Intellectual Property Rights, And Competition Law
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Lecture – 28
IP Based Conduct Under Article 102 (Contd.)

Till now we have discussed regarding abuse of dominant position and existence versus exercise of IPR.

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"Exceptional circumstances" test

- **In Magill (1995),** the Court went further and extended the reading of Volvo to an "exceptional circumstances" test.
- It had to rule on the refusal of Irish TV programs to license their IP protected program listings to a company that tried to produce a comprehensive weekly television guide for Ireland, a product that did not exist at the time of the judgment.

As I said, intellectual property right does not hamper the competition, but under certain circumstances behaviour of the intellectual property right holder may lead to abuse of the dominant position. In one of the landmark cases of *Magill decision*, the court went further and extended the reading of *Volvo case* to the *Exceptional Circumstances Test*.

Magill, is an Irish TV programmer. They wanted to compile a TV program guide because there are three TV channels which were broadcasting their programs. They used to come up with a weekly magazine that listed out the timing of the various programs. Magill decided to come up with a combined program guide for three TV broadcasters in Ireland, however, the three companies did not give permission to Magill to compile their weekly guide material because it was under the purview of copyright.

They did not provide copyright to Magil to come up with a new guide. In this case, the court ruled that the refusal of Irish TV programs to license their IP protected listings to a company that tried to publish a comprehensive weekly television guide for Ireland, a product that did not earlier exist at the time of the judgment, is an abuse of dominant position.

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Here, the court looked into the exceptional circumstances test and its three requirements. First: the refusal to license something that involves an intellectual property right (say) in terms of copyright. Has the refusal prevented creation of a new product, which in this case was the weekly TV guide. Second: If there is sufficient justification from the broadcasting or the publishers for the refusal and third: Is the license indispensable to enter the downstream process, of making a market for new TV guides, which may lead to a monopoly on the secondary market.

These three questions were considered by the European court of justice to come up with Exceptional Circumstances Doctrine. In this case, because of the refusal of the license by three broadcasters, the development of a new product into the market was prevented. The motto of the competition policy in the European Union is to promote innovation and promote healthy competition. It prevented the appearance of a new product, which was a

weekly combined TV guide, which would have contained the information from all the three broadcasters.

Was there a justification? The court did not find any suitable justification for the refusal. Was the license indispensable for creation of a new downstream market or not? Was the license for copyright needed to create new TV guide? Yes, of course, because all the three broadcasters had copyright over their program listing.

The license was essential to come up with a new program guide. Since, they refused the license, a new type of product was prevented from coming to the market and it may lead to monopoly on the secondary market because this new product was dependent on the copyright holders.

This case laid the basic provision for the exceptional circumstances test i.e. under what circumstances the act or the behaviour of the undertakings may lead to abuse of dominant position. There is another doctrine which is known as the *Exceptional Circumstances Doctrine*, it came up with *IMS health case* in 2004.

This case was about the licensing which is known as the brick structure. IMS health, in France, created a brick structure which is known as the 1860 brick structure. It divided the whole pharmaceutical market depending on the nature of the sales and the pharmaceutical prescription.

It made a map, a kind of structure, which gave a clear insight to the pharmaceutical manufacturers to understand what kind of sales and what kind of medicine is being sold at various parts in France. Certain other companies sought for a license from IMS health so as to come out with similar kind of brick structure, so that they can enter the market.

But IMS health refused to give them license saying that this is their copyright and they are not willing to share the technology. Further, IMS also said that, they are infringing on the technique which the IMS is adopting for creation of their pharmaceutical brick structure. The brick structure was critical at that point of time. All the pharmaceutical firms relied on the brick structure to afford market analysis. In this case, the exclusive

right to reproduction forms parts of the copyright holder's rights. A refusal to license cannot in itself constitute an abuse.

In general, refusal to license does not constitute an abuse of dominant position; however, in some exceptional circumstances, the refusal may lead to abuse of dominant position or may lead to abusive conduct. In this case, the European court of justice said that, when a copyright holder refuses to give access to a product or service which is indispensable to carrying out business, this would be considered as an abuse and three parameters would be taken into consideration.

First: the undertaking, which requested the license, intends to offer new products or services not offered by the owner of the copyright and for which there is a potential consumer demand. Second: the refusal cannot be justified by objective considerations. Third: the refusal is such as to reverse the undertaking, which owns the copyright and the relevant market, by eliminating all competition in the market.

These three conditions were laid down by European Court of Justice. These conditions look into the circumstances, where the intellectual property is critical for development of a new product or a service, and it also looks into the whether there is a potential demand from the consumer side for the creation of the new product in this segment or not and whether this kind of agreement may lead to elimination of all competition in the market or not.

These circumstances should be taken into consideration while deciding an abusive conduct. After the *Magill case* one of the important cases in the history of European competition commission was *IMS health case* in the year 2004. This case was about copyright related protection and under what circumstances the denial to license copyrighted material can lead to abuse of dominant position.

This case gave the concept of *exceptional circumstances doctrine* or in other words we may say that, it has re-emphasised the *Magill judgment*. IMS health had a copyright over a structure, which is known as the brick structure, named as 1860 brick structure. It divided the total German pharmaceutical market into 1860 bricks, like compartments,

which was developed taking the area code into consideration. It gave data regarding pharmaceutical sales data and prescription medicine data for those areas.

The brick structure was important for all the pharmaceutical manufacturers and distributors in Germany, because it gave them an idea regarding the sales and distribution of medicines. Two companies *NDC* and *AGX* wanted to get a license on this copyrighted material from IMS to develop another database which would show the pharmaceutical sales data and pharmaceutical medicine supply information.

But, IMS health refused to provide the license regarding copyrighted 1860 brick structure and this led to a complaint being filed at the European commission regarding the denial of the license from IMS to NDC and AGX. This case was being prosecuted in the German court. Simultaneously it was referred to European Court of Justice. This case was going on at two places side by side.

The question was whether the denial of a license by copyright holder or intellectual property holder would lead to abuse of dominant position or not. As we have already discussed that the intellectual property right gives an exclusive right to the owner of the intellectual property. It is the discretion of owner of that property whether he would want to give the license or not. However, mere existence of IPR is not an issue, but how intellectual property right is exercised becomes an issue which may lead to abuse of the dominant position.

In the 1860 brick structure, the court considered whether IMS has the exclusive right to reproduction. It does have the right to refuse license but the way it has exercised this exclusive right to license may in exceptional circumstances give rise to abusive conduct.

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The ECJ ruled that where a copyright holder refuses to give access to a product or service indispensable to carrying on business this will only be considered an abuse where:

- The undertaking which requested the licence intends to offer new products or services not offered by the owner of the copyright and for which there is a potential consumer demand.
- The refusal cannot be justified by objective considerations.
- The refusal is such as to reserve to the undertaking which owns the copyright the relevant market by eliminating all competition in that market.

The court has took into consideration three-prong approach. First it looked into whether the product or service in question is really essential for the development of a new product or a service in the market? Whether there are justified conditions for the refusal of the license or not? And whether by refusal the right holder is trying to limit the competition from the market and trying to primarily retain his position?

The European Court of Justice considered this particular situation and tried to find out whether the copyrighted brick structure is essential or indispensable for the development of a new product or service or not. The 1860 brick structure is a kind of map which provides pharmaceutical sales data and pharmaceutical prescription medicine distribution data to other vendors. NDC and AGX were trying to seek license for the development of a new brick structure. Without the permission from copyright holder it is not possible on the part of NDC or any other company to create a new database. So, it was held that the copyright in question is really indispensable for the creation of the new product.

Now, Can refusal be justified by objective consideration? The brick structure became a standard in the market and all the pharmaceutical companies were relying on the data of the brick structure. It set its own standards. So there was no justification which EC could find in denying the license. And since IMS health is denying the license, it is stopping the development of a secondary market. The judge also looked into two kinds of market;

first one is known as the upstream market i.e. the 1860 brick structure that provided the data regarding pharmaceutical sales and prescription medicines which the companies were taking into consideration for doing businesses in the Germany. And second is the downstream market which would be created by licensing of the database structure, where companies like NDC or AGX can take the information from the 1860 brick structure and create a new kind of database which may be used for other pharmaceutical segments.

So, in this case, by denial of the license of the copyrighted material, IMS health was indeed retaining its monopolistic power in the market and in some way trying to eliminate all the competition from the market. So, in this case the ECJ decided that under these exceptional circumstances, the refusal to license may lead to abuse of dominant position.

This is one of the landmark decision which laid down a three-prong approach for determination of abuse of dominant position after the Magill judgement. There are a series of case laws under article 102 which laid down the development in the European commission and how they look into abuse of dominant position.

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Microsoft case

- The Microsoft Decision by the European Commission consisted of two separate parts:
  - the case regarding the refusal to supply information and
  - the case concerning the tying of WMP and Windows.
- Windows was the dominant PC (or "client") operating system with a market share in excess of 90 percent and was the *de facto* standard for client operating systems.

One of the other important case in the history of European competition policies is the *Microsoft case* and it has in a way redefined how European competition policy looks into

intellectual property as well as abuse of dominant position. In the earlier case laws, like Magill and IMS, we have seen that the three prong approach has been followed and they have recognised exceptional circumstances under which the behaviour of a dominant player can be regarded as abuse of dominant position.

In the Microsoft case, the European commission look into two aspects, first: regarding the refusal to supply information and second: regarding the tying of two different products. In this case, Sun Microsystems requested Microsoft to provide critical interoperability information or the detailed interoperability information for operating their operating system with Microsoft Windows. This case happened during 1998. During that time Microsoft had more than 90 percent of share in the operating system market and it had established itself as a de-facto standard for client operating systems.

The Sun Microsystems was based on a Linux operating system and hence windows and sun operating system were not compatible. In order to operate in the windows operating system servers as well as the clientele computers, Sun Microsystem required certain critical information by which they can program or they can run in the windows operating system also. The sun wanted to get a license and requested Microsoft to give the information regarding interoperability data, but after 4 months Sun Microsystems complained in the European commission alleging that Microsoft is abusing its dominant position by denying the access to the interoperability data.

This led to an investigation by the European commission in 1998 and the first decision came in 2004 in which the European commission said that, Microsoft indeed is abusing its dominant position and this abuse is taking place in two ways. First: the abuse by denying or refusing to supply information to Sun Microsystems which is initiated by the complaint by Sun Microsystems and second: is by tying two products i.e. windows media player with the client operating system. The European commission found that Microsoft is trying to tie two different products and sell them in the market. In the judgment, court looked into these two aspects.

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1. Refusal to supply

- The refusal to supply case was about computer networks that link client computers used by employees for their daily work with server computers that perform specialized tasks including managing the network.
- The Commission considered whether the information requested by Sun was needed by rival server operating system vendors to enable their work group server operating systems to interoperate with Microsoft's client computers as well as with Microsoft's work group server operating systems on the same network

It was said that Microsoft has abused its dominant position by refusing to supply critical information to Sun Microsystem. The refusal to supply was about the computer networks that linked the client computers used by the employees for their daily works with the server computers that performed specialised tasks including managing network, printing a material or transferring data.

The question which the commission considered was, Whether the information requested by sun was indeed needed by the rival server operating system vendors to enable their work group server operating system to interoperate with the Microsoft client computers as well as Microsoft work group server operating system in the same network or not? i.e. Whether the interoperability data is critical for operation of the Sun Microsystem or any other competing company or not?

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Decision

- The Decision concluded that Microsoft's competitors needed access to protocols that provide "sets of rules of interconnection and interaction" between Windows client and work group server.
- Commission required Microsoft to license the protocols at a reasonable and non-discriminatory royalty that did not reflect the strategic value of the protocols.
- Microsoft agreed to license the protocols at three different terms

The court of first instance i.e. the European commission concluded that the interoperability data was essential for functioning of the operation of other competitors and in this regard Microsoft was abusing its dominant position.

The European commission directed Microsoft to license the interoperability data and provide critical information at a *fair, reasonable and non-discriminatory terms* known as the *FRAND terms.* Still Microsoft did not agree to it readily and this led to another investigation later on. Ultimately, Microsoft agreed to license the protocols at three different terms.

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Decision-contd.

- Refusal to supply is the exception to the behavior of dominant firm.
- The case law presumes that a dominant firm can refuse to supply actual or potential traditional practices and that doing so is an abuse only in "exceptional circumstances."
- **Magill, Bronner and IMS** make it clear that a necessary condition for requiring a company to share its property is that the property "itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence.

If you look critically into the decision, the court had again followed the Magill judgment or the IMS or the Bronner case. And it tried lay down the conditions required by a company such as whether the product or service in question is really indispensable for getting the competitors in business or not.

As we know in the Magill case, the TV channel listing by BBC and other player was critical for Magill to come out with a weekly guide for the customers. In the Magill judgment, the weekly TV guide was the new product in question and copyrighted material by three broadcaster companies was essential for the formation of the weekly guide. Since they denied to supply the information, Magill could not develop a new product.

Similarly in the *Bronner case,* which does not directly relate to intellectual property, the court has looked into the question of indispensable service. Bronner wanted to associate with the media print who were the leading supplier of the newspaper in the region with a home delivery system. Bronner wanted to get involved in the home delivery system so that newspaper can be delivered to the customers. The court looked into, the question of whether the product or the service in question is really indispensable for carrying out business of the competitor company or not?

The home delivery system of the newspaper distribution system is not the single way by which newspaper can be delivered to the consumers, it may be delivered through shops or by post offices or by other means. The court decided that because this service in question is not indispensable for the business of the competitor firm, the denial to license or denial to tie or tag with Bronner is not an abuse of dominant position from the point of view of media print.

Similarly in the IMS case, as we discussed, the 1860 brick structure was critical for development of new pharmaceutical market map. Because of the denial to license, generation of a secondary or downstream market was stopped. Also, IMS having the leading position in the upstream market, may indeed stop competition in the European Union.

In all these three cases, it was clear that the condition necessary for requiring a company to share their property is that: the property must be indispensable for carrying out the business in as much as there is no actual or potential substitute in existence. The indispensable nature of the property is essential to find out whether there is abuse or not. The property maybe any property i.e. an intellectual property or any other kind of property.

In the Microsoft case also, the court looked into whether the interoperability data by Microsoft is indispensable on the part of Sun Microsystem or any other competing microsystem or not? The Sun Microsystem and others operated in a different operating system. Hence, it was essential. The interoperability code was required by Sun Microsystem without which Sun Microsystem could not enter into or cannot operate in the windows operating system.

The court ruled that the interoperability data was indeed indispensable and the refusal to supply the information is an abuse of the dominant position.

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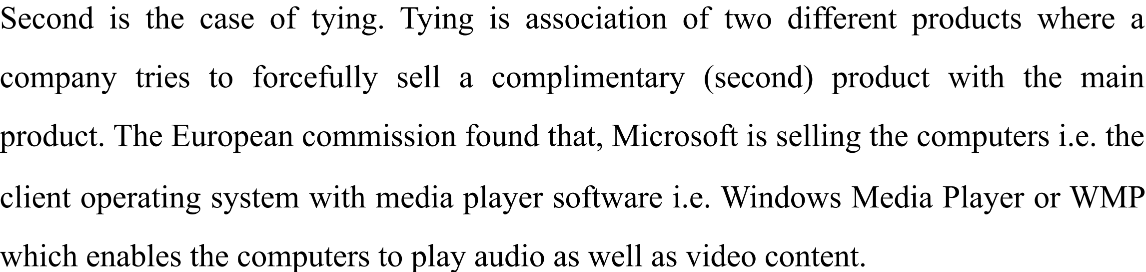
The tying case

- The tying case was about media player software that enables computers to play back audio and video content
- The Commission's concerns run as follows: given that Windows was on more than 90 percent of all PCs, the bundling of Windows and Windows Media Player guaranteed Microsoft WMP's ubiquity in the market.

Second is the case of tying. Tying is association of two different products where a company tries to forcefully sell a complimentary (second) product with the main product. The European commission found that, Microsoft is selling the computers i.e. the client operating system with media player software i.e. Windows Media Player or WMP which enables the computers to play audio as well as video content.



At that point of time there were separate software for streaming audio from the radio and streaming videos from other sources, but with the advent of broadband during the late 1990s, Windows came up with Windows Media Player software which could play audio as well as video directly from the server.

There were other players also in this kind of business, but during this case Microsoft was one of the leading company which had developed windows media player system and started selling Windows media player system along with Microsoft operating system.

The commission's concern was that, given the fact that Windows had more than 90 percent of all the PCs market, the bundling of windows and windows media player guarantees Microsoft windows media player a unique position in the market. In this case, the court looked into whether these two products in question are really inseparable or not

and what will be the consequence if the company tries to sell or complement products together.

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The Commission found that, Microsoft had abused a dominant position in the client operating system by making its client operating system available only with its media players since May 1999. The commission did not object to Microsoft's making windows available for the windows media player, but it objected to Microsoft's making windows available with this WMP without also making available windows without windows media player. From 1999 onwards Microsoft started selling the windows operating system along with WMP. Earlier, both Windows Operating System and WMP were available separately but after May 1999 bundling the products led to the question of tying up.

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- In the Decision, the Commission ordered Microsoft to make available a version of Windows that did not include Windows Media Player.
- It prohibited Microsoft from charging more for the unbundled version of Windows than for the bundled version but did not require Microsoft to charge less for the unbundled than for the bundled version.

After the prosecution of this case, the commission ordered Microsoft to make available a version of windows that did not include windows media player. And it prohibited Microsoft from charging more for the unbundled version than it charged for the bundled version. But, it also did not require Microsoft to charge less for the unbundled than the bundled version.

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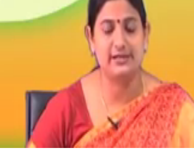
- In this judgment the CFI had departed from the *IMS Health* and *Magill* "*new product*" condition.
- It had held that:
  - "§647. *the circumstance relating to the appearance of a new product, as envisaged in Magill and IMS Health . . . cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of [Article 102(b) TFEU]*".
- The CFI further added that it was sufficient for the Commission to prove that the refusal to supply interoperability information gave rise to a "*limitation [...] of technical development*".



There were many criticisms for this case. We will discuss in the context of two points i.e. refusal to supply information as well as tying. The criticism in the first instance, in the IMS health case or the Magill case was looked from four-prong test approach, where the court looked into whether the denial to supply information leads to stoppage of the development of a new product or not.

The new product condition was satisfied in both the *IMS health* as well as the *Magill case*. But in the Microsoft case per se the question of new product is not addressed because the Sun Microsystem during the time when the case was filed, was also having nearly 60 percent Micro-market share in the open operating systems. By windows operating system, windows was gradually increasing the market share, but while the decision was being taken, Sun Microsystems had nearly 12 percent of the share in the market.

So, there is no question of a new product. The Sun Microsystem wanted to operate within the area of windows operating system, but the refusal to license per se is not prohibiting Sun Microsystem to operate in the market because although the market-share was less yet it had limited share, it was existing in the market. There was no question of the development of a new product.

But in this case, the court held that the circumstance relating to the appearance of a new product as envisaged in Magill and IMS health cannot be the sole parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to the customer within the meaning of Article 102 of the treaty of functioning of European Union.

Further the CFI added that it was sufficient for the commission to prove that the refusal to supply interoperability information gave rise to the limitation of technical development. This judgment, was the first landmark judgment where *requirement of anew product* has been substituted with *technical development*. According to some critics, it was a vague judgment for intellectual property right because intellectual property right is for promoting technical developments and gain exclusivity of the

intellectual property rights, to gain the right to monopolise. Denying technical innovation or technical development is the abuse of dominant power which is not justified.

In the European policy, the behaviour of a dominant firm or the refusal to license by a dominant firm is taken to be per se an abuse of dominant position which was highly criticised.

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In the second case, where Microsoft was held for tying windows media player to windows operating system, the court followed the judgment of *Hilti* and the *Tetra Pak case.* In the Hilti case, the supplier tried to sell construction material, some of which were binding material used in the construction along with the sale of nails used for construction. They denied to sell the substance to the customer who were not buying the second product. They tried to sell both the products. They tried to sell the first product only on the condition that the customer takes the second product.

In the Tetra Pak case, a packaging machine was used for packaging of antiseptics. The Tetra Pak was complemented with another product which was manufactured by the same company. In both the cases, the products which were sold were complemented or two different products were sold.

Taking the cue from those judgments, the EC held that tying was subject to per se prohibitive condition under the European commission law and it is triggered by a finding of dominance in the market. Tying product and tied product are two separate products.

First: it is to be established that there is a dominant market for the tying product. Whether the two products are separate or not? Whether any element of coercion towards the customer is used or not i.e. are the customers forced to take the two product or not?

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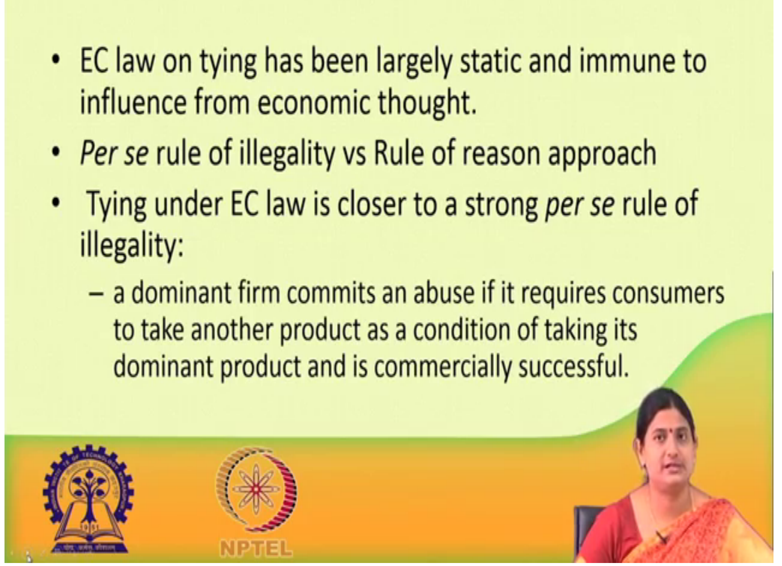

This approach in European Union differs from the United States' approach because in the European Union the per se rule of illegality is given importance rather than the rule of reason approach. Tying under the EC law is closer to a strong per se rule of illegality i.e. a dominant firm commits abuse of dominant position if because of its dominant position and commercial success, it requires the consumer to take another product as a condition.

If a dominant firm is commercially successful and is tying one product, it is considered as per se illegal, whereas in the US, they takes more of an economical approach and considers the consumer point of view as well as the manufacturer's point of view. They look into whether there is any economic significance of the tying or not? What effect would it have on the consumer market or on the consumer psyche? What options do the consumers have? Is it beneficial for the consumer or not? In the United States, they not

only look into the competition in the market, but also from the point of view of the consumer. But the European Commission differs in this respect from United States. They look more into the static influence, the way we discussed about the static and dynamic innovations.

Static innovation talks about the difference in pricing and dynamic innovation is more relatable to the technical development. So, instead of looking into the dynamic approach the European commission looks more into the static approach. This case is one of the critical cases in the history of European commission because this case has blurred the line between abuse of dominant position and tying i.e. between Article 101 and Article 102.

In the cases where intellectual property rights are involved, to judge a new product or new innovation or the stoppage of a technical innovation or the behaviour of the competitors in the market a bit of different approach, which not liberal per se, is applied. Some critics say that, European Commission follows an approach where no market per se can have a dominant position. If one company has the majority of share in the market, still the European commission's policy is such that it will never allow anyone to get a dominant position.

This was all about Article 101 and Article 102. In the next sessions, we will discuss about various provisions given by European Commission such as block exemptions particularly free space where companies can operate, what are these, how the guidelines have been placed. With this we end this session on Article 101 and 102.

Thank you.