

**Intellectual Property Rights, And Competition Law**  
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**Lecture - 10**  
**Introduction to Competition Law - Anti - Competitive Practices**

Dear students, today we will discuss about the *Indian Competition Act*, various provisions and especially about the Anti Competitive Practices

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as well as the abuse of dominance and regulation of combinations. It is divided into three parts. Today we will start with the Indian scenario of *Indian Competition Act* and also the anticompetitive practices especially the horizontal agreements.

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### COMPETITION ACT, 2002

- The Competition Act, 2002 came into existence in January 2003 and the Competition Commission of India was established in October, 2003
- However, the Act could not be notified due to legal hassles.
- Finally, the Parliament in September, 2007 passed the Competition (Amendment) Act, 2007 and the Act became operational.
- CCI came into existence on 1<sup>st</sup> March, 2009.
- Provisions were notified on May 20, 2009.
- The provisions relating to Combinations were notified w.e.f 1<sup>st</sup> of June, 2011.



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We know that the *Indian Competition Act* was passed in 2002, which I mentioned in the last class, and came into effect in 2003. But yesterday also I mentioned that due to court cases and other legal problems it was not enforced completely.

And finally, in 2007 the amendment act was passed and the Act became operational. And the *Competition Commission of India* took another two years and became operational from 2009 onwards and the *Combination Rules* were actually notified in 2011.

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### Preamble

- To prevent practices having adverse effect on competition
- To promote and sustain competition in markets
- To protect the interests of consumers
- To ensure freedom of trade carried on by other participants in markets in India.



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We will see these notifications in detail. If you look into the *Indian Competition Act* it basically is to prevent practices having adverse effect on competition. And to promote and sustain competition in the markets and to protect interest of consumers, to ensure freedom of trade carried on by other participants in the markets in India. We will see elaborately what is this adverse effect on competition. The preamble very clearly states what it wants to achieve in commentariat with the modern competition laws of United States and European Union.

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## Mandate

- Prohibit Anti-Competitive Agreements
- Prohibit Abuse of Dominant Position.
- Regulate Combinations
- Render opinion on competition issues to statutory authority / Government
- Undertake Competition Advocacy

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And the mandate of the Indian Competition Act is very clear. It prohibits anti-competitive agreements and we will see in detail what are those anti-competitive agreements. Then it prohibits abuse of dominant position, regulates combination and we will also discuss about the Indian competition authority and what are the duties.

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The slide is titled "Overview" in a large, bold, black font. Below the title, there is a list of four key provisions of the Indian Competition Act, each in a separate line: "Prohibit anti-competitive agreements (S 3)", "Prohibit abuse of dominant position (S 4)", "Regulate combinations (S 6)", and "Mandate competition advocacy (S 49)". The slide has a light green background with a yellow wavy line at the bottom. In the bottom left corner, there are logos for the Ministry of Law and Justice, Government of India, and NPTEL. In the bottom right corner, there is a small video inset of a man in a blue shirt speaking.

## Overview

- Prohibit anti-competitive agreements (S 3)
- Prohibit abuse of dominant position (S 4)
- Regulate combinations (S 6)
- Mandate competition advocacy (S 49)

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And let's look into the important provisions of the Indian competition act: Section 3 talks about anti-competitive agreements, Section 4 talks about the abuse of dominant position, Section 6 talks about the regulation of combinations and the competition advocacy of the competition commission of India is in Section 49.

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The slide is titled "ANTI COMPETITIVE AGREEMENTS" in a bold, black font. Below the title, there is a paragraph explaining that whenever there is an effort to restrict competition through means such as collusive agreements to fix prices and outputs, they need to be prohibited through legal devices provided by the competition law. The slide then lists two categories of agreements: "Horizontal Agreements" and "Vertical Agreements". Under "Horizontal Agreements", there are four bullet points: "Agreement to limit production and/or supply", "Agreement to allocate markets", "Agreement to fix price", and "Bid rigging or collusive bidding". Under "Vertical Agreements", there are three bullet points: "Tie-in arrangement", "Exclusive supply / distribution arrangement", and "Resale price maintenance; Refusal to deal". Below these, there is a section for "Concerted Actions/practices" and "Exemptions – IPRs, Copy Rights, Patents etc.". At the bottom, there is a red line of text stating "Section 3 of the Act deals with anti-competitive agreements." The slide has a light green background with a yellow wavy line at the bottom. In the bottom left corner, there are logos for the Ministry of Law and Justice, Government of India, and NPTEL. In the bottom right corner, there is a small video inset of a man in a blue shirt speaking.

## ANTI COMPETITIVE AGREEMENTS

Whenever, there is effort to restrict competition through means such as collusive agreements to fix prices and outputs they need to be prohibited through legal devices provided by the competition law.

**Horizontal Agreements**

- Agreement to limit production and/or supply;
- Agreement to allocate markets;
- Agreement to fix price;
- Bid rigging or collusive bidding;

**Vertical Agreements**

- Tie-in arrangement;
- Exclusive supply / distribution arrangement;
- Resale price maintenance;
- Refusal to deal.

**Concerted Actions/practices**

**Exemptions –**  
IPRs, Copy Rights, Patents etc.

*Section 3 of the Act deals with anti-competitive agreements.*

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And today the focus of our class is on the anti-competitive agreements which are classified into two important categories; one is horizontal agreements and the second one



is vertical agreements. In the last class I have mentioned what are horizontal agreements and vertical agreements.

Horizontal agreements are amongst companies who are in the same area, the same plane, and in the vertical agreements are at different levels of their business. Within the horizontal agreements we will seek elaborately what are those anti-competitive agreements which are prohibited agreements under the competition law.

These are agreements to limit production or supply, the agreements to allocate markets, agreements to fix prices, then bid rigging or collusive bid rigging or collusion between parties. And the vertical agreements include tie-in agreements, arrangements, exclusive supply or distribution arrangements, then resale price maintenance, refusal to deal and other concerted action and practices which we will see in the coming classes.

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**WHAT IS ANTI COMPETITIVE AGREEMENT**

- An anti-competitive agreement is where two or more companies operating as competitors in the same market agree to co-operate by, for example, **fixing prices** or **dividing up the market**, which has the effect of **reducing competition** in their market.
- *Northern Pacific Ry. V. United States* [1958] 356 US 1 - "There are certain agreements or practises which, because of their pernicious effects on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable, and therefore illegal without any elaborate inquiry as to the precise harm they have caused or the business excuse for their use"

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And today our focus is on the horizontal agreements and what are basically the anti-competitive agreements? Anti-competitive agreements are certain behaviour which yesterday we talked about: the behaviour of firms, behaviour of companies, behaviour of huge business firms. The anti-competitive agreements happens when two or more companies or two or more competitors specifically in the same market agree to co-

operate each other for fixing prices. And they may divide the geographical market into different areas with the ultimate objective of reducing competition in the market.

In 1958 in one of the United States cases i.e. *Northern Pacific Railway Company versus the United States*, the court said that “there are certain agreements or practices which because of their *pernicious* effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable. And therefore, illegal without any elaborate inquiry as to the precise harm, they have caused or the business excused for their use”. So what are anti-competitive agreements? The answer is very clear. It basically means that those agreements which have a pernicious effect on competition are known as the anti-competitive agreements.

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**Anti-competitive Agreements**

- The Anti-competitive Agreements as provided under the Competition Act, 2002 can be subdivided into
  1. Horizontal Agreements and
  2. Vertical Agreements

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And we will see these agreements. As I told you the Indian competition act is divided into two categories; one is horizontal agreements and the other one is vertical agreement.

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## Horizontal agreements

- Limits or controls production, supply, markets, technical development, investment or provisions of service.
- shares the market or source of production, allocation of geographical market, limiting customers etc,



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Basically the horizontal agreements are to control production, supply, markets, technical developments, investment or provisions of service. And also to share the market, source of production and allocation of geographical market, then limiting customers. All these are against the basic principles of competition in the market, so these will be considered in detail under these horizontal agreements.


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## Horizontal Agreements

- Under the Act, horizontal agreements are placed in a special category and are subject to the adverse presumption of being anti-competitive.
- This is also known as 'per se' rule.
- This implies that if there exists a horizontal agreement under Section 3(3) of the Act, then it will be presumed that such an agreement is anti-competitive and has an appreciable adverse effect on competition



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So, it is already mentioned that these are in the pernicious category of activities of business firms which are considered to bring an adverse effect on competition or are otherwise anti-competitive in nature because all horizontal agreements are considered to be the *per se* anti-competitive. The *per se rule* is very important to be understood.

All horizontal agreements are presumed to be pernicious in nature and are considered to be anti-competitive in nature. So, Section 3(3) very clearly says that it is presumed that such an agreement is anti-competitive and has an *appreciable adverse effect on competition* under Section 19 of the Indian Competition Act which you will see later.

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### Per se rule

- The 'per se' rule as applicable for horizontal agreements does not apply for vertical agreements
- Hence, a vertical agreement is not *per se* anti-competitive or does not have an appreciable adverse effect on competition

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I already said that the *per se rule* is applicable to the horizontal agreements, but the *per se rule* is not applicable to the vertical agreements (but not all vertical agreements which we will see in later class, which are those applicable vertical agreements). So, vertical agreements are not *per se* anti-competitive, but horizontal agreements are considered to be *per se* anti-competitive.

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## Vertical Agreements

- Enterprises or persons at different stages of business, level of production or chain in different markets.
- Tie-in Agreements
- Exclusive supply agreement
- Exclusive distribution agreement
- Refusal to deal
- Re-sale price maintenance.



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So the vertical agreements includes the enterprises or business firms at different level of production or in the chain or in different markets. And these includes tie-in agreements, exclusive distribution agreements, refusal to deal and resale price maintenance which we will see later.

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## Appreciable adverse Effect

- Section 19 (3) of the Competition Act provides that while determining whether an agreement has an appreciable adverse impact on competition or not, the Competition Commission of India has to look at the following factors:
  1. Creation of barriers to new entrants in the market;
  2. Driving existing competitors out of the market;
  3. Foreclosure of competition by hindering entry into the market;
  4. Accrual of benefits to consumers;
  5. Improvements in production or distribution of goods or provision of services;
  6. Promotion of technical, scientific and economic development by means of production or distribution of goods



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If some kind of activity of a business firm does not have an *appreciable adverse effect on competition* then it cannot be prohibited. But what can be prohibited, if any activities



which have an appreciable adverse effect on competition, is explained under Section 19 of the Indian Competition Act which states whether an agreement has an appreciable adverse impact or effect on competition or not.

Under this particular section certain factors are taken into consideration to determine whether there is an appreciable adverse effect on competition or not. These are: creation of barriers to new entrant in the market, driving existing competitors out of the market i.e. predatory in nature, then foreclosure of competition by hindering entry into the market, prevention of the accrual of benefit to consumers, then improvements in production or distribution of goods or provisions of services, then promotion of technical, scientific and economic development by means of production or distribution of goods. So, illegal collaboration for any of these kind of activities will be considered as an appreciable adverse effect on competition which is prohibited under the competition act.

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### Appreciable adverse Effect

- **Creation of new barriers:** They refer to hindrance without which firms have full freedom to enter/exit the market allowing competition to prevail and substitutes to remain in the market, which in turn helps in maintaining fair prices
- **Driving existing competitors out of the market:** It refers to the capacity of big firms to drive competitors out of the market owing to their monopolistic advantages used to maintain favourable prices due to efficiency of large scale production

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The companies which are operating already in the market can create new barriers in the market, so that the new entrant cannot enter the market because of these barriers. So, the hindrances in full freedom to enter or exit the market, allowing competition to prevail and substitutes to remain in the market.

So, if these companies do not allow the substitutes to remain in the market then it will be considered as an appreciable adverse effect on competition. And the second category is predatory in nature, what do you mean by predatory in nature? It is driving the existing competitors out of the market, so that you can capture the market completely.

So, the firms in order to drive competitors out of the market or into their monopolistic advantages maintain favourable prices due to efficiency of large scale production because of their dominant position in the market. So, they can drive out the small players from the market, which will have an adverse effect on competition.

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**Appreciable adverse Effect**

- **Foreclosure of competition:** It refers to the ability of firms to singularly or jointly prevent the entry of other firms in the market including potential entrants
- **Accrual of Benefits to consumers:** As a result of anti-competitive agreements, price may escalate leading to enhancement of profit
- **Improvement in production and distribution of goods or provision of services and Promotion of technical, scientific and economic development by means of production or distribution of goods**

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And the foreclosure of competition refers to the ability of firms to singularly or jointly prevent the entry of firms in the market including potential entrants. So, the large firms or the large players can prevent the small firms from entering into the market. Such foreclosure of competition also is considered to have an appreciable adverse effect on competition.

Then preventing the accruing of benefit to consumers. Because of these anti-competitive agreements, anti-competitive activity the price may escalate which will lead to the enhancement of profit. But it will adversely affect the consumers and it will have an appreciable adverse effect on competition in the market which is prohibitive in nature.



Then improvement in production and distribution of goods or provision of services, promotion of technical, scientific and economic development by means of production of distribution of goods. So, these factors are also taken into consideration for calculating whether there is an appreciable adverse effect on competition.

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**CARTELS**

- Cartels are agreements between enterprises, persons, a government department and association of persons not to compete on price, product, services or customers.
- Most pernicious form of anti- competitive practice which results in higher prices, poor quality and limited choice for goods or / and services.
- International Cartel – Import Cartel and Export Cartel.

**Conditions conducive for formation of cartels**

- High concentration
- High entry and exit barriers
- Homogeneity
- Dependence of the consumers on a product

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And the most important category of the pernicious effect on the market is cartelization. Cartelization and cartels are known to be pernicious to the market. Because the concept of the entire modern competition law itself is based on to take action against the cartels which are known as trust (in the last class we talked about the history in the united states). So competition law is for taking action against the cartels.

And the cartels are basically agreements between enterprises or persons or the government associations or an association of persons or against an agreement not to compete on price, product, service or customers. These are considered as cartels. And these cartels are considered to be the most pernicious form of anti-competitive practice which always results in higher prices.

The choice for consumers is not going to be present and the quality of the product is going to be very less, then limited choices for the goods and services because of the

cartels. So there can be import cartels, there can be export cartels, there can be production cartels and different kind of categories of cartels.

So, for the formation of cartels there are certain conditions which are high concentration, high entry and exit barriers, homogeneity and dependence of consumers on a particular product. These can be considered to find whether the cartels are working or not.

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And Section 2 of the Indian Competition Act clearly says the cartel includes an association of producers, sellers, distributors, traders or service providers who by agreement amongst themselves limit, control or attempt to control the production, distribution sale or price of trade in goods or provisions of services. It means that the cartels can happen at any level of production or any level of distribution or in between market factory to the consumer. Anywhere else the cartels can happen.


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## Cartels

- Cartels fall in this category of pernicious agreements which tend to cause great harm to consumers in particular and economy in general.
- Cartel includes an Association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services
- The direct effect of Cartel is that consumers pay more for the respective goods or services than they would otherwise pay in an efficient competitive market



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And basically the cartels is considered to be the most pernicious because it directly affects the market and it directly affects the consumer welfare in general. It is a harm to the consumers, the prices will go up and the cartel even try to restrict the market, not only the market even the supply. And even when there is less supply, they can raise the prices, they can increase the prices and thus get more and more profit out of it.

And the cartels may be the sellers, those who are producers as well as sellers, distributors, traders, service providers and all these people may be involved in a cartel including distribution, sale or price. So, the direct effect of cartel is that the consumers pay more for the respective goods or services for which otherwise they pay less in a competitive market, in an ideal competitive market.


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## CARTELS

- Cartels are considered to be one of the most distortive conducts under any competition regime.
- It involves unfair practise by the competitors in the form of price collusion, which in turn leads to reduction of choice for the consumers
- The severity of this conduct is evidenced by the fact, that cartels have been subjected to the highest penalty under the Competition Act



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And again the cartels are the most distortive in any market. Because they form price collusion, their price collusion will be between the participants and this leads to the reduction of choices of the products and the consumers will be at a disadvantage. Most importantly the highest penalty is imposed on cartels and we will see the case law at the end of this particular class.

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## Cartels – 4 types of conduct

- Price fixing
- Market sharing
- Output restricting
- Bid rigging

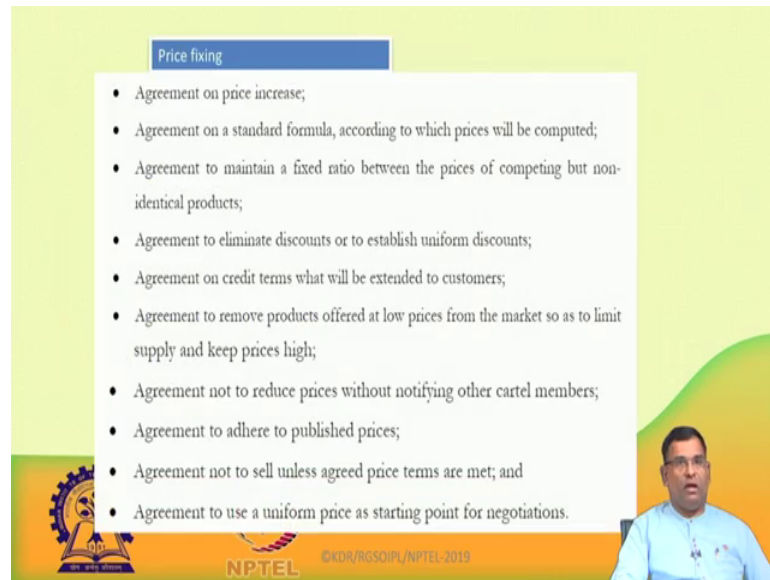


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And the cartels are considered to be of 4 types, I would say 4 conducts. These are price fixing, market sharing, output restricting and bid rigging. These are the 4 type of cartels which can be formed.

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**Price fixing**

- Agreement on price increase;
- Agreement on a standard formula, according to which prices will be computed;
- Agreement to maintain a fixed ratio between the prices of competing but non-identical products;
- Agreement to eliminate discounts or to establish uniform discounts;
- Agreement on credit terms what will be extended to customers;
- Agreement to remove products offered at low prices from the market so as to limit supply and keep prices high;
- Agreement not to reduce prices without notifying other cartel members;
- Agreement to adhere to published prices;
- Agreement not to sell unless agreed price terms are met; and
- Agreement to use a uniform price as starting point for negotiations.

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We will see these one by one. What is the price fixing? Price fixing is the most easy way of cartelization, because there will be printed or maximum retail prices onto which the sellers stick the maximum consumer prices or maximum retail prices. So by this they may enter into increasing the prices, they may increase by a standard formula for fixing the prices or computing the prices.

Then again agreement to maintain a fixed ratio between the competing prices, but not for identical products. There can even be cartel for fixing prices for known identical products, substitutive products. Then agreement to eliminate discounts or established uniform discounts among all the producers. Then agreement on credit terms. The credit terms will be uniform amongst all the participants in cartels for what will be executed to the customers.

And then removing the low priced products from the market, so that cartels can impose their products into the market, enforce the sale of their products into the market. So, they

remove the low priced goods from the market, and also cartels can form agreement not to reduce prices without notifying the other cartel member.

And also they can agree upon to adhere to the published prices, the same published prices and that they have to consult each other for any kind of changes in the prices. So, it means that it is almost impossible for the customer to get a product for a competitive price from different producers or from different distributors. And so all these categories are price fixing and price fixing is considered to be very pernicious to the market because the consumers are going to pay a higher price for the products. There is no consumer choice at all.

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**PRICE FIXING**

- Price Fixing Occurs when competing businesses make an agreement that has the purpose or effect of fixing, controlling or maintaining the price of the goods or services
- The Agreements to eliminate, minimize or restrict other terms and conditions for sale such as discounts, advertising allowance, credit terms or freight charges, lead to illegal price fixing and thus are *per se* illegal
- The aim and result of every effective price-fixing agreement is the elimination of one form of competition

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We can say that the purpose is very clear to fix or control and maintain the price of the goods or services, so that the producers can make more and more profit. And then there can be agreements to eliminate or minimize or restrict other terms and conditions of such sales or discounts so that all the participants in the cartel offer the same level of discounts.

So, price fixing is *per se* considered to be illegal because price fixing is the most distortive in nature and which is harmful to the customers at large. So, the effective price

fixing agreement for eliminating competition from the market will be considered as pernicious or distorting and it is anti-competitive in nature.

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*Builders' Association of India v. Cement Manufacturers' Association & Ors.*

- The CCI, through its order dated 20 June 2012, imposed a penalty of approximately six thousand crores (*approx.* USD 1.1 billion) on cement manufacturers in India after holding them guilty of cartelization in the cement industry.
- The penalty has been imposed at the rate of 0.5 times the net profit of such manufactures for the past two years.
- Additionally, the Cement Manufacturer's Association (the **CMA**) has been fined 10% of its total receipts for the past two years for its role as the platform from which the cartel activity took place.

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And one case we have to discuss if you want to understand the cartel i.e. the *Builders association of India versus Cement Manufacturers Association* which is popularly known as *Cement Cartels* case in India. The facts of the case are very simple the Competition Commission of India initiated an investigation and finally passed an order in 2012 on the Cement Manufacturers in India for entering into different kind of cartels. You can see that a huge sum of money around 1.1 billion US dollars were imposed as fine on the Indian cement manufactures holding them guilty of running a cartel in cement industry. The penalty is imposed at the rate of 0.5 times the net profit of such manufactures for 2 years from 2010 to 2012. So, it means that it is an additional penalty. The cement manufacturers association has been fined 10 percent of its total receipts for the 2 years period in which they engaged in the cartel activity.



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## Facts

- The decision of the CCI emanates from information filed by the Builders' Association of India on 26 July 2010 against the CMA and ACC, Gujarat Ambuja Cements Limited (now Ambuja Cements Limited), Ultratech Cements, Grasim Cements (now merged with Ultratech Cements), JK Cements, India Cements, Madras Cements, Century Textiles & Industries Limited, Binani Cements, Lafarge India and Jaiprakash Associates Limited.



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This is a huge fine on the cement industries and all the big players, the manufacturers were included. All of them were involved in this cartelization and huge fine was imposed on these companies.

But ultimately these huge fines on the companies, these companies always try to pass this burden to the consumers and the cement prices in India has increased for the last 10 years. We know there is a huge increase and there is no match in the percentage increase with their production prices.

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## Market structure

- *Market Structure of the Cement Industry:* As previously stated, the CCI observed that no player can be said to be dominant in India as per the prevailing market structure.
- The industry is characterised by twelve cement companies having about 75% of the total capacity in India with about 21 companies controlling about 90% market share in terms of capacity.
- Given the oligopolistic nature of the market, each company takes into account the likely reactions of other companies while making decisions particularly as regards prices.
- In such a scenario, collusion between companies is possible and can be adduced from circumstantial evidence.



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The competition commission has elaborately discussed each component of the cartelization and the market structure of the cement industry. So, the competition commission of India has observed that no player can be said to be dominant in India as per the prevailing market structure, because each and everybody is part of the cartel, so there is no market dominance rather market distribution by the companies.



So, 12 cement companies are having about 75 percent of the total capacity in India and about 21 companies are completely controlling 90 percent of the market share in terms of capacity in India. It means that the total control is with these 21 companies.

So, it gives an oligopolistic or a monopolistic market for each company to exploit. So the decisions as part of the cartel are final. So, the collusion between the companies are possible if there is no dominant position, so the CCI very clearly said that the market structure of the cement industry is very prominent or prone to cartelization.


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## Circumstantial evidence

- CCI noted that the CMA publishes statistics on production and dispatch of each company (factory wise) and circulates such information amongst its members.
- The sharing of price, production and dispatch data makes co-ordination easier amongst the cement companies.



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We can see that the statistics of the production dispatch of the companies are also very important. So, it is said that the sharing of price production and dispatch data makes co-ordination easier amongst the cement companies. So, each and every company share their data with one another, so that they can control the market very well.


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## Price parallelism

- *Price Parallelism:* The DG had conducted an economic analysis of price data which indicated that there was a very strong positive correlation in the prices of all companies.
- This, according to the DG, confirmed price parallelism. The respondents argued that the correlation benchmark of 0.5 taken by the DG was arbitrary.
- Moreover, the prices used by the DG were incomparable since the prices submitted by the companies differed from each other (some had submitted gross prices, while others had submitted depot prices, average retail prices etc.).
- The CCI did not accept these arguments and stated that given the nature of data exchanged between the parties, price parallelism could not be a reflection of non-collusive oligopolistic market conditions.



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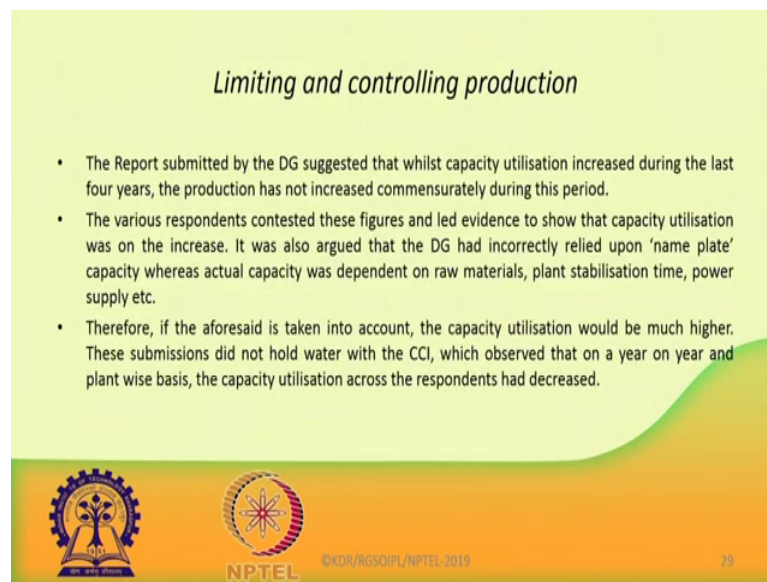


And most importantly the competition commission has discussed elaborately on price parallelism so what is this price parallelism? This is an economic analysis of price data

which indicated that, there is a strong positive correlation of prices of cement of different companies. So, it does not matter which are the company, the prices, there is a huge correlation between the prices of these companies.



So, the DG found a price parallelism between the cement companies which leads to this particular cartelization. And the CCI did not accept the arguments of these cement companies and the data exchanged between the parties confirmed this price parallelism which has happened between these manufactures.

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*Limiting and controlling production*

- The Report submitted by the DG suggested that whilst capacity utilisation increased during the last four years, the production has not increased commensurately during this period.
- The various respondents contested these figures and led evidence to show that capacity utilisation was on the increase. It was also argued that the DG had incorrectly relied upon 'name plate' capacity whereas actual capacity was dependent on raw materials, plant stabilisation time, power supply etc.
- Therefore, if the aforesaid is taken into account, the capacity utilisation would be much higher. These submissions did not hold water with the CCI, which observed that on a year on year and plant wise basis, the capacity utilisation across the respondents had decreased.

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And limiting and controlling of production: The CCI also found that these cartels have taken a decision to limit and control the complete production. Market Control itself can happen due to the scarcity of cement in the market, so that they can increase the prices.

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## Case

- *Limiting and controlling supply:* The CCI observed that the forces of demand and supply dictated that the dispatch figures should have been more than or equal to consumption of cement in the corresponding period of the previous year.
- However, in two months of November and December 2010, the dispatch was lower than the actual consumption for the corresponding months of 2009.
- It was not the case that the market could not absorb the supplies, but, instead, the lower dispatches coupled with the lower utilisation establishes that the cement companies indulged in controlling and limiting the supply of cement in the market.




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Not only production, they control the supply also. And in this particular matter the CCI observed that force of demand and supply should be depend upon the market. But if the manufacturer or the producer controls or limits the supply then the prices will increase will dictate the dispatch of figures and dispatch. It is a dictatorship on the market that how much to be consumed by the consumers in a period of time, within a period of the previous years, so the data shows that they have controlled the dispatch as well.


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## Case

- *Production Parallelism:* The production figures across cement companies (in a particular geographical region) showed strong positive correlation.
- According to the CCI, in November – December 2010 the cement companies reduced production collectively, although during the same period in 2009, the production of the cement companies differed.
- This was a clear indication of co-ordinated behaviour.

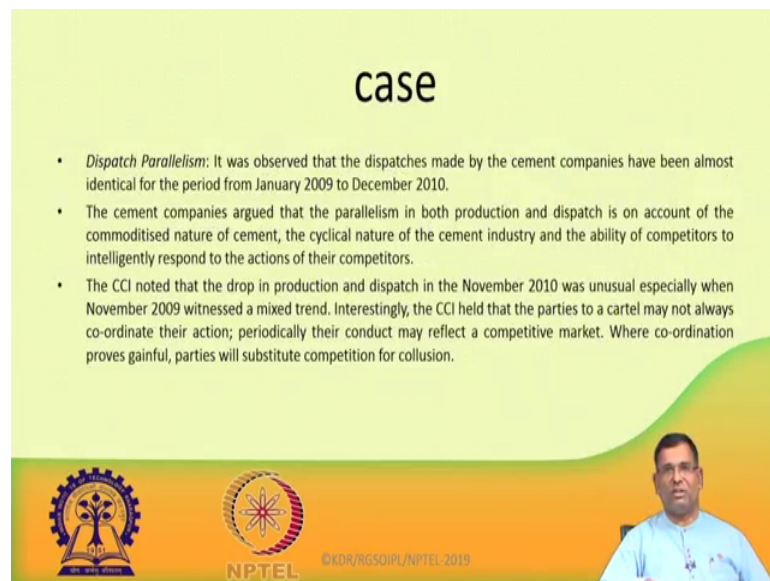


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And most importantly the production parallelism: We talked about price parallelism, we talked about the supply, now we will talk about the production parallelism. The production figures shows that there is a positive correlation among all these manufactures on production level as well, because it is very well coordinated behavior of the cement industry leading to cartelization.

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The slide is titled "case" and contains three bullet points. The first bullet point states that dispatches made by cement companies were almost identical from January 2009 to December 2010. The second bullet point explains that cement companies argued this parallelism was due to the commoditized nature of cement, the cyclical nature of the industry, and the ability of competitors to respond to each other. The third bullet point notes that the CCI observed an unusual drop in production and dispatch in November 2010, contrasting it with a mixed trend in November 2009, and concluded that parties to a cartel may not always co-ordinate their actions, but their conduct may reflect a competitive market where co-ordination is profitable.

case

- *Dispatch Parallelism:* It was observed that the dispatches made by the cement companies have been almost identical for the period from January 2009 to December 2010.
- The cement companies argued that the parallelism in both production and dispatch is on account of the commoditised nature of cement, the cyclical nature of the cement industry and the ability of competitors to intelligently respond to the actions of their competitors.
- The CCI noted that the drop in production and dispatch in the November 2010 was unusual especially when November 2009 witnessed a mixed trend. Interestingly, the CCI held that the parties to a cartel may not always co-ordinate their action; periodically their conduct may reflect a competitive market. Where co-ordination proves gainful, parties will substitute competition for collusion.

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We talked about production parallelism. Dispatch parallelism: which shows that how much cement is to be dispatched in the market.




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## Case

- *Increase in price:* The deliberate act of shortage in production and supplies by the cement companies and almost inelastic nature of demand of cement in the market resulted into higher prices for cement. The CCI was of the view that there was no apparent constraint in demand which could justify the lower capacity utilisation.
- Further, there was no constraint in demand during November and December 2010, and, in fact, the construction industry saw a positive growth in the third quarter of 2010-11.



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All these are done mainly for increasing the prices, so there is a deliberate shortage in production and supplies by the cement companies. So that they can justify the price increase but they say that they have lower capacity which is not true.


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## Case

- *Price Leadership:* The CCI noted that the given the small number of major cement manufacturers, the price leaders gave price signals through advanced media reporting which made it easier for other manufactures to co-ordinate their strategies.



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And there is a price leadership, so price parallelism between all the companies are found.




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## Case

- *High Profit Margins:* The profit margins of all the cement companies were examined by the Commission, which arrived at the conclusion that some companies posted a high Return on Capital Employed and higher EBITDA in 2010-11 as compared with 2009-10. Additionally, the CCI observed that the respondents earned huge margins over the cost of sales.
- *Factors set out in Section 19(3) of the Competition Act:* It is worth noting that the CCI has stated that where contraventions of sections 3(3) (a) and (b) are proved, the adverse effect on competition is presumed. However, on account of the rebuttals raised by the respondents, it considered the factors mentioned in section 19(3) to determine whether an appreciable adverse effect on competition has been caused.



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The competition commission of India found that there is a high profit margin among the companies even though they claim that they could not use their complete capacity of production.

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Company	Penalty (INR in Crores)
ACC Ltd.	1147.59
Ambuja Cements Ltd.	1163.91
Binani Cements Ltd.	167.32
Century Textiles Ltd.	274.02
India Cements Ltd.	187.48
J K Cements Ltd.	128.54
Lafarge India Pvt. Ltd.	480.01
Madras Cements Ltd.	258.68
Ultratech Cement Ltd.	1175.49
Jaiprakash Associates Ltd.	1323.60



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And you can see the what were the penalties? Huge penalty was imposed on these particular cement companies.


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## Appeal

- This 2012 Order was challenged before the Competition Appellate Tribunal (**COMPAT**), primarily on grounds of due process and violations of principles of natural justice and was set aside on these grounds.
- The matter was remanded to the CCI for fresh adjudication.
- Consequently, the CCI re-heard the Opposite Parties and passed the 2016 Order.



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Then what happened is that these companies appealed to the *COMPAT* i.e. competition appellate tribunal in 2012. So the case was remanded back to the CCI for adjudication and the CCI issued the order in 2016 with minor changes.


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## Appeal

- It is interesting to note that the 2016 Order has essentially endorsed the findings in the 2012 Order, imposing a penalty of 0.5 times of the net profits of the Opposite Parties for the years 2009-10 and 2010-11 for violation of the cartel provisions of the Act.
- Further, the role of the CMA was also examined by the CCI and it observed that the Opposite Parties exchanged price sensitive information relating to cost, prices, production and capacities using CMA as the platform.



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Again there was an appeal, in the appeal most of the findings of the competition commission of India were confirmed again.


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## Price parallelism

- The CCI focused on price parallelism amongst the cartel members as the primary indicator of the cartel and found that the price correlation was greater than 0.9, which indicated a high degree of correlation amongst the Opposite Parties.
- Interestingly, despite the Opposite Parties' arguments regarding use of correlation of percentage change in prices rather than absolute price, the CCI refused to do a detailed analysis to identify price parallelism.



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And the fine was imposed, so again the competition commission discussed about the price parallelism which happened in this particular cartelization.

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## National Company Law Appellate Tribunal - 2018

- Competition Appellate Tribunal, which was replaced by NCLAT in 2017.
- India's competition appeals tribunal has upheld a decision imposing **€784 million (Rs 67 billion)** in fines against 11 members of an alleged cement cartel that agreed parallel prices and exchanged commercially sensitive information.



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And again the producers went with their appeals to the competition appellate tribunal, now it was replaced by the national company law appellate tribunal in 2017. All these legal fines started in 2012 and even in 2018 the new tribunal i.e. the national company

law appellate tribunal imposed a heavy fine of 67 billion Indian rupees which is almost equal to the 784 million Euros and the 11 members of the cartel were fined.

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The slide has a light green background with a yellow wavy border at the bottom. The title 'Cartel' is centered at the top in a large, black, sans-serif font. Below the title, a single bullet point reads: '• 6 companies under scanner for fresh cartelization – February 2018.' The bottom of the slide features a dark green banner containing three logos on the left: the Indian Institute of Technology (IIT) logo, the NPTEL logo, and a copyright notice '©KDR/NGSOIPL/NPTEL-2019'. On the right side of the banner, there is a small video inset showing a man in a light blue shirt speaking.

But ultimately what happened is that the cement prices for a long period of time remains the same. And presently it is reported that 6 new other companies are under the scanner of CCI for cartelization. So, the cartelization continues to be very pernicious to the industry. I have shown only one industry i.e. a cement industry. The cartel is a problem in airline industry as well which the competition commission has investigated into and found the cartel in that.


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## STRUCTURAL FACTORS AIDING CARTELISATION

- Even though cartelization can occur in any industry, there are some industries in which it is more likely, due to particular features of the industry or of the product involved
- If the market is subject to considerable volatility, the cartelization is unlikely
- The probability of cartelization gets higher if some structural factors are present in the product market



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So, cartel is pernicious, cartel is most distorting of the market, so this is highly anti-competitive in nature.

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## Cartelization

- I. Highly concentrated market
- II. Demand and supply conditions
- III. Homogeneous product
- IV. Entry barriers
- V. Active trade association



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So, a concentrated market, demand supply, homogeneous products, entry barriers, active trade associations: these are all the cartelization factors which were found to be positive in the cement industry.

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**DEFENCES AND EXEMPTIONS TO  
CARTELS**

- I. Joint Venture
- II. Agreements relating to intellectual property rights
- III. Export cartels exemption
- IV. Leniency regime

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The defences are very less in cartels i.e. the joint venture, agreements relating to intellectual property, export cartel exemption and leniency regimes. So, we will stop this class here and we will go to the bid rigging another form of anti-competitive practice in the next part.

Thank you.