IS ZERO PRICING PREDATORY UNFAIR: MCX STOCK EXCHANGE LTD. V. NATIONAL STOCK EXCHANGE

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ABSTRACT

This article examines the law that has been laid down by the Competition Appellate Tribunal and the Competition Commission of India in relation to zero pricing as given by the recent order passed against the National Stock Exchange. The Competition Act, 2002 and the Regulations thereunder do not provide for any specific mechanism or cost criteria that may be exclusively applied to determine the predation of a market where average variable costs may be close or equal to zero. The Article analyses how in such an absence of guidelines the Competition Commission of India and Competition Appellate Tribunal have faltered in their approach and have deviated from the long accepted practices of cost based determination of predation. Further, a new criteria of 'unfairness' has been evolved which does not rest on a firm ground. In this context, the article seeks to compare the approach undertaken by both, the United States and the European Commission, and the application of various criteria by them- like intention to eliminate competition, ability of recoupment of losses, impact on consumers and a threat to disrupt the harmonious functioning of the market- which are a necessary pre-requisite for any determination of predation in cases of pricing above average variable cost or marginal cost. The article concludes by pointing out the lacunae in the Competition Commission of India order and a possible alternative approach.

1. INTRODUCTION

Recently, on August 5, 2014 the Competition Appellate Tribunal (hereinafter referred to as "**COMPAT**") upheld the order of the Competition Commission of India (hereinafter referred to as "**CCI**")

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passed against the National Stock Exchange (hereinafter referred to as "**NSE**") in *MCX Stock Exchange Ltd.* v. *National Stock Exchange & Ors.*[1], holding the fee waivers given by NSE in the currency derivatives segment to be unfair; NSE was held to be guilty of abusing its dominant position. Earlier in 2011, the CCI had come to conclusion that the 'zero pricing' adopted by NSE, although not predatory, was still unfair and the same amounted to an abuse of dominant position.

The relevant legal questions raised are: what should be the test to determine whether zero pricing amounts to predatory pricing? Should the cases of zero pricing in relation to network industries be treated differently? Whether the impact of such zero pricing on competitors (and not competition) should at all be taken into account? These are a few questions that have posed a challenge to competition regulators across jurisdictions. It was the first time that both the CCI and the COMPAT were faced with a situation of zero pricing and both have failed to seize this opportunity and lay down a clear law that may be applied to test the predation of zero pricing. However, the dissenting opinion came very close to a clear determination of the law.

The article examines the CCI order (both, the majority and minority order) in brief in Part I. The authors then examine various costs parameters that have been used across jurisdictions to determine the predation of the zero pricing mechanisms in question and compares them to the criteria applied by the CCI in Part II. Part III delves into the more pertinent debate of the necessity of an impact on consumers for an action to be held predatory or unfair. Further, in Part IV, we look into the requirement of an intention and a possibility of recoupment, which, wasn't considered in adequate detail by either the CCI or the COMPAT. The article concludes with a criticism of the CCI Order and the possible alternatives that both the CCI and the COMPAT could have adopted.

1.1. The CCI Order

NSE, in 2008, right at the time of its entry into the Currency Derivatives segment, announced a transaction fee waiver in respect of all currency future trades executed on its platform. At the time when Multi Commodity Exchange of India Ltd. (hereinafter referred to as "**MCX**")

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[1] MCX Stock Exchange Ltd. v. National Stock Exchange & Ors. Case No. 13 of 2009 (COMPAT, 5/12/2014)

entered into the currency derivative segment, NSE was its only competitor.

MCX claimed that the waiver continued even after the Currency Derivatives (hereinafter referred to as "**CD**") segment became mature. Further, no admission fee was being charged in the CD segment, unlike the equity, F&O and debt segments. It was 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 (the only segment where MCX operates), from the date of its entry into the stock exchange business, which results into losses to the MCX. It was also alleged that NSE was charging no fee for providing the data feed and that this action of NSE is aimed at blocking the residual revenue stream of the MCX. The losses, it was contended by the informant MCX, were being cross-financed by NSE, using its profits from other segments describing the pricing as annihilating or destructive.

The CCI, though a majority order, has found violation of Ss. 4(2)(a)(ii), 4(2)(b)(i) & (ii), 4(2)(e) and (d) of the Competition Act, 2002 (hereinafter referred to as "**the Act**").

In its assessment of the relevant market for the determination of dominant position, the CCI - both by the majority and minority orders-had restricted the relevant market to the CD segment. The COMPAT modified the relevant market to include the entire stock exchange service market in India. After such extension, it was beyond doubt that NSE was the dominant player.

As per the relevant market determination by the CCI, the majority decided, post the consideration of factors enumerated in Section 19(4) that NSE held dominant position mainly because it was able to maintain its zero pricing in the CD segment by recovering its losses from other segments, and further because it was aware of this ability. It was also held that in absence of this strength, NSE would not want to continue with zero pricing, which indicated its special advantageous position. The minority disagreed, claiming that none of the players in the market enjoy a special power against the other, all players had the necessary size and resources to overcome the competitive disadvantage, and most importantly, although NSE began with a 100% market share, its share dropped with the entry of competitors, thus showing its inability to influence the market or the competitors in its favour.

The abuse of dominant position was examined on account of four factors, namely, transaction fee waiver, admission fee and deposit level waivers, data feed fee waiver and exclusionary denial of "integrated market watch" facility in the CD segment. NSE's defence to these waivers was that it was done to encourage larger participation since the CD segment was at a nascent stage. However, this was rejected by the CCI on the ground that nascence must be differentiated from infancy and while the market in question may be claimed to be at an infant and immature stage, it cannot be called nascent. The waivers were continued in the third year of the existence of the market, well after its nascent stage. No reason was provided, however, for the determination of what period qualifies as nascent stage for such a market. The finding that the same has not been done for other segments refuted the claim that NSE historically waives fees.

It is, however, imperative to note that the CCI could not get itself to hold that the fee waivers that led to zero pricing did amount to predation. It circumvented its way through it and went on to hold that the waivers amounted to unfair pricing by NSE. This was despite the fact that NSE was not incurring any variable cost in its operation in the CD segments. The minority disagreed with this conclusion citing peculiarities of the market, inappropriate use of a cost-price model by the majority and pointing to the lack of possibility of recoupment and therefore intention on the part of NSE. The Competition Appellant Tribunal upheld the majority order. It is this aspect of the Order that the Article seeks to examine. The authors have attempted to analyse the correctness of the ruling in relation to the unfair or predatory nature of the zero pricing adopted by NSE in the backdrop of the legal framework and existing precedence on the issue in other jurisdictions.

2. DETERMINING AN APPROPRIATE COST TEST FOR ZERO PRICING PREDATION

Predatory pricing can be defined as pricing below cost by a firm, which enjoys dominant position, so as to drive out competition and eventually, recoup the losses.[2]In order to show that there exists an abuse of dominant position due to predatory pricing the conduct of the market dominant enterprise should be looked at and the mere fact of the presence of

[2] Abir Roy & Jayant Kumar, *Competition Law in India,* (1st Edn., 2008).

dominant position is not enough. Every strategy aimed at raising barriers to entry to the market is an abusive behaviour.[3]

2.1. The Threshold for Determination: Marginal Cost/ Average Variable Cost as a Proxy

Although predatory pricing must definitely be below cost, it is a difficult task to differentiate between predatory pricing and pro-competitive pricing.[4] So as to identify predatory pricing, courts have attempted to lay down benchmarks in terms of cost, below which, a price can be presumed or suspected to be predatory. One such approach is using the Marginal Cost. An addition in cost that results from the production of one more unit is the marginal cost.[5] Marginal cost is theoretically considered to be the most appropriate measure for determining the existence of predatory pricing however; there exist a few practical problems due to which its application is infrequent.[6]

In *United States* v. *AMR Corp.*[7]*,* the Court while evaluating the first criteria laid down by *Brooke Group*[8] i.e. 'pricing below an appropriate measure of cost' held that marginal cost was the ideal measure because "[a]s long as a firm's prices exceed its marginal cost, each additional sale decreases losses or increases profits."[9] The Court further stated that Average Variable Cost[10] (hereinafter referred to as "**AVC**") was only a commonly accepted proxy for marginal cost. Arguing in favour of marginal costs, the Second Circuit Court in the *North eastern Telephone Case*[11] stated that a rule involving marginal costs protects relatively inefficient firms along with the interest of consumers.

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[3] D. P. Mittal, *Competition Law and Practice*, ¶6.11 (2nd Edn., 2008).

[4] Raghavan High Level Committee, *Report on Competition Law and Policy,* 2000.

[5] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, 733 (2nd Edn. 2002).

[6] Ne. Tel. Co. v. AT&T, 651 F.2d 76, 88 (1981, US Court of Appeals, Second Circuit).

[7] United States v. AMR Corp., 335 F.3d 1109 (2003, US Court of Appeals, tenth circuit) (No. 01-3202), available at <http://www.usdoj.gov/atr/cases/f9800/9814.pdf.>.

[8] Brooke Group Limited v. Brown and Williamson Tobacco Corporation, 509 US 209 (1993, US Supreme Court).

[9] 335 F.3d at 1116 (alteration in original) (quoting *Advo, Inc.* v. *Phila. Newspapers, Inc.*, 51 F.3d 1191, 1198 (1995, US court of Appeals, third circuit).

[10] See Regulation 2 of Competition Commission of India (Determination of Cost of Production) Regulations, 2009.

[11] Ne. Tel. Co. v. AT&T, 651 F.2d 76, 90 (1981, US Court of Appeals, Second Circuit).

The U.S. Department of Justice recognizes that some courts have indicated that marginal cost is an appropriate benchmark of cost for determination of predation, though it has not been used in any case due to the difficulty associated with its estimation.[12]Realising that estimation of Marginal Cost can prove to be extremely difficult, the AVC Test[13] was propounded, whereby; predatory pricing is defined as pricing below the AVC.

At the earlier stages, the test did not include in its ambit intention of the dominant player or the possibility of recoupment. However, judicial precedence has included these parameters in this test, making below-cost pricing merely a rebuttable presumption of illegality.[14] A two-tier test has eventually evolved to minimize errors in calculation of an appropriate price for predation.[15] The first tier analyses the market structure to assess the likelihood of predation by judging how competitive the market, extent of restriction to entry etc. The second tier looks at the pricing in the context of production costs. The test follows the *AKZO* rule in the second tier whereby prices below AVC are presumed to be illegal and those between AVC and Average Total Cost (hereinafter referred to as "**ATC**") are judged on intention. The US Supreme Court, in the case of *Utah Pie* v. *Continental Baking Company*[16] considered price below full cost as predatory, because, although it was above the average variable cost and marginal cost, it was done with an intention to drive out competitors, who are as efficient as the dominant player, but have less financial resources.

2.2. CCI's Approach to the Cost Criteria

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[12] U.S. Federal Trade Commission and U.S. Department of Justice, available at <http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20pp/us%20response%20predatory%20pricing.pdf>..

[13] Also known as the Areeda and Turner test. *See* Areeda and Turner*, Predatory Pricing & Related Practices under Section 2 of the Sherman Act,* 88 Harvard Law Review 697, (1975).

[14] American Bar Association Antitrust Section, Monograph No. 22, Predatory Pricing (1996), available at <http://books.google.co.in/books?id=SG3WVSq7K1AC&pg=PA65&lpg=PA65&dq=Sherman+Act+predatory+pricing+average+variable+cost&source=bl&ots=tEwQ6HIMfQ&sig=xxPH6hhrRNcRIqVBFcCGE92JrEw&hl=en&sa=X&ei=jXpCVJq1D4ytac6rgegB&ved=0CCQQ6AEwAQ#v=snippet&q=rebuttable&f=false>.

[15] Paul L. Joskow and Alvin K. Levorick, *A Framework for Analysing Predatory Pricing*, 89(2) Yale Law Journal 213, 245 (1979).

[16] Utah Pie v. Continental Baking Company, 386 US 685 (1967, Supreme Court of the United States).

According to explanation (b) of Section 4, it is for the CCI to issue regulations stipulating what cost must be considered to determine predatory pricing. As per Regulations 3(1) of cost regulations,[17] the term "cost" in the explanation to Section 4 shall generally, be taken as AVC as a proxy for marginal cost. The regulations also provide that in specific cases, depending on the nature of the industry, market and technology used, other relevant costs such as relevant cost concept such as avoidable cost, long run average incremental cost (hereinafter referred to as "**LRIC**"), market value etc. may be considered.

In the case at hand, the Director General (hereinafter referred to as '**DG**'), rejected NSE's argument that AVC is the appropriate cost benchmark in this case and concluded that there is a strong case for following ATC or at least LRIC. The DG had concluded that since NSE was not incurring any variable costs for running the CD segment and therefore, the zero pricing could not amount to predatory pricing within the meaning of Section 4 of the Act, but it incurred costs under various heads that could not specifically be allocated to any segment. It was further held that NSE could not have survived on zero pricing had it not had any other segment to support its income and further that although there was no variable cost, substantial fixed cost had been incurred for all the segments and thus, the DG chose to follow the ATC to decide the case. Further, the DG and the CCI concluded that the CD segment does include some variable costs, by analysing the data provided by MCX. The majority finally concluded that the pricing may not be predatory, but definitely does Section 4 contemplate "unfair" as. The definition of "unfair pricing" was held to be something that must be decided on a case-to-case basis.

An approach similar to the *AKZO* Rule was been taken by the DG and the majority order where the market was analyzed to conclude as one with a few players and high barriers to entry, in the context of which, the pricing was adjudged to be unfair. The rule laid down by the *AKZO* judgment,[18] which the DG has relied upon in this case, remains the most accepted rule for identifying predatory pricing across jurisdictions. The same has been followed by the CCI which, in the case of *H.L.S. Asia Limited* v. *Schlumberger Asia Services Ltd,*[19]which followed the benchmark of AVC.

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[17] Competition Commission of India (Determination of Cost of Production) Regulations, 2009.

[18] Case C-62/86, AKZO Chemie BV v. Commission, ECR I-3359, (1991, EC)

[19] Case No. 80 of 2012(CCI, 11/04/2013).

The question before the CCI was whether zero-pricing could be predatory where there are no variable costs. As the dissenting order explains, the stock exchange industry displays the characteristics of a network industry where fixed costs may be high but marginal costs are negligible or zero,[20] wherein it is a sound business strategy to charge low prices initially in order to attract more customers, increase liquidity and expand the market so as to succeed.[21] Its economic characteristics differ from other market because of its complementarities or dependency between various users who form buyers and sellers of a transaction. This makes it unreasonable to judge by traditional economic tools used for other markets.[22] The dissenting order further compares the stock market to an infrastructure industry where marginal cost is low or zero and prices must be initially kept low or zero so as to attract users, a rationale similar to promotional pricing.

It must be noted that our law does not make a special mention of zero pricing. Considering the peculiar nature of the market, the case can, however, be judged by cost parameters different from AVC according to regulation 3 of the Cost Regulations. For example, the DG in the NSE case had argued that some fixed costs were incurred which were not attributable to any particular product but needed to be taken into account. Accordingly, the ATC was considered to determine pricing. The minority judgment, on the other hand, puts forward another solution to the problem of zero pricing by introducing a concept of "value-based pricing", according to which, the pricing must be decided according to the value of the product. Since the value of the product grows with liquidity, initially, zero pricing must be allowed, which will gradually change when the products gain more value.

In the US, a similar question of joint costs arose in the *Northeastern Telephone Case* and it was claimed that the predator could utilise its monopoly in other markets or products by allocating all its fixed costs there, keeping the variable costs in one product very low. The Second Circuit court allowed cross subsidisation on the ground that it made no real difference to predation because the opportunity cost of lost profits would be the same for diversified firm and a single-product firm. The

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[20] Dissenting opinion, MCX Stock Exchange Ltd. v. National Stock Exchange & Ors., Case No. 13/2009 (COMPAT, 5/12/2014)

[21] Pradeep S Mehta, "Making the case for NSE", The Financial Express, July 14, 2011, available at < http://www.cuts-ccier.org/Article-Making_the_case_for_NSE.htm>.

[22] Supra 20.

court argued that allocation of joint costs is arbitrary and must be left to the enterprise. The majority judgment in the NSE case too agrees that cross subsidization is not *per se* against the law, and yet goes on to conclude that NSE enjoys a dominant position merely on the basis of its capability to cross subsidize. Further, based on joint costs, the Average Variable Cost test was rejected by the DG. The Commission, however, did not go by any cost measurement at all. It is submitted that since the DG as well as the majority seemingly agreed to the US position that cross subsidization was permissible, the fact of cross subsidization should not have been used to draw an inference of dominance against NSE. It is also self-contradictory on the part of the majority to hold NSE guilty of unfair pricing because it is in a position to recover its costs. By doing so, the CCI essentially penalised cross-subsidization.

The pricing methods used by network industries have caused a stir throughout jurisdictions. In the U.K., the test for predation has changed overtime in order to fix liability on network industries. Initially, the rule laid down in the *AKZO Case*[23]in the case of *Tetra Pak II*[24]was followed for all markets. Later, in order to deal with the problem of network industries which weren't accounted for in these two cases or the U.K. Competition Act, 1988 and also to take into account the common/joint costs that are specific to network industries, the European Commission had suggested that instead of taking recourse to an average variable cost parameter, a determination should be based on average incremental costs (costs that are attributable to a product when that product is added to a company's existing product line) over a period longer than one year.[25]Contrary to the approach adopted by the E.C. and the U.K., the U.S. allows zero pricing on the basis of cross subsidization which is evident from the *Northeastern Telephone Case*. The approach adopted by CCI does not follow any of these approaches. The CCI, as pointed out earlier, has adopted a self-contradictory approach wherein the reasoning adopted does not lead to the conclusion.

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[23] Supra 18.

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

[25] *Notice on the application of competition rules to access agreements in the telecommunications sector*, 41 Official Journal of the European Communities, 98/C 265/02, (1998)

3. EVALUATING THE IMPACT ON CONSUMERS

The Raghavan Committee Report on competition law[26] formulated a few questions for the adjudication of abuse of dominance. One such question was whether consumers benefit from lower prices and/or greater product and service availability.

An approach that is adopted to determine the predation of price, in the context of its impact on consumers, is to test the actions of a dominant firm which is suspected of predatory pricing as against those of a hypothetical rival who must be 'as efficient' as the firm. In cases where at the same price the hypothetical rival who is equally efficient would be able to sustain itself in the market, the same would be taken as an indication or evidence of the price not being predatory.[27] The rationale behind such an approach is that even if such a price is allowed to prevail, it would only drive out competitors who are not as efficient but would not affect the competition in the market; thus the same cannot be said to be anti-competitive.[28] Also, if this approach is not adopted, it would be unfair to the efficient firms and at the same time eliminate any sort of price competition.

The as-efficient rule advocates that predatory behaviour is characterised by a firm attempting to exclude competition or restricting entry on the basis of something other than efficiency.[29]Further, the need to ensure that the predatory pricing test remains a below cost test comes from the fact that the law must not discourage efficient producers from indulging in price competition.[30] Prioritizing consumer interests, one school of thought argues that predatory pricing must not be stringently prohibited.[31]It has been argued that an action must be understood to be an abuse of dominance if it eliminates competition in a way that it adversely affects

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[26] Supra 4.
[27] "What is Competition on the Merits?" OECD Policy Brief, p. 4, available at <http://www.oecd.org/dataoecd/10/27/37082099.pdf>.
[28] ICN Unilateral Conduct Working Group, Report on Predatory Pricing, April 2008 (UCWG Predatory Pricing Report), p. 11 and 23.
[29] Supra 2, 112.
[30] Ritter, Cyril, *Does the Law of Predatory Pricing and Cross-Subsidization Need a Radical Rethink?,* Vol. 27, No. 4 World Competition: Law and Economics Review (2004), available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=572888>
[31] Professor Easterbrook had stated that there is no reason for competition law to take predation seriously. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV.263, 264 (1981).

consumers.[32] For example, the Supreme Court, in the case of *Haridas Exports* v. *All India Floating Glass Mfrs. Association and Ors*[33] held that availability of goods from abroad at prices lower than costs in India encourages and not reduces competition and therefore must not be restricted, as long as the pricing benefits the consumers.

In the case of NSE, competition was not seen to be reduced as a result of the waiver. Rather, due to the waiver, the competitors also waived their fees in an attempt to price-compete. The question arises as to whether such price competition can be and must be restricted and whether the impact on consumers must be contemplated in doing so? Further, when determining whether the pricing is responsible for reducing competition, is it not necessary to consider whether competition was eventually reduced as a result of the same. For example, in the case of of *Utah Pie* v. *Continental Baking Company,*[34] the petitioner, Utah Pie, had managed to secure a high market share owing to local production advantages and resulting low prices. The competitors (respondents) reacted by lowering the prices further. The price competition resulted in the market having lower prices than other similar markets .The US Supreme Court interpreted the Robinson Patman Act to decide against the respondents holding that they created a deteriorating price structure. The judgment has received severe scholarly criticism for having directly struck at competition and advocated restraint of trade.[35] One of the criticisms leveled against it is that it protects particular competitors at the cost of competition.[36]

It is submitted that the NSE decision may be criticized similarly. Although the statute restricts the reduction of competition and elimination of competitors, it must be argued that the underlying presumption is the economic hypotheses that the means of restricting competition are created through acts against particular competitors to eliminate them. Such acts must be restricted so that the market, in the long run, functions harmoniously and provides to the consumers more at lower costs.[37] From here, it follows that particular competitors must be protected, but only for

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[32] Supra, 30.
[33] AIR 2002 SC 2728
[34] 386 US 685 (1967, the Supreme Court of the United States)
[35] Bowman, Ward S. Jr., *Restraint of Trade by the Supreme Court: The Utah Pie Case (1967),* Faculty Scholarship Series, Paper 4243, available at <http://digitalcommons.law.yale.edu/fss_papers/4243>
[36] Id.
[37] Id.

the larger cause of protecting competition, since the law condemns price discrimination only to the extent that it threatens to injure competition.[38]

4. Intention of the Predator and Possibility of Recoupment

The principle that governs predatory pricing is the intention to drive out competitors or to lessen competition, that is, restrict their entry.[39] The requirement of intention becomes clear from the language of the explanation to Section 4 which states that the below cost pricing must be with a view to reduce competition or eliminate the competitors.

In the case of NSE, it is doubtful whether this intention was proved. When NSE has entered the CD segment, it had 100% market share. Its share reduced to below 40% after the entry of the competitors, MCX and United Stock Exchange in spite of zero pricing, proving that the pricing did not either reduce competition or eliminate competitors as the explanation to Section 4 contemplates predatory pricing to cause. The majority decision rejects the claim that the market was in a nascent stage without providing a benchmark as to what period qualifies as nascent for this market and from here, deduces an intention to eliminate competition without actually proving it. For this, it relies on the fact that similar fees were charged in other segments. Finding no other reason for the zero pricing, the majority assumes the same was done with anti-competitive intent. The minority order argues that there may be truth in the contention by NSE that the zero pricing was intended at the growth of the CD segment, which, in fact, had grown in the 2 years after the waivers. Further, one of the factors that led to the determination of NSE as a dominant player was that there were high barriers to entry into the market caused by the various regulatory laws that govern the stock exchanges in India. The entry of MCX and USE further show that the restriction to entry was, in fact, low.[40]Their entry into a market operating at zero price led the minority order of the judgment to argue that the competition in the market was non-price, since, in spite of all enterprises charging zero price, the market share got divided once 2 new entities entered.

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[38] Supra 8.

[39] Standard Oil Co. of New Jersey v. United States, 221 US 1 (1911, Supreme Court of the US); Newmann v. Reinforced Earth Co., 786 F 2d 424 (1986, the US Court of Appeals for the District of Columbia Circuit); Supra 18.

[40] Supra 21.

Possibility of recoupment is another parameter by which predatory pricing may be judged. The US courts, in particular, follow this test to establish whether the consumers eventually stand to lose from the pricing.[41] The European courts, however, as seen in the *Tetra Pak case,* do not find it necessary to prove recoupment. This view has been confirmed by the European Commission's Guidance paper of 2008 on abusive conduct by dominant undertakings. As the Raghavan Committee puts it, practically, the fact of predation is only established once the rival has left the market and the predator has acquired a monopoly position in the market,[42] which brings into the ambit of predation, a "dangerous probability"[43] of the predator recouping its losses and being able to benefit from monopoly power in the future. In essence, it must be established that the act of predatory pricing makes economic sense. It follows from here that the law intends to restrict any act that brings a threat of this creation of monopoly. The minority order in the NSE case delves into the test of recoupment, arguing for a sufficiently high standard of proof for predatory pricing so as to differentiate it from competitive behaviour.

In the case of NSE, even after the waiver, the market as well as the competition in it has expanded, thus dispelling such fears. It is submitted that this should have been considered by the majority bench to determine whether the pricing was predatory. With regard to the possibility of recoupment, as the US Supreme Court held in the case of *Matsushita Industrial Electric Co. Et Al.* v. *Zenith Radio Et Al.*,[44] predation depends on the ability of the predator to maintain monopoly power for long enough to recoup its suffered losses. In the case of NSE, MCX and USE entered the market when the prevailing price was zero. It can, thus, reasonably be assumed that even if the pricing scheme were to drive out competition, new competitors would enter the market when NSE would increase the price, which, in turn, would force it to reduce prices. The possibility of recoupment was, therefore, very low. This strikes at the intention of predation by NSE. In this situation, a scheme of predation does not make economic sense and hence, such pricing must not be held to be anti-competitive. Arguing that merely low prices, even if below cost, cannot suffice as predatory, the minority opinion considered recoupment as an

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[41] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp 509 US 209 (1993, the Supreme Court of the US)

[42] Supra 43.

[43] William Inglis et al. v. ITT Continental Banking Co. 668F.2d 1014, 1035 (1981, US Court of Appeals, Ninth Circuit).

[44] 475 US 574 (1986, the Supreme Court of the US)

important component of predation to strike a balance between preventing predation and preserving competition.

5. CONCLUSION

As has been argued in the minority order it is too simplistic an approach to adjudge a pricing policy to be predatory merely because the price is zero. The CCI's attempt to determine what is "unfair" in relation to a customer or a competitor does not address the direct impact of the measure on the competition in the market. Further, the CCI has not adjudged the unfairness on the basis of a specific cost-related parameter and has stated that the question that it attempts to answer is "whether, in this case, zero pricing by NSE can be perceived as unfair as far as MCX-SX is concerned."[45] It then goes on a detailed comparison between NSE and MCX to conclude that the situation at hand is adversely affecting MCX. The CCI states, "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."[46]The Commission here has gone further than the court in *Utah Pie*, by absolutely disregarding the competition in an aggressive attempt to save a presumably helpless competitor. It concludes that had MCX been as strong as NSE, the same pricing would not be termed as unfair. This line of argument is without any reasonable justification or legal backing, and, it is submitted, amounts to admitting that the act of zero pricing *per se* is not an abuse of NSE's dominant position, it is the helplessness of its competitor that makes the same an abuse. It directly follows from here that the act is not anti-competitive.

In the opinion of the authors, in order to resolve the competition-competitor conflict the CCI should have looked at the intention; that is, whether NSE was intending to eliminate competitors in a way that would hurt the consumers, a consideration that the majority attempts to take, but fails to address. The intention of the enterprise, as has been discussed earlier, should not have been gathered merely from a lack of any other reason for its actions. It was imperative for the Commission to enquire as to whether the scheme of pricing made economic sense as an act of predation. Hence, it has been further submitted that the possibility of

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[45] Para 10.73

[46] Para 10.75

recoupment must have been decided in the backdrop of the fact that entry of competitors in the market has not proven to be highly restricted. In such a situation, recoupment is difficult and therefore, a successful predation is rare. As was observed in the *Northeastern Telephone Case*, in this case, a simple rule of determining predation must be used and fully distributed cost test tends to favour the interests of single market rivals over those of the consumers. This is exactly where the majority order went wrong. By restricting zero price in a situation where recoupment would have anyway not been possible, the CCI has run the risk of depriving consumers of the lowest possible prices in the CD segment and the CD segment of expanding and benefitting from greater liquidity.

As a concluding remark, there is a need to raise the standard of proof required for predatory pricing so as to preserve competition, because, as the *Brooke* judgement lucidly explains, "it would be ironic indeed if the standards of predatory pricing were so low that the anti-trust suits themselves become a tool for keeping prices high".