Intellectual Property Rights, And Competition Law
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Lecture – 42
TRIPS and Competition Law (Contd.)

Hello again. So, in the earlier module we just discussed the various provisions mentioned in the TRIPS Agreement related to the Competition Law and how the national member states are free to adopt their own measures for prevention of these anti-competitive behaviour.

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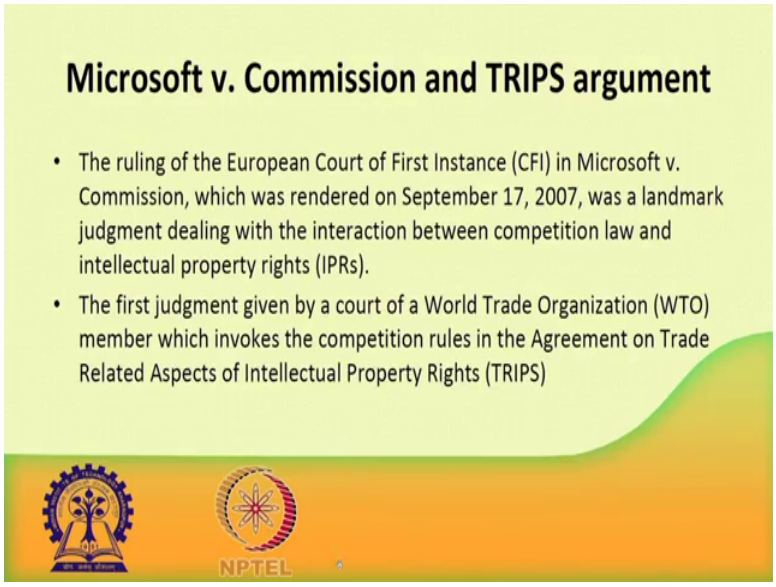

So, we will be continuing that module in today's class. We will just take an example of this Microsoft case where the Microsoft has put an argument related to TRIPS Agreement and competition policy and how the European Court of first instance has given its point of view. So, we have already dealt with the case just to again reemphasise.

So, the European Court of first instance, CFI in the Microsoft versus commission, the decision was given in 2007 and it was a landmark decision dealing with the interaction between the competition law and intellectual property rights. And this is one of the first judgment given by a court of the world trade organization member which invoked the

competition rules in the agreement of the trade related aspect of the intellectual property rights.

So, this case becomes very important being the first, where the WTO member has invoked the competition rules, TRIPS provisions has been raised as one of the objections/argument from the Microsoft side.

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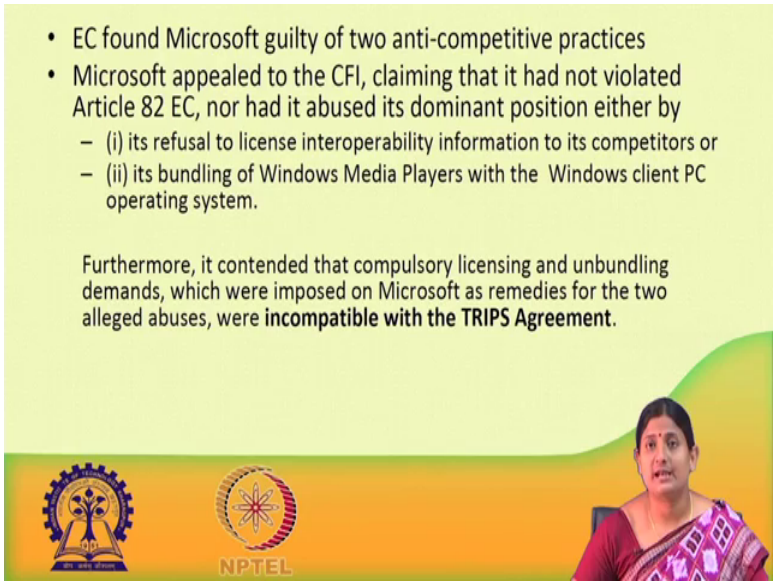

So, going to the facts of the case again. The European commission has found Microsoft to be guilty of two anti-competitive practices. First, the abuse of dominant position and second was the tying of the product. The Microsoft appealed in the court of first instance CFI claiming that it had not violated any provisions of the Article 82 of European Commission nor had it abused the dominant position.

Basically, refusing the license for the interoperability information to its competitor is not an abuse of dominant position and the bundling of the windows media player with the windows client PC operating system is also not a part of the tying. And further Microsoft contended that the compulsory licensing and the unbundling demands which were imposed on the Microsoft as remedy for the two alleged abuse were incompatible with the TRIPS Agreement.

So, after being held guilty by European Commission, the commission has asked for compulsory licensing as well as the unbundling of the windows media player with the client PC.

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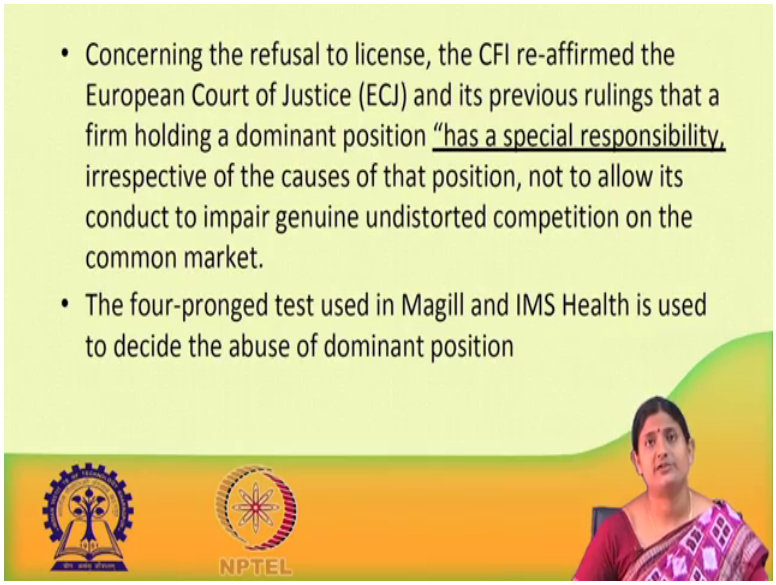

So, as per Microsoft these decisions were incompatible with the TRIPS Agreement. The Microsoft appealed the case to CFI, but the CFI has reaffirmed the European Court of Justice decision and its previous ruling that a firm holding a dominant position has a special responsibility and irrespective of this position conduct to impair the genuine distorted competition on the common market is not allowed.

So, when a firm is holding a dominant position by virtue of its intellectual property it has a special responsibility and it is not allowed to distort the competition in the market. So, now, again the court has looked into the Magill as well as the IMS health case and looked into the four-pronged test which has to be confirmed to find whether there is abuse of dominant position or not.

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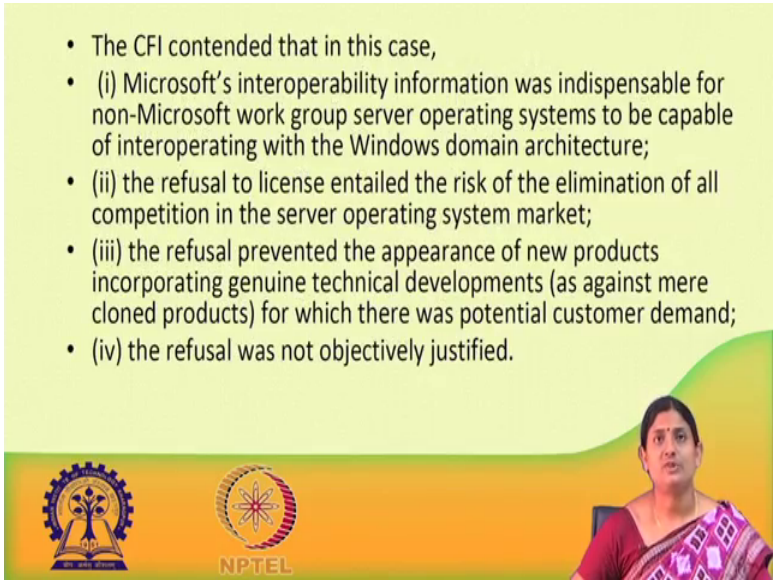

So, here based on this IMS as well as the Magill judgment the court of first instance, contended that in this case the Microsoft's interoperability information was indispensable for the non-Microsoft group of server operating systems to be capable of interpreting with the windows domain architecture. So, for the downstream operation of the other competitors or the players, the Microsoft interoperability information was needed. So, it is stopping the downstream market to operate and stopping the competition thereby.

The refusal to license entail the risk of elimination of all competition in the server operating market. So, if the Microsoft is not giving the license, then no one can operate in the similar market by the same interoperability information. There may be different set of market for other operating system, but with this those cannot work with the Microsoft. So, it is eliminating the competition.

Third the refusal prevented the appearance of new product incorporating genuine technical development. As mere cloned product for which there is a potential consumer demand. So, by denial of this license there will be no new product formation for which there is a consumer demand. And there is no objective reasons to justify these kind of refusal of the license.

So, all the four test based on Magill and the IMS decision were tested on the Microsoft case. And Microsoft failed to satisfy the court with respect to all these four questions. And it was held that Microsoft was a dominant player in the market and by refusing the license or by refusing to provide the interoperability information Microsoft has abused the dominant position.

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With respect to tying, the CFI agreed with the commissions that the tying infringes the Article 82 of the European Union as the five cumulative requirements have been met. So, to decide whether a tying will be anti-competitive or not there are five tests for that and here also the five requirements have been met.

First, the tying and the tied goods are two separate products. So, the windows media player and the interoperability, the two windows operating system were two separate product that were tied. So, not related to each other and that is why it is a kind of anti-competitive practice.

Again, the undertaking concerned is dominant in the tying product market. Windows media player, Microsoft was dominant for that market, more than 38 or 40 percent shares were held by them. Again, the undertaking concerned does not give consumer the choice

of obtaining the tying product without the tied product. So, no one was able to get the windows media player without obtaining the windows operating system.

And for that reason the tying forecloses the competition, it has the power to or power for the foreclosure of the competition and this tying was not objectively justified. So, based on these test, like the four-pronged test for the abuse of dominant position, five test for the tying product or tying activity, the court of first instance concluded that Microsoft has committed two types of abusive conduct each incompatible with the Article 82 of the European Commission.

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So, this is just a factual background. We have already seen the earlier cases also. So, Microsoft has again argued against the compulsory licensing to be issued for the interoperability information as well as it was asked to sell the product separately. So, Microsoft alleged that this is against or incompatible with the TRIPS provision.

Now coming to the provisions in the TRIPS Agreement, how a member country can adopt the TRIPS provision or how a member country can interpret the TRIPS provision, there are two ways, there are two approaches for that. First one being the monist approach and second one is known as the dualist approach. So, the country with a monist

approach, particularly it is followed by most of the country where civil law traditions have been followed. Here what happens is that:

The international agreements are incorporated directly to the domestic laws i.e. they are self-executing in nature. So, suppose there is a certain provision in the international law then that is directly taken from there and inserted into the domestic law. And whenever a case would be dealt, it will be self-executing in nature. Second one is the dualist approach. So, in a country with a dualist approach, particularly for the most of common law countries, the international agreements become national law only after passing further national legislation, i.e. they are not recognised as self-executing.

So, they have to pass again second set of legislation to adopt international legislation. Particularly countries like United States adopt this dualist approach, also to some extent the European Union also adopts the dualist approach. But in the case of European Union the member countries or the national may adopt the monist approach, but when it comes to the European Union it is particularly the dualist approach which the European Commission, European Union adopts.

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And regarding this Microsoft versus commission, based on this argument that the TRIPS Agreement does not have a direct effect on the community level, the court of first

instance held that the TRIPS Agreement does not prevail over the primary community law. WTO agreements are not in principal among the rules in the light of which the community judicature is to review the legality of measures adopted by the community institutions.

It is only where the community has intended to implement a particular obligation assumed under the WTO or where the community measures refers expressly to specific provisions of the WTO agreement that the community judicature must review the legality of the community measures in question in the light of the WTO rules.

The circumstances of this present case clearly do not correspond with either of these two situation. So, here the court had made clear that the TRIPS Agreement is not above the primary community law. So, community law has basically taken the member country's point, provisions as mentioned in the WTO agreement to judge whether any practices will be anti-competitive or not.

And it is the prerogative or member country has the power to decide what may be considered as an anti-competitive behaviour and what can be the punishment for that and what can be the remedial measure for that, how the competition may be restored as we have seen in the Article 8.2 or 31(k), the competition has to be restored again in the market.

So, basically the member country has the power, European Union or European Community has the power to adjudicate its own decision. And the WTO rules are there, but it is not compulsory on the part of a member country or the European Union in this case to directly adopt or follow the WTO rules.

It has taken the principles or provisions into consideration, the provisions as specified in the WTO agreement, but again it is with respect to the domestic or it is on the part of these member countries how to adopt those specific legislation. So, the argument that the compulsory licensing or the untying of this product is not compatible with the TRIPS Agreement did not hold ground in this case. So, this is one of the important case where for the first time a decision was given by WTO member country and the TRIPS provisions were invoked.

So, this becomes very important in this respect. And the provisions of the anti-competitive practices, in the TRIPS Agreement become important more for the developing nations, as these provisions were incorporated by the concerns, issue raised by the developing nation because the developed country has more IP power and they may create a monopolistic situation or they may refuse to transfer the licensing they may refuse to, refuse for technology transfer of such IP in question.

So, to prevent them these provisions were adopted, now most of the member countries have adopted the competition law provision, but when it was incorporated out of 80, 40 members only had competition law provisions. So, it has become important, but again more guidelines or more specific guidelines have to be given, so that those countries which have not adhered or which have not formulated their competition policy may also adopt those.

Or those which have competition policy, competition law in place can also take specific remedial measures for any action that may arise in the course of international trade related to intellectual property rights.

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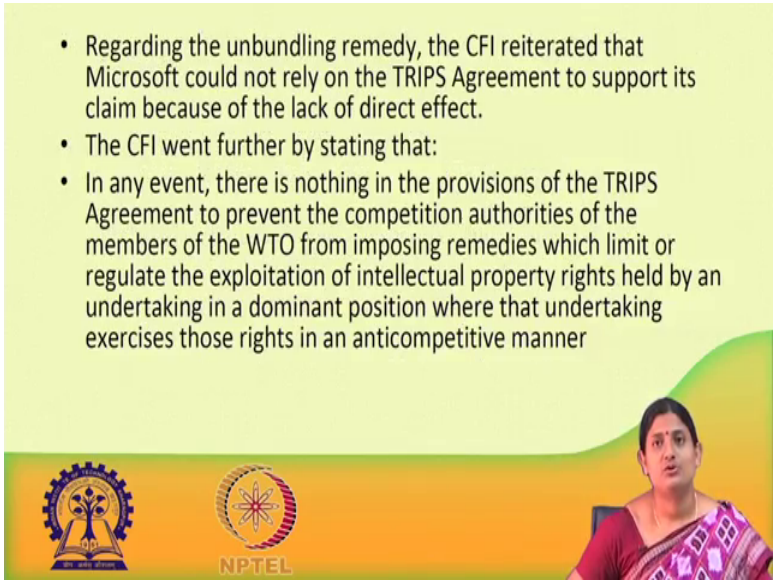

So, coming back to this case. Regarding this unbundling remedy, the court of federal instance reiterated that Microsoft could not rely on the TRIPS Agreement to support this

claim because of the lack of the direct effect. The CFI further stated that in any event there is nothing in this provision of the TRIPS Agreement to prevent the competition authorities of the member of the WTO from imposing remedies which limit or regulate the exploitation of the IPR held by an undertaking in a dominant position.

So, the member countries or the country where the problem has arisen, has the power to impose remedial measures. So, there is nothing in the TRIPS Agreement that may stop the member country from taking remedial measures because the member countries are in a better position to determine what is better for their country and how the anti-competitive behaviour can be stopped and competition can be restored in the system.

So, this is all about the provisions of the TRIPS Agreement and competition law provisions. So, I hope with this course we have got a brief idea about how competition law and intellectual property are related, at what point we may consider these are complementary to each other or support each other and required for the proper or smooth functioning of both IPR. So, thank you for being with us. See you again.

Thank you.