Intellectual Property Rights, And Competition Law
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Lecture - 25
Introduction to EU Competition Policy and IPR

Hello all, welcome to this module on European Competition Policy and Intellectual Property Rights. In this module, we are going to briefly discuss the European Competition Policy.

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The main provisions under this European competition policy, which we can relate with the various aspects of intellectual property rights and their commercialisation in the market, particularly are the Article 101 and Article 102 of the treaty of the functioning of the European Union. In this we would discuss the various scopes and application of those articles.

We would discuss a bit about the competition policy and intellectual property rights, and at a great length in the next modules.

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The competition policy in the European Union is a vital part of their internal market. The European competition policy aims at providing a healthy and fair competition amongst the players in the market, to the companies which are offering different goods and services in the market.

So that, the people of the European Union can get better products and services at a reasonable price. There are a set of rules and regulations within European competition policy, which regulates the European market. Thereby providing better quality material or substances to the consumer as well as offering more choices to the consumer. If you look into the basic objectives of the European competition policy, the major objectives are as follows:

One of the major objective is to provide goods and services at a lower price. To gain any market one of the easiest or important things the market operators or the companies think is to provide the goods and services at a better price or better quality. So, reducing the price of these substances along with maintaining quality is an important aspect. The EU competition policy ensures this. They also ensure that the companies operating within European market provide better quality products. And, since there is a fair and healthy competition, the companies would definitely try to come out with different kinds of products which are different from the existing products.

The consumer would get more choice of products and in this process of making a different product comes the part of innovation. The European competition policy further ensures innovation. All this together, not only leads to a good competition in the internal market of the European Union but it also leads to better competition in the global market.

All these are achieved with a set of rules and regulation. The European Union's antitrust policy arises from the two sets, two central rules, which are set out in the treaty on the functioning of the European Union and the Article 101 and Article 102.

So, in this module, we will discuss these Articles one by one. We will discuss these in the context of the competition policy. In the latter part of this section, we would try to correlate the sections along with the aspects of the intellectual property rights.

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Article 101 prohibits agreements between two or more independent market operators, restricting the competition. These provision covers both the horizontal agreements as well as the vertical agreements. So, what are those horizontal agreements? Horizontal agreements are the agreements between the actual or the potential competitors operating at the same level of the supply chain.

Means, if there are two manufacturers which are manufacturing two similar kinds of products, they can be said to operating at the same level of the supply chain.

And, vertical agreements are those agreements between the firms or the companies, where the companies are at a different level of the supply chain. For example, the agreement between a manufacturer and it's distributor. Article 101 prohibits agreements between these kind of firms or the companies, which may restrict the competition in the market.

There are few exceptions provided under this article. One of the prominent example for Article 101 is the prohibition over the creation of cartels between the competitors. The cartels are the group of the companies operating at the same or different levels so that they may involve themselves in price-fixing or market sharing.

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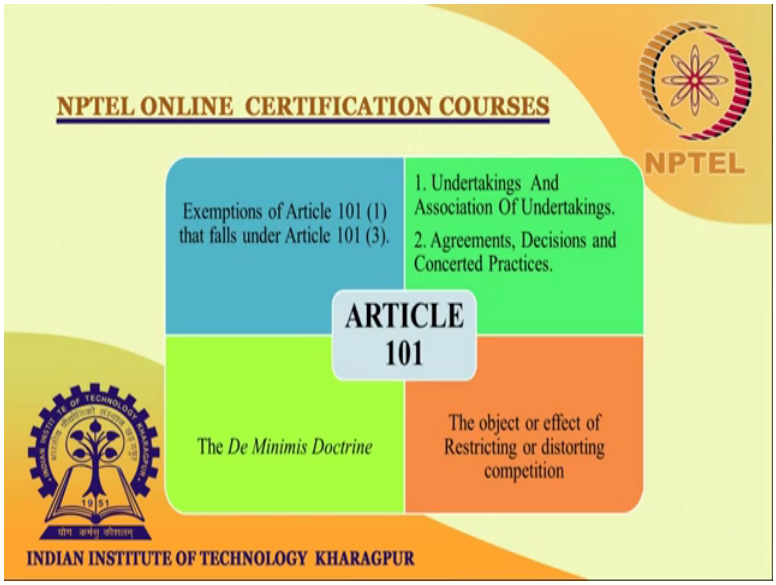

If we look into Article 101, there are four important things, which needs to be taken into consideration. For example, the Article 101 directly prohibits the agreements between the company which inhibits competition in the market, but there are certain exemptions provided under this Article 101 under sub-section (3).

It talks about undertakings and the association of undertakings, also about the status of the companies between which agreements are taking place, what kind of company can be liable for violation of the competition rules.

The concept of undertakings and the association of undertaking is also very important to understand. There is ***de-minimis*** doctrine, object or the effect of restricting or distorting the competitions, which we will discuss later. There are four important aspect of Article 101, which are very important and which we will discuss one by one.

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Article 101 prohibits agreements, which directly or indirectly fix: purchase or selling prices or any other trading conditions. Secondly, they limit or control the production, market, technical development, investment or any agreement which shares the market or sources of supply. It also prohibits agreements, which apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantageous position.

It also prohibits the agreement that makes the conclusion of the contracts subject to the acceptance by the other parties of certain supplementary obligations, which by their nature or according to the commercial usage have no connection with the subject of such contracts.

These are the few things which have been stated directly under Article 101.

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However, sub-section (2) of Article 101 also says that "any agreements or decisions prohibited pursuant to this Article shall be automatically void". So, any agreement or any decision which is directly mentioned under sub-section (1) of Article 101 will stand automatically void.

However, sub-section (2) of the treaty is silent about the concerted practices and only talks about the agreements.

As you know the agreements and decisions may create rights and obligation whereas the concerted practices do not create any rights or obligations. It remains silent about other things.

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Under sub-section (3) of Article 101, there are certain provisions given where the provisions of paragraph 1 may stand inapplicable. For example, in the case of any agreement or category of the agreements between the undertakings or any decisions or concentrated practices between the undertakings, which contributes to improving the production or distribution of or promotion of technical or economic progress.

If any of these agreements are leading improvement in production or distribution of the goods, or promotion of the technical or economic progress, then it would not be considered as a violation of competition policy because the European competition policy aims at promoting a fair and healthy competition in the market, which promotes consumer welfare and which enhances innovation.

Consumer welfare and promotion of innovation or technical advancement is the basic objective of the European policy. So, whenever there is an agreement, it is looked from two dimensions, whether it is promoting the innovation, or whether it is promoting competition or not. These things are looked into and then it is decided whether the agreements are anti-competitive or pro-competitive in nature.

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The balancing of the anti-competitive and pro-competitive effect is conducted within the framework laid down in sub-section (3) of Article 101. As I mentioned earlier four conditions are taken into consideration: if there is any gain in the efficiency of the process, if the consumers are getting any fair shares or any benefit at the end of the agreement or all those restrictions which are placed in the agreement are really indispensable to the whole process, or is there a better way of achieving all these things, is there an elimination of competition or not.

These four aspects are looked into and accordingly the decisions are made, whether the agreements are anti-competitive or pro-competitive in nature.

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While judging the anti-competitive agreements the court looks into various case laws. The court has evolved the ***de-minimis*** doctrine, which states that the negative effect of the agreement on the competition is so small that, they have no appreciable impact either on the competition within the purview of the Article 101 sub-section (1) in the market, nor in the interstate trade.

All these process may have a positive and a negative aspect. The pros and cons are weighed against each other. If the negative effects of the agreement are very small or if they do not have any substantial effect on the competition within the market, then they would not be considered as anti-competitive practice.

This doctrine was first formulated by the court of justice in the case of ***Volk versus Vervaecke***, in 1969.

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One of the other important aspect of European competition policy is Article 102.

Article 102 prohibits the firms; that holds a dominant position in a given market to abuse that position. It talks about the abuse of dominant position. One firm or a company can abuse the dominant position either by charging unfair prices, or by limiting the production, or by refusing to innovate, which is prejudice to the consumers.

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Both the Article 102 and Article 101 are important parts of the treaty of the functioning of the European Union. Article 101 deals with the agreements, decisions and concerted practices, which are harmful to the competition. Article 102 is directed towards the unilateral conduct of the dominant firms, which act in an abusive manner. Article 102 prohibits certain forms of unilateral market behaviour.

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The text of the Article 102 says that "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market. In so far as it may affect the trade between the member states".

The abuse may in particular consist of directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, by limiting production, markets, or technical development, to the prejudice of the consumers; applying dissimilar conditions to the equivalent transactions with other trading parties, thereby placing them into a competitive disadvantage, making the conclusion of the contracts subject to acceptance by the other parties of the supplementary obligations, which by their nature or according to the commercial uses have no connection with the subject of such contracts.

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These are as per the standard text of the Article. If you look into the major elements of Article 102 we can come out with this understanding that it applies only to the undertakings. And, these undertakings must hold a dominant market position.

The undertaking must abuse their dominant market position in the relevant internal market or a substantial part of it. These abusive practices can be of various types, for example, exclusionary abuse, exploitative abuse and discriminatory abuse. The abuse of the dominance affects trade between the member states, this is the important point that comes out of Article 102.

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The Article 102 expressively says that the provision is not only applicable to the abuse of the dominant position by one firm, but it is also applicable in the cases of collective undertakings, where two or more undertakings come together and hold the dominant position.

This Article does not say that dominant position is bad or dominant position per se is prohibited, but it is only the abuse of the dominant position which is prohibited. The abuse of the dominant position is determined, when there is an *Appreciable Adverse Effect on the Competition* in the market. And, this is prohibited under the article 102.

There are certain criteria by which the court or the commission decides, whether these practices are creating an appreciable adverse effect on the market or not, based on their investigation they come out with their own observations and accordingly it is decided, whether there is an abuse of the dominant position or not.

The decision of the European Commission may be challenged in the court, at the General Court or the European court of Justice.

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These are the two important provisions of the European competition policy. As we are discussing Article 102, there is a question that what can be considered as a dominant position.

The dominant position can be defined as a position of the economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently. Meaning thereby that if a company is enjoying a reputation in the market by which it can affect the competition, by exercising one of its monopoly power or exercising any activity then it may be considered to have a dominant position. The dominant position per se is not prohibited, if the company abuses its dominant position then only it comes under the provisions of Article 102.

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The abuse of the dominant position is always looked into in the relevant market.

The relevant product market comprises of all the products, all the services, which are regarded as interchangeable or substitutable by the consumer. While considering the relevant market we may look into whether this kind of service can be replaced by any other service or not.

All the interchangeable or substitutable services by reason of the product's characteristics and their price and the intended use are considered as relevant. These three factors are taken into consideration and supply-side substitutability may also be taken into account, while defining the market, for example if the product is manufactured in one place, can a supply chain fill the void or not?

All these things are considered while considering the relevant market and the behaviour of a dominant player is judged in the relevant market, whether it is an abuse of its position or not and then the decision is taken.

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Article 101 and Article 102, tells us or gives a fair idea about what kind of agreement or what kind of behaviour of a firm or a company is or will be considered as anti-competitive. So, with this background information let us discuss a little bit about the interface between the competition law and the intellectual property law.

We know that intellectual property rights are monopoly rights, which are given to the inventor for his or her innovative creations, it may be in the form of a patent, a trademark, a registered design or unregistered design, know-how's, trade secret, all these are essential part of the intellectual property rights and since it is a kind of monopoly right.

When we talk about the monopolistic right, we have the monopoly or the inventor has the monopoly over the right. It is a kind of exclusionary right. We exclude or the inventor excludes others from using that right.

In a strict sense or in the first instance it seems to be anti-competitive, in the sense that from the very beginning we are removing any kind of competition, but we need to look deeper into the aspect of the intellectual property and also into the competition policy. At first it sounds like these are completely two different forms of laws, but they share the common goal or objective, i.e. creation of or promotion of the innovation and consumer

welfare. Consumer welfare and technical promotion of innovation are the two major aims of both the competition law and the IP law.

In this respect, both of these laws are quite synergistic and go side by side. However, while judging the various overlapping dimensions of the competition law and intellectual property law it is generally looked from two perspectives.

The aim of the competition policy is to increase the market efficiency. Theoretical scientists came up with two kinds of efficiency; one is known as the static efficiency and the other one is the dynamic efficiency. Static efficiency is how the product is being marketed. When we decrease the price of a product when there is more competition there is more marketability of the product, it comes under static efficiency.

Dynamic efficiency is the promotion of the innovation or technical know-how, so that more market player come to the market, and new products come to the market which directly or indirectly promote consumer welfare.

When we deal with the questions of intellectual property right and competition law, the practices associated or the conduct based on the IPR are calculated or analysed, in terms of both static efficiency and dynamic efficiency. When the sum total of the static and dynamic efficiency is positive, then it is not anti-competitive, but when the sum total of the static efficiency and dynamic efficiency is negative, then the conduct of IPR is considered to be contrary to Article 101 and 102. And, the firm's or the company's practices may be considered as anti-competitive in nature.

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The guidelines on the technology transfer of Article 101 and Article 102 mention the *theory of complementarity* which means that the competition law and the intellectual property shares the same objectives i.e. promoting consumer welfare and efficient allocation of the resources.

By virtue of the intellectual property, the company operating with the help of intellectual property are not immune from the competition law aspect. Both the competition law and the intellectual property law goes side by side.

This was a brief introduction to IPR and EU competition policy. In the next modules, we will discuss the licensing agreements under Article 101 and various agreements under Article 102 with respect to intellectual property rights and how it is decided whether some agreements or some arrangements are contrary to Article 101 or Article 102 and how they are considered to be anti-competitive in nature.

With this, I will stop here and we will start with the next module. Thank you.