

Kluwer Competition Law Blog

India – Competition Appellate Tribunal on determination of relevant product market

Akansha Mehta (Dr. Ram Manohar Lohiya National Law University) · Tuesday, March 3rd, 2015

In its order passed on 5th August, 2014 the Indian Competition Appellate Tribunal upheld the decision given by the Competition Commission of India (CCI) holding the National Stock Exchange of India Ltd. (NSE) guilty of abusing its dominant position in the market for currency derivatives (“CD”) and imposing a penalty of INR 55 crore. The decision has now been appealed to the Supreme Court of India.

The highlight of the case is the opinion of the Tribunal that the relevant product market determined in the case of “abuse of dominant position” shall remain broader than the relevant product market as defined in the case of “Mergers”. The principle laid down by the Tribunal has significant implications on the merits of a case as well as on the procedure of imposing a penalty.

Under the Competition Act 2002, a penalty of not more than 10% of the average turnover for the last three preceding financial years can be imposed on the enterprise(s) found guilty of contravention of provisions of the Competition Act. The most crucial factor while determining the relevant “turnover” for the purpose of levying penalty is the turnover of the enterprise in the “relevant product market”, which means the penalty is imposed only on the relevant turnover from businesses connected to the violation (COMPAT order dated 29th October, 2013 in the case of United Phosphorous v. Competition Commission of India).

Therefore, if the relevant product in this case is decided to be entire stock market business, then the amount of penalty that NSE shall be liable for will be significantly greater than what it would be liable to pay if only the CD segment is considered as the relevant product market.

Background

The case arose out of information filed by MCX Stock Exchange Limited (MCX-SX) that NSE through its circular dated 26.8.2008 announced a transaction fee waiver in respect of all currency future trades (Currency Derivatives) executed on its platform. NSE was charging no admission fee for membership in the CD segment though it was charging one in the equity, F&O and debt segments. In the CD segment it also did not collect the annual subscription charges and advance minimum transaction charges.

Due to this transaction fee waiver by the NSE, MCX-SX, which was the only other player in the field in respect of currency derivatives, also had to waive transaction fees on its platform for CD

segment from the date of its entry into the stock exchange business, and thus suffered huge losses, as it had no income through its CD segment (the only segment it was operating in). Therefore, MCX-SX filed a case against NSE for abusing its dominant position by indulging in predatory pricing with the aim of driving out its competitors from the CD segment.

Analysis of Relevant product market: Director General and CCI

While determining the relevant product market in order to analyse NSE's dominant position, the Director General (investigative arm of the CCI) in its report held the entire stock exchange business as the relevant market. According to its report product differentiation was not of any practical consequence. He found a co-relation between each segment and concluded that the users were common. However, this conclusion was rejected by the CCI. The CCI in turn held specifically the CD segment as the relevant product market concluding that the CD segment was meant specifically for the importers and exporters who desired to hedge the currency fluctuation. Therefore, owing to its inherent characteristics, it was very different from equities/debts/F&O and other segments.

Conclusion of the Competition Appellate Tribunal

When the matter came for appeal under section 53B of the Competition Act 2002, the COMPAT took a significantly different stand with respect to relevant product market. It disagreed with the CCI and DG that NSE was offering a "product" at all and concluded that NSE was in fact offering "services". It explained that the Stock Exchange does not manufacture, offer or sell any product but simply offers a trading platform and associated services for brokers to use.

The Tribunal reached this conclusion rejecting various foreign judgments cited by the Opposite Parties where Currency Derivative was held to be the relevant product market. For example, in the merger of TSX Group Inc and Bourse de Montreal (2009), the Bureau observed that "equities, derivatives and commodities had distinct risk profiles; as such, demand substitutability was limited". Secondly, in the case of Australian Stock Exchange and SFE Corporation Ltd. (2006), it was suggested that the merger between an equities exchange and derivatives exchange was approved on the basis that there was no product substitutability, implying a lack of demand substitutability.

The Tribunal rejected these cases on the ground that these cases were specifically related to merger cases. It made an interesting observation at this point that the merger analysis is an ex-ante review of the proposed merger. Therefore, it is natural that the definition of relevant market for assessment becomes as narrow as possible to evaluate the impact of merger in the future. The consideration is that if the proposed merger does not significantly and adversely alter the structure of the narrowest possible relevant market, then it can be justifiably concluded that the proposed merger may not have an impact on competition in future. This is in sharp contra distinction with a review in connection with abuse of dominance case, which is an ex-post facto review.

Analysis

The decision given by the Tribunal appears faulty on various grounds. While it rightly brings out the fact that NSE is not offering or selling any "product" but is facilitating the sale and purchase of such products by providing a platform and hence offering a "service", what remains unclear here is the rationale behind taking the entire stock exchange market as the "relevant service" and not particularly the service provided in Currency Derivative segment by NSE. Despite, the fact that

that there were common users across various segments in which NSE was dealing, it cannot be said with certainty that the users trading in CD segment would also be involved in other segments. It may be noted here that Section 19(7) of the Competition Act, 2002 lays down the factors that needs to be given due regard while determining “relevant product market”-

- Physical characteristics or end-use of goods;
- Price of goods or services;
- Consumer preference;
- Exclusion of in-house production;
- Existence of specialised producers;
- Classification of industrial products.

The characteristics and use of the various segments of stock exchange remains significantly different from each other. These segments cannot be regarded as interchangeable or substitutable by the users. Also, the price being charged by NSE for other services as observed in the DG’s report, included the transaction fee. NSE had not waived the transaction fee in any other segment except for the CD segment. Therefore, the fact that the other segments were also included in the relevant product remains to be a moot question which can be clarified only by way of a clear judicial pronouncement.

The author would like to thank the Society for Excellence in Competition Law, Dr. RMLNLU, Lucknow, India for its input.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

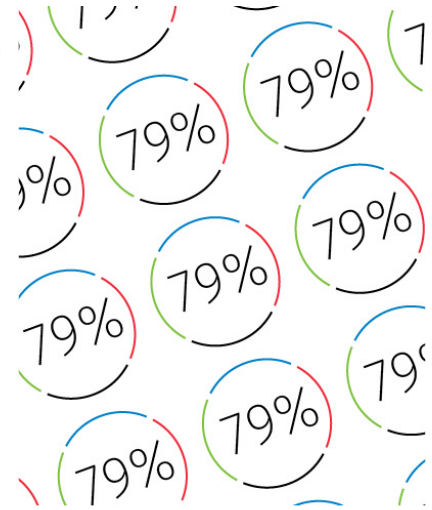
Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change



This entry was posted on Tuesday, March 3rd, 2015 at 12:43 pm and is filed under [India](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.