COMPETITION COMMISSION OF INDIA
Case No. 35 of 2019

In Re:

Manoj K Sheth, Flat 1-C, KG Spring Manor, 23, 1st Main Road, Sastri Nagar, Adyar, Chennai, Tamil Nadu-600020	**Informant**
And	
National Stock Exchange of India Ltd., Exchange Plaza, C-1, Block G, Bandra Kurla Complex, Bandra (E), Mumbai-400051	**NSE/Opposite Party**

CORAM:
Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Present

For Manoj K. Sheth (Informant)	Mr. Nithyaesh Natraj, Advocate Mr. Animesh Kumar, Advocate Mr. Anirudh, Advocate
For NSE (Opposite Party)	Mr. Neeraj Kishan Kaul, Sr. Advocate Mr. Somasekhar Sundaresan, Advocate Mr. Naval Chopra, Advocate Mr. Aman Singh Sethi, Advocate Ms. Manika Brar, Advocate Mr. M. Vasudev Rao, General Counsel

Order under Section 26(2) of the Competition Act, 2002

1. The present Information has been filed under Section 19(1)(a) of the Competition Act, 2002 (**'Act'**) by Mr. Manoj K Sheth (**'Informant'**) against National Stock Exchange of India Ltd. (**'NSE'**) alleging contravention of the provisions of Section 4 of the Act, particularly Section4(2)(b)(ii) and 4(2)(c) thereof.

2. The Informant has alleged that NSE has indulged in practices of granting preferential market access to select brokers thereby creating artificial information asymmetry and market manipulation in relation to co-location facilities. The Informant has submitted that co-location facilities allow some brokers to operate closer to their servers upon payment of additional fees to NSE. It helps such brokers secure advantage over others due to proximity to exchange servers as data transmission to their systems takes lesser time. These co-location facilities were launched by NSE in 2010 and it was to allow members to rent rack space with low latency connectivity to the exchange. These services are offered in the form of full rack as well as half rack. The trading members who avail these services get access to information about granular 'tick by tick' data like order, cancellations, modification, prices, trades, *etc*. ahead of other brokers, which makes a huge difference to the proprietary and high frequency brokers. Further, a uniform fee has been charged from all members towards co-location services, but allegedly uniform benefits have not been accorded to all trading members who had paid for the service.

3. It has been alleged that NSE provided preferential and unfair access to some trading members which gave such select members further competitive edge over rest of the trading members who had paid for co-location service in terms of preferential access to order, trade and price data. As a result of such preferential access, the competition amongst market participants was allegedly eliminated. At the relevant time, there were no regulatory guidelines governing the use of co-location facilities. The first set of guidelines for co-location facility and high frequency trading ('**HFT**') was issued by Securities and Exchange Board of India ('**SEBI**') in March, 2012. Since the measures like co-location, HFT and sharing of granular tick-by-tick data have impact on the

competitive structure of the market and since NSE was regulated by SEBI under Securities Contracts (Regulation) Act, 1956 ('**SCRA**'), SEBI Act, 1992 and regulations made thereunder, NSE was stated to be duty bound to take approval of SEBI before unilaterally allowing co-location facilities to a selected few members.

4. The Informant has further submitted that NSE has abused the dominant position it holds in the relevant market. Since NSE offers stock exchange services across India, the relevant geographic market is stated to be India. The relevant product market is stated to be entire securities market, since use of co-location facilities impact trading in all forms of securities. As per the Informant, NSE enjoys dominant position in the relevant market based on its market share, dependence of consumers and regulatory barrier of entry for a new stock exchange. The Informant has alleged that NSE, by giving unfair preferential access to some trading members of its co-location services, has limited and restricted the provision of services to other trading members availing the co-location services which resulted in denial of equal market access.

5. The Informant has referred to whistle-blower's complaints made to SEBI in August and October 2015, wherein it was disclosed that NSE was allowing preferential access to the data dissemination servers to select stockbrokers to the exclusion of others, permitted non-empanelled Internet Service Provider ('**ISP**') to lay fibre in its premises for few stockbrokers and that NSE was acting in collusion with certain stockbrokers. The Informant also submitted that these allegations were subsequently confirmed by SEBI in its Technical Advisory Committee ('**TAC**') report. SEBI found that certain stockbrokers had insider information, *inter alia*, as to when different servers of NSE were turned on and speed of such servers which enabled them to log onto the services faster and as soon as they were turned on, thus being able to obtain the first orders placed in the market. Prior information about the impending buy and sell order-size at different prices, allowed such stockbrokers to know the price trend which encouraged and institutionalised a practice of front running. Thus, such conduct allegedly distorted and compromised the core principles governing stock market transactions *qua* interests of investors and pricing of stocks.

6. The Informant has submitted the evidence of preferential access to brokers *via* whistle-blower's aforementioned letters to SEBI, extracted in media report of *www.mydigitalfc.com*. These extracts suggest that due to favourable access, certain brokers were benefitted as against the whole market, every day for at least a period of 5 years of representing trading volume of roughly Rs. 2-3 lakh crores per day. Besides placing reliance on the media reports and TAC report (annexed with the information), the Informant has also placed reliance on the report of the independent agency (*Deloitte*), appointed by NSE to investigate, pursuant to the directions of SEBI. This report also mentioned that different stockbrokers were treated differently and there was no uniform approach across stockbrokers with respect to allocation of new IPs across ports on existing servers and movement from one server to another. Ticks were disseminated faster to members connected to less crowded servers, thereby giving an advantage to such stockbrokers. The Informant also placed reliance on report dated 18.11.2017, that appeared in "*The Week*" bearing caption '*IT department seizes Rs.11 crores from entities in NSE co-location case*' and whistle-blower's letter dated 14.12.2017, addressed to the Ministry of Finance. Furthermore, the Informant has also submitted that CBI found *prima facie* abuse in the market, resulting in institution of FIR against certain brokers, officers of NSE and SEBI.

7. On the basis of the above details, the Informant has, *inter alia*, submitted that NSE has indulged in practices of granting preferential market access to select brokers putting the rest of the market at a disadvantage which is in violation of Section 4(2)(b)(ii) and Section 4(2)(c) of the Act.

8. Based on the aforesaid facts, the Informant *inter alia* sought initiation of an investigation against NSE in terms of Section 26(1) of the Act, cease and desist order from indulging in anti-competitive activities, including in violation of Sections 4(2)(b)(ii) and 4(2)(c) of the Act and imposition of a penalty under Section 27 of the Act.

9. Further, the Informant sought an interim relief, under Section 33 of the Act, that pending conclusion of investigation, NSE be directed to suspend operations of its co-location

facilities as continuation of the same would continue to distort the market and further anti-competitive practices.

10. The Commission considered the Information in its ordinary meetings held on 16.10.2019 and 14.01.2020, and decided to call the Informant and NSE for a preliminary conference on 25.02.2020 and a copy of the Information was forwarded to NSE. In the preliminary conference held on 25.02.2020, the Commission heard the detailed submissions of the Informant and further allowed the Informant to file his written submissions. NSE was not present in the conference before the Commission. The written submissions, so filed by the Informant were forwarded to NSE, which was given liberty to give its comments to the information and written submissions of the Informant within 3 weeks. *Vide* order dated 11.03.2020, the Commission considered the application of NSE, wherein NSE requested for a preliminary conference stating that it had not received any previous communication from the Commission. Accordingly, the Commission granted it time till 06.04.2020, to file its response/comments and fixed for a preliminary conference with NSE on 22.04.2020. Thereafter, on account of Covid-19 pandemic, the matter could only be fixed for preliminary conference with the parties through virtual mode on 17.12.2020.

11. On 04.12.2020, NSE filed its detailed written submissions and on 17.12.2020, the Commission held the preliminary conference, wherein at the outset the counsel for the Informant made his oral objection stating that he had not received a copy of the written submissions filed by NSE. NSE, however, submitted that it had duly served its submission on the Informant *via* email, on the email address mentioned in the Information. In view of the discrepancy, the Commission directed NSE to file a proof of service and directed it to again serve a copy of its written submission on the Informant. The Commission thereafter proceeded to hear the detailed submissions made on behalf of NSE and granted NSE time till 24.12.2020, to file its additional submissions. The Informant was given liberty to file his response to the written submissions filed by NSE as also the additional submissions made by the said party within 2 weeks post the receipt of the same by him.

12. As directed *vide* order dated 17.12.2020, NSE filed its supplementary submissions on 24.12.2020. The Informant, filed his rejoinder submissions on 07.01.2021 and also an application dated 26.12.2020, seeking an opportunity of oral hearing stating that he was last heard on 25.02.2020, which was way back whereas NSE was accorded an extensive hearing on 17.12.2020.

13. Simultaneously, the Informant also approached the Hon'ble High Court of Madras in Writ Petition No. 877 of 2021 seeking a direction for an opportunity of another oral hearing before the Commission, which was allowed by the Hon'ble High Court. Accordingly, as per the directions of the Hon'ble High Court of Madras given *vide* order dated 10.03.2021, the Informant was heard again in a preliminary conference held on 19.03.2021. The parties were also given liberty to file their written synopsis based on their oral arguments which opportunity was availed by them. The written synopsis so filed by the NSE and the Informant on 26.03.2021 and 31.03.2021, respectively, were considered by the Commission on 04.05.2021.

14. The Commission has perused the information, the written submissions and documents filed both by the Informant and NSE, the order(s) passed by SEBI and Hon'ble Securities Appellate Tribunal, as have been placed on record by the parties. Besides the allegations in the information as mentioned above, the Informant and NSE have given their respective submissions, the gist of which is contained in the following paras.

15. The Informant in his written submissions dated 03.03.2020 (filed after the preliminary conference dated 25.02.2020) has stated that co-location facility discriminates between class of traders and divides the market where persons in co-location facility become better placed as compared to persons outside co-location facility. NSE has a dominant position in the exchange space, particularly in the securities market and in February 2020, it had a market share of 92.6% in cash market and in derivatives market it had a market share of 99.79%. Further unlike BSE, where maximum volume is contributed by institutions, in NSE, the retailers or ordinary investors contribute 70% of the total business. The co-location facility offered by NSE is a mechanism for market abuse as few select brokers were allowed to rent the limited rack space and front run other

brokers and their clients. Brokers availing such facility and wrongful preferential access to the price and order data would be able to make extra-ordinary profits which is an inherent violation of the Act.

16. Further, even within the co-location space, there was discrimination between different brokers since few brokers, through connivance and collusion with officials of NSE, were able to get faster access to the systems of NSE ahead of the rest of the market. The TAC report of SEBI as well as the report of Deloitte clearly establish this fact. The absence of a documented system in place resulted in market abuse. Also, as per emails exchanged between officials of NSE itself, access to secondary server could be given only if the primary server failed, whereas there are documents on record which show that access to secondary servers were given to select brokers like OPG Securities while other brokers were barred from accessing the data dissemination servers through secondary servers. It is further claimed that such preference was made available to OPG Securities because of the linkages it had with Omnesys Technologies, a subsidiary of NSE, as also the algo software company that hosted most of its solutions in NSE colocation facility and also managed servers in NSE colocation facility. The TCP/IP protocol used by NSE was inherently vulnerable to abuse through inequitable access. The exchange did not use a randomiser and load balancer which could have ensured free and equitable access to all brokers. Further, criminal investigations have been launched against unnamed officials of NSE and SEBI besides others. The conduct of NSE has thus, resulted in denial of market access as provided under Section 4(2)(c) of the Act.

17. The Informant further claimed that the Commission earlier in Case No. 47 of 2018, *vide* order dated 07.01.2019, had after noticing the entire allegations observed that though it had jurisdiction, however, since the matter was still under investigation of SEBI, it was premature to pass an order under Section 26 of the Act. Now, the findings of SEBI have come and *vide* order dated 30.04.2019, the regulator has given a clear finding against NSE and held them guilty of violations under the SEBI Act, 1992 and SCRA, 1956. It has been stated that the Commission exercises jurisdiction independent of SEBI and proceedings initiated by SEBI will neither be relevant nor germane for the purposes of

the proceedings before the Commission in this matter. Further the anti-competitive conduct has wide ranging ramifications for retail customers, listed companies, brokers, traders, banks as well as clearing houses. While executing a trade, time is extremely critical as the distance that data needs to travel between the exchange and a broker is a critical factor for success or failure of that broker *vis-à-vis* other brokers in the market. The undue advantage not only has a financial cost but also a larger economic and social cost. Thus, according to the Informant, it is a fit case for suspending co-location facilities at NSE.

18. NSE *vide* its response dated 04.12.2020, the extensive oral submissions made by its learned senior counsel in the preliminary conference held on 17.12.2020 and further *vide* its supplementary submissions dated 24.12.2020, has *inter alia* stated that co-location facility entails computerized high frequency trading in securities by providing a stock exchange's trading members an option to co-locate their trading servers within the exchange's premises. This service benefits trading members by improving Direct Market Access and Algorithmic trading infrastructure and enables them to get faster access to information regarding price and market movements. This is a universal service offered by many stock-exchanges like (i) London Stock Exchange, (ii) NASDAQ, (iii) Chi-X, (iv) BATS (Better Alternative Trading system), (v) the New York Stock Exchange, (vi) Chicago Stock Exchange, (vii) Shenzen Stock Exchange, (viii) Tokyo Stock Exchange, (ix) Bombay Stock Exchange. It was to address latency issue that international stock exchanges introduced co-location services. NSE introduced co-location on 31.08.2009. Prior to 2009, trading in India entailed dissemination of data through means ranging from terrestrial lines to satellite links to fibre optic cables and there was lack of uniformity in speed with which market data could be accessed by different trading members. It has been further mentioned by NSE that co-location services facilitate trades at higher speeds and lower costs, faster execution of orders, reduced risk of errors associated with manual order entry, greater transparency, increased liquidity and therefore provide greater avenue for better price discovery in the market. As a result, it also aids lower impact costs of large trades, better audit trails and better use of hedging and arbitrage opportunities.

19. NSE further submitted that the provision of co-location services in itself cannot be termed as abusive under Section 4 of the Act. Further, SEBI (sectoral regulator) has put in place an extensive regulatory framework comprising regulations/guidelines/ measures specific to co-location services to address any potential issues of unfairness in providing co-location services. SEBI is also said to have implemented a new set of measures to strengthen algorithmic trading and co-location/proximity hosting framework. SEBI has also mandated stock exchanges to provide TBT data feeds to all trading members free of cost to create a more level playing field among different types of market participants.

20. NSE submitted that it fairly and equitably provides the co-location services to its trading members who wish to avail such services. The Informant is neither a trader nor a competitor but is only an interloper. No evidence has been provided by the Informant of any trading member being denied access to co-location services who wishes to avail the facility for a charge.

21. NSE contended that though the Informant has alleged that through connivance and collusion with NSE, some trading members were able to gain preferential access over others, however, no evidence has been placed on record by the Informant to substantiate this. SEBI has already examined this allegation and exonerated NSE from any allegation of collusion or connivance with any trading member. According to NSE, SEBI has given a finding that while design architecture may have resulted in unfairness, this was not pursuant to any connivance or collusive action on the part of NSE. Further, though SEBI found that NSE failed to have better defined policies and procedures for access to secondary server and monitor connections to the secondary server by certain trading members, yet there is no finding that any preferential access was given by NSE to any particular class of trading members in so far as access to secondary servers is concerned. Secondary server allowed trading members to continue to receive TBT data without disruption. To ensure that trading members could connect to the secondary server in case of failure, it always had to be kept in active mode. Further, all trading members availing co-location facility were required to adhere to NSE's co-location guidelines and it cannot be held liable for breach of such guidelines by trading members

of their own accord, which is not a competition law violation in any case. Also, NSE took prompt and strict action against trading members as soon as such breach was brought to its notice. It was also stated that accessing secondary server out of turn conferred no benefit or advantage to a trading member.

22. NSE has submitted that connecting to the server does not imply that data will be received first. In this regard, it has stated that there is no inherent randomness in dissemination of TBT data under the TCP/IP architecture through variabilities built in at the POP server level, port level and at the trading member level and thus there is no tangible time advantage for connecting first. There is no evidence of any pecuniary advantage or monetary gain from connecting first and neither SEBI nor any of the independent forensic auditors appointed found any benefit to have accrued to any trading member owing to first login. It was also stated that NSE itself does not benefit from a system where a set of trading members within the group availing co-location services would benefit at the cost of others.

23. NSE further argued that in any case findings of SEBI have been impugned before Hon'ble SAT in an appeal wherein NSE has contended that (i) it acted fairly and equitably and applied uniform rules to all members when granted access to secondary servers and expected its members to adhere to these in good faith, (ii) connecting to secondary server did not guarantee any benefit to any member, (iii) it had not given any permission to any member to continue accessing secondary server, (iv) it took prompt action against members misusing the secondary server as soon as it became aware of it and (v) NSE cannot be held liable for any breach of the co-location guidelines by its members.

24. It was also submitted by NSE that in case any trading member breaches guidelines on co-location, it cannot be said that NSE has breached the provisions of the Act.

25. NSE further submitted that the Informant has alleged that TCP/IP technology used by NSE was inherently vulnerable to abuse and NSE did not use a randomiser and load balancer which could have ensured free and equitable access to all brokers. Furthermore, at the time of introducing co-location services, SEBI had not prescribed

any specific technology to be used. In response, NSE has stated that it had a choice between two technologies (i) TCP/IP technology (simpler and cost effective both for NSE and users as co-location was a new concept) and (ii) Multicast tick by tick (MTBT), and NSE after studying practices of some leading international stock exchanges providing co-location services came to a decision to have TCP technology as it provided market safety, reliability, integrity and accessibility. While MTBT disseminates data in the manner of a radio or TV broadcast and can simultaneously transmit data to a large number of persons, the onus of ensuring that the data packets are properly received lies with trading members. However, this is a complex technology and its implementation requires extensive programming. Also, it requires greater investment from trading members. Further, the market was nascent and NSE thought that it could introduce MTBT when the market was more mature and accordingly, it launched MTBT in April 2014. NSE submitted, in this regard, that the Informant is approaching the Commission close to 5 years after the technology being complained about was phased out.

26. NSE also submitted that SEBI has given a wrong finding that (i) a trading member who connected first to the server, would allegedly get an advantage in terms of receiving the data faster and (ii) absence of a load balancer and randomiser allegedly led to imbalance of load between servers and unfair and inequitable access to data. Even assuming these are correct, there is no violation of Section 3 and/or 4 of the Act. Further, even if there was any theoretical advantage in connecting first to NSE servers, every member had the freedom to do so by deploying the best hardware.

27. NSE further submitted that SEBI's findings against NSE on some of the issues are currently pending adjudication before Hon'ble SAT and the matter has not attained finality. The Commission may await the finality of the proceeding to avoid duplication of issues in parallel proceedings on the same facts alleged by same person. Since Hon'ble SAT is already looking into the facets of technological aspect of architecture of co-location facility, there is no requirement for the Commission to look into this aspect at this stage. Further, this may not be in consonance with the judgement of Hon'ble Supreme Court in *CCI vs Bharti Airtel and Others (2019).*

28. NSE, thereafter, submitted that across the globe, co-location facility has not been deemed to be in violation of any regulations/laws *per se* including competition laws. SEBI, which exercises regulatory and supervisory role over NSE, has not found fault with the provisions of co-location facility by NSE or any other exchange in India.

29. NSE contended that the Informant has not demonstrated his *locus standi* and how he has suffered legal injury as held in the decision of Hon'ble NCLAT in the case of *Samir Aggarwal vs CCI*. The Informant has deliberately not mentioned in the information that SEBI has examined co-location service and exonerated NSE and its employees of allegations of fraud and unfair practices. The Informant has failed to disclose current status of co-location case and that appeal is pending before Hon'ble SAT as the Informant is an intervener and has also filed a separate appeal and same counsel is representing the Informant before the Tribunal and the Commission.

30. NSE also stated that the Informant who is President of M/s Chennai Financial Market and Accountability has not disclosed in his information details of pending litigation. He filed a PIL before Hon'ble Madras High Court being W.P.No. 28493 of 2019 in September 2019, raising same issues. The said matter is pending hearing; however, the Informant has withheld details of this case and misled the Commission. It was also submitted in this regard that same set of individuals have filed W.P.No.19724 of 2018 against SEBI before Hon'ble Madras High Court alleging co-location was offered by NSE without authorisation from SEBI. This writ petition was later withdrawn as infructuous *vide* order dated 10.09.2020.

31. It was next contended by NSE that a writ petition being W.P. No. 24345 of 2018, was filed against Financial Intelligence Unit (FIU), Ministry of Corporate Affairs (MCA) and Serious Fraud Investigation Office (W.P.No.24326 of 2018) before Hon'ble Madras High Court on 06.09.2018. Both the writ petitions were dismissed by Hon'ble Court on 07.10.2020, recording that Petitioners had already impleaded themselves in appeals before Hon'ble SAT. As per the CCI General Regulations, 2009 amended in November 2019, details of pending litigation have to be brought to the notice of the

Commission. The Informant has not disclosed these facts in the further written submissions filed by him. Further, multiplicity of proceedings by the Informant shows his objective of unnecessarily harassing NSE.

32. It was then contended by NSE that there was an in-ordinate delay in raising allegations pertaining to co-location service. This service has been offered since 2009 and Informant has approached the Commission after 10 years. Technology in respect of which allegations have been raised, viz. TCP/IP (under which data is disseminated sequentially to trading members) is no longer in use and NSE has moved the services entirely to alternative technology which is MTBT in December 2016. Also, the Informant has sought to rely on unverified newspaper reports which are not legally admissible as evidence. The reports relied upon such as TAC Report, report of Independent Agency engaged by NSE, Deloitte and reports prepared by Ernst and Young and ISB are not conclusive and do not carry any judicial weight.

33. In his rejoinder submissions dated 07.01.2021, the Informant while assailing the contentions of NSE has stated that NSE has been dilly dallying and procrastinating the issue for the last one year and despite several opportunities has chosen to file its response much belatedly and such response be not entertained by the Commission. In respect to the challenge of NSE on the *locus standi* of the Informant, it has been stated that the information has been filed in larger public interest. Further, Hon'ble Supreme Court *vide* judgement dated 15.12.2020 in Civil Appeal No. 3100 of 2020 *(Samir Agarwal vs CCI and Others)* has set aside the judgement of Hon'ble NCLAT and the issue of *locus* of the Informant is thus no more relevant. The Informant has also vehemently opposed the submission of NSE that the Informant has filed any appeal before Hon'ble SAT against the findings of SEBI or that he has filed any writ petition before Hon'ble High Court of Madras. Further, he has contended that other proceedings mentioned by NSE is neither germane nor relevant for the purposes of present adjudication and in so far as any violations under the Competition Act are concerned that can only be adjudicated by the Commission. The Informant also disputed the contention raised by NSE that it is a vexatious litigation, rather submitted that he is exercising a statutory right. He also submitted that NSE has deliberately not divulged

the fact that CBI pursuant to a preliminary enquiry has filed an FIR dated 28.05.2018 against NSE under provisions of IPC and Prevention of Corruption Act.

34. On merits, the Informant has submitted that NSE's request that the Commission await the finality of the matter to avoid duplication of issues in parallel proceedings on the same facts alleged by the same person, is a vexatious attempt to escape from its anti-competitive activities. The Informant has submitted that the total number of members of NSE is roughly about 1000 whereas only 188 of such members have availed the co-location facility even after such facility being in offer since about last 10 years. Thus, this system is not a success as large number of brokers are not able to avail this facility owing to high costs charged by NSE. The facility was provided by NSE with a profit motive and the cost in August 2009 was Rs. 22.50 lakhs per annum for full rack and Rs. 10 lakhs for half rack; these prohibitive costs were in place for 3 years and after multiple complaints from brokers the costs were reduced by almost 50% to Rs. 12 lakh for full rack and Rs.6 lakh for half rack. It is only after reduction in charges that some others members applied for the facility and even now only 20% of the total members avail the facility. Further, the facility offered by NSE is not comparable with the facility offered by NASDAQ as the said exchange offered the facility to all its members as opposed to NSE, which operated the same on first-come-first-serve basis.

35. The Informant also contended that co-location facility is anti-competitive *qua* retail investors, which aspect will come to light once an investigation is ordered by the Commission. The facility was offered by stock exchanges in other countries in a uniform manner to its brokers/customers, whereas NSE offered it on first-come-first-serve basis, citing limited availability. The facility has also been assailed stating that it is artificial exchange creating information asymmetry. Those who had located their server in NSE premises would be able to see the entire order-book ahead of everybody else. They would also be the first to get the order executed before the counter-bids/offers from rest of the market reach the exchange. Thus, only those brokers who are able to install their servers in NSE premises alone are the beneficiaries of the so-called efficient price discovery, for others it is lagged price discovery which is not of much benefit. For the price-discovery to be efficient, every participant has to have fair chance to get

information equitably. Co-location with TCP-IP creates opportunity of front-running for some brokers to make a killing at the cost of the rest of the market. It creates differentiated market for price-dissemination (co-location users get the entire tick-by-tick data while non-co-location users get best 5 quotes on buy / sell sides), which attracts Section 4 of the Act. The way the facility was provided by NSE to only a few brokers enabled them to make money by front-running everybody else. Hence, by getting TBT data one can analyse the entire demand/supply for every security in the market and can punch a buy or sell based on overall picture and status of the market. NSE thus, caused an anti-competitive atmosphere by depriving such precious data to the vast majority of the participants. NSE has wrongly stated that SEBI permitted co-location facility by virtue of the DMA circular issued in 2008, which infact does not pertain to co-location facility but merely allows brokers to offer their clients direct access to the exchange trading system through the broker's infrastructure without manual intervention by the broker. Further, NSE has tried to mislead the Commission by stating about facility provided by Chi-X and BATS which are alternative trading platforms and not exchanges and Indian markets do not have the depth to accommodate such platforms. NSE did not give co-location facility actually in line with international standards but purely for its own personal benefit and gain.The Informant has submitted that the anti-competitive activity prevailed at 4 levels because of the co-location facility, *viz.* (i) broker *vs* broker level by way of discrimination among the broker members of NSE, (ii) client availing co-location facility of co-located broker *vs* client of a normal broker who is not co-located, (iii) NSE brokers *vs* brokers of other exchanges, and (iv) NSE *vs* BSE and erstwhile MCX Stock Exchange.

36. Next, it has been contended by the Informant that SEBI has given a clear finding that the co-location facility offered by NSE was prone to manipulation and market abuse and that there was a violation of Regulation 41(2) of the SECC Regulations, 2002, though fraud was not established under the PFUTP regulations. Also, the present information is in relation to violation under the Competition Act, 2002, which is completely different and independent of other proceedings.

37. The Informant also submitted that the anti-competitive conduct by NSE is a continuous one and has been going on from 2009 onwards. However, the conduct came to light only in 2015 and it was only after that the statutory authorities were forced to go after NSE. Action was initiated by SEBI in the year 2016 which culminated into passing an order on 30.04.2019. There is a continuous cause of action and the cause of action arises *die in diem,* and therefore, NSE is not correct in stating that there is any delay in raising allegations. It was also submitted that NSE is not a private organisation and being a public body, it has to ensure that its policy is not only fair but seen to be fair.

38. Countering the arguments of NSE on cost which it factored at the time of choosing a technology for co-location facility, it was submitted by the Informant that fundamentally there is no difference in cost or in terms of software as regards TCP-IP and Multicast. It was also submitted that another stock exchange, *viz.* Interconnected Stock Exchange had used multi-cast system as early as in 1999. Even NSE used this system for its normal trading activity prior to the co-location episode in 2009. NSE is further misleading the Commission by making a comparison between TCP-IP and MTBT, whereas the question is between TCP-IP and multicast protocol. As regards the ongoing investigation by sectoral regulator, it was contended that SEBI has investigated the matter from the standpoint of SEBI Act and not Competition Act and there is no overlap between the functions of SEBI and the Commission.

39. It was also contended by the Informant that NSE had been offering co-location facility since 2008 onwards and it was only in the year 2018 that on the basis of various complaints received from many brokers, SEBI directed the stock exchanges to provide TBT data feeds to all trading members free of cost, which implies that prior to 2018, such data was being provided to few brokers at the cost of rest of the participants, which is clearly anti-competitive. The intervention did not happen by NSE itself but because of the intervention of SEBI.

40. The Informant has next submitted that NSE's co-location guidelines themselves very clearly state that the secondary sever should not be used as the primary means for connecting, whereas from the evidence it is clear that NSE allowed OPG Securities to

log in through the secondary server even though there was no problem with its primary data server. Byelaws of NSE casted a responsibility upon NSE to determine functional details of the trading systems including the system design, user infrastructure, system operation in order to ensure smooth operations of trading keeping in view larger public interest and thus, it is incorrect of NSE to say that if a member jumps the signal, it is a violation by the member and there is no responsibility of NSE.

41. The Informant lastly stated that he is a retail investor with about 25 years of experience. He is also relying on the findings by SEBI, the answers to the questions raised in Parliament, the FIR filed by CBI, report of the TAC constituted by SEBI, the Deloitte report, in support of the information.

42. The Commission has perused the material on record and considered the oral as well as written submissions made by the parties.

43. At the outset, the Commission observes that the co-location facility has been in vogue since 2009. The choice of technology, which has been alleged to have created distortions, has ceased to exist as far back as in 2016 and there seems to be confidence instilled in the system, with 188 members of the exchange availing the facility and the sectoral regulator specifying guidelines for adherence by the exchange for provision of such facility. As submitted by the Informant, even the charges payable for availing such facility has been considerably reduced.

44. Be that as it may, the Commission notes that an information alleging similar infractions was filed against NSE in the year 2018 relating to co-location services namely, *Adv. Jitesh Maheshwari* Vs. *National Stock Exchange of India Limited* (Case No. 47 of 2018) wherein the Commission, while closing the matter under Section 26(2) of the Act, *vide* order dated 07.01.2019, observed as under:

> "*20. The Commission notes that it is apparent that SEBI is looking at similar issues as alleged in the information by the Informant. However, the exact role of the OP, either direct or indirect, with respect to the alleged contravention in provision of preferential/discriminatory co-location services is still at the stage of investigation.*

21. The Commission observes that discriminatory and abusive conduct which falls foul of the provisions of the Act falls within the jurisdiction of the Commission and can be independently examined by the Commission based on cogent facts and evidence. However, the allegations against the OP are yet to be established in an appropriate proceeding and also there is not sufficient information and data before the Commission about the role attributable to the OP, in the provision of discriminatory co-location services qua certain trading members, as alleged in the Information to arrive at a prima facie view. Thus, it may not be apposite for the Commission to delve into the allegations contained in the Information at present."

45. The Commission was of the view that it had the necessary jurisdiction and the mandate under the Act to delve into issues relating to anti-competitive practices notwithstanding that same or similar set of facts and allegations were also subject matter of investigation before SEBI, being the sectoral regulator. The Commission consciously chose to keep its hands away from the matter on account of the fact that the matter was still under investigation by SEBI and there was no sufficient data or information in relation to the role of NSE at that stage. The Commission is not impressed by the contention of NSE that though SEBI has passed an order and that the order is impugned by it before Hon'ble SAT and as no finality has been reached *qua* the role of NSE, therefore the Commission should freeze its actions in relation to the present information. The Commission is in agreement with the submission of the Informant that similar set of facts can give rise to two different cause of actions under two different legislations being the SEBI Act, 1992 and the Competition Act, 2002 and there is nothing to suggest that mere pendency of an appeal before Hon'ble SAT necessitates the Commission to place any moratorium on its statutory functions, if an infraction of the provisions of the Competition Act is observed in the facts and circumstances of the matter. Further, the facts and circumstances involved in the present case, in the view of the Commission, cannot be likened to the facts and issues involved in the *Bharti Airtel* case. This is particularly so as the Informant besides impugning the conduct of NSE as giving unjust preference to certain trading members by unfair means has also challenged the

provision of facility of co-location itself as being discriminatory and violative of certain provisions of Section 4 of the Act. This challenge is to be decided by the Commission and not by the sector regulator as SEBI has already recognised the practice of co-location services as being inherent in a stock exchange and besides NSE, it is noted that certain other exchanges are also offering such services for more than 10 years. Notwithstanding the above, the Commission, as can be discerned from the order passed in *Adv. Jitesh Maheshwari* Vs. *National Stock Exchange of India Limited* has treaded the path with due care and, in its discretion, chose to close the matter at the *prima facie* stage considering the pending investigation by the sector regulator *i.e.* SEBI. Thus, mere pendency of matters in alternate forums does not axiomatically place any embargo on the Commission to halt its mandate in discharging its statutory obligations, in the face of any alleged anti-competitive conduct which is brought or comes to its notice. It is for the Commission to satisfy itself at that stage based on the facts and issues involved, as to whether to proceed with the investigation and inquiry, if so warranted, or await any finding from the sectoral regulator, should it be germane and have a bearing on the ultimate decision of the Commission.

46. With regard to the challenge on the *locus* of the Informant to file the present information, the Commission notes that pursuant to the judgement of Hon'ble Supreme Court in *Samir Agarwal vs CCI*, such a challenge pales into insignificance in light of the observation of Hon'ble Supreme Court on such aspect as extracted below:

> *"13.A reading of the provisions of the Act and the 2009 Regulations would show that "any person" may provide information to the CCI, which may then act upon it in accordance with the provisions of the Act. In this regard, the definition of "person" in section 2(l) of the Act, set out hereinabove, is an inclusive one and is extremely wide, including individuals of all kinds and every artificial juridical person. This may be contrasted with the definition of "consumer" in section 2(f) of the Act, which makes it clear that only persons who buy goods for consideration, or hire or avail of services for a consideration, are recognised as consumers.*

14. A look at section 19(1) of the Act would show that the Act originally provided for the "receipt of a complaint" from any person, consumer or their association, or trade association. This expression was then substituted with the expression "receipt of any information in such manner and" by the 2007 Amendment. This substitution is not without significance. Whereas, a complaint could be filed only from a person who was aggrieved by a particular action, information may be received from any person, obviously whether such person is or is not personally affected. This is for the reason that the proceedings under the Act are proceedings in rem which affect the public interest. That the CCI may inquire into any alleged contravention of the provisions of the Act on its own motion, is also laid down in section 19(1) of the Act. Further, even while exercising suo motu powers, the CCI may receive information from any person and not merely from a person who is aggrieved by the conduct that is alleged to have occurred.

16. The 2009 Regulations also point in the same direction inasmuch as regulation 10, which has been set out hereinabove, does not require the informant to state how he is personally aggrieved by the contravention of the Act, but only requires a statement of facts and details of the alleged contravention to be set out in the information filed. Also, regulation 25 shows that public interest must be foremost in the consideration of the CCI when an application is made to it in writing that a person or enterprise has substantial interest in the outcome of the proceedings, and such person may therefore be allowed to take part in the proceedings."

47. With regard to the allegations regarding the Informant or his associated people having filed multifarious litigations against NSE, it is not observed from the record that the Informant has filed the same in his individual name and capacity. Further, merely because any Informant has preferred a proceeding before another forum is not a ground to non-suit any information filed before the Commission, if such information otherwise

discloses conduct of an anti-competitive nature. The scheme of the Act also does not bar filing of any such information. However, it is incumbent upon the informant/parties to disclose such information so that the Commission can understand the gamut and import of such other proceedings, where required, and make an informed decision, while exercising its jurisdiction under the Act. Accordingly, non-disclosure where pertinent and in disregard of the requirement of Regulation 10 of the Competition Commission of India (General) Regulations, 2009, can be viewed seriously by the Commission.

48. Coming to the merits of the case, the Commission notes that broadly there are two issues that have been highlighted in the information and further submissions made by the Informant, *firstly,* the provision of co-location facility by NSE is *per se* in violation of the provisions of Section 4 of the Act. *Secondly,* the manner in which NSE provided such facility, giving an unfair advantage and discriminating between members who availed such facility is also in violation of the aforementioned provisions of the Act.

49. The grouse of the Informant, which he says is based, both on the anvil of public spirit as well as in his personal capacity as a retail investor for more than two decades is that the co-location facility creates a divide between two classes of trading members, one who can afford and pay for such facility and set up their infrastructure inside the exchange so as to get faster information, as opposed to other members, who receive trade information later than the privileged members of the exchange. Members of the NSE who have availed the co-location facility have swifter and complete information and are able to service their clients better and earn profits, as opposed to other members who don't have the facility. NSE, has justified the facility, which it says is in vogue since the year 2009 and is an accepted practice in some of the major exchanges of the world. It has also stated that the facility is made available on a first come first serve basis and essentially there is no pick and choose as such in provision of co-location facility, provided the requisite charges are paid to the exchange. According to NSE, it is not the only exchange in India providing the co-location facility and even other exchange like BSE is providing the same. The Informant has vehemently attacked the charges payable for availing such facility and has stated that the charges were

prohibitively high till NSE lowered such charges by almost 50% after three years, pursuant to many complaints lodged by trading members in this regard. Besides impugning the facility as being anti-competitive, the Informant has alleged that NSE created a facility whereby some select brokers were able to log on to the server of the exchange first and then get information faster than other members who had also availed the facility. Thus, according to the Informant, even within the *niche* class that was created, some members derived unjust advantage over others which has resulted in violation of Sections 4(2)(b)(ii) and 4(2)(c) of the Act. Thus, by the overt conduct of NSE, there entailed discrimination in provisions of services by a dominant exchange to its members. Thus, the discrimination was alleged to be practised between two sets of members, those who availed co-location facility by paying exorbitant charges *vis-à-vis* those members who chose to not have such facility and even within the members who availed such facility, one who by unfair means logged on to the system by a manipulation allowed by NSE *vis-à-vis* the others who unknowingly kept on availing the facility by paying the same charges.

50. To determine whether there is an abuse by a dominant entity under Section 4 of the Act, the Commission has to first define the relevant market, assess the dominance of an entity against whom an action has been brought in the relevant market so delineated and then examine whether the unliteral conduct complained of is an abuse, within the provisions of the said section.

51. The Informant in the present case has delineated the relevant product market as entire securities market since co-location impacts trading in all forms of securities. Further, the relevant geographic market has been taken as the territory of India. The Commission observes that while defining the relevant product market under Section 2(t) of the Act, all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use, need to be included in the realm of the relevant product market. The purpose of defining the market is to encompass all those products or services which are considered to be the effective substitutes for the product or service in question, by the

consumers. In the present case, the consumers are the trading members who were looking for the co-locational facility for algorithmic-trading ('**algo-trading**').

52. Co-location is the practice of renting space for servers and other computing hardware at a third-party provider's data centre facility. Co-location helps in faster movement of data. In the context of co-location services, NSE had on 31.08.2009, announced the launch of co-location services along with the guidelines/ procedure to be followed by members interested in availing co-location facility. Members availing co-location facility are allowed to take one or more leased lines to the co-location facility from different telecom service providers for the purpose of setting up or modifying parameters, trading related activities and hardware, software, network related access, software download / upload and monitoring and data downloads. Such lines are called Point-to-Point links. A Point-to-Point link does not lie on the trading/data dissemination path of the Exchange. Point-to-Point links are not within the purview of the Exchange as they are procured by, paid for and maintained by the members without Exchanges intervention. To enable members to seek such links, the Exchange provides infrastructure in the form of racks to connectivity service providers based on Legal/technical/physical feasibility and limitations. Connectivity service providers can host their infrastructure in NSE designated areas and provide Point to Point Leased line services to its members located in co-location facilities. Some of the leading telecom operators like Airtel, MTNL, besides others service providers are present inside the exchange to provide leased lines to co-location facilities.

53. For availing co-location facility, an application along with fee has to be made to NSE. Grant of such facility depends upon availability of physical infrastructure such as rack space, cable duct space, inter rack cabling trays/duct, power, *etc.*, at NSE's co-location facility. It may be noted that electronic trading and algo-trading are sub-sets of trading in securities. Direct Market Access ('**DMA**') lowers the transaction costs, helps maintain confidentiality, reduces errors due to omission/ commission and helps extract best price for the trade. On the other hand, algo-trading is a more sophisticated way of trading in the digitalised environment which replaces humans by machines for the trading functions. Algo-trading makes use of much more complex formulas, combined

with mathematical models and human oversight, to make decisions to buy or sell financial securities on an exchange. Algorithmic traders often make use of high-frequency trading technology, which can enable a firm to make tens of thousands of trades per second. Thus, the Commission observes that in terms of features and characteristics (speed, sophistication, time and cost involved), algo-trading appears to be different from normal electronic trading. Given these factors, the Commission is of the view that the relevant product market in the present case should be '*market for providing co-location services for Algo-trading in securities to the trading members*'.

54. The Commission observes that the relevant geographic market is the *territory of India*. Therefore, in view of the Commission, the '*market for providing co-location services for Algo-trading in securities to the trading members in the territory of India'* is the relevant market, given that the allegation is with regard to the discrimination in the treatment accorded to members availing the co-location facility.

55. Having delineated the relevant market, the Commission now proceeds to ascertain whether NSE holds a position of dominance in the market delineated above. The Commission took note of the SEBI's Annual Report. Based on the '*Annual Report 2019-2020*' of SEBI, it is observed that share of NSE in terms of total turnover in equity segment, currency derivative segment, *etc.*, is much more than that of BSE which indicates trading volumes at these exchanges. According to the data published by World Federation of Exchanges (WFE), NSE remained the premier equity derivatives exchange in the world in terms of number of contracts traded. In 2019, NSE was ranked first globally in Index Options, Currency Options and Currency Futures segments and ranked second in Stock Futures segment, in terms of number of contracts traded. Also, as per Futures Industry Association (FIA), NSE has emerged as the world's largest derivatives exchange in 2019 by number of contracts traded, surpassing the CME Group.

56. Further, as per NSE's own Annual Report for 2019-20, during financial year 2020, NSE enjoyed a market share of about 93% in the cash equities segment, almost 100% in the equity derivatives segment and about 60% in the currency derivatives segment. Further,

in the year 2019, NSE is stated to have emerged as the largest derivatives exchange in the world based on the volume of contracts traded. NSE was also ranked as the 2nd largest exchange in the world in respect of contracts traded in the stock futures; it was ranked No. 1 in terms of contracts traded in index options and currency futures and options. In the cash equities segment, NSE was ranked 3rd largest in the world based on the number of trades in the year 2019. Thus, if the market share being one of the important parameters, is seen with respect to the volume of trades of securities through algorithmic trading, NSE appears to be having considerable share as compared to other stock exchanges simply owing to the volume of trade handled at its exchange. The Informant has, in written submissions, stated that NSE has a dominant position in the exchange space, particularly in the securities market and in February 2020, it had a market share of 92.6% in cash market and in derivatives market it had a market share of 99.79%. This fact has not been controverted by NSE in any manner. The Commission notes that even if the relevant market were to be expanded to accommodate many members and investors, who rather than using algorithmic based services, prefer the traditional (non-algorithmic) based trading, yet the assessment of dominance of NSE will not undergo any change in such expanded market. Further, since algorithmic trading is a subset of total trade, the market dynamics will not vary substantially when scaled down to a narrower sub-market.

57. It may also be relevant to mention that the NSE has been the first stock exchange in India to introduce algorithmic trading in India and BSE has followed suit, approximately a year later. Further, in *MCX Stock Exchange Ltd. & Ors. v. National Stock Exchange of India Ltd. & Ors. (13 of 2009)*, the Commission had held NSE to be dominant in the '*Currency Derivative segment in India*'. In the case of *UPSE Securities Ltd.* v. *NSE (Case 67 of 2012)*, the Commission held NSE to be dominant in the '*securities market in India*', based on its market share, size and resources, its economic power, advantage over competitors, absence of countervailing buying power and existence of entry barriers, *etc.* Its position of strength seems to only have been accentuated, considering the observations made by the sectoral regulator SEBI in its annual report on the performance of NSE in India as well as globally, as captured in the

foregoing paragraph. In view thereof, the Commission observes that NSE appears to be dominant in the relevant market.

58. The Commission notes the finding of the Sectoral Regulator, *i.e.* SEBI, wherein it has been held that NSE has not exercised the requisite due diligence while putting in place the TBT architecture. The same created a trading environment in which the information dissemination was asymmetric, which cannot be considered fair and equitable. This failure of NSE to ensure equal and fair access, has resulted in violation of Regulation 41(2) of SECC Regulations, 2012. However, SEBI has not found any fraudulent conduct on the part of NSE being in violation of SEBI (PFUTP) Regulations, 2003.

59. The Commission notes that in so far as the allegations have been made in respect of the of abuse of dominant position by NSE in provision of co-location facility, the same would be required to be examined within the four corners of the Act. NSE vehemently contended that there is no abuse by it and that co-location facility is a worldwide accepted facility in the services provided by the stock exchanges. Further, NSE sought to explain that it had not given any preference to any member nor allowed manipulation of its system. It also submitted that SEBI findings exonerate its conduct in many respects and that no fraud has been established on the part of NSE in provision of such services. Further, the findings of SEBI in so far as have been held in violation of the Regulation 41(2) of SECC Regulations, 2012, have also been challenged before Hon'ble SAT.

60. The Commission notes the submission of NSE that at the time of introducing co-location services, SEBI had not prescribed any specific technology to be used and that it had a choice between two technologies (i) TCP/IP technology, and (ii) MTBT. NSE, after studying practices of some leading international stock exchanges providing co-location services, came to a decision to have TCP technology as it provided market safety, reliability, integrity and accessibility. NSE stated that this technology was simpler and cost-effective both for NSE and users as co-location was a new concept. While MTBT disseminates data in the manner of a radio or TV broadcast and can

simultaneously transmit data to a large number of persons, the onus of ensuring that the data packets are properly received lies with trading members. However, it has been stated that this is a complex technology and its implementation requires extensive programming. Also, it required greater investment from trading members. Further, the market was nascent and NSE thought that it could introduce MTBT when the market was more mature and accordingly it launched MTBT in April 2014. Further, NSE moved its services entirely to MTBT technology in December 2016 and TCP/IP technology phased out completely. The Commission, thus notes the submission of NSE that it had choice of adopting either of the two technologies and based on a study undertaken by it, it chose one of them. If such technology could have been prone to some kind of manipulation by certain unscrupulous persons/members, hitherto, not in the contemplation of NSE, then it may not be appropriate to term such conduct as abusive. The Commission tends to agree with the submission that if there has been a *bonafide* choice of a particular technology, coupled with the fact that the sector regulator has not observed any instance of fraudulent conduct in violation of SEBI (PFUTP) Regulations, 2003 in the provision of the co-location facility which has been the mainstay of the allegations against NSE, then it ought not to be found in contravention of Section 4 of the Act, in the facts and circumstances of the present case.

61. In so far as the allegations are considered that co-location facility in itself is anti-competitive and that the facility should be stalled, the Commission cannot be oblivious to the strides being taken by technology in all walks of life, leave alone the financial field. A robust exchange acts as a backbone of the financial system and the provision of co-location facility by exchanges help increase volumes of trades manifold and provides liquidity to investors. This augurs well-for the market, the companies and the economy. Any intervention by the Commission to stop the co-location facility which has been in place since 2009 and is on offer not just by NSE, but by BSE as well, will be retrograde, so to speak. This is in the face of evidence that co-location is offered by several major exchanges of the world. Moreover, the exchanges in India are not just accessed by domestic investors but by foreign investors alike for making investments and reaping rewards and the economy is benefitted by such transactions, which allows inbound capital. The Commission, in this regard, notes that SEBI has not stopped the

co-location facility in any manner since its introduction and has both implicitly and explicitly recognised such service.

62. In view of the foregoing, the Commission is of the opinion that there exists no *prima facie* case, and the information filed is directed to be closed forthwith against NSE under Section 26(2) of the Act. Consequently no case for grant of interim relief's as sought in the information arises and the same also stands rejected.

63. Notwithstanding the order passed above, the Commission particularly emphasises that the findings reflect the views of the Commission purely from the standpoint of the provisions of the Competition Act, 2002 and may not be construed as expressing any opinion on merits, in any manner, in respect of other ongoing proceedings against NSE.

64. The Secretary is directed to communicate to the parties, accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date:28/06/2021