Intellectual Property Rights, And Competition Law
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Lecture - 24
Enforcement of anti-Trust Law in United States

Dear students, today we are going to discuss the Enforcement of the Anti-Trust Law vis-a-vis IP Law in the United States. In the last classes, we were discussing the entire provisions and implementation of the Anti-Trust Law vis-a-vis intellectual property law in the United States.

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And today, specifically we are going to discuss the various agencies involved in the implementation of the intellectual property law as well as the competition law. There is a Department of Justice(DoJ), there is a Federal Trade Commission(FTC) and there are various programs to implement the Anti-Trust Law and different areas of enforcement which we will be discussing.

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What is the objective of anti-trust law? Anti-Trust Law is specifically to protect the economic freedom of the market as well as to promote competition in the market and there must be free and fair trade, or free and fair competition in the marketplace. This is the objective of the anti-trust law.

The ultimate objective of the competition in the free market is to enable the entire market for consumer welfare. And this will enable to lower the prices, better the quality, better the consumer choice and will also lead to the welfare of the consumers ultimately. And moreover, it provides business opportunities for the new entrants to compete in quality, in price. In an open market, there must be a level playing field in the market for the new entrants.

So, if there is no competition in the market, if there is only monopolies or oligopolies in the market, the market is going to be distorted. These anti-competitive restraints restrict new entrants. There must be competition in the market.

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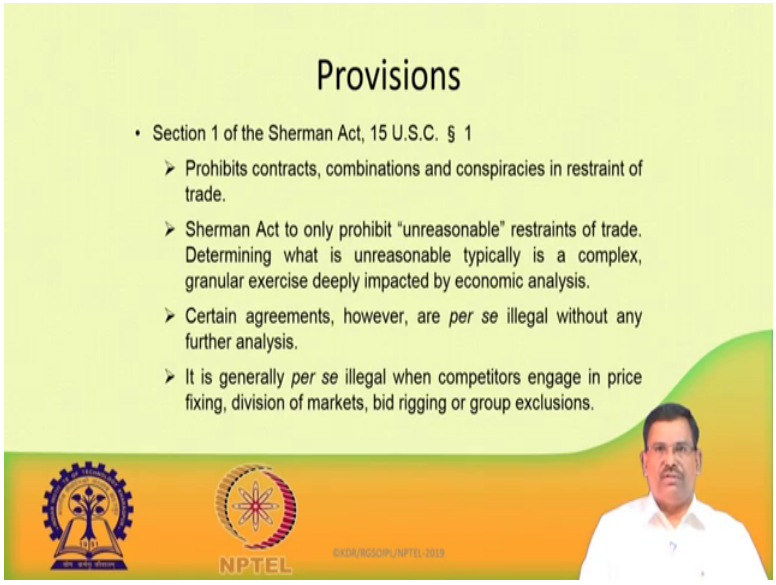

If you look into the provisions of the Sherman Act which we have already covered, Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies in restraint of trade. And also it restraints and prohibits unreasonable restraint of trade which impacts the economy, affects the economy of the United States.

And thirdly we can see the agreements. A certain category of agreements such as business agreements is held to be per se illegal, without any further analysis. There is a presumption in favour of the per se illegal rule. When the competitors engage in price-fixing, division of markets including vertical as well as horizontal markets, bid rigging, group exclusions etcetera it becomes per se illegal. So, Section 1 prohibits these combinations and conspiracies to restrain trade.

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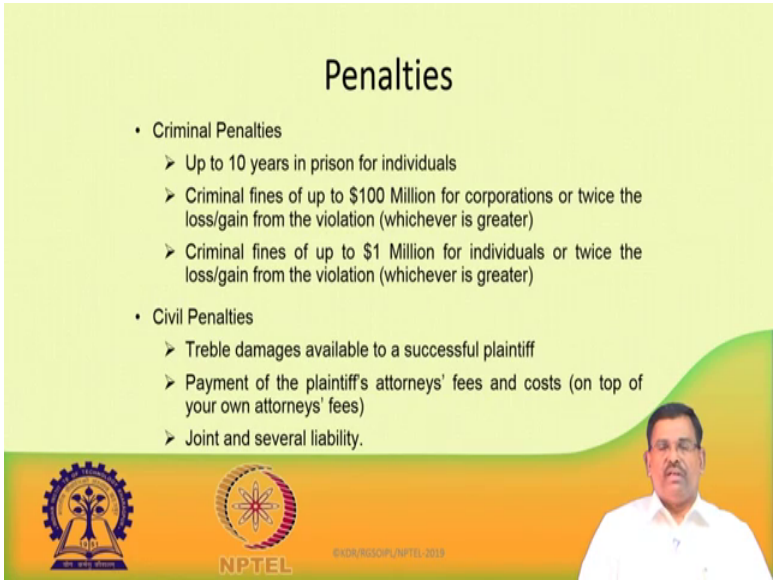

If you look into the penalties which are imposed, there are criminal penalties as well as civil penalties. And the United States is one of those countries where criminal penalties were imposed and if one is in violation of these prohibitions, the Sherman Act will attract 10 years of imprisonment for individuals. This is very harsh punishment which is imposed under the Sherman Act.

If you look into India, you can find that there is no jail time, there are no criminal penalties which are provided in the Competition Act. There(in the United States) the fine is also very huge amount. The criminal fines are up to 100 million for corporations or twice the loss or gain from the violation, whichever is greater in quantity.

In the case of an individual, criminal fines can be up to 1 million or twice the loss or gain of the violation, whichever is greater and will be imposed as criminal penalties. If you look into the civil penalties, then we can see that there are treble damages available to the successful plaintiff which includes the attorney fees and the cost of litigation and there are several joint liabilities imposed on the defendants in case of civil penalties.

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The enforcement of antitrust law in the United States is by two agencies. The first one is the department of justice, which is the law enforcement arm of the executive branch and the second is the federal trade commission which is construed under the federal trade commission act, which is an independent regulatory authority created by the Congress.

The third category, which we see there are lot of individual attorneys, attorney generals, all over the states playing a role in enforcing the anti-trust law. The fourth category is that of the private persons and non-governmental organisations, civil litigants and others those who file cases against big companies, those who engage in anti-trust violations.

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If you look into both the agencies, both the agencies FTC and the department of justice, they work with each other, meaning that in some areas their works overlap with each other, but the two agencies complement each other. They will always try to see if there is overlapping of initiations by both the agencies. So, both the agencies are experts in certain areas or industries and markets and so, they cooperate with each other and transfer information, share information with each other, so that there is no overlapping of enforcement.

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If you look into the FTC, the FTC is the independent regulatory authority which spends their resources in certain segments of the economy or they specialise in certain areas of the economy which is a lot of spending in the American market.

For example, the healthcare sector, like pharmaceuticals, professional services, food, energy, and high-tech industries, like the computer giants, internet services. So, this agency specialises in these areas and they consult with the department of justice before initiating any investigation in order to avoid duplication of their investigations.

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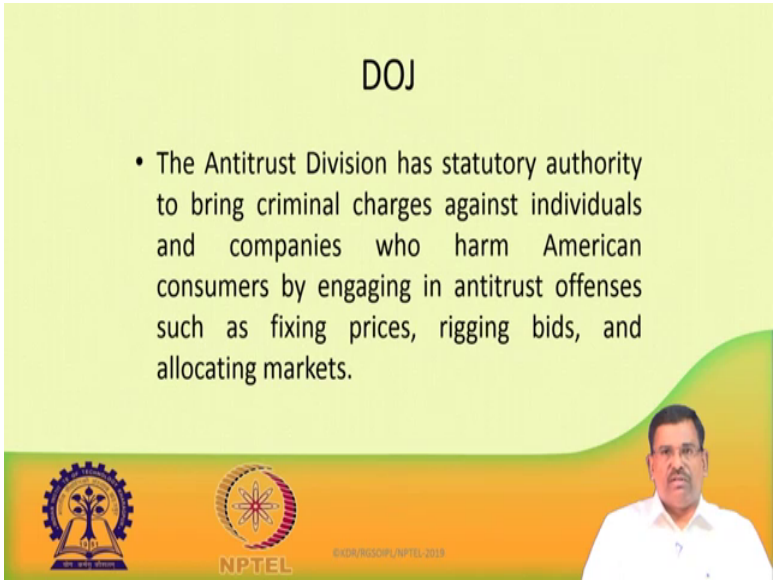

And on the other hand, in the department of justice there is a division on the anti-trust law. Those who bring criminal charges against individuals and companies, who harm American market or who harm the American consumers, like fixing prices or bid rigging allocating markets or tying or meddling other and other categories of offences, which we will discuss it later will be dealt by this department.

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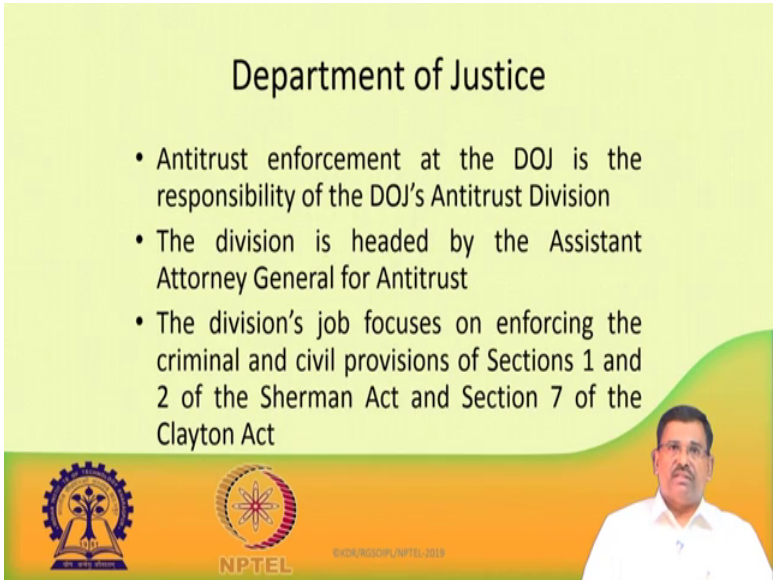

The department of justice is headed by an assistant attorney general for anti-trust. They focus or they initiate civil and criminal provisions under Section 1 of the Sherman Act, Section 2 and Section 7 of the Clayton Act. They enforce these provisions virulently in the American market or in the company or with individuals who are violating the anti-trust provisions, they also initiate prosecution in the court.

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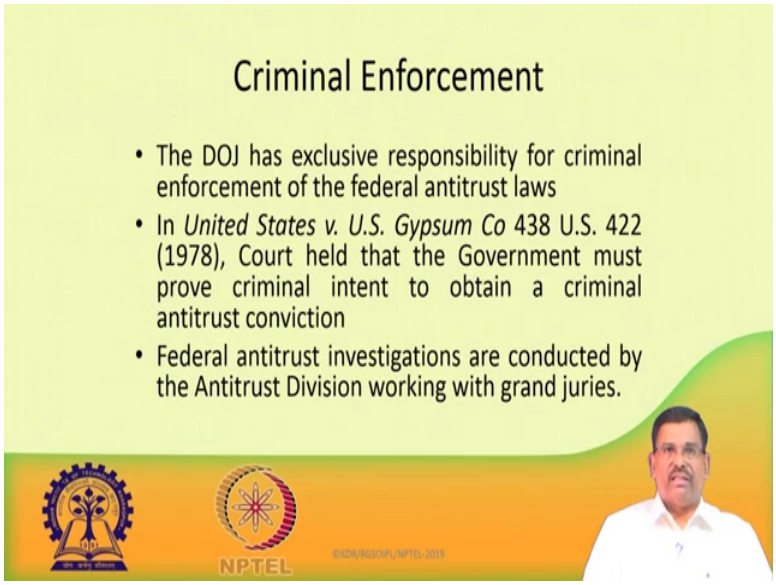

The department of justice is exclusively responsible for the criminal enforcement of federal antitrust laws. In some of the cases like *the United States versus US Gypsum*, the court held that the government must prove criminal intent to obtain a criminal anti-trust conviction. So, a greater quality or greater quantity of evidence or greater evidence is required to initiate the criminal investigations. The court said that, the criminal intent must be proved then only they can initiate the criminal action against the violation of the Sherman Act. They work in the jury system.

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Lets look into the criminal enforcement in almost the last 10 years, the department of justice releases these data every year. We can see that the corporations have been less prosecuted than individuals and in almost every year for the last 10 years the individuals prosecuted are very high in number, in terms of the cases or charges levelled against individuals than the corporations.

It means that the corporations are either complying with the anti-trust law or the complaints against the American companies are very less. For example, in the year 2018 there are only 5 charges, i.e. only 5 corporations were charged with anti-trust violations. This is the case in most of the years, the number is approximately 20. It means that corporations are more complying with anti-trust provisions than individuals. So, it is very

clear that more individuals are involved in the violation of the anti-trust provisions in the United States.

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Grand jury system prevails in the case of this act as well as the Sherman Act. The grand jury is convened under the authority of the court and is run by the prosecutor and then finally, they come to the conclusion. The department of justice runs two programs for settling disputes, settling disputes with corporations and settling dispute with individuals. And with corporations it is known as the *corporate leniency program* and with individuals it is known as the *individual leniency program*.

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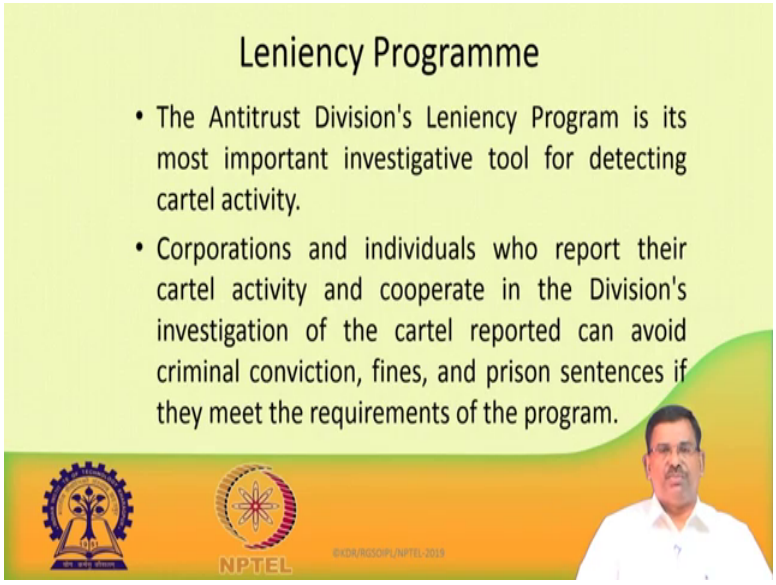

These programs are to settle the disputes with a lenient mind. This program is applicable, to those who are co-operating with the investigation or those who voluntary come up and disclose anti-trust violations to the department of justice. It is basically to investigate, it is a tool, it is used as a tool for detecting cartel activities. The people those who are giving information will be considered leniently.

So, here the corporations and individuals those who report their anti-competitive activity to the department of justice and co-operate fully in the division's investigation of a cartel can avoid criminal conviction, fines, prison sentences, if they meet the requirements or preconditions of the program.

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If you look into this program you can see certain conditions. The leniency programs are availed by the corporations as well as individuals. Their activity must be reported to the department of justice at an early stage. And it is must that the information must not be reported by anybody else, so they must be the first person to report that particular activity to the department of justice.

Only in these cases leniency will be shown to the informer along with report on others those who are doing this particular activity. Leniency will be shown to the people those who disclose or give information to the authorities. This policy is also known as *corporate amnesty* or *corporate immunity policy*. This is in line with the famous criminal jurisprudential system, those who give information on the commitment of crime will be leniently considered.

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Corporations reporting activity must do so before the investigation begins. Those who are giving information to the DoJ must do so before starting the investigation, not after the investigation has started, this is one of the conditions.

The corporations, upon the discovery of illegal activity being reported, must take prompt and effective action to terminate that part of activity. So, they must promptly terminate that particular activity and this confession of wrongdoing should be a truly corporate act, as opposed to the individual confessions by the executives and other officials of the company. These are some of the pre-conditions to come under the corporate leniency program.

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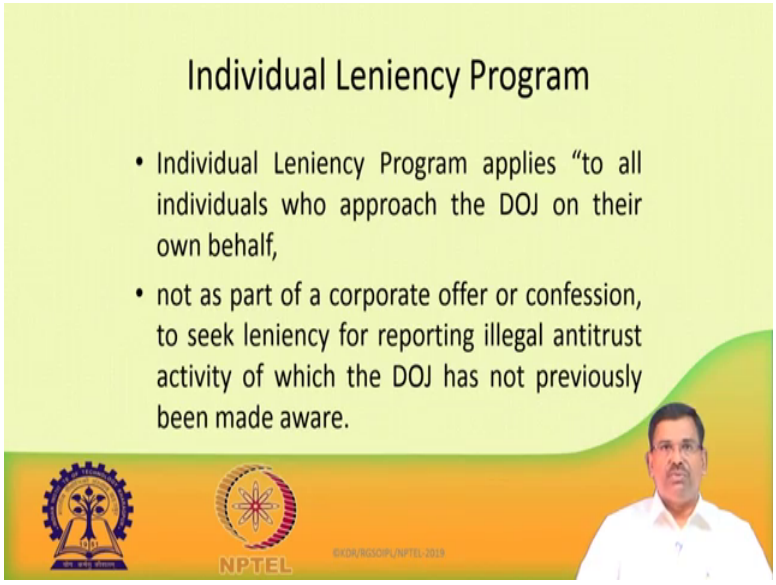

The individual leniency program has been extended to the individual suspects. It applies to all the individuals who approach the department of justice on their own behalf to voluntarily disclose information to the department of justice. The conditions are: it must not be as a part of the corporate offer of confession to seek leniency in reporting anti-trust activity. This must not have been previously made aware of to the department of justice by anybody else. He should be the first person to report this particular matter to the department of justice.

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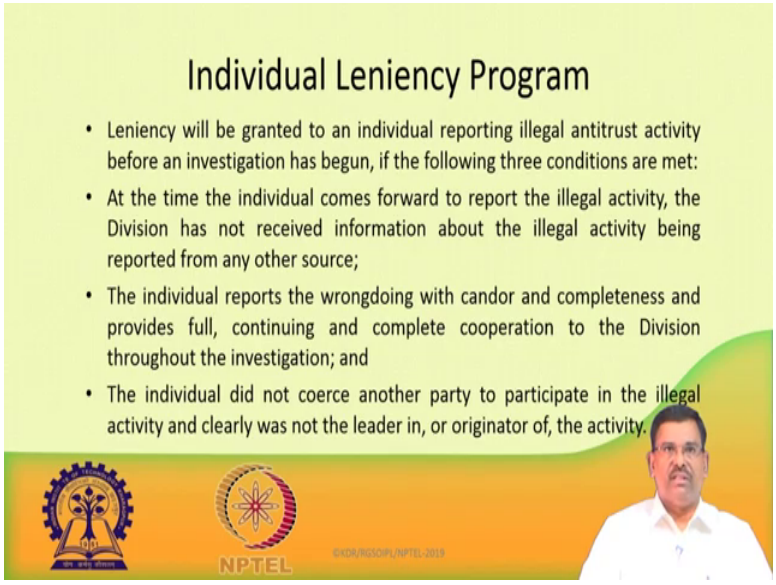

The other conditions are that the leniency will be granted to an individual, reporting illegal anti-trust activity before the investigation has begun. They must meet minimum three conditions. The first condition is that the individual comes forward to report the illegal activity, and the division has not already received the information about the illegal activity from any other source.

The second condition is the individual reports or wrongdoings, complete candour and completeness, provides full, continuing and complete co-operation to the department of justice, throughout the investigation. That is the second condition to avail this individual leniency program. Thirdly, the individual did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that particular activity. That is the third condition to avail the individual leniency program.

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When it comes to the civil enforcement, the department of justice has the power to attack anti-trust violation through civil enforcement as well, this is usually initiated in the case of less serious, clearly illegal or harder to prove activity than the hardcore activities. In the case of hardcore activities, criminal prosecutions will be initiated. The civil actions will be initiated against less severe activities.

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The department of justice has enforced merger enforcements as well. The companies may merge, the companies may acquire another company, mergers and acquisitions along with joint ventures are not illegal per se. But the department of justice, the anti-trust division has the authority to look into each and every activity, each and every merger. Each and every merger of companies is not illegal.

But they can look into the activity whether it is for avoiding or whether it is for fixing the prices, whether it is for dividing the market or whether any other illegal anti-trust activity is taking place or not. Because the responsibility of investigation is shared between the federal trade commission and the department of justice.

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So, if we look into the merger enforcement, we can see that, the major provisions which are applicable to mergers are Section 7 of the Clayton Act, Section 1 of the Sherman Act and Section 5 of the FTC Act.

Section 7 of the Clayton Act proscribes a merger the effect of which may be substantially to lessen competition. The per se rule is not applicable here, the rule of reason is applicable here. So, if the merger is for substantially lessening competition in the market, then the competition authorities or the anti-trust authorities, the department of justice and FTC are going to look into this particular activity under Section 7 of the Clayton Act.

If we look into Section 1, it specifically prohibits any activity, agreement that constitutes an unreasonable restraint of trade. Under section 5, the federal trade commission enforces or proscribes unfair methods of competition. So, there are three *Acts,* one is the Sherman Act, second is the Clayton Act and third is the FTC Act. The enforcement agency can look into the mergers of companies under any of these provisions.

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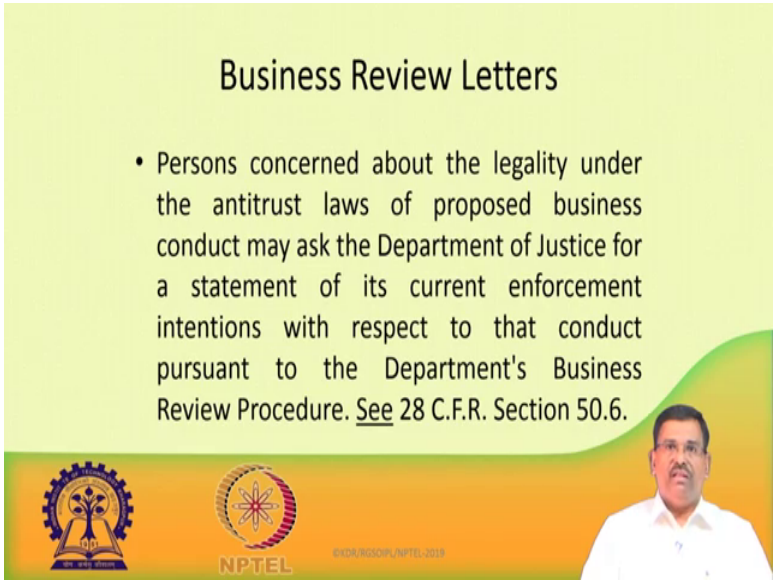

Another method is the business review letters. The companies can go to the authorities, department of justice or FTC and take their views on the activities. The business review letters are nothing but advises from FTC or law enforcement agencies on competition.

So, here the people are concerned about the legality. The companies or individuals themselves make sure that they are not entering into any kind of illegal anti-competitive activities. So, they can approach the department of justice or the FTC. These are the proposed business conduct, particular business which they are going to carry out and current enforcement intentions with respect to the conduct of that particular business.

The department of justice and the FTC can look into that particular business, review the entire process and issue a business review letter which makes it sure before starting the business that the businessmen are not entering into any illegal activities under the Sherman Act or the Clayton Act or the FTC Act.

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These business review letters gives an important opportunity to the businessman to get guidance from the department with respect to the scope, interpretation and application of the anti-trust laws to particular proposed conduct.

So, it gives, in advance, the advice from the department of justice or FTC with regard to particular business activity. So that the companies or the individuals can make sure that the activity which they are going to or the business which they are going to start or the business method is not anti-competitive in nature. The authorities issue business review letters in the form of advance advice to conduct a particular business which will be beneficial to the industry as well as beneficial to the enforcement agencies.

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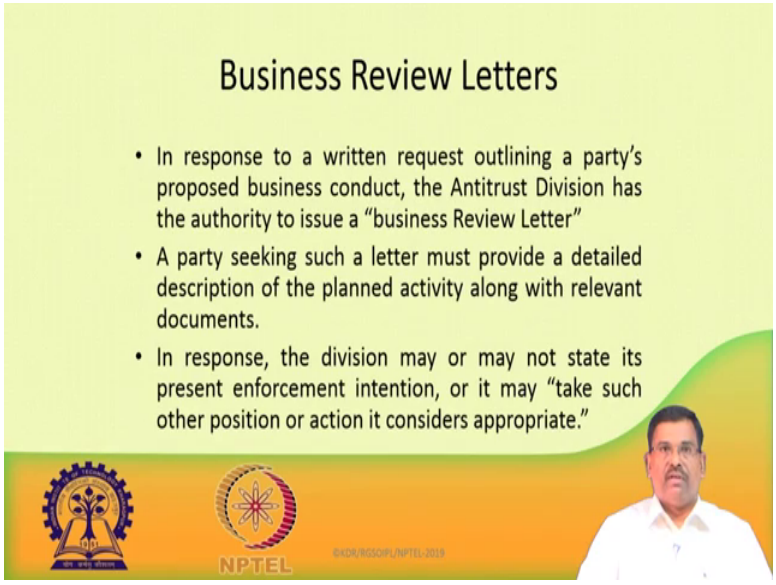

You can see the process is simple and this is in response to a written request, outlining the parties proposed business conduct and then the anti-trust division will issue a business review letter. So, the party seeking such letter must provide a detailed description of the planned activity along with the concerned documents. And in response to the information which is disclosed to the department, the division may state its present enforcement intention, take such other position or action it considers appropriate. So, the department of justice advises on the particular activity whether it is going to violate any of the provisions of the competition law.

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These are the activities of the department of justice. And now we will look into the activities of the federal trade commission. Federal trade commission is an independent regulatory body which is constituted under the Federal Trade Commission Act. It is led by five commissioners appointed by the president for a 7-year term. They have a much higher responsibility.

The FTC has three bureaus; the competition bureau, consumer protection bureau and the economics bureau. They have a larger role to see whether the competition authorities are harming consumer interest and economy in general, whether the economy is harmed or the market is harmed.

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The federal trade commission's mission is prescribed on their website "to prevent business practices that are anti-competitive, deceptive or unfair to consumers". The second objective is consumer protection. They clearly say that the Federal Trade Commission Act under the FTC Act, unfair or deceptive acts or practices affecting commerce are declared unlawful. And thirdly, they look into the competition, the FTC Act also prohibits unfair methods of competition, any kind of conduct which violates the Sherman Act or the Clayton Act.

FTC has a larger role. They look into all the legislations and they are involved in the enforcement of all the anti-trust legislation. But they will always try to see that it is overlapping with the department of justice. They work hand in hand and consult each other in order to avoid duplication of actions.

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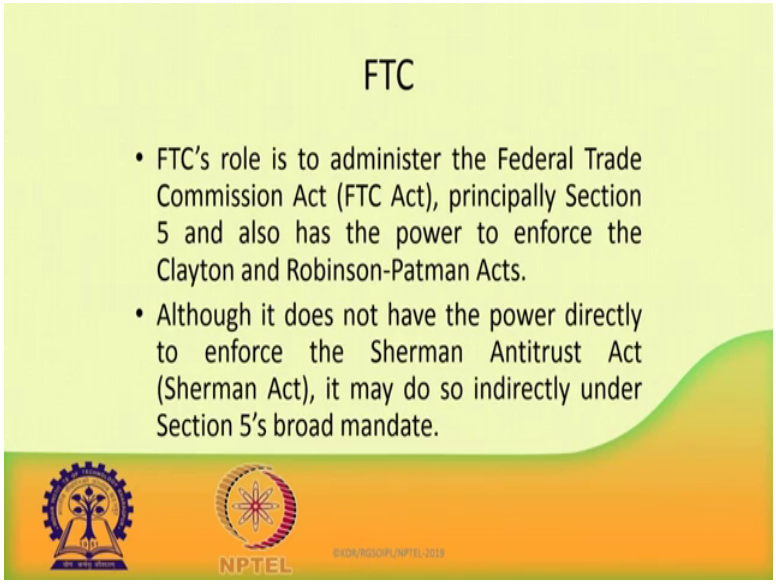

FTC administers the FTC Act and principally Section 5 to enforce the Clayton Act and the Robinson-Patman Act and also they enforce Sherman Act as well as the Clayton Act indirectly under the Section 5. So, there is a broad mandate which is given to the FTC Act under Section 5. They can interfere, they can enforce any of the provisions of FTC Act, Sherman Act and Clayton Act. They can look under the various provisions, they have jurisdiction to look into specific conduct of the industry.

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At the same time, the FTC shares its responsibility with the department of justice for merger enforcement for promulgating and enforcing pre-merger notifications which are implemented under the Hart-Scott-Rodino Anti-trust Improvements Act of 1976. It is an independent agency. They have the power to pass cease and desist orders in the case of violations of the FTC Act under Section 5. So, they have wider powers under the FTC Act than in the other legislations.

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If we look into some of the enforcements provisions which they put on their website, we can see various categories of cases dealt by the FTC. For example, the case of settlement of in-app purchases, it was a 32.5 million settlement with regard to apple. And all major companies such as Honeywell, merger of barcode scanner companies in the case of competition. Honeywell, Nielsen and Wise Media, Jesta Digital, TRENDnet, all these are different categories of dispute cases dealt by FTC.

They will look into different kind of activities involving the latest technologies, the technology companies, they will look into different kind of cases and take action against companies those who violate the provisions.

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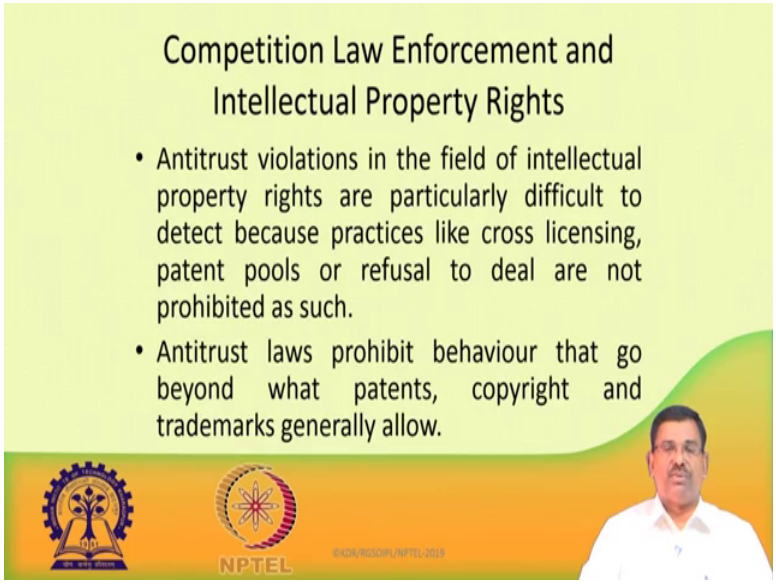

When it comes to the enforcement of the intellectual property involved competition law cases, the FTC is very active. These cases are very technical in nature, very complicated in nature, but the FTC deal with these kind of cases in a series of areas like cross-licensing, patent pools, refusal to deal, tying and bundling, market divisions and all these have been dealt by us in detail in the last classes. The FTC looks into these activities and enforce the particular provisions.

Specifically the FTC looks into whether these companies/the patent owners are going beyond the rights conferred under patents or copyrights or trademarks. And they look into the anti-trust angle of their dealings especially in the case of licenses or cross-licenses or agreements or franchise agreements etc.. So, the FTC has a dual role; they have to look in from the intellectual property protection perspective as well as they have to look into the competition law perspective.

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They usually look into the price-fixing and the coordinated output restrictions, foreclosure of innovations, prohibited other anti-trust activities very closely and these will be always controversial in nature.

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We can find that intellectual property is present in merger control as well. So, innovation is the mantra of success for any particular company. Innovation can be purchased from another company, innovation can be acquired through mergers from another company.

This will increase the competitiveness of the company or increase the firm's ability to compete with its competitors in the market and also put pressure on the competitors to innovate, so that there will be a fair competition in the market.

But these mergers must be approved by the anti-trust authorities. It must get the signature of the anti-trust authorities. Because the merger rules very clearly say that none of the mergers should be for violating any of the provisions of the Sherman Act or Clayton Act or FTC Act. So no mergers can violate these provisions. If it is found later then these law enforcement agencies will enforce these particular provisions.

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We can see that in the case of mergers there can be structural as well as behavioural aspects. The structural remedies are related to the selling of the activity, a line of business, in order to immediately restore competition in the market and the behavioural remedies are to modify or constrain the market conduct of the merging firms. So, the mergers have always had an angle of anti-trust. So, they should get the signatures of the anti-trust authorities in order to merge companies.

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And there are a lot of controversies especially in the case of technology licensing agreements, so the licensing practices like technology grand back or tie-ins, territorial market limitations and field of use restrictions and all these restrictions will be addressed in the case of technology licensing. The FTC is to look into these kinds of activities very closely and sometimes these kind of activities cannot be declared per se illegal. The FTC has to look into these activities specifically under the rule of reason standard and check whether it is for the welfare of the market or not.

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The FTC looks into these agreements by applying the rule of reason. This can be potential or competitive and have existed without an agreement, it may be considered restrictive in nature. That means the rule of reason is a basic criterion to look into these particular agreements by FTC.

Intellectual property rights are given for a limited period of time and the enforcement agencies always look into whether these owners of the intellectual property are exceeding their rights conferred under the patents or trademarks or copyrights. This is the main duty of the enforcement agencies, and this is very complex in nature.

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In the case of patent rights, patent rights give monopoly for a limited period of time and the patent holders license, cross-license and even assign their rights to other companies that may be competitive companies. But the agencies, the law enforcement agencies always look into the purpose of the mergers or purpose of the transactions, purpose of the cross-licensing, whether it is for stopping or restraining competition in the market. This is the duty of the agencies to look into the cross-licensing agreements.

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Even the smallest IP(intellectual property), the smallest patent can yield big quantities of royalties because the competitive companies may want that particular patent to compete in the market along with their rival companies.

Portfolio cross-licenses and patent pools can solve this particular problem, in those cases pooling cross-licensing and pooling of patents are not per se illegal. The rule of reason will be applicable in those particular cases. This will reduce the transaction cost, this will be mitigating hold up problems and this will be good for the market. The FTC will look into these pro-active conditions to determine whether they are anti-competitive in nature or not.

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We already discussed that, licensing and licensing activities are not at all prohibited. If any kind of activity is anti-competitive in nature, then only the FTC will consider them as violation of the anti-trust provision.

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Let us look into these individual activities which FTC looks into, for example, in the case of refusal to license, competition law imposes on firms a duty to deal. Refusal to license is considered to be a violation of the competition act. But when a firm refuses to

deal with a customer, in most of the cases, there is an intervention by the competition authority, intervention by the federal trade commission or department of justice. And in all those cases the activities are not justified ones. The only question, which the enforcement agencies look into is whether such refusal of such opportunity is fair or rational on the part of the firm or not.

Refusal to deal with a competitor may be abusive. Usually refuse to deal will be considered as anti-competitive in nature, but when we apply the rule of reason it may be pro-competitive as well. So, it is the duty of FTC to look into the pro-competitive effects on the market.

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There is another area which is the tie-in arrangements and bundling, which we have discussed elaborately earlier. Tie-in arrangements are considered to be per se illegal under the provisions of anti-trust law. In these cases one is compelling a customer to purchase something which he does not want to purchase, along with an item that may be patented or that may have some intellectual property on that product.

Bundling, when two or more products bundled together, is always considered as anti-competitive in nature, otherwise it is the duty of the defendant to prove that the bundling

of such products has a pro-competitive effect in the market otherwise tie-in arrangements are always considered as per se illegal.

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We saw a number of cases visited by the US courts which clearly said that in the case of tying and bundling if the firm lacks market power then the tying is not considered as anti-competitive in nature. So, it is the duty of the complainant to prove that the tie-in arrangements or bundling arrangements which are abusive in nature are against the market. The purpose has to be analysed very closely in the case of tying arrangements.

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The bottom line is that if the tying and bundling are abusive in nature they are not going to increase the efficiency of the market or demand, they will be considered as anti-competitive in nature.

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If we look into the price-fixing, which we have discussed earlier, we can find various type of price fixings. It is not only confined to the prices as such in technical terms. The price-fixing includes the future prices, pricing policies, promotional aspects or promo-

tional programs, bids, cost, capacity, the terms or conditions of sale, especially the credit terms, scale back or credit back, discounts, identity of customers, allocation of customers in geographical ways, production quotas, R&D plans.

All these headings will come under price-fixing. It is not just about fixing the prices. All these agencies tend to look very closely into the objective of price-fixing.

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Then comes the bid-rigging. We discussed bid-rigging and cartels very elaborately. Bid rigging is considered to be pernicious to the market as it is considered as illegal in nature because if two or more people or two or more firms come together on a prior agreement and if they are bidding there would be no competition in the market as such because the competitors will agree to take turns of being the lowest bidder. They will sit out of the bidding round and will be sitting for the next round of bidding. This is unacceptable, this is absolutely unacceptable to the market because these bid-rigging agreements are in the form of subcontracting and are also considered as cartelization.

Forming joint ventures for bid-rigging will also be considered as a violation of the anti-trust provisions. The federal trade commission or the department of justice very closely looks into the cartelization or the forms of cartelization, in the form of bid-rigging, the reasons for forming the joint ventures.

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The most important thing is the geographical distribution of markets or customer allocation. We saw some of the cases and the courts always said that these are per se illegal. It is the duty of the party to prove that this is not for curtailing the competition in the market. Generally geographical allocations are considered as per se illegal under the competition act, under the anti-competitive provisions in nature. Market allocation, customer allocation, geographical allocation will be considered as per se illegal under the Sherman Act.

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Another form is the refusal to deal, boycotting or refusal to do business with another firm. You can see that one competitor cannot be compelled to do business with another competitor, but the purpose has to be looked into.

If the refusal to deal has a pro-competitive effect in the market then that would not be illegal. But in most of the cases we can see that those are illegal. The boycotting or refusal to deal with a particular competitor will be considered as illegal especially when there is a group of competitors working together to capture the market or to capture some of the objectives which we mentioned earlier, then the refusal to deal will be considered as violative. This also has to be looked into by the department of justice and the federal trade commission.

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If you look into some of the other arrangements, any other kind of arrangements which are going to affect the market, will be considered by the department of justice and FTC. Whether they are harmful to the consumers, harmful to the market or anti-competitive in effect or nature will be considered by these law enforcement agencies but they will apply they will always apply the rule of reason. So, these two agencies work in tandem to look into all these kind of activities in the market, to see that everything in the market is to provide pro-competitive benefits to the consumers.

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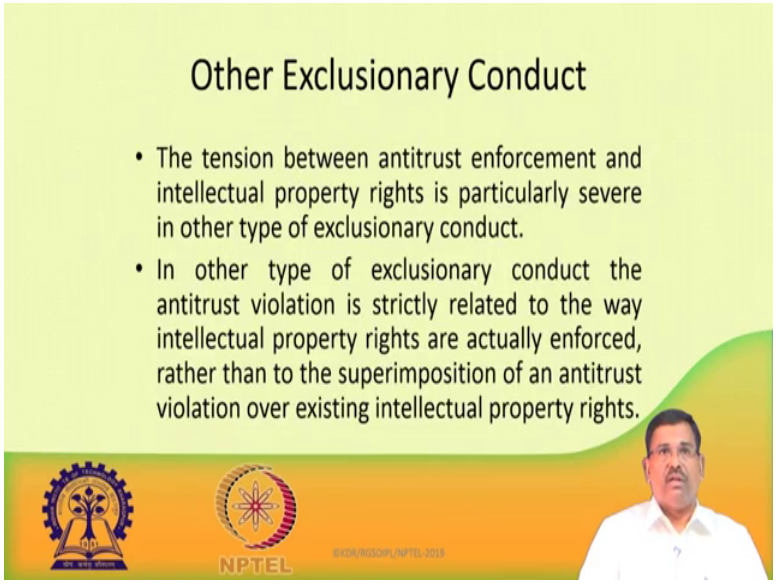

The law enforcement is very complicated for these two agencies in the United States. When enforcing intellectual property related anti-trust cases, these agencies find challenges or tensions, between the anti-trust enforcement and intellectual property protection. This exclusionary conduct or the conduct which we mentioned above whether it is tie-in or it is geographical location, etc. these violations coupled with intellectual property protection makes the determination very difficult and challenging for these particular agencies.

We discussed in this class, specifically, the enforcement agencies of the United States i.e. the department of justice and federal trade commission, their mandate and that these agencies look into different areas of the enforcement. These agencies are very important for enforcing intellectual property related competition cases because these are the two agencies engaged on a day-to-day basis to deal with both, corporations and individuals in intellectual property related competition cases.

I would say that United States is the one country, that is very liberal in nature in the case of doing business, at the same time it is very strict in enforcing the anti-trust laws, especially the anti-trust involved intellectual property protection cases. The best example is the *Microsoft case*. Microsoft involved a series of cases, in which tie-in arrangements and bundling was involved.

Whether it is the United States or the European Union, the anti-trust provisions are considered very serious legislation, that is why you have enforcement agencies strictly implementing these particular legislations.

If you look into India, we have to learn many things from these particular agencies as far as the enforcement is concerned, because we are in a very nascent stage of enforcement of the competition law. Our market is not a mature market. Our market is still developing. And we opened our economy in 1991 and the market is still not mature enough to accommodate all the provisions of the competition law.

But I would also say that, we have examples like that of the cement industry, the airline industry and other industries. We can see lot of cartelization in the Indian market and the enforcement with the competition commission. The competition commission requires a lot of expertise to deal with these ordinary cases, and especially when it comes to the e**nforcement of intellectual property related cases,** they require a lot of expertise such as in the Microsoft case, the Singhania case and the latest Micromax case.

You require a lot of expertise in the enforcement agencies, you require a lot of expertise in judiciary to deal with these competition involved cases. In the United States these two agencies play a very crucial role. Our competition commission has to look into the operation of these agencies in enforcing the anti-trust competition law.

I hope that, this comparison will help you to learn many things from other jurisdictions.

Thank you.