through letters dated 16.11.2010, 23.10.3020, 29.11.2010, 30.11.2010, 8.3.2011 and 9.3.2011. The Informant filed their preliminary submissions to the DG report vide their letter dated 1.11.2010. This was followed by letters and

submissions. The most important amongst which are letters dated 16.11.2010, 23.11.2010, 26.11.2010 (two letters), 29.11.2010, 14.12.2010, 22/2/2011, 10.3.2011, 14.3.2011 and 24.3.2011. The Informant filed a rebuttal on 21.2.2011 and further submissions on 22.2.2011, 10.3.2011 and 24.3.2011.

6.3 The Informant filed further written submissions on 22.2.2011, 10.3.2011, 14.3.2011 and 24.3.2011. The opposite parties 1 & 2 filed additional written submissions on 9.3.2011. Omnesys Technologies Pvt. Ltd. filed written submissions on 28.2.2011.

6.4 In their submissions and arguments, the opposite parties prominently relied on reports submitted by their economic consultants, **Genesis Economics Consulting Pvt. Ltd. (Genesis) and Prof. Richard Whish, Professor of Law at King's College, London**. Similarly, the informant also relied upon reports of their economic consultants, **LECG Ltd. (LECG)**. All the major aspects of the opinions of the above consultants formed an intrinsic part of the arguments of the respective parties and have been dealt with in this order at the appropriate place in the following discussions.

6.5 The main points of all the submissions made and oral arguments of the parties concerned are encapsulated in the following sections.

7. Contentions of opposite parties 1 & 2 and objections to the Director General's Report dated 20.9.2010:

7.1 At the outset, the opposite parties (OPs) 1 & 2 objected to the findings of the DG report and contended that the DG had erred on the following counts:

(a) The relevant market

(b) Assessment of dominant position of NSE

(c) Assessment of predatory pricing by NSE

(d) Assessment of leveraging its dominant position by NSE

(e) Assessment of exclusionary conduct by NSE

7.2 The OPs also relied on all previous submissions made to the Commission and before the DG and vehemently denied the findings of the DG report. In support of their position, they filed legal opinions and reports from economic consultants. Essential aspects of these are included in this section.

7.3 The following were the main contentions made by the OPs:

(i) There were methodological inconsistencies and errors made by the DG in the investigation;

(ii) As a result of an incomplete investigation, the findings of fact in the DG's Report, in particular, Chapters 5A to 5D of the Report, are incorrect and lead to the DG's erroneous conclusions in the Report;

(iii) The possibility of supply-side substitution has wrongly been taken into account in the market definition;

(iv) The DG has erred in concluding that the SSNIP test should not be considered on the facts of this particular case;

(v) The relevant market, based on a legal and economic analysis, is the "CD Segment and OTC currency forwards";

(vi) The findings of dominance – whether on the wide market of exchange trading services or the narrow one of the CD Segment – are flawed;

(vii) The DG has adopted an incorrect approach to the appropriate cost standard in a case such as this. Further, the DG has failed to provide objective basis for determining that NSE's conduct was with a view to reduce competition or eliminate competitors;

(viii) The DG has failed to analyze whether the CD Segment is at a nascent stage and whether NSE was objectively justified in waiving fees in the CD Segment. Based on legal and economic analysis, and the recent entry of USE, NSE was and continues to be justified in adopting its pricing policy; and

(ix) The DG's Report has characterized cross-subsidization as amounting to an abusive act in and of itself, which is wrong in law.

7.4 The above objections were elaborately discussed in the submissions and arguments of the OPs. Major elements of these discussions are dealt with in the following paragraphs:

Applicability of SSNIP Test:

7.5 The DG report has erred in rejecting applicability of the SSNIP test for determining relevant market in this case. It is averred that

"SSNIP test can often is used conceptually, in other words, it is a structured approach for identifying products and producers that provide a competitive constraint. This is often done without quantitative analysis. Further, it was contended "that not the current price, but a non-zero estimate of the competitive price is to be used. Further, an absolute increase in monitory terms can be used to carry out the analysis .....the hypothetical monopolist test is in fact designed for assessing the competitive interaction between differentiated products....."

7.6 Finally, it is contended that the transaction fees are only a small part of the costs incurred by a trader in stock exchanges, hence,

> *"The necessary implication is that market participants would not switch to another segment in the face of the modest or even large increase in trading fees, therefore, the segments do not constraint the trading fees charged in other segments and hence are not in the same market."*

Market definition:

7.7 It was contended by the OP-I that

> *"even if the OTC and exchange-traded segments are to be considered in separate markets, the significant constraint placed by the former or the latter would need to be recognised."*

7.8 It was further pointed out that *"even if we consider the relevant market as the exchange-traded CD market, NSE is not dominant with a market share of 32.11% as at 22.10.2010."*

7.9 In conclusion, it was contended that the pricing co-relation in respect of the CD/OTC comparison is very high, hence establishing a large degree of functional interchange ability,

despite somewhat different, characteristics of the two markets. In other words, it was contended that **the correct relevant market is the combined market of CD and OTC segments** where it can be seen that the overall market is overwhelmingly dominated by the banks who deal exclusively in OTC currency forwards. It was argued that considering the slightly different characteristics of the two markets, **if at all, CD segment should be taken as the relevant market as against the relevant market** delineated by the DG.

Distortion of facts:

7.10 It was argued that the DG report has attempted to first malign and discredit NSE so that any assessment of competition law principles that followed becomes prejudiced against NSE. It was contended that NSE is a reputable Company with higher standards, ethics and compliance and has made significant contributions to the development of capital markets of the country.

Transaction fee waiver:

7.11 The conclusion of the DG that waiver of transaction fee was an exclusionary device only to grab the market share is incorrect and baseless. The DG had found no evidence that the waiver was with a view to reduce competition or to eliminate

competitors. The DG has ignored the fact that in autumn of 2008 global economy was on a down turn and therefore transaction fee waiver in the new introduced CD segment was imperative.

7.12 The DG rejected evidence submitted by NSE in the form of agendas and minutes of the NSE Pricing Committee and the NSE Board as well as other relevant documents. These documents clearly reveal that the only desire of NSE was to grow in a market that had just been introduced in India. Failing to find any evidence from predatory intent in the CD segment, the DG has wrongly analysed conduct of NSE in other segment.

7.13 When NSE commenced trading in capital market segment (CMS) in November, 1994, there were about 20 other exchanges already in existence in India. The equity segment products were being traded in these exchanges and the investing public was fully familiar with it. Therefore, initially no waiver was made by NSE in this segment. The transaction charges imposed by NSE in the equity segment initially were higher than those imposed by other exchanges. Therefore, it cannot be said that NSE uses transaction charges with exclusionary intent.

7.14 NSE commenced trading in the F&O segment in June 2000 and imposed a transaction charge of Rs.2/- per lakh of trading value or Rs.1.00 lakh annually whichever was higher. But soon thereafter, in order to encourage trading in the newly introduced segment, NSE waived transaction fee. It was BSE and not NSE which was the first to reduce transaction fees in the F&O segment. The poor performance of the BSE in the F&O segment was because of its own shortcomings and there is no evidence that links waiver of transaction fee by NSE to decline of BSE in the F&O segment.

7.15 BSE had the same rationale for waiving/reducing transaction charges, as NSE, viz., to develop that market.

7.16 NSE commenced trading in WDM segment in June 1994. For a period of one year, NSE imposed transaction charge of Rs.1/- per lakh of traded value and thereafter waived the charge with a view to develop the market. This was done keeping the interest of trading members above NSE's own interests.

7.17 NSE commenced trading in Gold ETF in March, 2007. NSE imposed transaction charges till February, 2010 and only thereafter waived the charges. The conclusion of DG that this was with intent to ward off competition is incorrect and baseless.

7.18 NSE commenced trading in the HangSeng Benchmark in March, 2010. The waiver of transaction charges by NSE was to encourage wide market participation and not to destroy competition from BSE.

Positive role of NSE in capital market:

7.19 The DG has wrongly given a negative portrayal of NSE. It is contended that NSE is internationally recognized for its compliance etc. It is due to the professionalism and efficiency of NSE that BSE and other stock exchanges had started lagging behind. It is further contended that NSE has made sufficient positive contributions towards development of capital markets in the country. Its trading terminals are available in more than 1600 towns and it does not charge transaction fee on trades emanating from terminals in rural and semi urban areas. About 70% of its investors who have traded on NSE are from Tier II and III towns. Out of about 3.3 crores (33 million) income-tax payers in India almost 1.2 crores (12 million) are registered as members of NSE. The average trade size has also grown. All these are indicators that NSE has made significant contributions to development of stock exchange markets in India.

Decisions of NSE pricing committee with respect to the CD segment:

7.20 The findings of the DG Report that the Pricing Committee never discussed issues relating to waiver of transaction fee for CD segment is incorrect and baseless. The agenda and minutes of NSE pricing committee clearly give the rationale for the transaction fee waiver, viz. to encourage participation in CD trading. It is also noteworthy that the Informant itself as well as United Stock Exchange (USE) has also waived transaction fees for the same reason. The DG, is therefore, not justified in ignoring documents related to the NSE Pricing Committee and imputing reasons other than encouraging wider participation for the waiver.

Admission fee and deposit level waiver:

7.21 It is contended that NSE reduced deposit level as a reaction to reduction in the same by MCS-SX. Further, there was an objective of market development also involved in its decision.

7.22 MCX-SX waived deposit and admission fees at least up to 6.9.2008. No single waiver was granted by NSE at that time.

Data fee waiver:

7.23 The decision regarding the timing of imposing data feed fee in the CD segment was left to the Director-in-Charge who decided to act on the basis of feedback received from their leading vendors. The decision of the DotEx Board as reflected in the minutes was not intended to be immediately followed by imposition of data fee but was intended to be in nature of "in-principle" approval. The two vendors whose feedback was considered by the Director In-Charge are world leaders in financial news reporting and together contributed more than 50% of the revenue of DotEx. That is why their feedback had to be given due weightage.

Exclusionary denial of integrated market watch facility:

7.24 The conclusion of the DG that denial of access to integrated market watch facility of NOW software was harmful to competition is baseless.

7.25 Issues concerning the ODIN software are currently before the Bombay High Court. The court has appointed a Commissioner to carry out audit of the software but MCX-SX is resisting audit.

Since the matter is *sub judice* any investigation by the DG on this issue is objectionable.

7.26 DotEx had acquired 26% interest in Omnesys on 2.7.2008 which was before the news of establishments of MCX-SX had reached NSE. It is argued that OPs do not control Omnesys and merely have the right to appoint one director on the Omnesys Board.

7.27 Further by putting FTIL on a watch list, OPs have not committed any abuse of dominant position. The DG has disregarded details of complaints received from traders/brokers in relation to FTIL software which had been submitted during the course of investigation. Since most of the complaints were made telephonically, documentary evidence of each and every complaint was not available.

7.28 ODIN was put on watch list for very justifiable reasons since there were several problems with the software. NSE has the right to monitor performance of products that it empanels or uses.

7.29 DG has concluded that users were satisfied with ODIN on the basis of some depositions by trading members during the

course of investigation. Just because these trading members did not have a problem with ODIN, it cannot be concluded that there were no problems with the software. The DG has wrongly ignored the details of complaints submitted by the OPs.

7.30 The DG has done no analysis which can be said to make technical comparison of ODIN with other software.

7.31 The DG's observations that providing NOW free of charge places NSE's conduct under suspicion has no basis in law. It is submitted that NOW was introduced in 2008 but even till now it is not a dominant user interface for trading in stock exchange in general or NSE in particular. In fact, the Informant itself has indicated that ODIN has around 85% market share.

7.32 The conclusion of DG that denial of APIC facility for the CD segment in respect of ODIN has been done with an ulterior motive is not correct. It is submitted that the OPs have conducted themselves with integrity, in the best interest of their members and the public at large. It is to be also noted that NSE did not suspend or cancel FTIL's empanelment in other sectors. The only reason for NSE for denying APIC for CD segment to the FTIL software ODIN was the complaints received in relation to the functioning of ODIN.

Legal and economic objections:

7.33 The DG has wrongly concluded that the "relevant product market" is the "stock exchange services market". It is reiterated that the CM (equity) segment, F&O, WDM and CD segments fall into different markets. Also over-the-counter (OTC) market exercise meaningful constraint on the CD segment and the two could be considered as part of the same market. The OPs have emphatically submitted that:

i. Supply side substitutability is not a factor when defining the relevant market.
ii. The rejection of the SSNIP test in this case is incorrect in principle.
iii. The concepts of interchangeability and substitutability are one and the same.

7.34 It is contended that the Indian Competition Act requires that the market should be defined by reference to demand - side considerations, which means that one should take a conventional approach, based on consumers' uses for the products in question. Detailed analysis of the relevant market lead to the conclusion that:

(a) The CD segment is not conventionally interchangeable with the CM & F&O segment; and

(b) Currency derivatives, equity and equity derivatives neither have the same characteristics nor the intended use.

7.35 At the same time, it can be concluded that the instruments of the CD segment and OTC currency forwards are conventionally interchangeable. There is a price correlation between comparable products in the OTC currency forwards and CD segments. There is also an overlap of important part of the customer base of these markets. Further, other segments of the stock exchange are not interchangeable from a consumer's perspective with the CD segment or the OTC market. CD segment was introduced with the object of providing hedgers alternative to the OTC market. Considering these factors, the relevant market in this case should be taken as "CD segment and OTC currency forwards."

Assessment of dominance:

7.36 At the outset, it is contended that since DG's determination of the relevant market as stock exchange services market is incorrect, its conclusion on dominance is consequently flawed.

7.37 The DG has stated that there are various entry barriers in the market of stock exchange services in India. This is taken as an

important factor for determining dominance of NSE. This assessment of DG is incorrect and flawed. The OPs have drawn attention to the recent entry of USE in the CD segment and the proposal by Standard Chartered Bank (Mauritius) to set up a stock exchange in India. Looking at data between 20.9.10 and 29.10.10, USE was the market leader for 14 out of 29 days, NSE occupied the third spot for 17 days and 2nd spot for the balance 12 days. Thus after commencement of trading by USE, it emerged as the market leader in the CD segment in its first month of operation.

7.38 The above facts indicate that NSE is not dominant in the CD segment in terms of market share and the entry barriers suggested by the DG are not insurmountable since USE was able to enter and attract market share with ease.

7.39 The USE is backed by 37 banks and FIs (including BSE) and had obtained more than 500 members within a few days.

7.40 The OPs vehemently oppose the conclusion of the DG report that the overwhelming supremacy of NSE in the F&O, CN and WDM segment seen with around 45% share in the CD segment makes NSE dominant even in the CD segment. It is strongly contended that market shares do not support NSE's dominance in the CD segment. Further, DG has erred in concluding that network affects, economies of scale, and leverage from the broader

exchange market creates dominance of NSE in the CD segment. The additional resources available to NSE by virtue of its larger size do not result in any additional advantages nor does the higher degree of vertical integration confer any market power.

Abuse of dominance:

7.41 Without prejudice to the contention that NSE is not dominant in the CD segment, the OPs have submitted that -

(a) NSE has not provided service at a price which is below cost;
(b) NSE's intention to follow a zero pricing policy was not with a view to reduce competition or eliminate competitors.

7.42 It is contended that the DG has erred in concluding that there is a strong case for following average total cost (ATC) or at least long run average incremental cost (LAIC). It is argued that average variable cost (AVC) is the appropriate cost measure.

7.43 It is contended that AVC or average avoidable cost (AAC) is the standard measure for assessing predation. ATC cannot be the standard for determining predation, particularly in absence of strong evidence of predatory intent as in the instant case.

7.44 The DG has wrongly tried to allocate costs in the CD segment. It is argued that using turnover value of trades to allocate

cost is an arbitrary method. Allocation of shared common costs in estimation of LAIC is contrary to the definition of incremental costing. Further, estimation of LAIC and total costs by DG are overstated since it appears that depreciation costs have been included twice.

7.45 It is argued that no anti competitive effects have flowed from the zero pricing approach of NSE which was essentially done with a view to promote and develop the market. There are no grounds for inferring that the "intent" was to reduce competition or eliminate competitors. Neither any legal evidence nor any analytical process which would establish anti competitive intent of NSE in following a zero pricing approach has been extended by the DG.

7.46 It is argued that CD segment is in its nascent phase. The monthly average growth has remained around 30% which is an indicator of developing markets. Again, compared to the OTC market, hedging in the CD segment is only 2.7% of that in the OTC market. These facts establish that the CD segment is a miniscule fraction of the total currency market and is, therefore, in its infancy.

7.47 The rationale for fee waivers by NSE is to attract hedgers from OTC to the CD segments. It is further argued that below cost

pricing is penetration pricing which is generally accepted in a new market.

7.48 It is also argued that there is no imminent sign of exit of MCX-SX, that USE which has entered the CD segment recently has done well and that Standard Chartered Bank may be starting a new exchange. These facts all indicate a healthy market.

7.49 It has been strongly contended that applying competition law test to the facts of this case would lead to the following conclusions:

(i) Fee waivers are justified in terms of market expanding efficiencies defence.

(ii) The test for examining objective efficiencies as per EC guidelines on exclusionary conduct has been met. The guidelines seek to assess whether any efficiencies are realised by the conduct; whether the conduct is indispensable for realising those efficiencies; whether the efficiencies outweigh any likely negative effects on competition and consumer welfare; and whether the conduct does not eliminate effective competition.

7.50 The conclusion of exclusionary abuses by NSE arrived at in the DG report is incorrect. This conclusion is proved wrong due

to facts such as consistent growth of MCX-SX; fee waivers by MCX SX and USE; indication that USE will continue with fee waivers and potential entry of a new exchange of Standard Chartered in the CD segment. These facts clearly reveal that no anti competitive effect / result has flowed from zero pricing approach.

7.51 The OPs have also argued that any conduct has to be examined so as to demonstrate actual exclusionary foreclosure or a strong likelihood of it. This approach is gaining increasing recognition in the European Commission. The successful entry of USE in the market indicates that NSE's behaviour does not have exclusionary effect.

Leveraging dominance:

7.52 The OPs have vigorously objected to the finding of the DG report that NSE has abused its dominant position in the equity, F&O and WDM segments to protect its dominant position in the CD segment.

7.53 It is contended that analysis of leveraging requires delineation of two markets that are closely associated with each

other. The DG has not defined two such separate markets, but has consistently considered the entire market for stock exchange services as the relevant market for this case. It is contended that NSE is not dominant in any market relevant to this case, therefore, it cannot be held guilty of leveraging its dominant position in context of section 4(2) (e) of the Act.

7.54 It is further argued that cross subsidisation cannot constitute an abuse of dominant position. Neither in the Deutsche Post case nor in the Tetrapak II case of the European Market referred to by the DG was cross subsidy considered to be an abuse in itself.

7.55 It is also argued that NSE gained no special advantage in the CD segment by virtue of having additional resources in the F&O, CM or WDM segments.

8. Counter submissions of the Informant on the DG report and the submissions of NSE on the DG Report:

8.1 The Informant made extensive submissions before the Commission as well as oral arguments to support the findings of the

DG report and to counter the arguments and submissions of the OPs. Essential elements of the submission of the Informant are briefly dealt with in this section.

Preliminary submissions:

8.2 The Informant contended that submissions of NSE are riddled with contradictions, biased opinions and misleading analysis. Further, any legal opinion of foreign lawyers or experts relied upon by the OPs should be completely ignored in accordance with the Advocate's Act, 1961 and Indian Evidence Act, 1872.

8.3 In its submissions before the Commission, the OP has given misleading econometric analysis. While examining whether there is switching between the CD market and the equity/equity derivatives market on NSE, it uses volumes in the analysis. However, while examining whether CD and OTC forward contracts are in the same market, data relating to price movements of contract rather than volumes have been used. This is a deliberate ploy to delineate the relevant market wrongly.

8.4 In the context of applicability of SNIPP test to determine the CD segment as a separate market, MCX-SX contended that the test can only be applied if sufficient data is available regarding prices over a period of time. The Informant also contended that the test is only

applied in merger cases. It is further contended that SNIPP test cannot be applied because the products in different segments are not homogenous. Finally, it was argued that since transaction fees are only a small part of the cost incurred by traders, a small change in the fees would not influence the decision of participants to switch and hence the test would be useless in the instant case.

8.5 The informant also submitted extensive analysis reports by professional consultants and opinions of experts in support of their contentions.

Findings of fact in the DG's investigation report:

8.6 The Informant asserted that the DG has correctly determined all disputed facts first before going on to comprehensive competition law and economic analysis. The Informant strongly supported these findings of fact and objected to NSE's allegation that DG had tried to first malign and discredit NSE. The Informant considers the investigation report to be the result of meticulous and unbiased investigation.

Transaction fee waivers:

8.7 The informant contended that the DG's analysis of NSE's conduct in the matter of transaction fee waiver not only in the CD segment but also in other segments is based on incontrovertible

data. NSE's rebuttal is nothing more than afterthought and diversionary tactics.

8.8 Initially NSE implemented the fee waivers through circulars but later apprehending legal action from the Informant against predatory pricing, the OPs obscured all paper trails and continued the waiver without circulars.

8.9 To explain transaction fee waivers for more than two years now, NSE has consistently and conveniently shifted stands before the DG and the Commission in its submissions. An important example of this strategy was the original argument taken by NSE that imposition of fee in the CD segment would alienate participants who would switch to trade on OTC segment. After the Informant demonstrated before the Commission with authentic documents of SEBI that 85% of trades that happened in the CD segment are legally incapable of shifting to OTC market in view of FEMA Prohibitions, NSE abandoned this argument.

8.10 Similarly, initially NSE had justified claims by stating that it had considerable sum of money on account of interest-free (refundable) deposits and margin money from participating members in the CD segment to cover costs. When the informant pointed out that these amounts were lying with an independent entity, viz. NSE's Clearing Corporation and that the remaining

amount available would never be sufficient to run the CD segment, then NSE gave up its argument. Instead, if shifted its stand to argue variable costs involved are zero and, therefore, not charging fees is justifiable.

8.11 NSE had earlier argued that CD segment is meant for hedgers who would shift to OTC sector if transaction fees were imposed. However, the informant has submitted SEBI documents that indicate that at least 85% of participants in CD segment were proprietary stock brokers.

8.12 NSE has argued that CD segment was introduced in India in autumn of 2008 during global down turn which justified fee waivers. This explanation was never given by NSE during or before DG's investigation. Further, they have failed to explain why zero pricing is justified even two years later and after the end of global recession. The DG has extensively examined and relied upon documents such as minutes and circulars of NSE to comment on the pricing history of NSE. The report then concludes, "*transaction charges have been imposed whenever competition was absent and waived/reduced in any new segment at the first site of competition.*" The contention of NSE that the DG has not taken its minutes, agenda papers, circulars etc. on face value is not acceptable. The

DG has drawn his conclusions based on historical trends and incontrovertible facts.

8.13 The DG has compared NSE's pricing history in equity segment and clearly stated that no waiver of transaction fee was done because NSE was meeting the competition rather than beating the competition. Similarly, in F&O segments, the DG logically establishes how NSE succeeded over BSE on account of zero pricing and after vanquishing BSE, it proceeded to impose transaction charges. NSE's argument that it waived transaction fee in F&O segment only after BSE reduced their fee from Rs.2.65 to Rs.0.56 is nothing but a convenient afterthought. This contradicts NSE's argument that it waives transaction fee whenever it launches a new segment/product. Clearly, this philosophy was not adopted in F&O segment. The Informant further contends that complete waiver of transaction fee as a response to reduction by BSE clearly indicates NSE easily resorts to predatory (zero) pricing when faced with competition pressure.

8.14 The Informant supports the observation of the DG that NSE followed a similar strategy in the Gold ETF trading. NSE has not been able to offer any open defence for its conduct. The Informant has also made similar observations in respect of the DG's findings regarding NSE's conduct in HangSeng Index.

Admission and deposit level waivers:

8.15 The Informant has strongly pointed out that waiver of admission fee and deposit level by NSE has found no proper justification. The argument of aligning prices on those of its competitors is not acceptable in the context of a super dominant player like NSE.

Data feed fee waivers:

8.16 The Informant contended that NSE has not been able to convincingly explain why the decision to impose data feed fee was never implemented by NSE. Further, the excuse that the waiver was granted on request by its customers is not tenable in view of DG's finding that only two such requests were produced by NSE/DotEx. The explanations of NSE are vague and unsubstantiated.

Exclusionary denials of integrated market watch facility:

8.17 The Informant contended that the conduct of NSE against FTIL (Informant's promoter) is a blatant example of retributive actions and harmful intent of NSE.

8.18 It is submitted that the free distribution of NOW is clearly predatory and aimed at foreclosing the preferred product – ODIN of

FTIL. Further, free distribution of NOW is also a variable cost element that NSE incurs for the running CD segment. It shows that in no case can the cost be zero.

Market definition:

8.19 The Informant has refuted NSE's contention that services offered by stock exchanges on equity and other segments are not to be included within the relevant market. It is argued that from a market definition perspective if every product offered on a stock exchange is different then the relevant market would become so fragmented that it would be impossible to determine actual economic power enjoyed by any player.

8.20 The Informant disagrees with the contention of OPs that the terms "substitutable" and "interchangeable" are one and the same. It is argued that the average speculative consumer is a person who shifts between different securities or currency contracts on stock exchange to seek out opportunity for gain. For him, all securities/products offered by the stock exchange in the relevant market are interchangeable. The DG has shown a high degree of commonality of participants in different segments and this is not

disputed by NSE. Therefore, it is argued that the market definition given by the DG is the correct delineation.

8.21 The Informant also argued that exchange–traded currency derivatives and OTC currency contracts form different markets. The *RBI Internal Working Group Report on Exchange Traded Currency Derivatives*, which is the basis for introduction of CD segment has itself differentiated the OTC market. Further, OTC products market itself is not homogenous and is segmented into the merchant bank market and the interbank market. The CD segment involves standardised contracts for small lot size (USD 1000) bought and sold by hedgers, speculators, arbitrageurs etc. CD contracts are markedly different from OTC contracts in terms of characteristics, intended use and class of consumers. Most of the CD segment consumers regard OTC contracts as different and a majority even lack the legal capacity to enter into OTC contracts. CD segment is regulated by SEBI whereas OTC segment is regulated exclusively under FEMA.

8.22 CD futures is not very liquid and excludes long maturities beyond a couple of months. The OTC market allows only hedging of contractual exposures as opposed to that of economic exposures. All these factors indicate that CD segment and OTC are different markets.

Dominant position:

8.23 The Informant has vehemently challenged the averment of NSE that it is not in dominant position in any market. The Informant has reiterated its contentions made in the allegation and stated that NSE has maintained very high market share of over 85% in the combined segments of stock exchange services since 2003-04. It is argued that even if the relevant market is more narrowly defined, NSE would still be found to be super dominant in stock exchange services minus CD segment. The Informant has pointed to advertisements by NSE which claim that they have been market leaders since 1995 and that approximately 94% of capital market volumes in India are routed through NSE. The Informant refers to AKZO and BBI/Boosey cases of EC where self–admission was taken as a evidence of dominant position.

8.24 The potential argument of NSE that MCX-SX has bigger market share in the CD segment (based on volumes and not value) would have little substance. It is contended that MCX SX has only managed to retain the current market position after being forced to match NSE's zero pricing. This will not be viable for the long run whereas NSE will be able to sustain zero pricing due to its policy to cross subsidise. There is no such capability with the Informant.

8.25 The Informant submitted arguments that examined the various factors given in section 19 (4) of the Act to determine dominance. By and large, these resonate the analysis of dominance made by the DG in his report and, therefore, are not repeated in detail at this place.

8.26 The Informant further emphasised network effects as discussed by the DG. It was claimed that stock exchange is a network industry where liquidity plays a prominent role. Due to the acknowledged network externalities, the stock exchange services market has considerable barriers to enter. This renders the dominance of NSE even more unshakable.

Abuse of dominant position:

8.27 In the first instance, the Informant submits that NSE has not cooperated with DG in sharing its costs towards the CD segment. Further, NSE attempted to mislead the investigation by providing false financial analysis on the costs. These facts are borne out by the DG report.

8.28 It is vehemently argued that there is no need to enter any complicated exercise for determining appropriate cost pricing because in the present case, the OP is charging zero price. Thus,

little would turn on whether AVC, ATC, LRAIC, AAC or any other cost measure is used for establishing guilt.

8.29 It is argued that a particular feature of network markets is consumer lock-in and *ex-post* hold ups. In such markets, once competition is substantially reduced or eliminated, the incumbent player starts charging super normal profits.

8.30 The second limb of definition of predatory price requires below cost pricing with a view to reduce competition or eliminate competitors. The Informant argued that the findings of fact in the DG report clearly establishes the harmful intent of NSE by looking at past conduct, circulars, minutes and agendas of Board meetings etc. The Informant contended that there was considerable direct and indirect evidence from which the intent of NSE becomes apparent.

8.31 The Informant has completely rejected NSE's objections to the finding of DG regarding leverage of dominant position and contravention of section 4(2)(e). The OPs have wrongly brought in extraneous concepts such as "associative links", "close relation" or "inter relation" to interpret the section. In addition, it is trongly contended that the CD segment is actively and closely associated and inter-connected with the other segments, particularly F&O segment.

8.32 The Informant contended that majority of its customers as well as NSE's customers in CD segment are also potential customers if not actual customers in cash derivatives, equities and equity derivatives. It cannot be concluded from the evidence that the markets are not related and leverage is not possible. As such the conclusion would lead to a perverse outcome under competition laws. The standards of relationship advocated by NSE between markets are such that section 4 (2) (e) of the Act can never be applied.

8.33 The Informant argued that the DG has never concluded that cross subsidisation is an abuse in itself as interpreted by NSE. The actual issue examined by DG is whether zero price charge by NSE for stock exchange services in the CD segment is predatory. This conduct is further vitiated by the fact that NSE has special advantages by virtue of its strong presence in other segments which enables it to sustain losses in the CD segment. Had the NSE been operating only in CD segment, it would have suffered considerable losses similar to that of the Informant and the USE and would not have continued with zero pricing for long duration.

8.34 The Informant has reiterated arguments dismissing the nascent market defence, economies and learning effects and indispensability of waivers arguments extended by NSE.

Remedy:

8.35 The Informant has pleaded the Commission to provide structural remedies since it contends that behavioural remedies may not be effective or long lasting.

8.36 The Informant has pleaded imposition of appropriate penalties, awarding of costs and any other remedies as the Commission deems fit in the circumstances of the case and nature of the violation.

9. Rebuttals and counter arguments:

9.1 The OPs made detailed submissions rebutting all arguments of the Informant. The main thrust of all these arguments were that:

(a) The "relevant market" should be defined as the CD segment and OTC market in India.
(b) NSE is not in a dominant position in the relevant market.
(c) Consequently no claims under section 4 (2) (a) – (d) of the Act will exist; and
(d) Without prejudice to the above, there can be no contravention of section 4 (2) (e) since the markets are not closely associated and no special circumstances exist which would justify a leverage claim.

10. Issues:

10.1 The Commission has given due consideration to facts given in the information, the investigation report of the DG, the detailed written and oral submissions made by the concerned parties along with opinions and analysis of experts relied upon by the Informant and the OPs. The relevant material available on record and the facts and circumstances of the case throw up the following 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?*

(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?*

(c) *If so, is there any abuse of its dominant position in the relevant market by the above party?*

Issue no. 1

10.2 The edifice of competition law rests upon dynamics of competition in one particular market. Benefits or harm to competition has to be assessed with respect to that market. In the

Competition Act, 2002, the term used for such a market where the status of competition has to be evaluated is “relevant market”. This term has been defined in section 2(r) of the Act read with sub sections (s) and (t) of section 2. Furthermore, while examining facts of a particular case, the Commission must give due regard to any or all factors mention in section 19 (6) with respect to “relevant geographic market” and section 19(7) with respect to “relevant product market”.

10.3 Unlike in some other international jurisdictions, the Indian Competition Act not only gives a formula definition of “relevant market” but also specifies factors which have to be considered while determining that market. There is little scope for any arbitrariness or discretion under the Indian Act. Before we go into in-depth evaluation of all the facts pertinent to delineation of the relevant market in this case, it is useful to look at a few facts that in themselves may not be determinative but are strongly indicative.

10.4 The first of these indicators is the *RBI-SEBI Standing Technical Committee Exchange Trade Currency Futures report (RBI – SEBI report) of 2008*. This was one of the most important documents on which the policy decision was taken to start a new segment of capital market in India viz. exchange traded currency derivatives segment. The report pinpoints the origin of the policy

considerations on the *Report of the Internal Working Group of RBI* submitted in April, 2008 recommending the introduction of exchange traded currency futures. Further RBI-SEBI report states,

"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 ....."

10.5 The same report in its para 5.2 of Chapter 5 advocated a clear separation of CD segment from other segments in any recognized stock exchange where other securities are also been traded. It stipulated that the trading and the order driven platform of the CD segment must be separate; membership of the segment must also be separate and the CD segment must have a separate governing council. The demarcation was so rigid as to stipulate that no trading/clearing member should be allowed simultaneously to be on the governing council of the CD segment and the cash/equity derivatives segment.

10.6 Chapter 7 of the report dealing with regulatory and legal aspects stipulates that before the start of the CD segment, the exchange shall obtain prior approval of SEBI. Para 7.4 also stated, *"To begin with, FIIs and NRIs would not be permitted to participate in currency futures markets."*

10.7 The second indicator to be kept in mind is the fact that the Informant, MCX-SX was incorporated on 14.8.2008 and was initially authorised by SEBI to operate an exchange platform in trades in CD segment for currency futures in USD – INR of different tenures upto 12 months. NSE was an existing exchange and got permission to commence trading in CD segment on 29.8.2008. The latest entrant into the segment, USE got approval of SEBI in January, 2009.

10.8 The Information in this case has been filed 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.

10.9 The above indicators establish three things: **first,** in the minds of policymakers, the CD segment was not only completely different from other segments but also differed from OTC in *"fundamental ways"*. The policy, therefore, recommended strict segregation of the CD segment. **Second**, till 2008, the exchange

traded capital market in India did not have exchange traded currency forwards segments. **Third**, competition concerns, if any, have to be examined in the segregated and new market where the Informant is operating.

10.10 The above indicators seem to firmly point out that the exchange traded CD market is fundamentally distinct from other segments of the capital market. In fact, it did not exist prior to August, 2008. A market that earlier did not exist and which was consciously created by the policy makers as a new and distinct market cannot be said to be part of a market that existed.

10.11 Moving on from indicators to evaluation of facts, it is essential to look at the specific framework for delineation of "relevant market" given under the Act. 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 the consumers*, by reason of characteristics of the production or services, their prices and intended use.

10.12 This Commission notes that the information in this case has been filed due to competition concerns perceived by MCX-SX which is operating only in the CD segment. As noted above, the RBI/SEBI report holds the market of exchange traded currency forwards as a distinct, distinguishable and separate market from

other markets such as equity, F&O, WDM or even OTC forwards. The stock exchange services provided in the CD segment is, therefore, a separate platform, i.e. both functionally and statutorily segregated and distinct from stock exchange services provided for other segments.

10.13 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. This observation is further elaborated below:

i. Equity market:

The equity market in the context of the information is the secondary market which allows trading in the equities of various companies at the stock exchanges. The underlying asset in this market is equity. Typically, the stock brokers/traders trading on this market follow trends in the shares of various companies and seek to gain from movement in share prices. Largely, investment in the stock of companies performing well is a major consideration for picking up equity in that company.

ii. F&O market:

Futures and options of the derivative market is the F&O contracts have equities or equity indices as underlying securities.

Futures are contracts to buy or sell an asset on or before a future date at a price specified today. Options are contracts that give the honour the right but not the obligation to buy (in the case of call option) or sell (in the case of a put option) an asset. The considerations for trading in this market are largely the same as those in the equity market and consequently, the participants are basically the same.

iii. WDM market:

RBI has permitted banks, primary dealers and financial institutions in India to undertake transactions in debt instruments among themselves or with non-bank clients through the members and stock exchanges. Accordingly, stock exchanges commenced trading in Government Securities and other fixed income instruments. The WDM segment generally deals with Centre and State Govt. securities and treasury bills, which are the underlying asset in this market. Stock exchange service in WDM market is only a reporting mechanism whereby trades executed outside the exchange are reported on the exchange's system. The reporting is done through the member broker of the exigencies and settlement of trades is done by participants directly on delivery verses on payment basis. The responsibility of settlement lies with the participants in the settlement and is granted by the

clearing Corporation. The participation is highly restricted by the RBI and earning of mid to long term interest on specified debt instruments is the major consideration of the participants.

iv. CD market and OTC market:

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 risks. Functionally the products may be considered as similar but they are quite different in terms of characteristics as well as participants. There is a differentiation from the OTC segment in terms of settlement on maturity, settlement period, counter party risk, size of market lot and participation, amongst other things. It is also noteworthy that the CD segment products have maximum maturity of only 12 months whereas OTC forwards can be for much longer durations.

10.14 In terms of participation, equity and equity derivative segments or WDM segment are essentially for the investors or speculators who seek to gain from price movements of equities. In contrast, OTC segment is basically for importers and exporters having contractual exposures and who try to hedge their risks emanating from fluctuations of exchange rates. The CD segment is primarily for speculators of currency values and short term hedgers

who want to cover their economic exposure but require greater liquidity.

10.15 Most importantly, OTC products are not traded on exchanges and only specified entities can participate in this market. Since we are looking at a case where the Informant and OPs are both providing stock exchange services, a product that neither is trading in cannot be said to be part of any market the two are operating in.

10.16 This Commission finds it rather unnecessary to dive into technical tests such as SSNIP, particularly in the absence of historic data of prices. The SSNIP test is a tool of econometric analysis to evaluate competitive constraints between two products. It is used for assessing competitive interaction between different or differentiated products. Ideally, time - series price 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. However, 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. In the instant case, firstly, the CD segment did not exist prior to August, 2008 and secondly, right since inception, transaction fees, 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. 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 of the false substitutes.

10.17 Moreover, the proportion of transaction value that a broker / trader pays as transaction fees and other fees is so small and insignificant that it would have practically no bearing on substitutability effect. Therefore, SSNIP would be irrelevant in such a case.

10.18 Similarly, there is little point in going into any extended debate to distinguish the words "interchangeable" from "substitutable", given the facts of the case and 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.

10.19 It is undisputed fact 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.

10.20 While it may be possible for any existing stock exchange to start operations in any or all segments of capital markets, the fact remains that regulations require a complete segregation of and separate approval for the CD segment. The technical, infrastructural or financial capability of any stock exchange

operating in some segment, to start operating in another, has no relation to determination of supply substitutability between the segments. As an analogy, the capability of a grain *mandi* (wholesale market) to also start a wholesale spice *mandi* 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.

10.21 As briefly discussed in the background section of this order, the stock exchange provides platform or service for stock broker and traders to trade in securities and derivatives. Essentially a stock exchange is a composite of certain manpower, technologies, facilities and infrastructure which constitute a platform on which the trading is done. Both, MCX-SX the Informant, and NSE, OP I are providing such services for which there is a market. ***In this case, the stock exchange services in respect of the CD segment in India is clearly an independent and distinct relevant market.***

10.22 In view of the above discussion and looking at factors such as regulatory trading barriers mentioned in Section 19 (6) and characteristics, consumer preferences and existence of specialised services providers as mentioned in Section 19(7), this Commission does not have to resort to arcane reasoning, or esoteric logic to delineate the relevant market. It is an accepted principle of law that

where a plain reading of the provisions suffices, there is no need to take recourse to interpretations or surmises.

10.23 For the purpose of Section 4, the boundaries of relevant market freeze the moment the products cease being practically interchangeable or substitutable. In the instant case, the stock exchange services provided for CD segment may be similar to those provided for other segments, but they cannot be said to be "*interchangeable or substitutable*".

10.24 The DG has found a fairly high degree of commonality amongst members of the Informant and those of the OP I. In itself, this fact has no bearing on interchangeability or substitutability between various segments of stock exchange services. Simply because many wholesale traders of grains also do wholesale trading of vegetables does not imply that grains and vegetables are substitutable or that grains and vegetable *mandis* are interchangeable.

10.25 In view of the foregoing discussions in this case, **the stock exchange services in respect of CD segment in India is clearly an independent and distinct relevant market.**

Issue No. 2

10.26 Having delineated the relevant market in consideration for the instant case, it is now possible to examine facts to determine whether OP I, NSE has "dominant position" in the relevant market. "Dominant position" is defined under explanation (a) of Section 4 of the Competition Act, 2002. The same is reproduced below for ready reference.

"Dominant position" means 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 ..... or consumers or the relevant market in its favour."

10.27 In the context of the Indian law, dominant position is a "position of strength"; such strength should enable it to operate independently of competitive forces; or to affect its competitors or consumers or the relevant market itself in its favour.

10.28 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 enterprise, entry barriers etc. as mentioned in Section 19 (4) of the Act. This wide spectrum of factors provided in the section indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at a conclusion based upon such inquiry.

10.29 The investigation by the DG followed by the inquiry by the Commission during the course of the proceedings before it has thrown up several facts which, when viewed holistically, project a clear image. Some of the most important facts are mentioned below:

a. In the equity segment of stock exchange services in India, NSE has continuously held high market share for the past 8 years going beyond 71% in 2008-09.

b. In the F&O segment, NSE has almost 100% market share.

c. In WDM segment, NSE has maintained more than 90% market share for the past 6 – 7 years.

d. Putting together equity, F&O, WDM and CD segments, NSE have garnered 92% market share as of 2008-09.

e. In CD segment itself, NSE has a market share of 48% according to the DG report.

f. NSE has been in existence since 1994 as against incorporation of MCX-SX IN August, 2008.

g. As at 31.3.2009, 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.

h. In comparison, BSE had a net profit of Rs.2.6 billion only and MCX-SX carried forward net loss of Rs.298.7 million for the period ending 31.3.2009.

i. NSE has presence in 1486 cities and towns across India. BSE has presence mainly in Maharashtra and Gujarat and is now reduced to mostly operating in equity segment. MCX-SX has only about 450 centres and operates only in CD segment.

j. NSE has high degree of vertical integration ranging from trading platform, front-end information technology, data information products, index services etc.

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

10.30 The above facts are not disputed on any substantive ground. Triangulation of the above facts creates a hologram picture of the players in the capital market in general and in the relevant

market of exchange traded currency derivatives forwards in particular.

10.31 It can be seen that the first half century of independent India had BSE as the sole stock exchange, way ahead of all regional stock exchanges in terms of transactions as well as value. With the entry of NSE on the scene, the picture started changing rapidly and drastically. Several regional exchanges disappeared and BSE was soon reduced to a distant second position. As new sections of capital market were opened by the regulator, NSE consolidated its position and acquired near monopolistic position in those markets.

10.32 The explosive rate of growth of the Indian economy in the new millennium and the dramatic improvements in the variety of products and technology encouraged some new players to start stock exchanges in limited segments. Despite the presence of an undisputed giant like NSE in the exchange services sector, optimism about the Indian economy and overall size of the growing pie led to MCX-SX and later USE venturing into the arena. The CD segment market was the latest market opened by the regulators and every one hoped to get a fair piece of this pie. By then, NSE had acquired an overall position of strength in the capital markets and

substantial financial might, arguably due to better planning, strategy and management. Every new player would have been aware of this position of strength of NSE but would have hoped that this strength would not be misused to throttle competition.

10.33 The facts and conduct of NSE has to be viewed in the perspective of the picture that has been outlined above.

10.34 An important point in consideration of this issue is the current market structure. As of now, the relevant market has only three players, viz. NSE, MCX-SX and USE. According to some recent figures published in the public domain, this market is currently divided almost equally with about 34% share with MCX-SX, 30% with NSE and 36% with the latest entrant USE, as of October, 2010. Incidentally, this is a very dynamic market and market shares could vary with time. But the important thing is that in a market with just three players, each would have at least some ability to affect its competitors or the relevant market in its favour even if it is not capable of operating completely independent of competitive forces or affecting consumers in the relevant market.

10.35 However, this is a very limited ability which comes from the relevant market being a *triopoly*. This is not the "strength"

which would come not just from market share (which is fairly evenly distributed at the moment) but from several other factors mentioned in section 19 (4) referred to above.

10.36 In terms of explanation (a) of Section 4 of the Competition Act, “the position of strength” is not some objective attribute that can be measured along a prescribed mathematical index or equation. Rather, it has to be a rational consideration of relevant facts, holistic interpretation of (at times) seemingly unconnected statistics or information and application of several aspects of the Indian economy. What has to be seen is whether a particular player in a relevant market has clear comparative advantages in terms of financial resources, technical capabilities, brand value, historical legacy etc. to be able to do things which would affect its competitors who, in turn, would be unable to do or would find it extremely difficult to do so on a sustained basis. The reason is that such an enterprise 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 the dominant enterprise but detrimental to the competitors.

10.37 From the few facts enumerated above, 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.

10.38 In the context of the Competition Act, what has to be ascertained is whether an enterprise has "strength" and whether it has the ability to use that strength in its favour. Explanation (a) to Section 4 raises many possible ways in which such strength could be used. These possibilities can be examined individually or in a combined manner, depending upon the facts of a case. In the instant case, we can first ascertain whether NSE has a position of strength which enables it to affect MCX-SX as a competitor in its favour. The question is not whether NSE is doing so but whether all the indicative facts point out that it has the ability to do so. This assessment can be done by posing a few questions.

10.39 Firstly, can NSE sustain zero pricing policy in the relevant market long enough to outlive effective competition?

10.40 To answer this, it must be kept in mind that the rationale for doing any business is to earn some profit out of it. Although there could be slightly diverse strategies such as output optimisation, turnover maximisation, profit maximisation, positioning etc., the fact remains that earning of zero profit or accumulating

losses for indeterminate period would never be the goal of any commercial enterprise. Even the desire to develop a nascent market would have the foresight behind it, that it can eventually see profit generating within reasonable and relatively short time frame. 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. Looking at the financial statements of NSE, its reserves and surplus or its profits after tax, 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 clearly is a position of strength.

10.41 Secondly, is there any indication that the conduct of NSE shows that it is aware of its capability?

10.42 Modern business strategy and accounting standards are geared to keep a hawk eye on the bottom lines in any business. Financial strategies treat each and every segment of business, particularly in multi product enterprise, as independent cost centres. This enables the enterprise to monitor every activity in terms of cost overruns and take timely, corrective measures to keep the bottom

lines intact. This philosophy is also reflected in Account Standard 17 (AS17), which stipulates segment reporting.

10.43 In the instant case, not only has NSE not followed AS17 but appears to have a rather cavalier approach towards any costs it may be incurring to operate in the relevant market. The facile explanation, that this detachment from profit motive is with the desire to develop the CD segment for the larger good of the capital market in India, is unpalatable, looking at the aggressive competitiveness of NSE in the past.

10.44 This Commission has not found any acceptable justification for why a professionally managed enterprise like NSE would not want to keep any track of the commercial viability of its operations or does not have any concerns about the desire of its shareholders to earn higher dividends. It is unthinkable that a professionally managed modern enterprise can afford such financial complacency in the face of competition unless it is part of a bigger strategy of waiting for the competition to die out. This complacence can only point to awareness of its own strength and the realisation that sooner or later, it would be possible to start generating profits from the business, once the competition is sufficiently reduced.

10.45 Thirdly, in absence of the above strengths, would NSE be able to or want to continue with zero pricing indefinitely?

10.46 It is a historical fact that post independence several stock exchanges have gone out of business. Had NSE not got the undeniable advantages arising out of its operations in other markets, it would not have been able to or wanted to charge nothing for providing stock exchange services for the cash derivative forwards market. In this regard, MCX-SX, or indeed any other current or future competitor that does not have similar advantages is clearly in a weaker position.

10.47 The above discussion leads to the only rational conclusion possible that NSE enjoys a position of strength in the relevant market which enables it to affect its competitors in its favour. To conclude otherwise would not only be turning a blind eye to the facts available but also to the provisions of the Competition Act and to the intent and spirit of this economic legislation.

10.48 In arriving at this conclusion, the Commission has taken into account relevant aspects of the financial statements of the parties concerned, HHI index of more than 5000 in the CD segment (2009-10), ICR3 of more than 99 and other key indicators. The

Commission has also interpreted all facts in the context of typical features of regulations in the Indian capital market as well as historical perspective of stock exchange services in India. The Commission has also given due consideration to some important cases from international jurisdictions such as AKZO, United Brands, Du Pont amongst others as also guidance papers of some other jurisdictions. A perusal of these indicates that authorities have taken a very wide and varied range of market shares as indicators of dominance, going down to 40% in some jurisdiction. In context of the Indian law, this indicator does not have to be pegged at any point but has to be considered in conjunction with numerous factors given in section 19(4) of the Act.

10.49 In view of the discussion above, the Commission is of the firm opinion that NSE has a position of strength and, therefore, enjoys dominant position in the relevant market in context of Section 4 read with section 19(4) of the Act.

Issue No.3

10.50 Having delineated the relevant market and established that NSE is in a dominant position in the relevant market, it is only left to

be determined whether NSE has abused its dominant position in context of Section 4 of the Competition Act, 2002.

10.51 The Informant, MCX-SX had made allegations of abusive conduct of NSE in respect of the following four conducts:

A. Transaction fee waiver
B. Admission and deposit level waivers
C. Data feed fee waiver and
D. Exclusionary denials of integrated market watch facility.

10.52 The DG has done in-depth analysis and investigation in respect of these allegations as detailed earlier in this order. The fact that the above conducts took place is not in dispute.

10.53 The defence that the OPs took to justify the above conduct has also been given in detail in earlier part of this order. These can be broadly recapitulated as below:

i. NSE is not dominant in either the CD segment market or any other broader market of stock exchange services.

ii. The various fee waivers were done to develop the nascent market and were examples of competition–neutral penetrative pricing.

iii. NSE had historical philosophy of waiving fee in nascent market.

iv. Data feed fee were not charged because DotEx did not charge for it and because clients requested postponement of the fee.

v. Interface Code (APIC) was denied to ODIN for the CD segment because user complaints against ODIN.

vi. There was no element of predatory pricing because there was no variable cost.

vii. The charge of leveraging would not apply because NSE is not dominant in any market. Moreover, the DG has not identified two relevant markets and there is not enough associational link between the CD segment and remaining segments.

10.54 The Commission has considered every aspect of the investigation report; arguments and contentions made by the Informant as well as the OPs and has applied its mind to the facts, circumstances and nuances of the arguments. Many of these have been already detailed in their respective place earlier in this order and it is not necessary to repeat them here.

10.55 While discussing the issue of dominance in the previous section, this Commission has established the position of strength and therefore, dominant position that NSE enjoys in the market of

stock exchange services for currency derivatives in India, which has been ascertained as relevant market for this case. A point in order is that the OPs have themselves broadly contended that this is the correct relevant market. The Commission has only differed to the extent that it has not considered the OTC segment as part of the relevant market. Detailed reasoning for this has already been given at the appropriate place above. **Therefore, the defence of the OPs in respect of the dominant position is no longer sustainable.**

10.56 As regards the defence relating to development of nascent market, the Commission has already touched upon the existence of profit motive behind any business enterprise in the previous section while evaluating dominance. It is undisputed that since commencement of operations in August, 2008 till the time of passing this order in half way down 2011, NSE has continued with fee waivers. Nascence must be differentiated from immaturity or even infancy and it cannot be anyone's case that until a particular market has matured, it should continue to be treated as nascent. The word "nascence" denotes the state of existence at the time of or immediately after birth. Infancy denotes a state after the nascent stage. Immaturity is the remaining time before maturity. For any market, the first few months can be said to be nascent stage, where players are faced with day to day developments and discovering

new dynamics each operational hour. Thereafter, there may be a period of infancy, where almost all market situations have played out but the players are facing teething troubles. This may last even another year. After that would come the process of maturity, when the market cannot be said to be fully developed but it also 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.

10.57 The zeal or foresight for development of a new product market can definitely lead to initiatives such as promotional or penetrative pricing. However, this can be understandable for a period of a few months or even a year. To continue such pricing well into the third year of existence of a market can only be seen as an instance of astute strategy for market capture or extreme commercial self-interest. Nothing in the history of the dramatic rise and success of NSE indicates strategic naivety or commercial altruism. On the contrary, timing of fee waivers or fee impositions in the past as well as in this case indicate a level of strategic management that can only be termed as far from naive. Further, as demonstrated in the previous section, sacrifice of all earnings from a new business for several years at a stretch can only be

possible for an enterprise of redoubtable strength and deep pockets.

10.58 In context of the defence of nascent market development, the Commission has taken cognisance of certain incontrovertible investigative findings of the DG which have a strong bearing on the acceptability of the defence. Some of these main findings are mentioned below:

i. NSE issued a circular dated 26.8.2008 waiving transaction charges in the CD segment *"in order to encourage active participation in the currency derivation segment"* till 30.9.2008. The waiver was again extended from time to time till 30.6.2009. Thereafter, the waiver has continued without any circulars. Thus, right from the start, the Informant faced the restraint of zero fees.

ii. At no point did NSE waive transaction fee in the equity segment since 1994 because it was a case of meeting the competition rather than beating the competition.

iii. NSE commenced trading in the F&O segment in June, 2000. It started with charging transaction fees. This does not support the claim that NSE historically waives fees to develop nascent market. NSE started fee waiver from August, 2000 which continued in varying degrees up to August, 2001. The effect could be seen in BSE turnover which consistently fell in comparison with NSE

turnover till their positions were completely reversed by July, 2001 with NSE turnover at Rs.92 crores (920 million) as against BSE turnover of Rs.1.76 crores (17 million). Having consolidated its position, NSE re-imposed transaction charges w.e.f. 27.9.2001. All other kinds of waivers for F&O segment were completely removed after March, 2002 by which time BSE had been completely marginalised.

iv. In WDM segment, NSE commenced trading on 30.6.94. It levied transaction charges for a full year till June, 1995. This conduct again contradicts the claim of consistent policy of fee waivers to develop nascent markets.

v. The DG examined relevant agenda items and minutes of meetings of DotEx in this matter. Despite deliberations on the fee structure and in principle acceptance of imposition of fees, no data fee was implemented which indicates that DotEx had waived the fee with the purpose of capturing the market.

Therefore, the defence of development of nascent market is not tenable.

10.59 As regards the shield of benign historical philosophy towards charging of fee is concerned, the Commission has noted the pattern of behaviour of NSE in respect of F&O segment and

WDM segment. It has also been observed that fees were not waived in the equity segment. The conduct of NSE with regard to transaction charges in the Gold ETF segment and HangSeng Benchmark Exchange traded scheme has also been noted. Without making any specific comments, this Commission can conclude that historical conduct of NSE suffers from inconsistency and 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. The investigation report of the DG has commented upon these behaviour patterns in great detail and nothing substantive has been offered by the OPs that would make this Commission disagree with the DG report.

10.60 This Commission duly notes that DotEx is a wholly-owned subsidiary of NSE. The fact that DotEx has 26% stake in Omnesys which had developed the NOW software has also been noted.

10.61 Section 2(h) of the Act defines enterprise as "..... a person..... engaged in any activity..... either directly or through one or more of its units or divisions or subsidiaries....." section 4 applies to "enterprise or group" and explanation (c) gives a definition for "group". Reading both together, non-charging of data feed fee is a conduct that is attributable to NSE and DotEx

jointly. **The defence of nascent market development and historical philosophy by DotEx is not tenable on this count for the same reasons as discussed above.**

10.62 As regards waiver of data feed fee on the basis of customer requests, this Commission notes that the same magnanimity is not evidenced in respect of other segments where data feed has not been waived. Generation of data, creation of backend and front-end software and live data feed involves considerable technical and commercial investment and costs, not to speak of investment of billable man hours. No profit making enterprises delivering such costly services would deliver it free of cost for years merely on customer requests. Even with regard to customer requests not sufficient evidence was produced by the OPs to show that there was overwhelming demand for free services. Even this magnanimity would not have been felt had the only source of earning for the data feed services been the CD segment. **For these reasons, this Commission finds no merit in the justification given by the OPs regarding data feed fee waiver.**

10.63 Regarding denial of access interface code (APIC) for ODIN supposedly done due to programme vulnerabilities and client complaints, this Commission notes that the denial has only been with respect to data feed for CD segment trading on NSE. No

denial of APIC has been done in respect of data feed for any other segment. It is also noted that ODIN is a software developed by FTIL, which is one of the promoters of MCX-SX. Vulnerability or defects, if any, in ODIN would be a matter of concern for other segments also. Normally, APIC should have been denied for all segments but this was not the case. Moreover, the investigation has revealed that even NOW, which is the application being used by NSE, had generated many complaints. At the same time, sundry users of ODIN that were examined did not express any grave concerns.

10.64 All these facts put together take the wind out of the sails of the justification given by the OPs for denial of APIC for CD segment operations or for putting FTIL on its watch list. This conduct of NSE/DotEx smacks of dubious anti competitive intent when all the facts are viewed together.

10.65 In today's world, trading on stock exchanges is being done extensively on internet through electronic applications such as ODIN and NOW. In that sense, these software applications whether backend or frontend are essential facilities. In fact, for any segment, there can be said to exist an aftermarket for market watch and data feed services. Whereas in the aftermarket of data feed services of other segments, ODIN and NOW (and a few other less

prominent ones) are competing, denial of APIC for CD segment not only forecloses competition in the aftermarket of electronic trading platform for the CD segment for NSE traded derivatives but is also tantamount to exclusionary conduct in the main relevant market. In a way, this is imposing supplementary obligation on anyone wanting to trade on the CD segment of the NSE exchange to use only NOW, in complete exclusion of ODIN or any other software.

10.66 NSE has denied charges of predatory pricing. The basic ground taken was that no fixed costs were incurred on CD segment. The findings of the DG as well as arguments of the OPs in respect of whether AVC, ATC, LAIC or AAC is the best benchmark for evaluating predation; estimated costing based on allocation of various costs etc. have been mentioned in earlier portions of this order. However, it has been elsewhere noted in this order that since NSE does not follow segment accounting and since it has not given any segment figures to the DG, any exercise to arrive at a costing benchmark would be an exercise in futility in this case.

10.67 A very important finding of the investigation of the DG is that from 1st October, 2008 to 31st October, 2010, BSE incurred Rs.2.01 crores (20.1 million) for 2008-09 and Rs. 4.69 crores (46.9 million) for 2009-10 as direct and shared cost for running the CD segment.

10.68 The investigation also revealed that the Informant MCX-SE is only operating in the CD segment and examination of its financial statements of 2008-09 and 2009-10 reveals that it is incurring variable costs. The operating expenses include advertising, promotional activities, clearing and settlement, conveyance, communication and insurance expenses. For 2008-09, MCX-SX has incurred total expenses of Rs.37.33 crores (373.3million) and for 2009-10, it has incurred Rs.85.78 crores (857.8 million). When these findings of facts are considered, it gives every reason to believe that operations in the CD segment do require *some* variable costs to be incurred by the stock exchange. These cannot be zero as claimed by NSE. It is also noteworthy that NSE has not been able to provide any figures of segment account to substantiate their claim.

10.69 The DG report makes an attempt to work out an estimation of costs that should have been incurred by the NSE. It indicated that the total cost for 2008-09 works out to Rs.4.42 crores (44.2 million) and for 2009-10, which is the first full year of operation, Rs.37.07 crores (380.7 million). The report has estimated total cost for CD segment on a percentage based *pro rata* system. The total cost for CD segment estimated for 2009-10 is to the tune of Rs.37.07 crores (370.7 million) whereas for 2008-09, it is estimated at Rs.4.42 crores (44.2 million). Based on pro rata assumption,

about 72% of the total cost is allocable to F&O segment, 17% to equity segment, 2% to WDM segment and about 1% to corporate debt segment and 7% to CD segment for 2009-2010. Admittedly, this may be just estimation, and like all estimations, open to debate, but the exercise indicates logically that the costs of operations for NSE for the CD segment cannot be absolute zero.

10.70 More importantly, it is worth pointing out that the issue under investigation was allegation of zero pricing. The fact of zero pricing has remained undisputed. Section 4(2)(a) (ii) deals with "unfair or discriminatory.....price in purchase or sale (including predatory price) of goods or service". From the wordings of the provisions, it can be concluded clearly that "predatory price" is considered as a subset of "unfair price".

10.71 The term "unfair" in relation to pricing in the context of the Indian Competition Act has not been dealt with in any case so far. Had NSE been charging some price for its services in the CD segment, there would perhaps have been a need to examine that price as "predatory price" or otherwise and consequently, to arrive at the appropriate benchmark for predation for this particular case. Explanation (b) to Section 4 specifically defines predatory price as a "*price which is below the cost.... of production .....with a view to reduce competition or eliminate the competitors*". However, "unfair"

price has not been defined anywhere. This unfairness has to be determined on the basis of facts of a case.

10.72 It has been amply demonstrated in the DG report that there are manpower, hardware, infrastructure and other resources dedicated to CD segment operations by NSE. Several of these heads of expenditure are variable in nature. The operation of CD segment cannot be run without employing those resources and none of those resources including manpower and electricity etc. come for free. Even though it may not be easy to make cost allocations as claimed by NSE, it is certainly desirable and not impossible. Had NSE been operating in no other segment, it would certainly have ascertained its own cost of operations. As mentioned elsewhere while discussing dominance, this cavalier attitude of not allocating cost of operation for a clearly segregated operation can come only from a position of strength and the intent to wait for competition to die out.

10.73 The term “unfair” mentioned in section 4(2) of the Act has to be examined either in the context of unfairness in relation to customer or in relation to a competitor. For unfairness of any act to be judged, all the surrounding facts have to be considered. It cannot be judged on the basis of some formula or accounting process. In the present context, unfairness of pricing (as distinct

from the concept of the predatory pricing) cannot be determined by selecting ATC, AVC, LRAIC, AAC or any other costing calculation used in accounting. It has to be seen whether, in this case, zero pricing by NSE can be perceived as unfair as far as MCX-SX is concerned.

10.74 As discussed above, NSE has a position of strength which has enabled it to resort to zero pricing since August, 2008. MCX-SX does not have such strength or deep pockets. There is practically no justifiable reason for NSE to continue offering its services free of charge for such a long duration when it is paying for manpower and other resources for running the business. It is also a fact that no enterprise would have the intention to engage in a profit-less venture for eternity.

10.75 MCS-SX, which operates only in the CD segment, has no other source of income. This is a major constraint. In these circumstances, the zero price policy of NSE cannot be termed as anything but unfair. 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.

10.76 Had NSE and MCX-SX been on equal footing in terms of resources directly available, spectrum and scale of operation, nationwide presence, length of existence etc. perhaps perception of unfairness would not have been so blatant and impossible to ignore, but in this case, the sense of the two being equal or even almost equal does not exist. **Therefore, this Commission concludes that the zero price policy of NSE in the relevant market is unfair.**

10.77 In this case, the conduct of zero pricing by the NSE is beyond the parameters of promotional or penetrative pricing. **It can, in fact, be termed as annihilating or destructive pricing.**

10.78 It is to be noted that the Commission has already delineated the relevant market in this case as the market of stock exchange services for exchange traded currency derivatives in India. It has been argued that for a charge of leveraging to be established, there is a requirement of identifying two distinct "relevant markets", as per the provisions of section 4(2)(e) of the Act and for these two relevant markets to have associational link.

10.79 Coming now to the issue of leveraging in this case, it is pertinent to observe that there is a subtle difference in the concept of "leveraging" as applied in some international jurisdictions (particularly the European Commission) and the wordings of the related provision in the Indian Competition Act, viz. section 4(2)(e). In the Indian context, Competition regime is a very new tool for regulating market forces. Due to historical developments, several enterprises have been incumbent and entrenched in trade and commerce in India without any regulations to keep their anti-competitive conducts in check. This position is in sharp contrast with that in some mature jurisdictions like the US or EU where competition laws have been in force for a century.

10.80 The Indian Competition Act recognizes leveraging as an act by an enterprise or group that "*uses by its dominant position in one relevant market to enter into, or protect, other relevant market*." Nowhere does the Act indicate that there has to be a high degree of associational link between the two markets being considered for this sub section. This is so because competition concerns are much higher in India than in more mature jurisdictions because of the historical lack of competition laws. In India, if an enterprise dominant in the market of audio-visual (AV) equipment enters into the market of say, computers, it is possible for it to use its strength

in terms of finances, technological expertise, sales network etc. in the AV market to muscle its way into and protect its position in the computer market, even though the two markets are not at all connected. That is why the Act does not indicate any requirement of associational link.

10.81 At this stage, the Commission would like to clarify the intent as well as the import of section 4(2)(e) of the Competition Act, 2002. It is incorrect to argue that the whole of section 4 pivots around determination of *only one* "relevant market" or that determination of a second "relevant market" is not possible or that having treated a particular market as the "relevant market" for the purpose of explanation (a) to section 4, that market cannot be treated as the "other market" for the purpose of section 4(2)(e) as per the wordings of the provision.

10.82 Explanation (a) is for defining what dominant position means for any market being examined under section 4 while section 4(2)(e) deals with a situation where an enterprise in dominant position in (any) delineable relevant market uses its strength therein to enter or protect any other (delineable) relevant market.

10.83 Section 4(2)(e) uses the terms, “one relevant market” and “other relevant market”. The section recognizes the fact that an enterprise may be multi-product and may be operating in two (or more) markets. It may be possible for such enterprise to use its position of strength derived in one market to leverage its position and gain unfair advantage in the other market. While its conduct in the second market has to be separately examined for abuse if and after it acquires a dominant position there, the fact that it has used the strengths from the first market to wrongfully enter into or to protect the second market is independently considered harmful to competition under the Act. The “relevant market” of the explanation (a) applies equally in intent for sections 4(1) and (2) but the relevant market in respect of clauses (a) to (d) of section 4(2) *can be different* than the relevant market for the purpose of clause (e).

10.84 In the instant case, the relevant market in respect of clauses (a) to (d) of section 4 (2) has been taken as stock exchange services for currency derivatives in India. It must be emphasized that this Commission has considered NSE as being in dominant position in this market based on factors given in section 19(4). But it must be kept in mind that NSE is also operating in other markets, such as equity, F&O and WDM. It is not the place to go into a discussion whether each of these is independent relevant market or

some are interchangeable / substitutable for the consumer and therefore constitute a single market. What is important is that this Commission has clearly differentiated the CD segment as an independent relevant market. For the sake of convenience, we shall refer to the rest of the market (or markets) as the "market of stock exchange services for the non CD segment". In this discussion, we shall call the relevant market as the "X market" and the market of stock exchange services for the non CD segment as the "Y market". The complexity in this case arises from the fact that NSE has been considered as dominant in the X market due to its strengths in the Y market (amongst other things). A question can then be posed as to how, once determined as dominant in the X market, can the charge of leveraging the position in the X market to enter or protect the same X market itself be made? But this question is assuming that once X has been taken as the "relevant market" then wherever the word "relevant market" occurs in clauses (a) to (e), it should automatically refer to X market.

10.85 This is distortion of the provisions. As explained earlier, the "relevant market" for clause (e) can be different from the "relevant market" for clause (a) to (d) but the aspects of dominance given in explanation (a) would apply equally to both. In fact, the scheme of the section, particularly when read with section 19(4), is

such that it is possible to take one market as the “relevant market” for sub sections (a) to (d) of section 4(2) and the same market as the “other market” for section 4(2)(e).

10.86 In the Indian Competition Act, under section 19(4), the ability to leverage, in itself, is taken as one of the factors of dominance. This revalidates our observation above that both “position of strength” as well as the concept of leveraging has slightly different nuances in the Indian Act. Phrases like “size and importance of competitors”, “vertical integration”, “relative advantage” etc. are concepts that indicate the strength to leverage based on strengths in other markets. It is this strength that would render an enterprise dominant in the relevant market itself and would expose its conduct therein to evaluation of any other abuse of dominance separately. At the same time, the wrongful exercise of that strength by itself is also held as abusive conduct in its own right, under section 4(2)(e).

10.87 To further clarify, if an enterprise merely uses its dominant position in any “relevant market” to enter or protect some other “relevant market” wrongfully, it can only be held guilty of contravening section 4(2)(e). But if the enterprise, after entering the other relevant market through such leveraging and acquiring

dominant position there, commits further acts of abuse (such as unfair pricing) in that relevant market, then there would be a separate violation of section 4(2)(a).

10.88 In the previous paras, the conduct of NSE has been examined within the relevant market delineated for this case (X market). However, the cumulative impact of those conducts also translates into the act of protecting its position in the X market by the dint of its strengths in the Y market where also NSE is dominant. Whereas X market is the “relevant market” for sub sections (a) to (d), the Y market is the “relevant market” for sub section (e).

10.89 It is worthwhile to observe here that the language of section 4(2)(e) does not exclude the possibility that the enterprise is dominant in both, the “relevant market” as well as the “other relevant market”. An enterprise can be dominant in one market and can enter another market, acquire position of strength there and then commit acts to protect its position. This is the situation in this case. The acts of abuse in the market of stock exchange services in CD segment have to be examined in terms of sub sections (a) to (d) of section 4(2), whereas, the anti-competitive use of might

arising from the market of stock exchange services in non CD segment is to be examined under section 4(2)(e).

10.90 Having clarified the existence of two market necessary for examining section 4(2)(e) and without prejudice to our view on the requirement of associational links under the Indian law, we now examine if the two markets have associational link. This can be done by considering the following questions:

(a) Whether NSE holds a position of strength on the CD segment market comparable to its position in the CD and non CD segment markets as a whole?

(b) Whether the NSE enjoys advantages in the CD segment market by virtue of its dominance in the non CD segment market?

(c) Whether the NSE customers in one market are potential customers in the other?

(d) Whether the NSE and its competitors can become competitors in both markets?

10.91 As evident from our discussion in the section on dominance, the NSE possesses almost the same strengths in the CD segment as it does in the combined stock exchange market. This fact gives it definitive advantages in the CD segment. There is high commonality of brokers and traders in other segments and CD segment. As indicated in the introductory section of this order,

MCX-SX has already applied for permission to operate in the equity/cash ("Equity") and equity derivatives - Futures and Options ("F&O") segments and has also communicated its willingness to SEBI to commence the SME (small and medium enterprises) segment. At this point in time, the necessary regulatory approvals have not been given and the matter is *sub judice*. However, potentially, NSE and MCX-SX can be competitors in those segments. Indeed, MCX-SX is desirous to compete with NSE in other segments. Therefore, all the above four questions can be answered in the positive. **Consequently, it can be said 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.**

10.92 In the instant case, the acts of NSE such as fee waivers, 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.

10.93 The Commission has earlier touched upon aftermarket of software for trading on stock exchanges. The client desirous of trading on stock exchange would first choose some exchange. After that, for trading, he has to rely upon trading software such as data

feed, market watch etc. ODIN and NOW are both such softwares. In a technical sense, they are competing products. Also, the trading software is an essential facility without which trading cannot be done today.

10.94 NSE has placed FTIL, the developer of ODIN (and one of the promoters of MCX-SX) on its watch list and has denied APIC for interface between its own software NOW (the marketer DotEx is a 100% subsidiary) and ODIN for the CD segment. This prevents clients of NSE, most of who use ODIN for all other segments, from choosing ODIN for the CD segment trade on NSE. In the aftermarket of trading software for CD segment of NSE, it has denied access to ODIN. Had the APIC been provided to ODIN, the two software, viz. ODIN and NOW would have competed for clients. This in fact, would lead to improvements in the technical development of all such softwares due to competitive forces in the aftermarket.

10.95 This situation is similar to the US vs Microsoft case where the allegation was that Microsoft had manipulated its application interface code to put third party browsers at a disadvantage for users who were working on Microsoft's Windows operating system. There are also similarities with the European Commission's case

against Microsoft where there was allegation that Windows Media Player was bundled with the operating system and third party players had difficulties in running on it.

10.96 In view of the discussion above, this Commission concludes that **the conduct of NSE / 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**.

11.Conclusion

11.1 In the previous section, the Commission framed three issues for determination and has discussed them in great detail. The findings of the Commission, based on the above discussions are summarized as below.

11.2 The stock exchange services in respect of CD segment in India is clearly an independent and distinct relevant market. In this delineated relevant market, NSE has a position of strength and, therefore, enjoys dominant position in the relevant market in context of Section 4 of the Act.

11.3 In the facts and circumstances of the case, the defence of nascent market development and historical philosophy of fee waivers by NSE and DotEx is not tenable.

11.4 This Commission finds no merit in the justifications given by the OPs regarding waivers of transaction fees, admission fees or data feed fee waiver. Therefore, the zero price policy of NSE in the relevant market is unfair. It can, in fact, be termed as annihilating or destructive pricing. This is contravention of section 4(2)(a)(ii).

11.5 The conduct of NSE / 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. This is contravention of sections 4(2)(b)(i) and (ii); 4(2)(c) and 4(2)(d).

11.6 Lastly, NSE has used its position of strength in the non CD segment to protect its position in the CD segment. This is contravention of section 4(2)(e).

12. Order under section 27

12.1 Consequent to finding NSE and DotEx in contravention of the provisions of the Section 4 of the Act the Commission issued a show cause notice on 29.4. 2011 to NSE for imposition of penalty under Section 27 of the Act. The Commission also issued a reasoned order dated 25.5.2011 wherein the contraventions were elaborately dealt with. Copies of the order were conveyed to NSE and DotEx granting time for submission of replies and an opportunity to appear before the Commission. Copy of the minority order dated 3.6.2011 was also sent to parties. Accordingly, NSE filed a detailed reply to the aforementioned show cause notice on 10.6.2011. This was followed by oral hearing on 13.6.2011. Shri Soli Cooper, Counsel, Ms. Pallavi S. Shroff & Shri M.M. Sharma, Advocates made oral submissions on behalf of NSE. DotEx did not file any reply or made any oral submissions.

12.2 The instant order under Section 27 of the Competition Act, 2002, is to be read in continuation of this Commission's reasoned order dated 25.5.2011 establishing the contraventions of Section 4 by Opposite Parties 1 & 2. The said order shall be considered an inherent part of and conjoined with this order.

13. Contentions of NSE in response to show cause

13.1 The essential ingredients of the detailed written submissions and oral arguments of the Opposite Party 1, NSE are summarized in the following paragraphs.

13.2 In its written submissions, NSE summarized the findings of the order of this Commission dated 25.5.2011 as also of the dissenting order of the dissenting Members of this Commission dated 3.6.11.

14. Submissions against imposition of penalty:

(a) Novelty:

It was submitted that *"given that the alleged violations are based on novel concepts and principles, they are incapable of having been anticipated for the purpose of compliance. Further it is the established practice of other competition law regulators that where a concept is novel, no penalties are levied or remedies be ordered."*

(b) Uncertainty on application of law:

It was contended that in the absence of guidance papers or a case law from the Commission dealing with concepts like dominance, unfair pricing etc., there is a large element of uncertainty in the

application of the Act and regulations framed there under. It was argued that in such circumstances, no penalties should be levied or remedies be ordered.

(c) Lack of cogent or convincing evidence:

It was argued that there is no evidence to suggest that NSE's pricing policies were intended to reduce competition or eliminate competitors. The Commission's order is not based on any cogent or convincing evidence to establish violation of Section 4. It was argued that in such circumstances, no penalties should be levied or remedies be ordered.

(d) Lack of intention or negligence:

It was forcefully contended that in competition law it is the settled principle *"that the fines should only be imposed where the defendant has either intentionally or negligently infringe competition law."* It was further argued that NSE did not act *"with the intent to restrict competition……."* It was averred that when NSE commenced trading in the CD segment on 29.8.2008, the Competition Act had not yet come into force. NSE did not levy any charge when it commenced trading in the CD segment even when there were no competitors. It was argued that *"given that there were no competitors, NSE could have entered the market with a charge and thereafter could have reduced the charge to zero when MCX-SX entered, if it was NSE's intent to ward off competition, which is not*

the case." Accordingly, in the absence of intent or negligence on the part of NSE, no penalties should be levied or remedies be ordered.

(e) No foreclosure:

NSE contended that the main reason for prohibiting an abuse of dominance is to prevent competitive foreclosure. It was argued that since there has been no foreclosure in the CD segment, there cannot be any abuse of dominance. It was further contended that the Commission's mandate is *"to protect competition and not competitors."* Further, it was stated that *"the losses incurred by MCS SX as a result of the zero pricing policy of NSE are small relative to MCS SX's excess capital and MCS SX is not harmed that it will be unable to survive in the immediate future. Accordingly, no serious anti competitive harm has been caused ……."* It was pleaded that in such circumstances, no penalties should be levied or remedies be ordered.

(f) Benefit to ultimate consumers:

It was argued that the Commission's order had made no observation on whether the consumers are being harmed. It was submitted that *"The Act mandates the Hon'ble Commission to protect competition and consumers and not competitors."* It was contended that the consumers have benefitted from NSE's pricing policy and in fact *"Competition has increased"* and "*the competitors of NSE have*

benefited." It was argued that no penalty or remedy may be imposed on this ground.

(g) Expansion of the market:

It was submitted that NSE's pricing policy have assisted in expanding the market and consequently, the turnover or business in CD segment on all exchanges has increased from Rs. 291 crores (2.91 billion) in August, 2008 to Rs.41,982 crores (419 billion) in May, 2011. It was submitted that such circumstances demand that no penalties be levied or remedies be ordered.

(h) Contribution to economic development:

It was contended that NSE had contributed to economic development through innovations made in the operation of the stock exchanges, over the years, since its inception.

(i) Meeting the competition:

It was argued that since inception of the CD segment, the competitors of NSE have imposed charges identical to that of NSE. Therefore, NSE was left with no option but to continue charging zero fees to meet the competition. Charging fees "will cause serious damage to NSE's market position in the CD segment." Therefore, no penalty or remedies should be ordered.

(j) Full support and cooperation:

It was submitted that NSE had extended full support and cooperation during the proceedings before the Commission and had submitted legal opinion of Prof. Richard Whish and various reports from Genesis Consulting Private Ltd. *"at a great cost."* Keeping this in view, no penalty or remedies may be ordered.

(k) Principle of proportionality:

It was submitted that penalties should not be imposed given that the Commission in its order has *"nowhere stated that consumers have been harmed by the pricing policy adopted by NSE....."* It was further submitted that any assessment of conduct can only begin from when Section 4 of the Act came into force i.e. 20.5.2009. NSE also pleaded that "*penalty imposed must be commensurate with the gravity of misconduct*."

(l) Order contrary to foreign precedents:

It was contended that the Commission's findings on aspects such as SSNIP, dominance, unfair pricing, leveraging etc. *"are contrary to foreign precedents and established principles of competition law."* In view of this, no penalty or remedies may be prescribed.

(m) No intent to deny FTIL the API for the CD segment:

It was submitted that the issue concerning ODIN is currently the subject matter of litigation before the Bombay High Court. Further, ODIN was put on a watch list for justifiable reasons. It was stated that when NSE sought to conduct an audit of ODIN, it resulted in a dispute with FTIL and the audit is still pending. It was suggested that this issue should be referred to SEBI. It was further submitted that there are instances of major exchanges not sharing the APIs with competing exchanges. It is stated as an example that despite having completed all formalities, Omnesys was not granted API by MCX-SX for more than two years and the same was granted for the commodity segment by MCX after more than one year and on intervention of FMC. It was argued that it is not ideal for an exchange to share its APIs with vendors affiliated to other exchanges and hence there was business justification in denying API. Lastly, it was submitted that SEBI has already seized of the matter and if at all the remedy is sought to be provided, it should be referred to SEBI.

15. Miscellaneous arguments

15.1 NSE referred to some laws of European Commission such as *Italian Flat Glass Case, National Grid plc v/s gas and Electricity Markets Authority* etc. to support its contention that penalties should

not be imposed when there is a novel concept involved. Reference was also made to Federal Trade Commission (FTC) policy statement on monitoring equitable remedies in competition cases wherein monetary penalties are to be levied if the violation is clear, there is reasonable basis for calculating the amount and after considering impact of other remedies including private actions and criminal proceedings.

15.2 NSE has also referred to OECD document titled *"Remedies and Sanctions in Abuse of Dominance cases"* where it is recommended that using lighter measures does not appear to be controversial when a conduct has never been dealt with by the jurisdiction's court before and there could have been reasonable doubt ex-ante about whether the conduct would be found unlawful.

15.3 It has been further argued that Section 53N of the Act enables MCX-SX to seek compensation from the Competition Appellate Tribunal (CAT). Therefore, "the harm caused, if any, to MCX-SX can be remedied and the requirement for the Commission to levy any penalties or impose remedies does not exist." NSE has also contended that in prior decisions of the Commission, viz. *Case No.1/2009, (FICCI v/s United Producers/Distributors Forum), Case No. 5/2009 (Neeraj Malhotra v/s Banks) and case No.7/2010 (Vijay*

Gupta v/s Paper Merchant Association and Others), the Commission has either imposed no penalties or symbolic penalties. Accordingly, it is submitted that no penalty be imposed on NSE.

15.4 NSE made detailed submissions that if there exists an effective behavioral remedy then no structural remedy be ordered. NSE relied on *European Union Council Regulation 1/2003 United Shoe Case, Microsoft Case and OECD document* preferred supra.

15.5 In respect of the behavioral remedy, it was contended that *"competition authorities* ***should not*** *regulate prices as they are ill suited to carry out price controls"*. It was submitted that NSE should not be ordered to charge a price similar to those charged by it in other segments. However, it was submitted that Commission has not provided any guidance on what would be a fair price and stated *"that the predation benchmarks would present a safe harbor for NSE in working to comply with the majority orders as long as NSE prices above the predation benchmark, it can be considered to be pricing fairly."*

15.6 NSE further contended that the cost estimates provided by the DG are flawed and cannot be relied upon and therefore, the DG's estimates should be ignored in arriving at a fair price.

15.7 It was prayed that if at all a cease and desist order is passed by the Commission, NSE should be allowed to decide the fair price. Further, NSE should also be allowed to decide to take any such actions as may be required to meet competition as covered under explanation to Section 4 (a) of the Act.

16. Turnover and profit calculation

16.1 It was submitted that while calculating penalties under Section 27 of the Act only the turnover of the "relevant market or "affected market" i.e. stock exchange services in respect of CD segment in India should be considered and turnover of other segments should be disregarded.

16.2 It was further argued that it would be irrational for a penalty to be levied with reference to total turnover rather than turnover derived from relevant market. As an example, it was submitted that if two enterprises were found in contravention of Section 3 of the Act and if one of the enterprises also happens to be trading in some other products, it should not mean that that enterprise pays a higher penalty. Such an outcome would penalize diversified enterprises. NSE placed reliance on EU guidelines on the method of setting fines (Regulation No. 1/2003). It also referred to UK OFT's guidance on

penalty (December, 2004) wherein the relevant turnover is taken as the turnover in the relevant product market and relevant geographic market affected by the infringement.

16.3 It was submitted that Section 27 (b) read with Section 2 (y) creates an ambiguity in respect of "turnover". It was stated that *"it is unclear whether the definition of turnover includes the value of items that are non-operational and do not form part of normal trading activities of the enterprise."* Further, it was argued that the term turnover usually connotes principal revenue generating activities of an enterprise and cannot include receipt which are not relatable to business but may be regarded as income from other sources. Similarly, income from turnover of other segments should also be excluded.

16.4 Detailed references were made to the penalty regimes in other jurisdictions such as Australia, Germany, European Community, Netherlands, United Kingdom, United States and South Africa.

16.5 NSE referred again to OFT guidelines where in exceptional circumstances, if the turnover is zero, an appropriate proxy to reflect the economic importance of the infringement should be applied. It was contended that such proxy turnover would have to be based on

assumption of a fair price which is above the predation benchmark set by the Commission.

16.6 As far as profit is concerned, it was contended that the figure is only relevant when there is a contravention of Section 3 with specific infringement by a cartel.

17. Prayer:

17.1 In conclusion, it was prayed that no penalties or remedies be imposed on NSE under Section 27 or Section 28 of the Act except cease and desist order only limited to the finding in relation to Section 4(2)(a)(ii) of the Act. Further this should be subject to the condition that NSE would be allowed to decide the fair price and it would be permitted to take any action to meet competition as available under explanation to Section 4(a) of the Act.

18. Decision under Section 27 of the Competition Act, 2002:

18.1 The Commission has taken into consideration the written submissions and oral arguments made by NSE as a consequence of show cause notice issued by the Commission on 29.4.2011.

18.3 Some of the contentions of NSE pertain to aspects of the substantive issues and facts which have already been elaborately discussed and determined in the Commission's order dated 25.5.2011 which clearly establishes contravention of Section 4 of the Competition Act, 2002. It is not necessary to revisit those discussions or issues in the instant order which is limited to prescribing remedies or imposing penalty in the context of clauses (a) to (g) of Section 27 of the Act. The following part of this order specifically deals with this aspect of the case.

19. Reference to the "Majority Order" and "Dissenting Order"

In its written submissions, NSE has made references to the Commission's Order dated 25.5.2011 as the "Majority Order" and also reproduced highlights of the Dissenting Order dated 3.6.2011. Both these orders dealt with the various substantive issues in this case and gave the respective decisions of the Commission and that of the Hon'ble Dissenting Members. Therefore, it is not necessary to comment on this part of the submissions of NSE.

20. Novelty

20.1 The Commission has considered the submissions of NSE in this regard. It is a matter of record that section 4 of the Competition Act, 2002 came into force on 20 May 2009. However, it is equally true

that this Act had received the assent of the Hon'ble President of India on 13 January 2003.

20.2 It is noteworthy that the Commission has undertaken extensive advocacy exercise over a period of nearly half a decade to spread awareness about the new legislation particularly in the spheres of business, commerce and legal profession in India.

20.3 The conduct of NSE examined in the Commission's Order dated 25.5.2011 can be said to have started on 26.8.2008 with a circular waiving transaction fee for the CD Segment of its stock exchange services. This was after *many years* of formal existence of the Competition Act as a law of the land. Under the circumstances, this Commission is of the view that neither the embedded concepts behind provisions of the Act nor the provisions themselves could be said to be so alien as to render them *"incapable of being anticipated for the purpose of compliance"* as contended by NSE. Perhaps the only factor making enterprises complacent about compliance was the fact that the deterrent tools of section 3 and 4 were not made operational.

20.4 As more cases are decided by the Commission more and more concepts embodied in the Act will get covered in the orders. It

can be no one's case that no remedies or penalties under section 27 or 28 be ordered whenever a new phrase or clause or concept is decided upon for the first time. As mentioned by NSE itself, in the past, this Commission has passed orders invoking provisions of section 27 in cases where some concepts mentioned in section 3 have been discussed at length for the first time. Those orders have duly considered relevant facts and circumstances peculiar to those cases and given remedies and imposed monetary penalty deemed appropriate to meet the ends of justice.

20.5 It would be an abdication of the duty placed upon the Commission under section 18 of the Act if it refrains from using tools provided by law under sections 27 and 28 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 – merely on the ground that a concept was being decided for the first time in a particular case. Furthermore, it is settled law that an authority charged with imposing a penalty within a prescribed discretionary parameter is entitled to do so after considering all the facts and circumstances in a logical and fair manner.

21. Uncertainty on application of law

21.1 NSE had argued the *"absence of guidance papers or case law from the Commission"* dealing with different concepts. The Commission does not find force in this argument because not only has it freely made available advocacy material on various aspects of the Competition Act, including a guidance booklet on competition compliance, but has also made considerable efforts to reach out to a large cross section of stake holders through seminars and conferences. Even more importantly, since 2009, the Commission has also published its final orders on its web portal which is in public domain, including orders under section 26(2).

21.2 While it may not be possible for any competition authority to clarify each and every concept that has been or could be adjudicated upon, this Commission has made considerable efforts to propagate the broader concepts pertaining to competition law in India. Though such efforts are desirable on part of any authority charged with administering a law, it is expected that all entities governed by that law would do their best to comply with the provisions or take corrective measures when required, regardless of any outreach by the authority. In fact after 20th May 2009, when the enforcement of section 3 and 4 was notified, NSE could have changed its policy of

zero pricing. Further, such corrective measures could have been taken at least after initiation of these proceedings.

21.3 In the context of dilemma over “predatory price” being hard to distinguish from vigorous competition, it is pertinent to emphasize that this Commission, in its order, has elaborately discussed how the Indian Competition Act intrinsically distinguishes the narrower concept of predatory price from the broader concept of unfair price that is intended to harm competition either through adversely affecting competitors or consumers or a relevant market. It is the immediate and demonstrable harm to competition as described above that constitutes the fabric of unfair price. As against that, it is the specific conduct of “below the cost” pricing “with a view to reduce competition or eliminate competitors” that is the necessary ingredient that qualifies and distinguishes predatory price in terms of the Indian Act. As discussed in this order, Section 4 (2)(a)(ii) uses the parenthesized words “including predatory price” in relation to “unfair” price. As per the scheme of the Act, there exists an area between the inclusive and exhaustive where the pricing may not necessarily be “below” cost or may be with a view to harm the consumer or the market in addition to reducing competition or eliminating competitors. The commission must acknowledge this legislative intent built into the provisions of section 4.

22. Lack of cogent or convincing evidence

22.1 The Commission does not agree that *"no evidence has been produced nor any exists to suggest that NSE's pricing policies were intended to reduce competition or eliminate competitors".* The Commission has categorically held in the order dated 25.5.2011 that circumstantial evidence shows that zero pricing was done with a view to eliminate competition. Hence there is no need to revisit this issue.

23. Lack of intention or negligence

23.1 It has been argued that *"fines should only be imposed where the defendant has either intentionally or negligently infringed competition law."* This Commission is of the firm view that section 27 of the Act imposes no additional burden to establish intentionality or negligence. To offer such shield to an enterprise held in contravention would be granting protection to the very perpetrators this Commission is duty bound to punish.

23.2 Moreover,the order of this Commission dated 25.05.2011 elaborates on how the timings, manner and denouement of strategy leaves little doubt for a reasonable mind as to the intent of NSE behind its conduct of fee waivers, denial of APIC etc. In this regard, the Commission has examined the historical conduct of NSE in

context to other segments of stock exchange services and its impact on other exchanges like BSE. It has also been shown how zero pricing policy in CD segment not only affects MCX-SX adversely but would also impact other existing or future competitors and competition. The Commission has also elaborately examined and rejected the “nascent market” defense taken. It has also shown the anti-competitive aspects of the conduct of NSE with regard to market watch facility of NOW. These issues do not require a relook at this stage. The mala fide intent is clearly manifested in the abusive conduct found to have been established by the Commission.

24. No foreclosure

24.1 It is rather presumptuous for NSE to contend that *“the principle reason for prohibiting an abuse of dominance is to prevent anti-competitive foreclosure”* and to argue that since there has been no foreclosure in the CD Segment, there is nothing anti-competitive in its conduct.

24.2 Even international jurisdictions do not limit evaluation of abuse of dominance to foreclosure effect. There is a larger picture of competitive environment that has to be considered in every case, which is a philosophy that this Commission completely endorses.

24.3 NSE has also contended that the mandate of the Commission is to protect competition and not competitors. While this may be an interesting and oft-used phrase, it is shorn of the practicality of competition regulation. Similarly, it is not possible to protect competition without in some way protecting the weaker competitor. Harm to competition may not be synonymous with or congruent to harm to competitor but it is impossible to assess the former without considering the latter. Even in international jurisdictions anti-competitive conduct is evaluated by examining intended, actual or potential affect on competitors.

24.4 Competition in a market is afforded by competitors and harm to competition has to be assessed by evaluating harm to competitors or its consequential impact on consumers. The harm cannot be assessed as an independent, conceptual construct that is devoid of any association with a competing enterprise. But this position does not translate to adopting an adversarial approach. It is worth re-emphasizing here that the order of the Commission shows how competition has been harmed and competitive environment has been adversely affected by NSE.

24.5 NSE has made another assertion that *"the losses incurred by MCS-SX as a result of the zero pricing policy of NSE are* ***small***

relative to MCS-SX's excess capital and MCS-SX is not harmed that it will be able to survive in the immediate future. Accordingly, no serious anti-competitive harm has been caused ……." This Commission fails to understand the thrust of this argument. How big a loss do competitors have to suffer for a conduct to be considered anti-competitive? Further, how are the provisions of the Act equipped to distinguish "*serious*" anti-competitive harm from the less serious? Would the harm be cognizable only when the competitor's "*excess capital*" is wiped out? Can that harm be ignored if it does not kill competition in "*immediate future*"? Lastly, does the Act provide different treatment for *less serious* anti-competitive conduct that cause *less losses* to competitors? These are imponderable questions to which no straight-jacket formula can be applied in all cases. These have to be determined considering the facts of each case.

25. Benefit to ultimate consumers

25.1 The contention that there is no observation on harm to consumers in the Commission's order dated 25.05.2011 and hence there is no element of abuse deserves to be dismissed because section 4 does not require it to be established. The section first and foremost requires that it be established that an enterprise or group is in dominant position in the relevant market. Thereafter, it is required to establish that it has engaged in a conduct as specified in clauses

(a) to (e) of the section. Once both are established, there is no statutory requirement to examine any other additional impact on competitors or consumers or the market. The Commission, in its order has amply established the aforementioned two questions. Section 4 of the Act, unlike section 3 does not require evaluation of appreciable adverse effect on competition (AAEC) or evaluation of the factors mentioned in section 19(3), which include "accrual of benefits to consumers".

25.2 If an enterprise or group in a dominant position indulges in conducts enumerated in clauses (a) to (e) of section 4, it is resultantly bound to cause harm to the consumer by destroying competition. That is why the section does not require consumer benefit to be evaluated separately. It will not be out of context to mention that even under MRTP Act the monopolistic trade practice was deemed per se violation of public interest except in the circumstances stated in section 32 and defenses relating to its redeeming features like being beneficial to the consumers or users of goods or services not made tenable.

25.3 Further, the contention that "*in fact, the competitors have benefitted*" has to be viewed in context of the accumulating losses of the competitors, which is not in dispute. Such accumulating losses

cannot be interpreted as benefits in any economic or commercial sense.

26. Expansion of the market

26.1 It has been argued by NSE that its pricing policies have assisted in expanding the market. As has been observed in the order dated 25.05.2011, *"...the proportion of transaction value that a broker / trader pays as transaction fees and other fees is so small and insignificant that it would have practically no bearing..."* The market for CD Segment is not a function of transaction fee or other fee but the market of stock exchange services for CD Segment only pivots around these fees as that is the "price" in relation to the services provided. Rather than the pricing policy of NSE, the CD Segment trading has grown due to factors such as the rapid growth of the Indian economy and the government's progressive and liberal economic policies.

27. Contribution of NSE toward economic development through innovations made in the operation of stock exchanges

27.1 This Commission finds no reason to disagree with this averment of NSE and it is given due consideration while prescribing remedies or imposing monetary penalty in this case.

28. Meeting the competition

28.1 The argument that zero fee policy was a result of meeting the competition because the competitors have imposed zero fee would amount to turning the facts of the case on its head. It is not MCX-SX or any other competitor in the relevant market who initiated zero fee but NSE. NSE's admission that charging fee *"will cause serious damage to NSE's market position in the CD Segment"* ought to be confronted by their own argument about what is "serious" harm. Following NSE's own contentions, if the damage is "small" and it is not harmed to the extent that it will not be able to "survive in the immediate future", NSE should not have any cause to worry.

28.2 International courts have also prescribed an "As-efficient competitor test". In AKZO v Commission of the European Communities (C-62/86) [1991] E.C.R. I-3359; [1993] 5 C.M.L.R. 215 ; and France Télécom SA v Commission of the European Communities (C-202/07 P) [2009] E.C.R. I-2369; [2009] 4 C.M.L.R. 25, it was held that in order to assess whether the pricing practices of a dominant undertaking were likely to eliminate a competitor contrary to art.82 EC , it was necessary to adopt a test based on the costs and the strategy of the dominant undertaking itself. In that regard, a dominant undertaking was not permitted to drive from the market undertakings that were perhaps as efficient as the dominant undertaking but

which, because of their smaller financial resources, were incapable of withstanding the competition waged against them.

29. Principle of proportionality

29.1 NSE has pleaded that "*penalty imposed must be commensurate with the gravity of misconduct*." The Commission has kept this valid plea in mind while framing this order.

30. No intent to deny FTIL the API for CD Segment

30.1 The question of intent is already covered by our observations supra. As regards the matter pending in Bombay High Court concerning ODIN, the dispute pertains to audit of ODIN. The matter before the Commission is not the inherent vulnerabilities of ODIN or its audit but the restricted issue of grant of APIC for interface with NSE platform.

31. Turnover and profit calculation

31.1 The Commission has carefully applied its mind on the contentions made in this regard by NSE. It agrees that in the instant case monetary penalty should not be based on calculation of profit, which is specific to a cartel.

31.2 Section 2(y) defines turnover as including value of sale of goods or services. Section 27(b) stipulates penalty based on an average of turnover for the last three preceding financial years. Neither gives a leeway for the Commission to interpret that turnover means turnover in the context of only the relevant product or geographic market.

31.3 In fact, the Commission is of the firm belief that such an interpretation would not be in consonance with the underlying intent of the provisions of the Act, particularly in instances of contravention of section 4(e) where the market entered or protected may have a very small turnover but the market from where the market power was transposed has a much larger turnover. The imposition of monetary penalty under section 27(b) of the Act must serve the dual purpose of deterrence as well as punishment. In the Indian context, if an enterprise or group is held in contravention of the Act, the law does not stipulate or allow the Commission to restrict the monetary penalty by artificially truncating the turnover of the enterprise or group and confining it to relevant market. As long as the entity that is guilty of contravention is a single entity, its entire turnover is the relevant turnover for the purpose of section 27(b). The only fetter which has been placed by section 27(b) of the Act on the power of the Commission to impose penalty in cases of infringement of section 4,

is the cap of 10% of the average of turnover for the last three preceding financial years.

32. Contravention by DotEx

32.1 The Commission's order dated 25.05.2011 has elaborately discussed the role of DotEx in the exclusionary conduct of NSE, both as a subsidiary in terms of section 2(h) as well as a group company in terms of explanation (c) to section 4. However, it is felt that being a wholly owned subsidiary of NSE, DotEx had little independence of action. This has been kept in mind while prescribing remedies or penalties under section 27.

33. Orders by the Commission after inquiry into the abuse of dominance position

33.1 The Commission has duly considered the contentions and arguments made by NSE in the matter. Mitigating factors wherever justifiable have been acknowledged at the appropriate place. Aggravating factors have been similarly pointed out, both with the reference to the Indian case laws as well as those of other jurisdiction, wherever applicable. To sum up NSE has abused its dominant position in terms of Section 4(2)(a)(ii) and 4(2)(e) of the Competition Act. The discussion made above show that 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 nascency 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. The past conduct of NSE and the conduct in the C.D segment shows a longing for dominance in any segments in which the NSE operated by dominating its competitors. Accordingly, in respect of this case, the following orders are passed:-

(a) In exercise of powers under section 27(a) of the Competition Act, NSE is directed to cease and desist from unfair pricing, exclusionary conduct and unfairly using its dominant position in other market/s to protect the relevant C.D. market with immediate effect.

(b) Further, in exercise of the powers under section 27(g) of the Act, NSE is directed to maintain separate accounts for each segment with effect from 01.04.2012.

(c) In exercise of powers under section 27(g) of the Act, NSE is directed to modify its zero price policy in the relevant market and ensure that the appropriate transaction costs are levied. This should be implemented within 60 days of the date of this order.

(d) In exercise of the power under section 27(g) NSE is directed to put in place system that would allow NSE members free choice to select NOW, ODIN or any other market watch software for trading on the C.D. segment of NSE. If necessary, this may be done under the overall supervision of SEBI. NSE shall ensure all cooperation from DotEx or Omnesys in this regard.

33.2 Considering the fact that there was a clear intention on the part of NSE to eliminate competitors in the relevant market and also considering the fact that Competition Act is a new Act, it would suffice if penalty at the rate of 5% of the average turnover is levied. Therefore, in exercise of powers, under section 27(b) NSE is directed to pay penalty of Rs. 55.5 crores within 30 days of the date of receipt of the order which is 5% of the average of its 3 years' annual turnover

Financial Year	Turnover (In Rs. Crore)
2007-08	1038.70
2008-09	1024.28
2009-10	1266.00
Total Turnover for three years as indicated below:	**3328.98**

Average turnover of three years Rs.1109.66 crores is rounded to Rs. 1110 crore.

Penalty levied @5% of the average turnover of Rs. 1110 crores is Rs. 55.50 crore.

33.3 NSE is directed to comply with the directions issued and submit a report of compliance within the time frame as specified above.

33.4 Copy of the minority order is appended.

33.5 The Secretary is directed to convey the orders to the concerned party along with the demand notice.

Member (R) Member (P)

Member (T)

Chairperson