Microsoft has finally arrived at the Competition Commission of India — Has it crossed the line in India too?

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Microsoft has finally arrived at the Competition Commission of India — Has it crossed the line in India too?

On 17-9-2001 not surprisingly newspapers were splashed with the news: "Microsoft Corp dragged to CCI for abusing dominant position". The instant complaint has been filed before CCI by Singania & Partners against Microsoft alleging that after quoting for original equipment manufacturer (OEM) licences, at the time of delivery tried to coerce the law firm by insisting on granting them volume licence, which would cost the firm double the price. The complaint alleges that Microsoft is abusing its dominant market position by indulging in "differential" and "discriminatory" pricing. The present complaint has been filed under Section 4 of the Competition Act, 2002. The Commission is yet to take a view on it.

Microsoft commercial conduct is well customers and vendors in the PC market. It may be recalled that Microsoft was investigated and hauled up in US for violating the anti-trust rules. This was followed by its investigation in EU for such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or....

* Advocate, Senior Associate, Adyopant Legal Services, New Delhi.
2 It is not clear whether a complaint has been filed as Section 19(1)(a) of the Competition Act, 2002 provides:

"19. Inquiry into certain agreements and dominant position of enterprise.—(1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 or sub-section (1) of Section 4 either on its own motion or on—
(a) receipt of any information, in that an "information" to be filed. It may be recalled that the Competition (Amendment) Act, 2007 substituted "receipt of a complaint" by "receipt of information".
3 An OEM licence is valid for the life of a computer, while a volume licence is transferable to any other computer than on which it was originally installed.
4 Section 4 of the Indian Competition Act, 2002 specifically states that:

4. Abuse of dominant position.—(1) No enterprise shall abuse its dominant position.
5 The Sherman Act (15 U.S.C. § § 1-7) Section 2 prohibits monopolisation or attempted monopolisation; it is sometimes used in conjunction with Section 7 of the Clayton Act (15 U.S.C. §18), which prohibits mergers or acquisitions which may tend to lessen competition.
abusing its dominant position under the European Community Competition Law. Microsoft continues to face similar allegations and litigations in Korea and elsewhere in the world. Yet its global presence and market share remains unchallenged. Hence it is no surprise to hear murmurs of violation of competition law by Microsoft in India.

The present article begins with an illustration of instances of Microsoft's typical business conduct. The article in the context of regulation of competition in free market economies would then briefly consider the response of the key jurisdictions consisting of USA and EU where it indulged in these alleged conduct. An endeavour will then be made to highlight the potential pitfalls of the remedies of these jurisdictions. The article ends with some tentative thoughts on how the CCI may respond to complaint filed by Singhania and Partners. In the overall discourse the article seeks to demystify some of the core concerns of competition law in the IT Industry but presumes some awareness of software related technicalities and terminologies.

Microsoft's Business Conduct So Far

Microsoft is famous rather infamous for its business conduct which typically involves using its operating system monopoly to expand into new markets by bundling new features into Windows. However even in order to acquire and maintain the monopoly in the Operating System market in 1990s, Microsoft adopted exclusionary licensing 6 Article 102 of the Treaty on the Functioning of the European Union (formerly Art. 82) provides “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 insofar as it may affect trade between Member States.”

7 Microsoft was ordered to unbundle its messaging service from its Windows software by South Korea's Fair Trade Commission. It has been fined 33bn won ($32m; £18.4m) following an anti-trust ruling by South Korean regulators. The US software giant <http://news.bbc.co.uk/2/hi/business/4505698.stm>.

8 Opera accused Microsoft of intentionally making its MSN service incompatible with the Opera browser on several occasions. Be Inc. accused Microsoft of exclusionary and anti-competitive behavior intended to drive Be out of the market. Be even offered to license its Be Operating System (BeOS) for free to any PC vendors who would ship it pre-installed, but the vendors declined due to what Be believes were fears of pricing retaliation from Microsoft by raising the price of Microsoft Windows for one particular PC vendor. Microsoft could price that vendor's PCs out of the market.

under which PC manufacturers were required to pay for an MS-DOS 8 licence even when the system was being shipped with an alternative operating system. It also indulged in predatory pricing in order to drive competitors out of the market. Microsoft further erected technical barriers to make it appear that competing products did not work on its operating system. 10

Tying and bundling

By the time Microsoft gained monopoly in the operating system market 11 and then, in the late 1990s, it began tying the Internet Explorer (IE) web browser into its Windows operating system (without giving customers the option of buying the two products independent of each other). It further entered into exclusionary agreements with internet access providers (“IAPs”), sometimes also referred to as internet service providers (“ISPs”), and online services providers, who agreed not to use, distribute or provide ready access to any Internet browser other than IE. This helped Microsoft in acquiring a dominant share in the web browser market. 12 In a similar manner Microsoft also started bundling other software such as the Windows Media Player and Instant Messenger with the Windows operating system in various other jurisdictions. Thus through tying and bundling Microsoft gained further dominant position in other related software market.

Refusal to supply

Microsoft consistently refused to share information under defence of intellectual property rights thus excluding competitors. For example—a four-month delay in 1995 in releasing the specifications for a particular application program interface (API) to Netscape, excluded Netscape from most of the crucial holiday season that year. In a similar fashion it refused to provide information about its server protocols to its rival, Sun Microsystems which led to the EU investigation against Microsoft.

Microsoft litigation in USA and EU so far

In the background of the above conduct it would be useful look at the two key litigation against Microsoft in the last two decades i.e. US Government cases, European Commission case.

US Government cases

The United States Justice Department filed one suit and 20 States and the District of Columbia filed the other against Microsoft alleging abuse of dominant market position. The complaints basic argument was that Microsoft by its exclusionary tactics and tying of Internet Explorer to Windows operating system sought to maintain the applications barrier to entry that protected its monopoly in the desktop operating system market. 13 This would further harm and reduce innovation in browsers and operating systems. At trial the Government's case broadened and exposed Microsoft's systematic pattern of conduct aimed at maintaining the applications barrier to entry and its operating system monopoly. The trial Judge found Microsoft guilty of violation of Section 2 of the Sherman Act. 14 Although some of Microsoft's conduct did benefit consumers, the Judge found that there was no reason for Microsoft's refusal to offer an unbundled operating system, with the Internet Explorer browser removed, other than its desire to exclude Netscape from the market. The Court of Appeals for the District of Columbia Circuit, agreed with the trial court's finding. 15

13 An operating system needs compatible software applications to make the operating system attractive to consumers. At the time, most applications were written to be compatible only with Windows, but Microsoft feared that Netscape, and the Java programming language which Netscape distributed, would be able to operate across platforms. This would make it possible for applications programmers to write programs to Netscape that would run on competing operating systems, not just on Windows.


The court closely examined each of Microsoft's practices. The court held Microsoft's array of contractual practices as anti-competitive since they resulted in the contracting party's exclusive or near-exclusive use of IE and Microsoft's Java Virtual Machine (JVM), to the exclusion of Netscape's Navigator or Sun's JVM. These included agreements with Internet access providers, particularly AOL, to limit distribution of Netscape, and agreements to give independent software vendors preferential access to technical information in return for making IE the default browser for software they developed and for making Microsoft's JVM the default JVM for their software. The court further condemned Microsoft's threat to withhold support and updating of office for the Macintosh unless Apple agreed to bundle IE into its operating system and make it the default browser. Similarly, the court condemned the threats that Microsoft made against Intel to convince Intel to stop developing a fast Sun-compliant JVM.

On the bundling of IE into Windows, the court held Microsoft's decision to tie browser and operating system code, thereby making it difficult to remove browser code as abusive. It held that Microsoft's failure to provide an "add/remove" utility in Windows 98, which would have allowed computer manufacturers to hide IE's functionality, demonstrates its intention to maintain applications barrier to entry. Finally, the court condemned Microsoft's efforts to deceive software developers by not telling them that Microsoft's Java development tools would create programs that were not fully cross-platform with programs developed with Sun's Java tools. Thus the court came to the conclusion that alleged conduct of Microsoft in most part was anticompetitive and lacked any precompetitive justification.

**EU case**

Before the European Commission Microsoft was investigated upon regarding two distinct conduct, the bundling of the Windows Media Player with the Windows operating system and its refusal to provide information about its server protocols to its rival, Sun Microsystems. In its decision the Commission found that both constituted abuses of dominant position in violation of Article 82 (now Article 102 TEFU). 16

Microsoft conceded that it had a dominant position in the PC operating system market. The Commission analysed, explored the anti-competitive effects of the practices on the operating system market and on adjacent markets, such as the work group server operating systems market, the Media Player market, and media content related markets. The Commission found that Microsoft had used its dominant position to leverage itself and to extend its dominance into these related markets. 17 On the violation relating to the refusal to supply, the Commission found that Microsoft had exploited its connections between the PC operating system and its work group server operating system and deprived competitors in the work group server market of "interoperability information" that was "indispensable" for viable competition. On the tying violation, Microsoft's practice assured dominance of its Media Player, foreclosing the competitive opportunities of rivals. This had the likelihood of Microsoft gaining the power to levy further charges on many future content transactions. 18

While the US Courts focused on effect of Microsoft's conduct on the competition in the market; across the Atlantic, the European Commission stressed highly on the impact that Microsoft's behavior had on innovation. It was of the view that Microsoft's tying of the Media Player to the operating system conveys the message to entrepreneurs and investors as to the "precariousness" of investing in potentially complementary software products which Microsoft could "conceivably take interest in" and tie to Windows in the future. Similarly, if Microsoft came to dominate the work group server operating system market, Microsoft's own incentives to innovate would diminish. On the other hand, had Microsoft disclosed interoperability information the competition would be revived as Microsoft would be forced to compete with its rivals and thereby continue to innovate.

In Appeal the Court of First Instance

17 Findings of commission elaborate.

18 Sufficient data has not been reported to indicate whether this apprehension was justified. However the past and present business conduct sufficiently indicates that the Commission was not unjustified in such an apprehension. It may even be gathered that the Commissions levy of fines other restrictions have had such deterrent effect to render these apprehensions false.


(CFI) upheld the Commission on both charges, substantially agreeing with the Commission's finding that the two abuses were a "leveraging infringement." 19 The court agreed that the refusal to supply the requested information was "likely" to eliminate effective competition in the work group server operating system market, pointing out that Microsoft's refusal was "part of an overall strategy" to use its dominant position in the operating system market to "strengthen its dominant position" in that "adjacent market". On the tying claim, the CFI pointed out (taking an approach similar to US Courts) that the problem was not the integration of the Media Player into the operating system, but Microsoft's refusal to offer a disintegrated version of Windows. The Court also found that the integration offered no "technical efficiencies" and that the operating system would not be "degraded" if the Media Player were removed. Finally, the CFI also agreed with the Commission's finding that the bundling of the Media Player and the operating system deters innovation in complementary software products.

**Remedies Used So Far**

**US case**

At the conclusion of the government trial, 20 the trial court ordered two pronged remedial decree. The first aspect required Microsoft to restructure itself by splitting it into two separate companies, one to develop, licence and promote operating systems for computers, the other to carry on the applications business. 21 The assumption was that the new Applications Company would have an incentive either to expand its word software program into a platform that could challenge Windows or might team up with other operating systems (such as Linux) to challenge Windows. Similarly, the Operating Systems Company would have market incentives to provide interoperability with other office productivity suites (such as WordPerfect). The second aspect of the decree consisted of transitional conduct provisions, with nine categories of conduct covering broad areas of Microsoft's business and behavior, including the critical issues of


20 Supra, n. 9.

21 This was because Microsoft's anti-competitive conduct was viewed as universal, and not just related to a single aspect of its operations.
bundling and information disclosure. These provisions would be ended once the structural relief became effective.

The Court of Appeals however vacated the decree for two major reasons. First, the District Court failed to conduct any evidentiary hearings on the decree proposed, particularly not giving Microsoft the opportunity to present evidence of the proposal's ill-effects. Second, although the Court of Appeals affirmed the finding that Microsoft has a monopoly position, it disagreed with the structural remedy that the trial court had entered into. Given these changes, the District Court was asked to rethink whether such a "sweeping" decree was warranted. Scholars are of the view that the Bush administration "had less concern about aggressive business behavior by monopoly firms and was more skeptical about the wisdom of structural relief or, indeed, remedial efforts that might become overly regulatory".

On remand of the case to the District Court, the US Justice Department, nine of the States, and Microsoft arrived at a negotiated settlement decree, which the District Court approved a year later. The settlement decree put two sets of constraints on Microsoft's behavior. One set related specifically to the exact conduct in which Microsoft had engaged and for which the District Court had found liability (for example, dealings with OEMs). The other set was related to disclosure and ensuring innovation. Microsoft was also required to disclose application programming interfaces (APIs) that would allow software developers more easily to interoperate with the Windows operating system. Second, Microsoft was required to disclose protocols that Microsoft uses to control communication between desktop PCS and servers. This was an attempt to assist in the development of cross-platform middleware. API disclosure would ensure that middleware could interoperate with Windows; server protocol disclosure would do the same for server software. The settlement decree also provided for the establishment of a three-person "technical committee," to be paid for by Microsoft. The Committee, to be composed of "experts in software design and programming," would help monitor Microsoft's compliance with the decree.

**Implementation of the Remedy**

Compliance with the decree has been patchy. On the positive side there have been only a few complaints regarding compliance with the provisions that enjoined Microsoft from engaging in the exclusionary conduct that was at the heart of the litigation. No complaints with regard to appear to have surfaced. However, the major problem of Microsoft's compliance has been with the API disclosure requirement. In 2006 the Justice Department and the States complained to the District Court that Microsoft's performance in documenting the protocols had been "disappointing". Due to this lack of progress, the parties agreed to extend the protocols disclosure part of the decree until 2009, with a possible additional three-year extension if necessary. In October 2007 some of the State plaintiffs filed motions to extend the entirety of the companion State decree until 12-11-2012 (the Judge had entered a virtually identical decree in the States' case). This motion was opposed not only by Microsoft but by the Justice Department, supporting Microsoft's position. The District Court decided to grant a two-year extension of the full decree (rather than the five years the States sought) on the ground that Microsoft needed to comply with all the provisions of the decree if the decree were to have a chance of achieving its potential of lowering the barriers to entry into the desktop operating system market. It was observed that Microsoft's "inexcusable delay" in complying with the protocols disclosure requirements "deprived the provisions of the final judgments the chance to operate together as intended [and] is entirely incongruous with the original expectations of the parties and the Court".

**EU case**

The European Commission gave four types of remedial orders:

1. Fined Microsoft €497 million.
2. Enjoined Microsoft from repeating the two infringements or from engaging in "any act or conduct having the same or equivalent object or effect".
3. Ordered Microsoft ("within 90 days") to offer "a fully-functioning" version of Windows without the Windows Media Player, although it was still permitted to offer a bundled version of Windows.
4. Microsoft was also ordered to make available ("within 120 days") the interoperability information it had previously withheld and to licence the use of that information on "reasonable and non-discriminatory terms" for the purpose of "developing and distributing work group server operating system products".

Similar to the US settlement decree, the Commission established an expert monitoring mechanism, the monitoring trustee. The trustee would be given responsibility to advise the Commission on Microsoft's technical compliance with the Media Player and interoperability orders. Microsoft was required to give the trustee full access to its technical information and to pay the trustee's costs, including the trustee's compensation.

Microsoft went in appeal before the Court of First Instance (CFI). The Court of First Instance upheld the fine and the Commission's remedial orders. The fine was not "excessive" or arbitrarily set (Microsoft had argued that the fine should have been set

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22 The remedial decree was proposed by the plaintiff (Government) and thus the defendants had a right to be heard before the trial court could agree to such a proposal and pass a decree to implement the proposal.

23 Supra, n. 10.


26 For the District Court's opinion, see New York v. Microsoft Corp., 531 F Supp 2d 141 (DDC 2008).

27 The Commission indicated that "reasonable terms" meant that pricing could not reflect the "strategic value" stemming from Microsoft's market power either within the PC or work group server operating system markets.
at zero); the unbundling order was "proportional" to the infringement, particularly given the fact that Microsoft was still allowed to offer a bundled version of Windows and the Media Player; and the scope of the protocols disclosure order was consistent with the interoperability information that Microsoft had refused to supply. The only aspect on which the CFI disagreed with the Commission's decision was the appointment of the monitoring trustee. The CFI pointed out that the monitoring trustee is not simply an expert appointed to advise the Commission, rather, the trustee was to be independent of the Commission, was given broad power to act on his own initiative and without any time-limit, and was to be paid for by Microsoft. The CFI held that the Commission's investigative and enforcement powers did not extend that far.

However, similar to the situation in US, the Commission had difficulty getting Microsoft to implement its order. On the unbundling aspect of the order Microsoft took almost a year to begin shipping an unbundled version of Windows to OEMs (longer before it was available to consumers in Europe). There was lengthy discussion and disagreement as to the name for the unbundled product, ultimately deciding to call it "Microsoft Windows XP Home Edition N", the N standing for "not with Media Player". Competitors then complained that the initial version had technical problems because Microsoft had deleted certain registry settings when removing the Media Player. Microsoft did not deny the fact that the new version did not work well, but said that the problems were "a direct result of having to comply with the Commission's order". On intervention by the Commission Microsoft quickly agreed to restore the registry settings.

As in the United States, the European Commission has had an equally difficult time getting Microsoft to comply with its order to disclose the protocols allowing workgroup server operating systems to interoperate with Windows server operating systems and the Windows PC operating system. This was further made difficult by disputes over whether the royalties Microsoft sought were reasonable, as required under the Commission's order.

In November 2005 while reviewing Microsoft's technical documentation, the Commission found that it was "virtually impossible" to develop interoperable work group server operating system software from the technical documentation that Microsoft had developed. The Commission after setting the principle28 for determining reasonable licence fee; held that Microsoft's proposed fees were commercially substantial and that Microsoft had not shown adequate justification for the rates. The Commission imposed a fine on Microsoft to the tune of €2 million per day (about $2.6 million) if Microsoft were not in compliance with both parts of the order within a month after its decision. The monitoring trustee subsequently reviewed Microsoft's documentation. The trustee concluded in November 2005 version of Microsoft's technical documentation was "not fit for use by developers, totally insufficient and inaccurate for the purpose it is intended". Even the revisions of the technical documentation in December 2005 version failed to fix the "serious deficiencies" and March 2006 version was "fundamentally flawed in its conception, and in its level of explanation and detail". In July 2006 the Commission imposed penalties for Microsoft's failure to make adequate disclosure of the interoperability information.29 It imposed a €280 million fine (about $350 million) for non-compliance for the period of December 2005 to June 2006 and then increased the daily fine from €2 million to €3 million a day (about $3.8 million at the time) if Microsoft were not in compliance within a month of the decision.30

Microsoft even under the threat of such heavy fines took another fifteen months before complying with the Commission's order. In October 2007 the Commission announced that Microsoft had changed its licensing rates: from an initial rate of 5.95% of net revenues for a worldwide licence to all the protocols (including patented protocols) to 4% for a patent licence, and a one-time payment of €10,000 for the rest of the protocols (about $14,000). The Commission was satisfied with the new rates and were viewed them as reasonable and non-discriminatory, as it had originally required. The Commission also announced that the interoperability information "appears to be complete and accurate to the extent that a software development project can be based on it".

However any additional fines for Microsoft's non-compliance with the reasonable royalty order were still left undetermined. In February 2008 the Commission issued a decision reviewing the royalties Microsoft had been charging between June 2006 and October 2007 for licensing the non-patented protocols.31 On the basis of the principle laid down in the November 2005 decision the Commission concluded that Microsoft's licensing fees for the period had not been "reasonable." It accordingly imposed a fine of €899 (about $1.3 billion), bringing Microsoft's fines for non-compliance with the interoperability order to approximately $1.7 billion over a period of four years. However for a company that makes profits of $1bn per month would that really be a deterrent is a question that has an obvious answer. Nevertheless, Microsoft decided to appeal against this fine which is pending while the fines lie in escrow.

As with the unbundling order, it is difficult to see a positive effect of the disclosure order on competition, either in the work group server operating system market or in the desktop operating system market. In its 2005 decision reviewing Microsoft's compliance the Commission pointed out that Microsoft's market share in the work group server operating system market had "continued to grow" since the Commission's 2004 violation decision. In its 2008 decision imposing fines for unreasonable royalty rates, the Commission noted that no firm seeking to develop a competing work group server operating system had yet taken a licence under the program; the only licences taken had been for products that did not directly

30 The Commission fines were under this order were restricted to Microsoft's inadequate disclosure, the question whether there should be an additional fine, dating from December 2005, if the Commission determined that Microsoft's licensing fees were not "reasonable" was not yet decided.
compete with Microsoft's server operating system. In fact, the Commission noted, Microsoft's share of the work group server operating system market had increased in 2006 and in 2007. This begs the question as to whether Microsoft then succeeded in its leveraging strategy? Was the remedy too late or was the remedy not adequate?

The Indian case

Little information is available at this stage on the details of the complaint filed by Singhania and Partners. One aspect that is clear from the news reporting is that it relates to discriminatory pricing which is examinable under the recently functioning competition law regime in India. Under the Section 18 of the Competition Act, 2002:

18. Duties of Commission.—Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India:

Thus, under the Act, the Commission is free to take action against anti-competitive agreements (such as cartels), abuse of dominant position (such as predatory pricing and unfair or discriminatory conditions of prices) and combinations (such as mergers).

The Indian Competition Act deals with the abuse of dominant position under Section 4 which states that:

4. Abuse of dominant position.—(1) No enterprise shall abuse its dominant position.

It further states that there shall be an abuse of dominant position if an enterprise imposes unfair or discriminatory conditions or prices in the purchase or sale of goods or provision of services or if it limits or restricts production of goods or provision of services or technical and scientific development or it denies market access, etc.

It is pertinent to state that that dominant position is not defined on the basis of any specific parameters or any specific share of the market as used to be the methodology in the case in the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. On the other hand, dominance of an enterprise is to be judged by its power to operate independently of competitive forces or to affect its competitors or consumers in its favour. Thus, an enterprise with a share of even less than 15% of the market could possibly be determined to be the "dominant" if it satisfies the above criteria; on the other hand, an enterprise with higher market share may not be considered as "dominant" if it does not meet the criteria mentioned in the Act. The Act also lays down a number of factors which the Commission is expected to take into consideration in determining whether an enterprise enjoys a dominant position or not, such as market share, size and resources of the enterprise, size and importance of competitors, economic power of the enterprises, vertical integration of the enterprises, entry barriers, etc. which involve a fair amount of economic analysis.

In order to even come to an opinion as to whether a case of investigation is established against Microsoft on the basis of the information filed before it, the Competition Commission of India (CCI) would need considerable wherewithal. Microsoft with its legacy of competition law related litigation is better equipped to stall any such investigation. Would the CCI take up this challenge with a resolve to fetter the wings of the Redmond Giant before it raises its head in India? That Microsoft has clear cut dominance in the operating system market as well as Microsoft Office product market is a fact beyond doubt. In this context is acquiescing to piracy or giving them free of cost an anti-competitive behaviour? Is insisting on selling a product on volume licensing terms as opposed to an OEM licence term discriminatory and differential pricing? Would the CCI deem it fit to order an investigation and broaden the scope of the investigation beyond the allegations of discriminatory pricing such as applications entry to barrier? Any analysis of the case against Microsoft's business conduct in India would need an indepth analysis of data relating to its marketing, sales and related business activities in India. Would the CCI call for all the requisite data for the purposes of the investigation? The CCI has the challenging task of satisfying itself whether Microsoft is indeed abusing this dominant market position in the "relevant geographic market" as well as the "relevant product market" based on the criteria laid down in the Act. The CCI has the benefit of drawing from the jurisprudence and precedents of the US and the EU litigation. At the same time it has the difficult task of applying the rules in the context of the information and the business conduct before it in the Indian market.

Remedy in India

Should the CCI find Microsoft guilty of abusing its dominant position, there are penalties that can be imposed and various directions that can be given by the Commission. It can impose a penalty of not more than 10% of the turnover of the enterprise. It can pass a "cease and desist" order, and pass such other orders as may be considered appropriate. It can also recommend to the Central Government for "division of dominant enterprise." The Commission also has powers to fines to the tune of 1 lakh per day subject to a maximum of 1 crore Indian rupees. In essence, the Competition Commission of India has the power to impose penalties similar to what has been directed by the European Competition Commission or it can recommend division of an enterprise as had been ordered by US trial court, if these are considered appropriate to the case. However, since the powers of the CCI are limited to being enforced within its jurisdictions it will be a challenging task to enforce an order to the effect of dividing an enterprise (in case of company like Microsoft) if such an enterprise would only be affected in its parent country (in this case USA). Having said that in view of the manner in which Microsoft has been conducting its business worldwide despite the various allegations and judgments, the CCI may have to devise an approach that encourages Microsoft to conduct itself in competition compliant manner in view of the incentive of being able to reap benefits in the high concentration markets of India. Can Microsoft be encouraged to look at its corporate governance agenda in this context?

Implications of the Remedies used so far in Indian Context

The forgoing discussion on remedies used so far in US and Europe tell a disheartening story. The effort to remedy Microsoft's monopolising conduct and bring competition to the markets involved is

33 S. 19(4) of the Competition Act, 2002.
34 The CCI has the power to institute an investigation.
35 The CCI has the power.
36 S. 19(6) of the Competition Act, 2002.
37 S. 19(7) of the Competition Act, 2002.
38 S. 27(b) of the Competition Act, 2002.
39 Ss. 27(a), (e), (g) of the Competition Act, 2002.
40 S. 28 of the Competition Act, 2002.
41 S. 42 of the Competition Act, 2002.
42 The author consciously restrains from suggesting and outlining any concrete approach in this article as the matter is more or sub judice.
discouraging. The effort has been time consuming, chequered by Microsoft's stubbornness where compliance really mattered and with little benefits for consumers or for innovation. Despite all the measures Microsoft's share of the PC operating system market remains above 90 per cent, a position it has held for nearly two decades. No remedy could assure that there would be competition in the relevant market, but the lack of any change in Microsoft's monopoly position in the more than seven years that the US decree has been in effect is a good sign that the decree has not opened the operating system market to competition. Most observers also agree that the browser itself has remained stagnant until the recent challenge from Firefox.

To the extent that protocols have been documented and licenced, there is no indication of the emergence of a new server operating system that might challenge Microsoft (media streaming has been the most popular use of the licences) or of any other middleware program that could serve as the cross-platform function that Netscape's browser had threatened. On the other side of the Atlantic threat and order of heavy fines had little effect on meeting deadlines, although it achieved some success on disclosure. The disclosure however has failed to show any effect on innovation and competition in the market. At the same time the presence of an unbundled version of Windows and Windows Media Player in Europe showed no change in the consumer preference in the nascence of any price difference. In fact there was hardly any sale of the unbundled version.

There are a number of lessons that can be drawn from this saga. The lessons deal with the political aspects of anti-trust remedies and issues of litigation. The difference in approaches to remedy also reflects the difference in their philosophy and the anti-trust policy these jurisdictions pursue. The CCI when faced with the challenges has an advantage of learning from the lessons in history and devising its own view as to which direction the policy relating to competition law should take in this context. The choice between imposing heavy penalties and dividing enterprise would remain open to it. However learning from the futility of both would the CCI carve out its own remedy would be something that remains to be seen (provided the CCI even investigates Microsoft's business conduct and finds it guilty)! The final caveat for parties concerned is that it may be best to draw out a remedy that can be effectively implemented in India to achieve the desired result even before embarking on the investigation.

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