Intellectual Property Rights, And Competition Law
Prof. Niharika Sahoo Bhattacharya
Rajiv Gandhi School of Intellectual Property Law
Indian Institute of Technology, Kharagpur

Lecture – 34
Introduction to Competition Law in India (Contd.)

Hello all. Welcome to this module on Introduction to Indian Competition Law.

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In continuation to our earlier discussion on various provision of Indian Competition Act, 2002, we will discuss other provisions of the Act with respect to intellectual property law. We would focus on the combination of various enterprises and how Competition Act, 2002 deals with regulation of combination; what are the provisions and steps associated with the regulation of combination.

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Through the earlier classes, we have an idea of anti-competitive agreements, cartels or the like. Specifically, section 3 talks about anti-competitive agreements. Then, section 4 talks about the abuse of dominant position. Related provisions deal with practices by firms or industries that may lead to anti-competitive environment in the Indian market or appreciable adverse effect on Indian market.

The nature of any agreement or nature of any combination or the behaviour of a firm is determined on the basis of whether the activities done by an enterprise is leading to any appreciable adverse effect on the competition in Indian market or not. The next important provision mentioned in the Indian Competition Act, 2002 is the regulation of combination.

Indian Competition Act has defined combination as any acquisition of one or more enterprises or one or more persons or merger or amalgamation of enterprises to be regarded as combination of such enterprises or the persons or the firms. There are mergers or amalgamation between two or more persons or enterprises or in simpler terms firms. Combination of the firm or a big company may acquire a small company. This is called an acquisition. This is one kind of combination.

Combination can happen between two companies, of different sizes; small company, big company, more than two firms may also come together to create a combination. Section 5, lays down the threshold limit till which combinations are free or exempted from anti-competitive practices or which will not come into the eyes of competition commission of India.

If a company is having market share of ₹1000 crore or a total turnover of suppose ₹3000 crore, and then it enters into any combination, then the company has to give information to the competition commission of India before entering into any such combination. Section 5 lays down the threshold level for different kind of companies operating in India or outside, when the combination comes under the scrutiny of competition commission of India.

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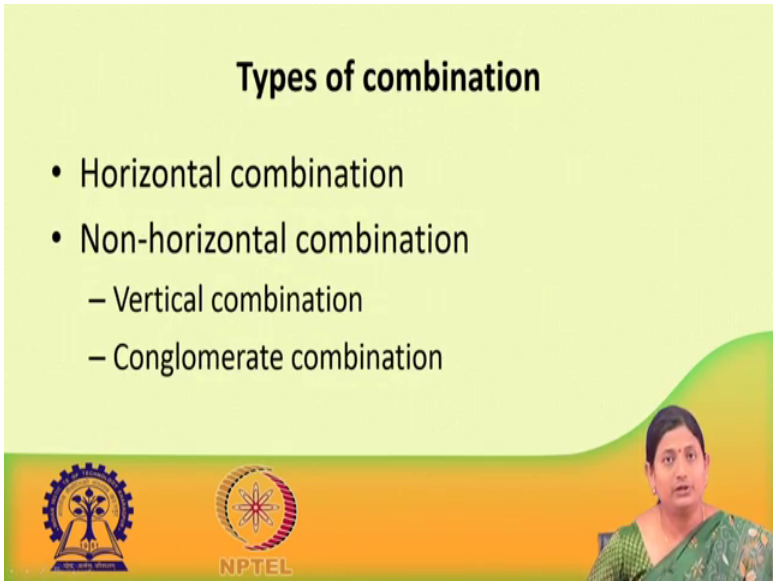

Combination can be defined or divided into two main categories. First, horizontal combination and second, non-horizontal combination. Horizontal combination is the merger or the amalgamation of two companies operating at the same level of the supply chain or two companies which are producing similar goods or two companies which are providing similar services or two companies nearly of same size or companies whose products are substitutable.

If two companies are producing substitutable products and the two companies are competitor per se and if they enter into (say) a joint venture or any combination and merge into a single entity, then, it would be a kind of horizontal combination. In horizontal combination, one of the drawbacks is the reduction of competition because two substitutable products now get combined.

The combined firm, which emerges, will have total monopoly over the substitutable products. There are chances of price increase, because all the technologies and innovations regarding their product will be under control of one firm. It may also lead to reduction in innovation or product innovation.

There are other effects, there maybe reduction in employment status because there may be a staff cut since two big companies have merged. All these comes under, horizontal combination and it has possibility of being anti-competitive in the Indian market. This type of combination is particularly important from the viewpoint of Indian competition law. The second category of combination is known as non-horizontal combination. It can be classified in: vertical combination and conglomerate combination.

Vertical combination is a combination between firms or enterprises which are operating at different level of the supply chain or at different levels. But it does not in the true sense reduces competition. Such kind of combination results in more product efficiency or process efficiency. Suppose there is a company A which is in manufacturing of final machinery and there is company B which supplies spare parts or parts related with the machinery. Amalgamation or merger between these two company may lead to process efficiency.

In one way, people may get cheaper product by this combination, but there are chances of anti-competitiveness depending on the nature of how technology has been procured or how technology will be suppressed or how further innovation will happen. More reasoning, more analysis is required to understand vertical combinations.

The second one is conglomerate combination, where two or more different kind of companies or firms come together and give rise to a combination. There are chances of reduction in competition, in the sense that, a product and its service may come together

to create monopoly in the relevant market. This also requires the rule of reasoning and analysis on how the market structure has altered or how the competition has changed.

For each kind of combination, the competition commission of India follows a different approach to understand the nature of the combination and the appreciable adverse effect which the combination may have on the Indian competition market.

Our Competition Act, has laid down various provisions for regulation of combination because big companies while they overtake the small companies or acquire the small companies, they may overshadow them. Bigger companies may acquire small companies in order to take their technology. The smaller companies have a really tough time in competing with them because the big companies will overshadow them or even swallow them.

All these combinations, are very important from the point of view of competition in the market, to provide the consumer with a cheaper and more effective product. This is why the Competition Act, 2002 has different provisions to regulate different kinds of combination.

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Not all combinations are in the eyes of competition commission as anti-competitive. As I mentioned, section 5 specifies the threshold limit. So, if a company is having certain

threshold in terms of their market turnover or assets, then only such companies will come under the scrutiny of the competition commission.

Per se, the competition commission will not look into the combination, unless and until it finds that the combination of such person or enterprise may cause or is likely to cause an appreciable adverse effect on the competition, within the relevant market, in India and if that happens, then the combination will be considered as void under the provisions of the competition act. Section 5, gives a threshold level for various combinations, for the firms or the enterprises and section 6 lays down various provisions or regulation on how a combination should be regulated. We will discuss these in the coming slides.

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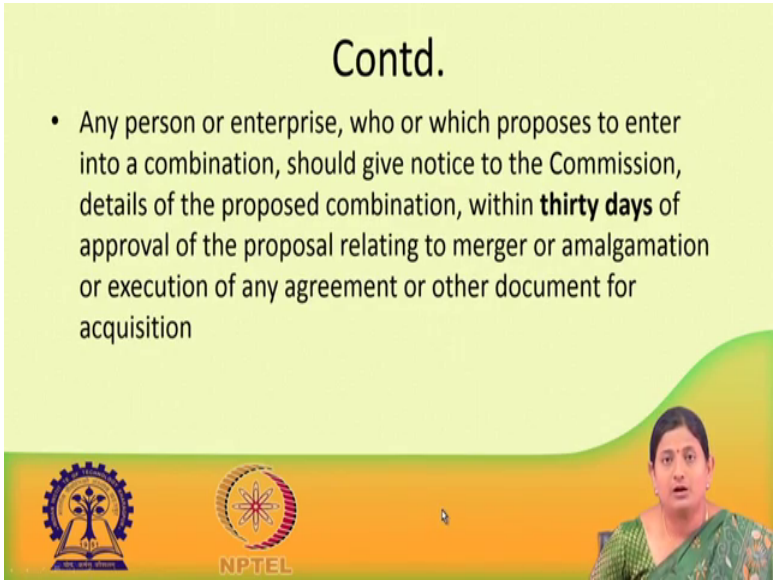

If certain firms or companies, want to enter into a combination, the very first step they should take is that they should check if they fall under the limit or the defined threshold level as specified in section 5. Then, the person or the enterprise who or which proposed to enter into a combination should give notice to the competition commission of India, within 30 days of approval of such proposal.

So, if any two company or two enterprises, decide to enter into a combination, they should give notice to the competition commission of India, within thirty days of such decision or their approval or the final decision between the companies, on the proposal

relating to merger or amalgamation or execution of any agreement or other document for such acquisition. This is the first step, as specified in section 6 of the Competition Act.

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After the first step, no combination shall come into effect until 210 days have passed from the day on which the notice was given to the commission. This is a time period. A combination approved by a company, takes 210 days to be approved by the competition commission of India. The minimum time limit for a combination to be effective is 210 days, if it meets the criteria as laid down in section 5 of the Competition Act.

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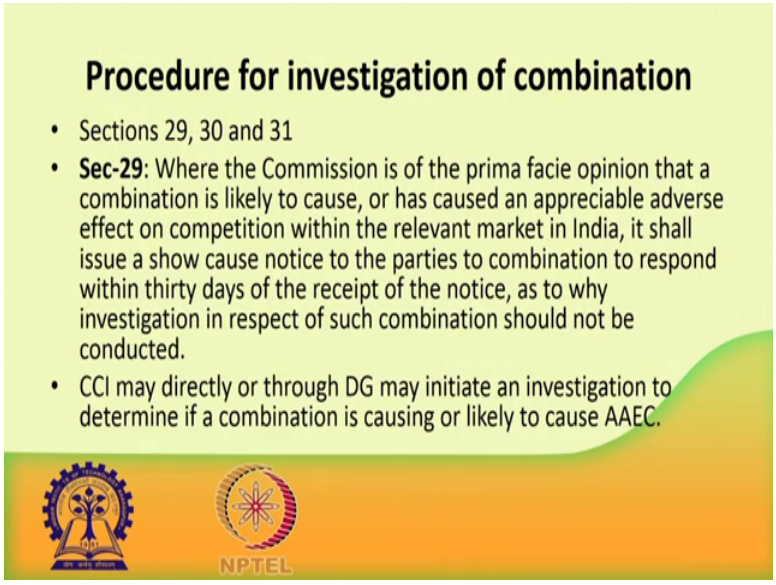

The detailed provisions regarding the procedure for investigation of combination is mentioned in section 29, 30 and 31 of the Competition Act. It has laid down a step by step procedure on how a combination should be investigated. As per section 29, when the commission has a prima facie opinion that a combination may cause an appreciable adverse effect on the competition in the relevant markets of India, it would issue a show cause notice to the parties and the parties are given thirty days time period to respond as to why there should not be any investigation regarding combination.

The competition commission of the India, on its own may initiate any investigation or it may on information received from other relevant party or persons, initiate an investigation. So, if the CCI is of the opinion that some combination may cause an appreciable adverse effect on the markets in India, it has the power to *suo-moto* start an investigation. After it gives a notice to the relevant parties to the combination and the parties are given thirty days time period to respond to the notice stating the reasons why there should not be any investigation. The CCI may directly start the investigation or the CCI may ask the Director General to initiate an investigation to determine if the combination is causing any appreciable adverse effect or does it have any chances of causing such effect.

These two things have to be considered carefully before combination can be named as an anti-competitive combination. The steps include first, notice to the parties of the combination; second, the investigation initiated directly through the CCI or through the help of DG.

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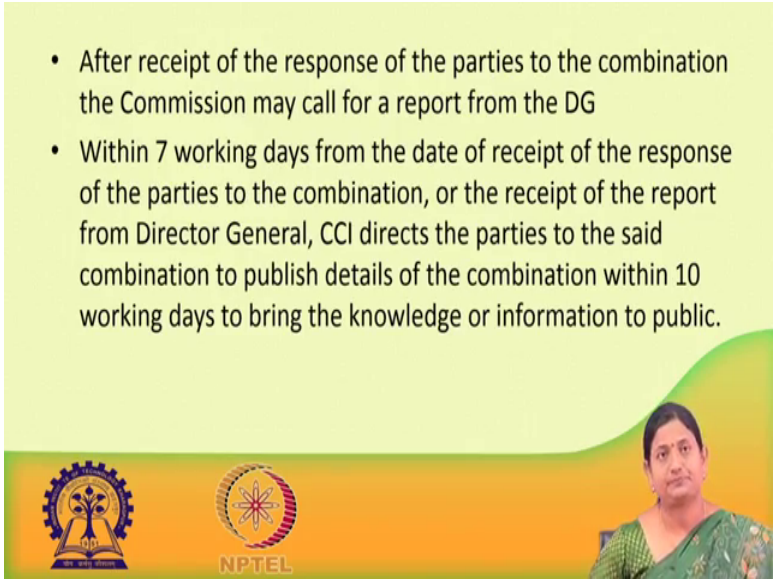

Thirty days time period is given to the parties to respond, after the receipt of the response from the parties, the commission may call for a report from the director general. When the commission receives the report or the response from the parties or report from the director general, within 7 working days of receiving such report, the CCI would direct the parties of the said combination to publish all the relevant details of the combination to the public, within 10 days. So, that it would be in the public domain, to understand the very nature of the combination.

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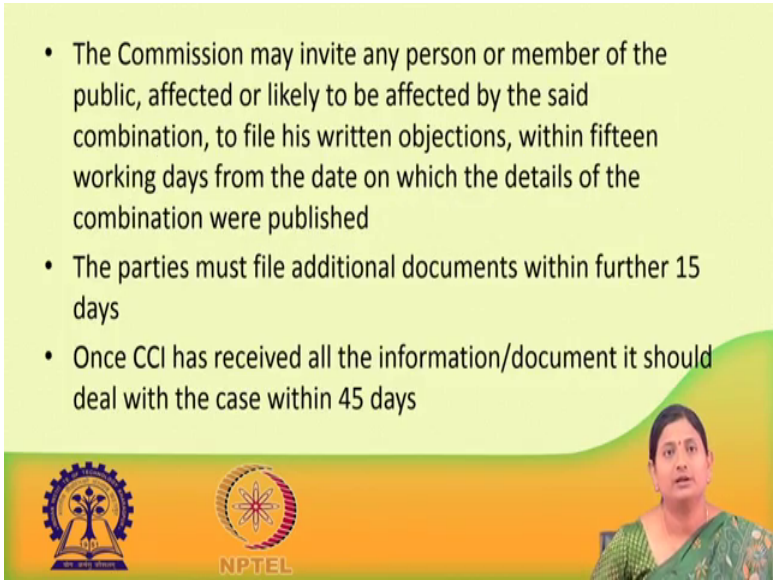

Once it has been published within 10 days, the commission has the power to also ask for individual assessment or ask from the members of the public or affected persons or parties which have higher chance of getting affected from this combination, to file their written objection within 15 working days from the date on which the details of the combinations were published.

So, once the parties publish the details of the combination agreement, in the public domain, the CCI may ask for third party objections from affected parties or from general public to raise their objections. They may be given an additional time period of 15 days to file such objections. Once the CCI receives such objections from third parties, then it should deal with such cases within 45 days.

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Within 45 days, CCI starts dealing with the cases. CCI has certain time limit, but it may be extended depending on the complexity of the cases. If the commission does not pass any order within 210 days of the date of notice to the parties, then the combination shall be deemed to be approved by the commission. So, if there is no information from CCI, then it is a good information and the combination can be thought of as approved. These are the basic steps, laid down in section 29 of the Competition Act, 2002 by which the competition commission of India analyses combination agreements.

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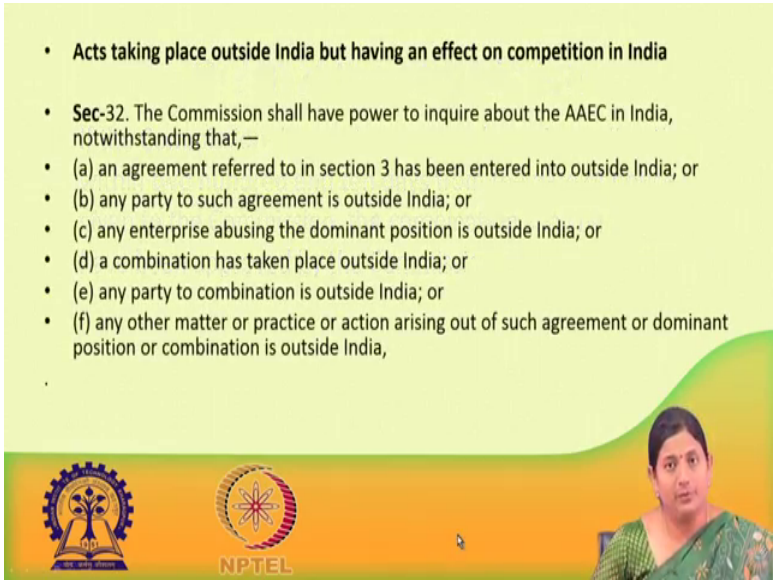

One of the important feature of the combination agreement is that, not only the combination agreements taking place in India are scrutinised or investigated by the CCI, even any of the party not residing in India or any of these enterprises residing outside India can also be investigated. So, the CCI has the power to investigate not only combinations, but also the anti-competitive agreements or abuse of dominant position agreements even though the parties are not residing in India.

If we look into section 32 of the competition act, it says that the commission shall have power to enquire about the appreciable adverse effect on competition in India not withstanding that an agreement referred to in section 3 has been entered into ***outside India*** or any party to such agreement is outside India or any enterprise abusing the dominant position is outside India or a combination has taken place outside India or any party to combination is outside India or any other matter or practices or action arising out of such agreement or dominant position or combination is outside India.

So, whenever there is an agreement, which is affecting the competition in India, irrespective of the geographical location of the parties to the combination or agreement or abuse of dominant position; the CCI has the power to investigate into all those matters. This is very important with respect to competition in the market, because today more than 200 countries have adopted the competition provisions in their laws. So, it becomes very important to maintain competitiveness amongst the companies in India to have an effective or a productive market.

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We have discussed about various anti-competitive provisions, which are laid down in the Competition Act such as section 3, which is about anti-competitive agreement, section 3 sub-section (5) which deals with exemptions when certain intellectual property rights are in involved or certain exemptions given to the company, then section 4 which talks about the abuse of dominant position, section 5 and 6 which talks about combination agreements and various procedure associated with it.

We have also seen how the competition commission of India deals with the cases and takes into account various questions to understand what is appreciable adverse effect on the competition. I would like to shed a light on competition advocacy, which is one of the important provision laid down in Competition Act of India. One of the important as well as one of the unique provisions is section 49 which talks about competition advocacy.

So, what is competition advocacy? As you know, the MRTP act was repealed, then Competition Act was passed in the year 2002, but it came into force in the year 2009. One of the important provisions, as laid down in this act is competition advocacy, which promotes the very nature of competition i.e. it create an awareness among the companies or masses about competition law provisions.

As per section 49, the central government and the state government while formulating any policy on competition matter or while reviewing any laws should take the opinion of the competition commission of India because any modification or any changes in law or policy might have certain implication on the competition within India. So, before making any changes to the competition related laws or any law other than competition law, they should get an opinion from the competition commission of India.

Once requested the competition commission of India will give its opinion within sixty days of such request but the opinion is not binding in nature. The opinion is not binding on the central government or the state government, but it may take into consideration such points. The provision which is laid down in section 49 is that the commission shall take suitable measures for the promotion of the competition advocacy, creating awareness and imparting training regarding various competition issues.

The competition act is new in India. Competition advocacy is one of the important provision, which should be propagated to all the stakeholders. Competition advocacy remains one of the unique feature of the Competition Act, 2002.

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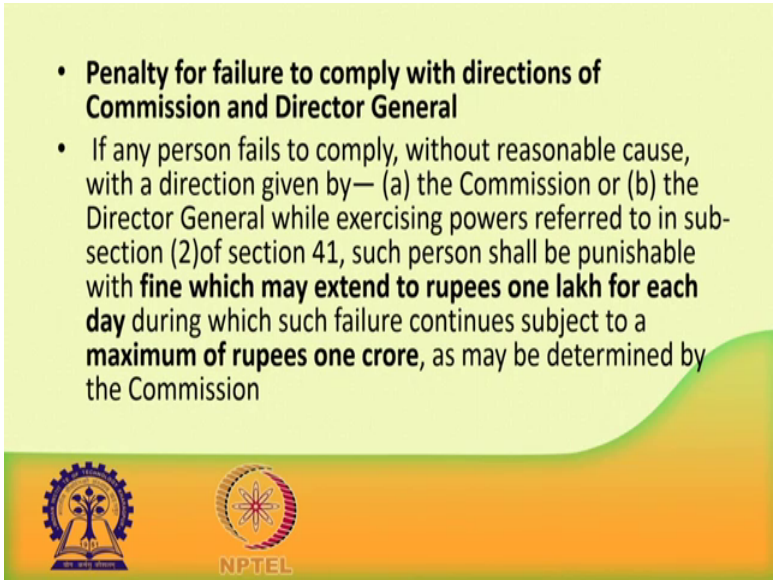

Once the competition commission reviews any agreement, whether it is horizontal or vertical or a cartel, merger, amalgamation, the competition commission then issues its

decision. The decision may be that it finds the agreement to be anti-competitive. It may abort the agreement or if it thinks that the agreement is likely to cause appreciable adverse effect which can be prevented by certain modifications in the agreement clauses, then, it may suggest such change. It may ask the companies to change certain criteria in the agreements. Depending on the nature of the final decision, the companies should abide by the decision of the competition commission of India.

If the companies or the parties to an agreement or combination do not abide by the final decision of CCI and director general, then they are generally penalised. If the person fails to comply, without reasonable cause, with the direction given by the commission or the direction given by the director general, they may while exercising their power by virtue of sub-section 2 of section 41, punish such person with fine, which may extend to rupees one lakh for each day during which the course till which the failure continues, subject to a maximum of rupees one crore.

So, a company may be fined by the amount of one lakh rupees per day to a maximum cap of rupees one crore, as may be determined by the commission. The penalty is decided depending on how much profit a company is making; how much share or asset a company is having. The competition commission takes all the financial matters into account and decides the amount of fine or the amount of penalty, which will be imposed on the companies.

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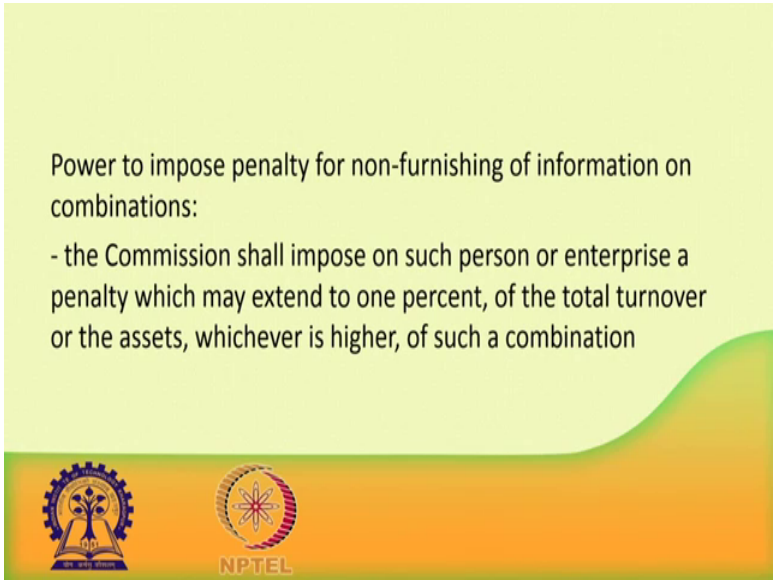

When the first notice is given to the parties of a combination and after the report from the DG, the competition commission ask the companies to publish all their relevant information on the public domain. If the parties to the combination, do not furnish the information about the combination, they can be penalised and the penalty may extend upto one percent of the total turnover of the assets of such combination. This is an essential requirement that the companies abide by all the rules and the procedures laid down in the Competition Act of India.

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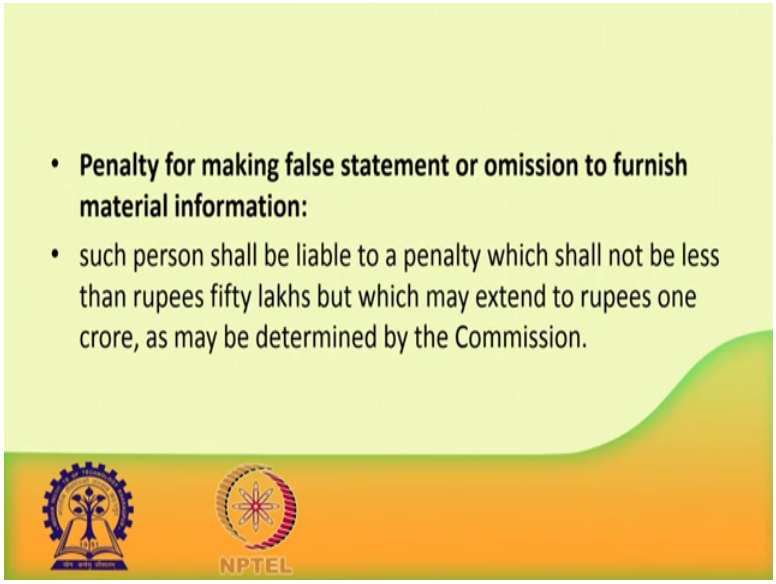

There is also penalty for making false statement or omission to furnish material information. If a company furnishes false statement or do not furnish complete information; they may be given a penalty of rupees fifty lakhs and it may extend to rupees one crore, as determined by the commission.

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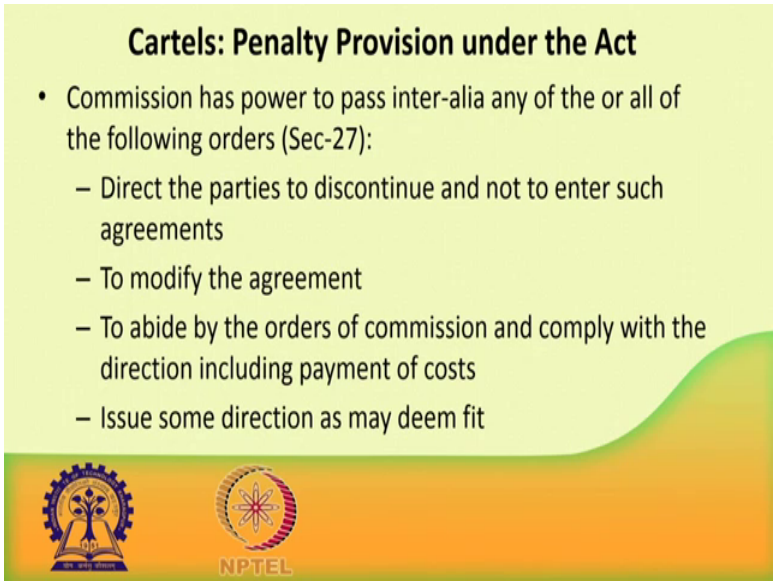

The commission can give penalty for any of the cartels or like anti-competitive agreements in the form of cartels. There are four kind of effects which a cartel or any combination agreement may bring about, as laid down in section 27. The commission has the power to pass any order such as the commission may pass the order directing the parties to discontinue and not to enter into such agreements. If the commission thinks that appreciable adverse effect is visible, it may direct the parties to discontinue or not to enter into such kind of agreements or it can ask the parties to modify the agreements or it can ask the parties to abide by the orders of the commission and comply with the direction; including the payment of costs and it may issue certain other direction as deem fit for the situation. The CCI and the DG has these powers to direct the parties, regarding change or modification or even cancellation of the agreement.

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One of the important provisions in the Indian Competition Act is the leniency program. We have seen, in the European Union, there are whistleblower immunity. Similarly, in India, we have a provision called the leniency provision. This leniency program has been started to incentivise the cartel members to come forward and share the secret informations, so that the commission can investigate the matter in a better way.

As you know cartels or anti-competitive agreements are kind of secrecy agreement. It is very difficult to get any substantial proof to establish that a cartel is ongoing and that it is affecting the price or the market structure or the competition. So, in order to get relevant information, the Competition Act has included the leniency provision in the year 2009 by an amendment. This provision was not there initially in the 2002 Act.

This provision tries to incentivise the cartel members to come forward; not only cartel members, any third party can also come forward if they have certain information to give to the competition commission of India.There are confidentiality provision as well as incentive provision. These are a kind of whistleblower protection and encourages and incentivises the actors of the competition infringement to disclose anti-competitive agreements, in lieu of immunity or leniency treatment.

The leniency treatment is in terms of reduction in penalty. Confidentiality clause is also there, but the main attraction is reduction in penalty. The penalty waiver can be as much as up to 100 percent or depending on the nature or type of disclosure. It may vary from 100 percent, 70 percent, 30 percent depending on the fact that at what stage is the information is given and how relevant are those information.

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The leniency program covers the infringement, which directly or indirectly determines purchase or sale price, limits or controls production, supply, markets, technical development, investment or provisions of services or the infringements which share the market or the source of production or provision of services by allocation of geographical area or type of goods or services, number of customer allocation, market share allocations, geographical region allocation or bid rigging provision or collusive tendering.

So, if any agreement is covering the above mentioned points, the whistleblower immunity or the leniency provisions can be applied there. All these cartelization and competitive agreements can be a part of leniency program.

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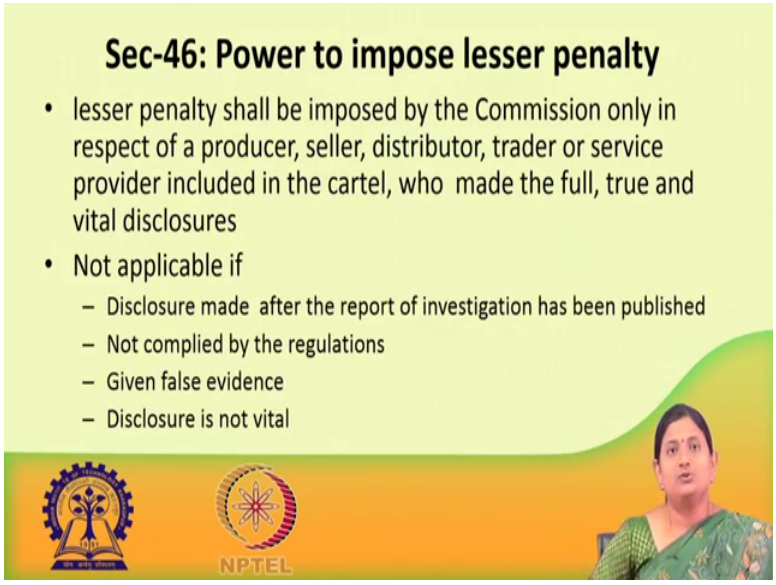

Section 46, gives the power to impose lesser penalty. Lesser penalty shall be imposed by the commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made full, true and valid disclosure. The most important thing is that the disclosure should be complete, true and vital.

Non-relevant information cannot be considered as vital information and for that reason, a company or whistleblower cannot be provided immunity. So, this immunity is not applicable if the disclosure is made after the investigation has been published. We have learnt that the competition commission of India follows certain steps to understand the very nature of an agreement. If certain companies makes disclosure after the commission has initiated the discussion and the final report has been published, in those cases, the leniency will not be applicable.

Leniency is also not applicable, if it does not comply with the regulation or false evidence has been given. The evidences are not true, in the sense that they are not related to the agreement and the disclosures are non-vital. In those cases, a company or a producer, seller, distributor cannot ask for leniency.

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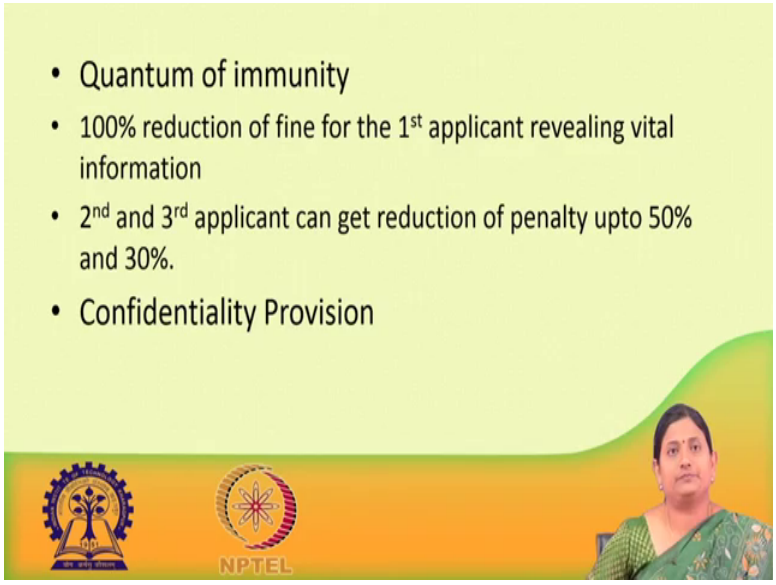

As I was discussing, the quantum of immunity maybe 100 percent for the first applicant revealing vital information. It is on a first come first served basis. Those parties which come forward after the first informant, such as the second or third parties can also get a reduction up to 50 percent or 30 percent.

The first informant coming for disclosure, gets a higher reduction in penalty and then, subsequently the percentage decreases. One of the important thing here is that, if a company wants their name to be kept confidential, that arrangement is also available in the leniency provisions.

So, this was all about combination agreement and the basic provisions laid down in the Indian Competition Act. We have learnt the very nature of section 3, section 4, section 5, section 6 and related procedure, leniency provision. This gives us a basic idea about what the Competition Act of India covers. Now let us look into, how the agreements related to intellectual property rights are looked into from the purview of Indian Competition Act and how these sections are applicable or relevant in the case of intellectual property related agreements.

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So far, there have been only five decisions on the leniency provisions. The first one to get a leniency decision by the competition commission of India was the Brushless DC Fan, in 2014, where the director general initiated the investigation on the input received from the CBI.

As per the report, a cartelization between the manufacturers and the suppliers of brushless fans in relation to the tenders floated by Indian railways and Bharath Earth Movers Limited for the supply of the brushless fans and other electrical items, existed. The CBI gave an input to Competition Commission, after which an investigation was started by the director general. It was found that there is a cartel like structure going for the tender for brushless fan. During the investigation, one of the parties applied for leniency.

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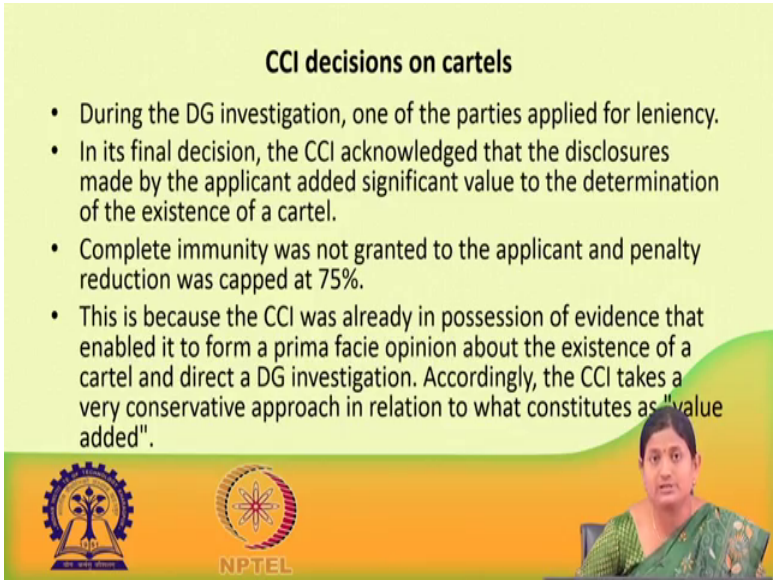

In the final decision of the case, CCI acknowledged that the disclosures made by the applicant were of significant and added value to the determination on the existence of cartel. The information were vital for the case and for that reason immunity was granted. But complete immunity was not granted, since the party came forward to disclose the information after the case investigation had started. This is why, in this case the reduction in penalty was 75 percent of the fine.

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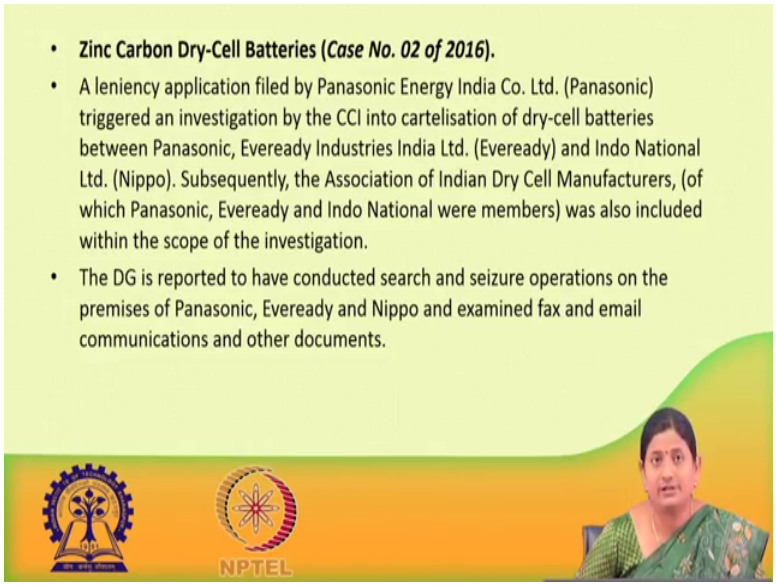

This was the first case, where leniency provisions were applied. The second case was Zinc Carbon Dry-Cell Battery case of 2016. The leniency application was filed by the battery company Panasonic energy India limited, when it gave information to the CCI about a cartelization of the dry cell batteries between Panasonic, Eveready industries or the Eveready batteries company and the Indo National or the Nippo companies. Subsequently, the association of the dry cell manufacturers, where these three companies were members, was also included within the scope of the investigation. After input received from Panasonic, the Director General conducted search and seizure operation in the premises of all these three companies and also looked into their communications, emails, etc. to understand the nature of the cartelization.

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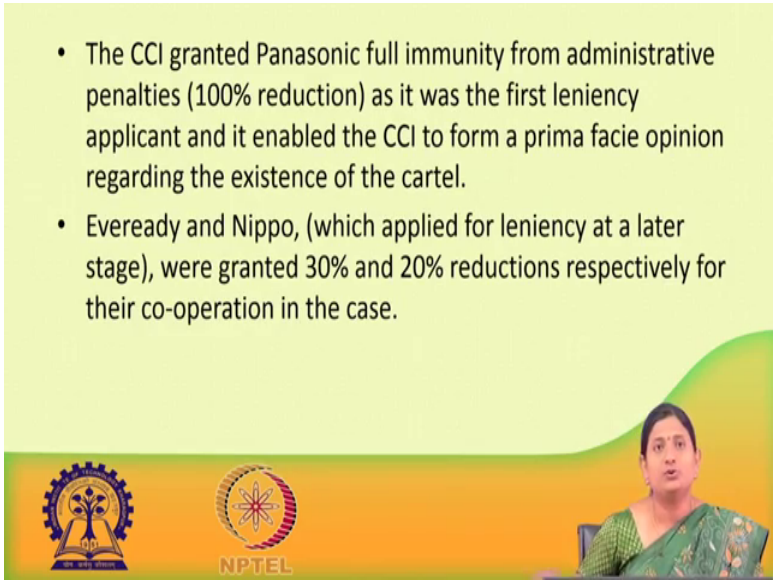

For this reason, CCI gave full immunity to Panasonic, from the administrative penalties. 100 percent reduction in the fees was given because the first information was given by Panasonic which led the CCI to investigate into this matter and find out the existence of a cartel. After Panasonic: Eveready and Nippo also came forward for the leniency program and they were granted 30 percent and 20 percent immunity, respectively, for their cooperation in the case.

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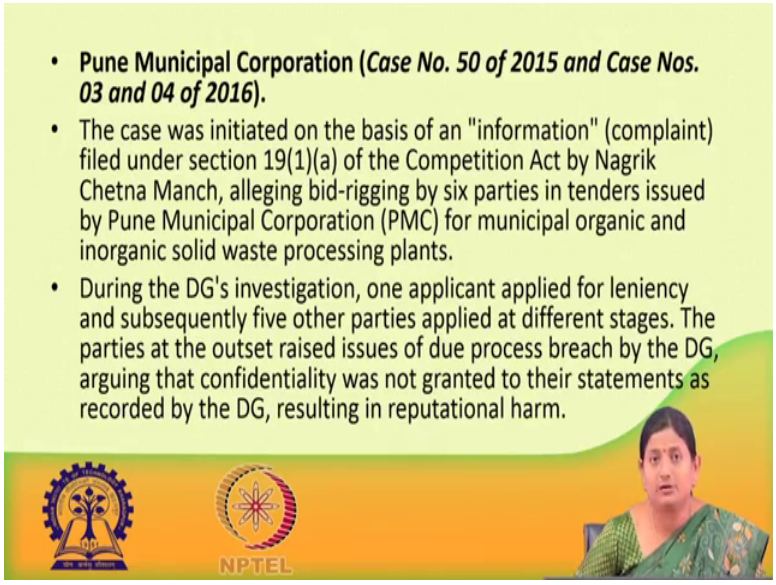

The third case was related to Pune Municipal Corporation regarding waste management. In this case also, the investigation was initiated on the basis of an information by Nagrik Chetna Manch, which alleged that there is a bid rigging process going on between six parties for a tender issued by the Pune Municipal Corporation for municipal organic and inorganic solid waste processing plants. Initially, during this investigation, one applicant filed for leniency and subsequently, five other parties also filed for leniency at different stages of the investigation. There were certain issues, regarding confidentiality of the very disclosure and the nature of the statements they made. They asked for confidentiality of their statements.

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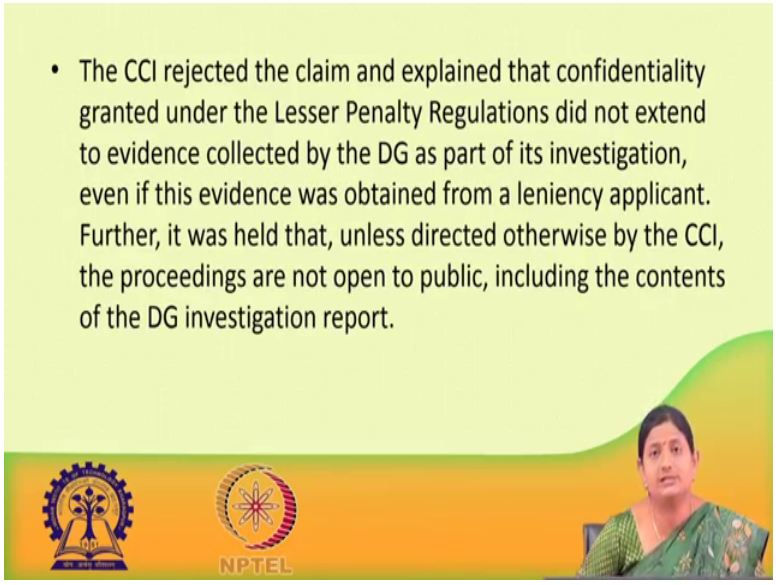

They asked to not to reveal their name and not to reveal what kind of information they are disclosing, regarding which the CCI explained that the confidentiality granted under lesser penalty regulation did not extend to the evidence collected by the DG as part of the evidence. Their names can be kept as confidential, but not the evidences. Because the judgment would prima facie be based on the evidences collected. Hence, the evidences cannot be kept confidential; even though, such evidence is obtained from a leniency applicant. They also held that, unless and otherwise directed by the CCI, the proceedings are not open to public, including the contents of investigation by the DG. DG's investigation reports are not public, unless and until CCI decides to make them public.

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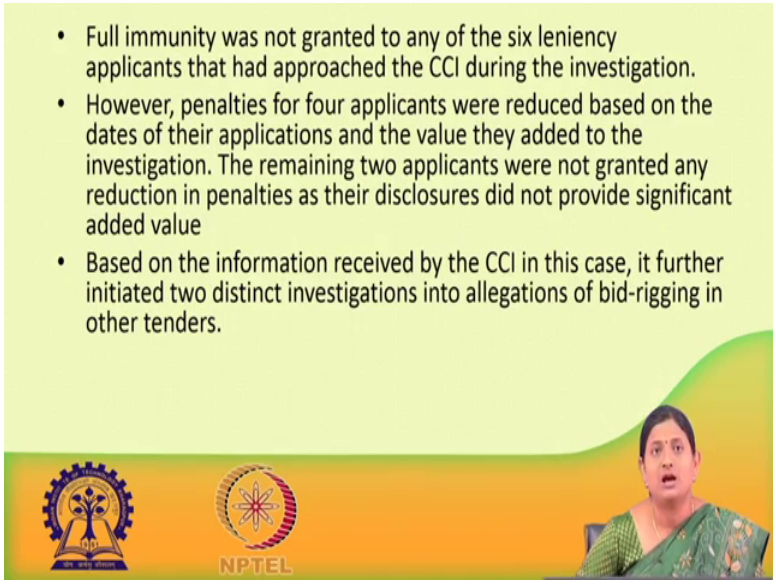

These things were made clear to the leniency applicants. Full immunity was not granted to the six leniency applicants who approached CCI. However, penalty was reduced and based on the information, the CCI further investigated into two more cases; two more tenders.

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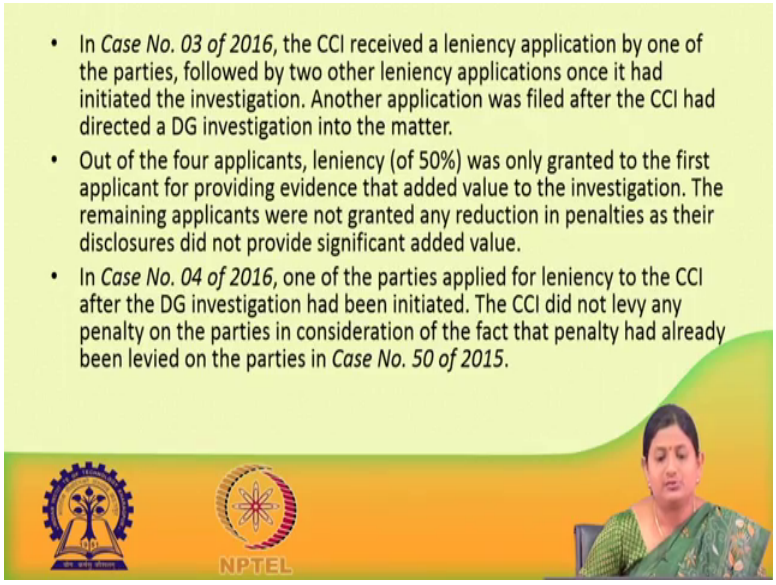

There was another case in 2016, where the CCI received a leniency application from one of the parties and followed by two more. Out of these four applicants, 50 percent

leniency was granted to the first applicant. Another case was investigated in the year 2016 where the CCI did not levy any penalty on the parties in consideration of the fact that the penalty has already given in a related earlier case.

These were the five cases, where leniency provisions have been applied. This provision helps the parties to come forward and reveal information so that the competition commission can investigate into the matter, in a better way. This is a very important provision, to understand, to maintain a good competitive environment in the Indian market.

With this, we complete this module on the basic provisions of Indian Competition Act. In the next modules, we will deal with the various licensing agreements and how the interface of IP and competition law are dealt in India.

Thank you very much.