Competition Commission of India

MRTP Case: RTPE No. 20 of 2008

Dated: 30.10.2012

All India Tyre Dealers Federation — Informant

Tyre Manufacturers — Opposite Party

Order under Section 27 of the Competition Act

As per R.Prasad (Minority)

This case has arisen out of information submitted by the All India Tyre Dealers Federation (AITDF) against the manufacturers of tyres. Incidentally Shri S. P. Singh Convener of AITDF on 28.12.2007 had submitted a complaint to the Minister of Corporate Affairs for probing cartels in transport and tyre. It was stated in the complaint that the tyre dealers have been witnesses to the trade activities of the domestic tyre industry. It was alleged that the tyre dealers did not fix the prices of tyres and that pricing and distribution policies were under the strict domain of each individual tyre manufacturer. It was also alleged that since independence, the domestic tyre majors have indulged in anticompetitive, antitrade and anti-consumer practices. For this reason, the MRTP Commission probed the activities of the trade and issued a 'cease and desist' order against cartelisation by the tyre manufacturers. It was further stated that the tyre manufacturers had indulged in price rigging and strangulation of production and supplies. It was also alleged in the information that the domestic tyre industry was operating at 95% to 100% capacity due to demand in the last four-five years and that the entire excise duty reduction allowed by the government had been usurped by the tyre manufacturers and that nothing had been passed on to the consumers. It was also alleged that the tyre manufacturers had a 'falcon like grip' on the government departments. On this very issue AITDF had approached the Competition Commission of India. AITDF agreed to assist

the authorities in the investigation of anticompetitive practices carried out by the tyre manufacturers. The Minister for Corporate Affairs sent the complaint to the MRTP Commission in early 2008. The MRTP Commission directed the Director General (I&R) to investigate the case.

2. Shri S.P. Singh, Convenor AITDF met the Member, Competition Commission of India in June 2007 and in a written complaint alleged collusive pricing, tax avoidance and various trade malpractices. It was stated that these anticompetitive practices have existed in the tyre trade since independence in 1947. The manufacturers in that period were Dunlop India Ltd., Goodyear India Ltd., Firestone Tyre and Rubber Ltd. and India Super Tyre Ltd. The government set up a Tariff Commission on Fair Prices of Rubber tyres and tubes in 1952 which in its report submitted in 1955 blamed the tyre companies for concerted price increases and anticompetitive activities. On the basis of this report, the government allowed the import of truck/bus tyres. It has been stated in the complaint that in 1959, the government permitted setting up of tyre factories by Mansfield Tyres Ltd. (now MRF Ltd.), Inchek Tyres Ltd. (now Tyre Corporation of India), Premier Tyres Ltd. (taken over by Apollo Tyres Ltd.) and Ceat Tyres Ltd. As now there were eight players in the tyre market, the government stopped the import of tyres. An allegation has been made that these tyre companies along with the earlier four also started indulging in anticompetitive practices. In the consequence, the transport operators approached the MRTP Commission and the Commission after inquiry came to the conclusion that the tyre companies were indulging in anticompetitive activities. The Commission therefore passed a 'cease and desist' order in 1974. Subsequently the Ministry of Industry examined the price structure of the tyre industry and came out with a 'Tyre Price Control' order. In 1976-77, four new tyre units – Apollo Tyres Ltd., J.K.Tyres Ltd., Modi Rubber Ltd. and Vikrant Tyres Ltd. entered the field of tyre manufacture. But after the stabilisation of production, these four companies along with the other eight companies started indulging in anticompetitive prices. The Ministry of Industry seeing frequent increase in the prices of tyres referred the issue to the

Bureau of Industries Costs and Prices. Further, whenever there was a hue and cry over the rise in tyre prices, the Ministry referred the issues to the Bureau & Industrial Costs and Prices. It was also stated that the Association of State Transport and Undertakings also went to the MRTP Commission against price rigging by the tyre manufacturers. AITDF has alleged under invoicing, tax avoidance and doctored financial results by the tyre majors. Around 1991, the government delicensed the tyre industry and four more manufacturers entered the fray especially Bridgestone and Birla Tyres. For sometime competition existed in the industry. This led to the exit of Dunlop India, Modi Rubbers Ltd., Tyre Corporation of India, Vikrant Tyre and Modistone. The market share of these companies went to Apollo Tyres, MRF, Ceat, J.K. Tyre and Birla Tyre. In the Finance budget of 2003, the excise duty was reduced from 32% to 24% and in 2004 budget from 24% to 16%. But the benefits of excise duty were not passed on by the companies to the consumers. In fact the excise duty on tyres was reduced from 66% to 16% but the consumers did not benefit. The tyre companies through ATMA moved the Anti Dumping Authority to levy Anti Dumping Duties on imports from Thailand and China. This was done in 2005 and the Designated Authority under the Anti Dumping rules by an order in 2007 held in the favour of the tyre companies and recommended antidumping duties on import of LUG tyres from China and Thailand. This order was confirmed in appeal. But when the tyre companies through ATMA moved the authority again in the case of radial tyres in the year 2010, the Designated Authority again levied the Anti Dumping Duty but CESTAT setaside the said order in 2011. The informant has also alleged that tyre prices were increased when the rubber prices went up but were not reduced when the rubber prices fell. It was, therefore, stated that the profits of the tyre companies went up exponentially in the last four to five years. AITDF wanted the antidumping duty on imports be removed.

3. As the investigation by the D.G. (I&R) MRTP Commission could not be completed when the MRTP Act was repealed, under the provisions of Section 66(6) of the Act, the case was transferred to the Competition

Commission of India. The Commission considered the issue in an ordinary meeting on 22.06.2010. The Commission held that antidumping duty may be restricting competition in the market. The Commission also considered that as the issue was before D.G. (I&R), the Commission considered it fit to continue the investigation. It, therefore, referred the issue to the Director General for investigation under Section 26(1) of the Competition Act. The Commission has referred to five tyre companies namely Apollo Tyres Ltd., Ceat Tyre of India Ltd., J.K. Industries Ltd., Kesoram Industries Ltd. and MRF Ltd in its direction under 26(1) of the Act.

4. The Director General (D.G.) considered the cost of production, antidumping duty order and a report conducted by JNU on a reference by the CCI. In addition to above named five tyre companies, some other tyre companies, AITDF and Automotive Tyre Manufacture Association (ATMA) were contacted by the D.G. and details were obtained.

5. The D.G. then considered the fact that the tyre manufacturers in India made tyres for trucks, buses, cars, jeeps, heavy duty equipment tractors, two wheelers and three wheelers etc. In his view, the tyre industry is directly related to economic development and growth. He has held that in buses and trucks two types of tyres are used (i) bias i.e. diagonal or cross ply tyres (ii) radial tyres. The cars are using radial tyres but in buses and trucks bias tyres are being used though there is a tendency to increase the use of radial tyres. The tyres are being sold separately or along with tubes and flaps. The flaps are used between tube and the wheel rim to prevent tube burst. But slowly the use of tubeless tyres is being promoted. The D.G. has held that the tyre market consists of (i) Original equipment manufacturers (OEM) (ii) replacement market (iii) export segment and (iv) State Transport Undertakings. Tyres for buses and trucks mainly radial tyres were being imported whereas cross ply tyres were being exported from India.

6. The D.G.'s main aim was to examine whether the tyre manufacturers have entered into a cartel. As it was not possible to

examine cartelisation in all the products, the D.G. considering the commercial utility of truck and bus tyres, limited his investigation mainly to bias tyres. In his view the bias tyres of different companies are consumed in large quantities and are substitutable and identical. He therefore considered these tyres for his analysis. Out of the bias tyres the tyres selected by him are as under:

Company	**Tyre (LUG)**
Apollo	10.00 – 20 16XT-7
Birla	10.00 – 20 16 PR LUG BT 112
MRF	10.00 – 20 SL 50 Plus N 16 LUG
Ceat	10.00 – 20/16 HCL Super LUG
J.K. Tyre	10.00 – 20 6 JTK LUG

7. During the course of the examination, the D.G. took responses from the following Cos.

(i) MRF Ltd. (MRF)

(ii) Apollo Tyres Ltd. (Apollo)

(iii) Ceat Tyres Ltd. (Ceat)

(iv) Birla Tyre Ltd. (Birla)

(v) JK Tyre Ltd. (JK)

(vi) Dunlop India Ltd. (Dunlop)

(vii) Goodyear India Ltd. (Goodyear)

(viii) Bridgestone India Pvt. Ltd. (Bridgestone)

(ix) Michelin India (Michelin)

8. The D.G. then examined the submission of J. K. Tyres Ltd. and he considered the installed capacity and actual production as well as the production of BIAS and radial tyres. They are reproduced as follows:-

Capacity Utilization **(Nos in lacs)**

YEAR	Installed Capacity (Qty in Nos)	Actual Production (Qty in Nos)	Utilisation %	% Increase/ decrease from previous year
2002-03	56.56	49.59	87.7%	13.3%
2003-04	60.55	53.96	89.1%	8.8%
2004-05	62.96	56.15	89.2%	4.1%
2005-06	62.96	63.61	101.0%	13.3%
2006-07	75.98	70.33	92.6%	10.6%
2007-08	87.00	75.26	86.5%	7.0%
2008-09	87.93	74.86	85.1%	-0.5%
2009-10	91.44	79.31	86.7%	5.9%

Truck/Bus Tyre Production **(Nos. in lacs)**

YEAR	Total Production		Qty Exported to the total Production	
	Bias (Qty in Nos.)	Radial (Qty in Nos.)	Bias (Qty in Nos.)	Radial (Qty in Nos.)
2005-06	26.44	2.69	5.81	0.69
2006-07	26.33	3.22	6.07	0.6
2007-08	25.43	3.52	6.62	0.55
2008-09	23.10	3.85	4.95	0.08
2009-10	21.62	6.62	3.96	0.09

It was stated by J.K. Tyres Ltd. that it fixed its selling price on the basis of demand and supply, cost of production, selling expenses and the competitive position of the company. It was also stated that OEM buyers like Tata Motors and Ashok Leyland are bulk buyers and are able to dictate prices. It was stated that some time sales were made to OEM buyers at a loss.

9. In the case of Apollo Tyres Ltd., the details of capacity utilisation, production and export for different years as submitted by the Company is as follows:

Capacity Utilization

(Nos. in Lacs)

Particulars	Installed Capacity (Qty in Nos.)	Actual Production (Qty in Nos.)	Utilization %	% increase/ decrease from previous year (over actual production)
2005-06	7,934,272	7,029,973	89%	18%
2006-07	8,822,612	7,841,008	89%	12%
2007-08	9,656,232	8,867,443	92%	13%
2008-09	9,896,725	8,592,050	87%	-3%
2009-10	13,153,934	10,528,299	80%	23%

Production & Export (Nos. in lacs)

Year	Production (Qty)		Export (Qty)	
	Truck Bus bias	Truck Bus Radial	Truck Bus bias	Truck Bus Radial
2005-06	3,176,419	-	462,330	-
2006-07	3,320,281	5,827	435,020	-
2007-08	3,542,572	35,164	423,936	-
2008-09	3,217,476	68,072	361,980	-
2009-10	3,744,803	81,157	325,030	-

Apollo Tyres Ltd. also gave details of Cost of Production as follows:

Cost of Production

Year	Cost of Production (Rs. Per Unit)	
	10.00-2016 Amar (in Rs.)	10.00-2016 XT-7 (in Rs.)
2005-06	4674	5144
2006-07	5343	5998
2007-08	5184	5718
2008-09	6206	6612
2009-10	6047	6356

It was stated by Apollo Tyres Ltd. that the price of the tyres was fixed on the basis of six factors which are (i) desired market share (ii) desired product positioning (iii) strategic intent of the products (iv) cost inputs of the products (v) target returns on investment and (vi) financial fluctuations.

10. Birla Tyres Ltd. submitted to the D.G. details of capacity utilisation which are as under:-

(No. of tyres in Lacs)

YEAR	Installed Capacity (Qty) (Truck Tyres)	Actual Production (Qty) (Truck Tyres)	Utilisation % (Truck Tyres)
2004-05	10.66	9.98	93.62
2005-06	11.66	10.58	90.74
2006-07	13.08	11.75	89.83
2007-08	14.58	14.24	97.67
2008-09	13.80	11.26	81.59
2009-10	13.80	14.43	104.57
Increase %age	29.46	4.59	

Birla Tyres Ltd. also stated that raw materials constituted 85% of the cost of production. Details of raw materials consumed and increase in their costs are given as below:

	% of total RM consumption	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	% increase form 2004-05
Natural Rubber	42.05	65.82	69.73	95.41	97.24	117.82	110.90	68.49
Synthetic Rubber	12.06	81.26	100.60	101.03	100.46	159.38	136.46	67.93
Carbon Black	11.04	28.41	32.78	41.74	40.07	54.09	53.02	86.62
Fabric	20.01	170.14	196.54	178.08	171.24	215.84	218.26	28.29
Total	**85.16**							**50.06**

It was stated on behalf of Birla Tyres Ltd. that as a percentage of exports/ turnover is falling over the years. This means that the exports of the company are stagnant in the different years though the turnover had increased over these years.

11. Ceat Ltd. also submitted the details of capacity utilisation to the D.G. which are as follows:-

Capacity Utilization

Year	Plant	Installed Capacity	Actual Production	Utilization (%)	% Increase/decrease from previous year
2005-06	Nasik	4,310,930	3,864,051	90%	
2006-07	Nasik	4,310,930	3,925,091	91%	1%
2007-08	Nasik	4,542,220	3,768,703	83%	-8%
2008-09	Nasik	4,542,220	3,411,444	75%	-8%
2009-10	Nasik	4,726,048	3,820,647	81%	6%

The details of Tyre Production and export by Ceat Ltd. as submitted are as follows:-

Tyre Production and export

Year	Total Production		Qty exported of the total Production	
	Bias	Radial	Bias	Radial
2005-06	1,771,797	0	495,896	0
2006-07	1,820,828	0	385,068	0
2007-08	1,875,991	0	485,964	0
2008-09	1,737,233	0	340,170	0
2009-10	1,958,922	0	364,233	0

12. The D.G. collected data from MRF Tyres Ltd. regarding installed capacity which are as under:-

	Installed Capacity			Actual Production				
Year	Bias	Radial	Total	Bias	Radial	Total	Utilisation %	% Increased/ Decreased from previous year
2005-06	2973333	233333	3206666	2329968	65268	2395236	74.7	
2006-07	3192223	168000	3360223	2597438	66170	2663608	79.27	4.57
2007-08	3095540	197502	3293042	2611930	92803	2704733	82.13	2.86
2008-09	3068889	286458	3355347	2630853	81932	2712785	80.85	-1.28
2009-10	3235052	334105	3569157	2957026	220795	3177821	89.04	8.19

The details of production and exports were submitted which are as under:

Production and export

Year	Total Production		Qty exported of the total Production	
	Bias	Radial	Bias	Radial
2005-06	2329968	65268	419760	55020
2006-07	2597438	6170	440453	41443
2007-08	2611930	92803	402294	34182
2008-09	2630853	81932	347754	20562
2009-10	2957026	220795	424142	

It was stated on behalf of MRF Ltd. that the selling price for the replacement market is the net billing price minus the discount reflected in the invoice.

13. The D.G. also collected data from Dunlop India Ltd. but as Dunlop India was not in production for a number of years and as it is only a fringe player in the tyre market, there is no necessity to examine this data.

14. Goodyear India Ltd. is a world major in the tyre business. In India it has been active for many years but it has hardly expanded its capacity and remains a small player. The details of Capacity Utilisation of Truck and Bus Tyres of Goodyear India Ltd. as submitted by it as follows:-

Year	**Installed Capacity (Nos.)**	**Actual Production (Nos.)**	**Utilization %**	**% Increase/ decrease from previous year (Actual Production)**
2005	363600	337516	92.83%	-4.50%
2006	300200	271344	90.39%	-19.61%
2007	300200	282901	94.24%	4.26%
2008	203319	187107	92.03%	-33.86%
2009	155450	147918	95.15%	-20.94%
2010 (Ytd Oct 2010	90871	74031	81.47%	-49.95%

The details of production and exports of Goodyear India Ltd. are as follows:-

Production and export

Year	**Total Production**		**Qty exported of the total Production**	
	Bias	**Radial**	**Bias**	**Radial**
2005	337516	NIL	56104	NIL
2006	271344	NIL	17832	NIL
2007	282901	NIL	26118	NIL
2008	187108	NIL	30201	NIL
2009	147918	NIL	32013	NIL
2010 (Ytd Oct 2010	74031	NIL	23009	NIL

15. Bridgestone India Ltd. is a subsidiary company of Bridgestone Corporation, Japan, one of world's topmost manufacturers of tyres. It does not manufacture any truck or bus tyre in India but it imports these tyres from Japan and Thailand. As this investigation is limited to the anticompetitive practices followed in the production of bus and truck tyres, the data in respect of Bridgestone is not required to be looked into. But now Bridgestone India is setting up a large unit for the manufacture of radial tyres in Maharashtra in Pune which is likely to be operational from the end of 2012.

16. Michelin India Ltd. is a subsidiary of world major Michelin. It does not manufacture any tyre in India but it imports and sells the same in India. The import consists of bus and truck radial tyres, two wheelers and earth mover tyres. It operates primarily in the replacement market. But Michelin is setting up a large manufacturing unit mainly of radial tyres in Tamilnadu with an investment of over Rs. 4000 crores.

17. The D.G. obtained responses from the Original Equipment Manufacturers (OEM) players which are mainly Tata Motors, Eicher Motors and Ashok Leyland. The OEM players source their tyres from domestic tyre manufacturers or imports from other countries. The OEMs procure tyre at a price lower than the replacement market because of the high volume of purchase.

18. The DG also examined the information provider i.e. AITDF. The allegations made by the information provider in the original petition were repeated before the DG and there is no necessity to reproduce the same.

19. The DG also collected materials from Automotive Tyre Manufacture Association i.e. ATMA. The DG collected the minutes of the meetings from the Association. The main objectives of the Association are (i) to foster and promote cooperation amongst the members (ii) to provide a meeting place of the tyre manufacturers (iii) to arrange and provide facilities of conferences, exhibitions, demonstrations, lectures, excursions etc. (iv) to collect, analyse and circulate information and statistics to a

different members of the Association (v) to inform and educate the general public regarding the tyre industry and (vi) to provide facilities and machinery for settlement of disputes among the members. The Association is a Section 25 Company under the Companies Act, 1956..

20. The DG then carried out an analysis of the price data of the five domestic tyre manufacturing companies i.e. MRF, J. K. Tyre, Birla, Ceat & Apollo. The DG observed that the major component of the price of the tyres was the cost of natural rubber and excise duty. Natural rubber accounts for 43% of the total tyre production cost. Central excise duty has been reduced over a period of time and during the years under consideration they were 16% which was reduced to 10% in 2008, further reduced to 8% in 2009 and increased to 10% in 2010. As far as rubber prices are concerned they were worked out on weighted average though there was a decline in prices to Rs. 97/- per kg. in the year 2009. The DG then examined the net the prices of the five specific lug tyres selected by him and the prices are reproduced as under

	2005	**2006**	**% change**	**2007**	**% change**	**2008**	**% change**	**2009**	**% change**	**2010**	**% change**
Apollo	8717	9793	12.34	10364	5.83	10701	3.25	10309	-3.66	10640	3.21
Birla	8057	8968	11.30	9506	5.99	9789	2.97	9280	-5.19	10091	8.73
MRF	8461	8992	6.27	9465	5.26	9973	5.36	9792	-1.81	10475	6.97
CEAT	7880	8720	10.65	9180	5.27	9718	5.86	9161	-5.73	10660	16.36
J.K.Tyre	7800	8904	14.15	9156	3.13	9612	4.98	9122	-5.10	10248	12.34

The DG observed that during the five-year period 2005 - 2010 the net dealer prices of Apollo tyres was the highest. According to the DG this showed that Apollo tyre was the market leader. The DG took the net dealer prices and on the basis of weighted averages, he found that the movement of net dealer price in terms of actual quantum as well as percentage change was found to be similar in all the cases. In his view the net dealer prices showed upward and downward correlation among the five tyre manufacturers. He also found that in all the years Apollo Tyres charged a price higher than that charged by the other tyre companies. He also found that the other tyre companies had prices in the same band. For this reason the DG came to the conclusion that price

parallelism existed among the five tyre manufacturing companies.

21. The DG then examined the actual production of the lug tyres by the five companies and the results are reproduced as under:

Actual Production by domestic tyre companies

Company	2005-06	2006-07		2007-08		2008-09		2009-10	
	Production (Nos in Lacs)	Production (Nos in Lacs)	% change	Production (Nos in Lacs)	% change	Production (Nos in Lacs)	% change	Production (Nos in Lacs)	% change
Apollo	70.30	78.41	12	88.67	13	85.92	-3	105.28	23
Birla	10.58	11.75	11.05	14.24	21.20	11.26	-20	14.43	28.15
MRF	23.95	26.63	11.18	14.24	-21.20	11.26	-20	14.43	28.15
CEAT	38.64	39.25	1.50	37.68	-4	34.11	-9.40	38.2	12
J.K.Tyre	63.61	70.33	10.60	75.26	7.00	74.86	-0.50	79.31	5.90

The DG found the actual production of the domestic tyre companies had increased in every year except in the financial year 2008 – 2009 when it registered a fall as compared to the immediately preceding financial year.

22. The DG then considered the capacity utilisation of each of the five tyre companies and the details are reproduced as under:

Capacity Utilization Movement

Company	2005-06	2006-07	2007-08	2008-09	2009-10
	Utilisation %	Utilisation %	Utilisation %	Utilisation %	Utilisation %
Apollo	89	89	92	87	80
Birla	90.74	89.83	97.67	81.59	104.57
MRF	74.7	79.27	82.13	80.85	89.04
CEAT	90	91	83	75	81
J.K.Tyre	101	92.6	86.5	85.1	86.7

The DG found that the capacity utilisation had dropped in the cases of Apollo, Ceat & J.K.Tyre over number of years whereas in the cases of MRF & BIRLA it had gone up. In the case of J.K.Tyres there was drastic decline in capacity utilization which is reflected in the under utilization of capacity. The DG therefore came to the conclusion that these five companies were not utilizing their capacity to produce tyres and thus created a shortage in the market.

23. The DG then examined the cost audit reports of the various companies. The companies produce various types of tyres but the DG

restricted his analysis to only truck tyres. The DG noted that the cost of production depended mainly in the price of basic raw material which is natural rubber. The DG also examined the cost of sales realisation in the market. He found that the margins for Apollo tyres had shown very healthy trend and that it reached its highest in financial year 2009–10. In the case of JK tyres he found the profit margin had been improving and had gone up drastically in Financial Year 2009-10. In fact in the year 2009–10 it had gone to Rs.617 per tyre. He found improvement in the margins in the case of MRF for the financial year 2009–10. But in the case of Ceat as well as Birla tyres he found that the margins had come down substantially in the financial year 2009–10. The DG found that the cost of sales showed an increasing trend mainly due to increase in the price of natural rubber. But the DG found that nearly all the companies had shown substantial profit margins in most of the years under consideration. The DG has further reported that the five tyre companies had been inflating miscellaneous expenses so as to reduce the net profit margins. But the DG has not pointed out as to which items of miscellaneous expenses have been inflated. He also recorded a finding that the change in the prices of natural rubber had no impact on the cost of production and that it did not explain the reason for the increase in the price of tyres. The DG also recorded a finding of the analysis of data submitted to him that the profit margins of all the tyre companies had increased. He therefore came to the conclusion that the domestic tyre manufacturers had been operating at higher profits but the benefit was not passed on to the consumers by lowering prices of tyres.

24. The DG then carried out a comparative study of the market share of each of the tyre companies. The information of the market share was compiled by ATMA. The detail was submitted by Birla Tyres which is reproduced as under:

MARKET SHARE

Tyre Company	2005-06		2006-07		2007-08		2008-09		2009-10	
	Total production	Market share in %	Total production	Market share in %	Total production	Market share in %	Total production	Market share in %	Total production	Market share in %

Apollo	3176420	27	3324776	25.04	3577464	27.23	3274926	25.52	3825960	25.83
Birla	1073464	8.9	2129491	16.03	1488924	11.33	1940653	15.12	2924545	19.74
Ceat	1823257	15.26	1901798	14.32	2012127	15.31	1872357	14.59	2014151	13.59
Goodyear	409653	3.43	352585	2.65	364654	2.77	224378	1.74	215013	1.45
JK/Vikrant	2913063	24.39	2955422	22.26	2894790	22.03	2695745	21.01	2824784	19.07
MRF	2397680	20.07	2520722	18.98	2700833	20.55	2726690	21.25	2896630	19.55
Others	147400	1.23	91900	0.69	97800	0.74	95700	0.74	110100	0.74
Total	**11940937**		**13276694**		**13136592**		**12830449**		**14811183**	

The DG analysed the figures of market share and found that the market share of Apollo remained constant at 27% from 2005–2008 and decreased by around 1.5% in 2008-2009. He also found that the market share of Birla tyres increased by 10.76% during the period of investigation. MRF saw a decline of 1.7% in 2009-10. In the case of Ceat he found no major change in the market share but he observed that the market share got reduced by 1% in 2009-10. The DG observed that in the case of JK tyres the market share kept on decreasing throughout the five-year period by 1 – 1.5% each year. The DG has also observed that the five domestic tyre companies especially in the lug tyres controlled 95% of the market i.e. that a market share of 95% of the entire production. According to the DG they showed very high concentration.

25. The DG then considered the Tariff Commission Report of 1985, the Tariff Commission Report of 1988, JNU market study on tyre industry, anti-dumping order of the designated authority 2007 and the anti-dumping orders of the designated authority 2010. The Tariff Commission observed that the intercompany price variation among five companies is a matter of concern and needs to be followed specially as the prices increase in tandem. The bureau of industrial costs and prices in 1983 had observed that the tyre industry was a very neat cartel and that it was the duty of the government to see that the competition was encouraged and that the government should intervene in fixing of the tyre prices because of excess capacity and competition. It was stated by the bureau that unified and coordinated increase of tyre prices should be discouraged.

26. The DG then examined the impact of excise duty on tyre prices. The DG has reported that the increase in price of tyres was much higher than increase in the price of raw materials. As far as Central Excise was

concerned the Bureau of Industrial Costs and Prices had observed that though the excise duty was reduced the tyre companies did not pass on the benefit to the consumers.

27. The Tariff Commission Report of 1988 also found concentration in the tyre market as the three top companies accounted for 50% of the sales. It observed that in the case of truck tyres the prices had increased many times. The bureau also observed that the increase in prices was coordinated by the tyre companies and that even though surplus capacity existed there was no adequate competition in the market. The bureau further observed that the price structure and the pricing policy of entire industry was not desirable and on accepted lines. The study also indicated the need for price regulation. The bureau recommended that all categories of tyres should be under the Open General Licence.

28. The JNU market study observed that the tyre industry is cartelised all over the world. The majority of the tyre sales were in the replacement market and a small amount of the sales went to the OEMs. The JNU report also found that as the share of imports was very small the antidumping duty did not cause any effect. But the report also observed that though the imports were small they appear to regulate the excess profitability of the tyre companies. The report stated that the market was concentrated with five major companies in the market. The study also noted that the eight largest companies accounted in 80% of the total production. The JNU report stated that the tyre companies indulged in a price-fixing, exclusive supply agreement and a tie-in arrangement so as to bind their dealers.

29. The DG then examined the order of the Designated Authority of the Directorate of Anti Dumping in the Commerce Ministry. The Designated Authority passed a detailed order and held that dumping existed in the imports from Thailand and China. The anti-dumping proceedings were initiated by ATMA at the behest of the five tyre companies. The Authority therefore recommended imposition of anti-dumping duty equal to the

difference between the amount and landed costs of imports on all imports of new pneumatic non-radial bias tyres. The designated authority passed another order in respect of radial tyres in 2010 again at the behest of the tyre makers in India through the agency of ATMA. Even in the case of radial tyres the Designated Authority found dumping on the imports from China and Thailand. The Authority held that the imported product was consumed only in the replacement market and not in the OEM market. The Authority did not accept the pleadings of the importers who had stated that the industry could not cope up with the demand for the tyres and that for this purpose import was necessary.

30 The DG then considered the behaviour of the Association of the domestic tyre manufacturers known as ATMA. The DG observed that the Association members had adopted various course of action under the umbrella of the Association and these were anti-dumping petitions, production of low-cost tyres, blacklisting of importers and increase in export realisation. The DG observed that anti-dumping action was initiated by the Association against import of passenger car tyres. The DG also observed that the antidumping duty proceedings were initiated by the Association by hiring one lawyer for all the manufacturers and the data was provided by Apollo, Ceat and JK tyres. Same was the case regarding import of truck and bus radial tyre. Regarding low-cost tyre strategy, the strategy was adopted by the Association members in order to tackle the cheap imports of Chinese tyres. The members of Association i.e. mainly the five tyre manufacturers formed a marketing group to tackle under invoicing of the import of tyres. To tackle this menace the marketing committee allocated geographical areas to the tyre companies. Delhi was allotted to Apollo, Mumbai to Ceat, Indore to JK Tyre and Vijayawada was given to some other tyre company. On the other hand the Association stated that no territory was allocated but that an area was assigned to keep an eye on under invoiced imports so that the same could be brought to the notice of the concerned customs authorities. Regarding export realisations the Association decided that the export price should be increased by US$2.25/tyre. Regarding original equipment manufacturers

the Association stated that the price realisation from OEMs was low and therefore some methods should be adopted that the realisation was increased. The DG observed that the tyre manufacturers had acted together to protect themselves from competition especially in the field of radial tyres. The DG, contrary to what he has stated earlier that the five tyre companies accounted for 95% of the total tyre production, he has also stated that there was a high concentration in this industry and that the industry was very capital intensive. The DG observed price parallelism among the tyre manufacturers and concerted price action.

31. The DG found Apollo to be the market leader and he also found that the tyres of Apollo were of higher end. But the prices of the remaining four domestic tyre companies moved in tandem. In his view Apollo tyres was the price leader. The DG then took into account that Apollo Tyre South Africa, Goodyear South Africa, Continental Tyre South Africa and Bridgestone South Africa who had been fined by the South African Competition Authorities on account of price-fixing. The DG held that tyre companies had acted in concert on various issues. They had also indulged in blacklisting of importers. In his view the Association was a platform of the tyre companies for sharing information related to price, export and other issues. He therefore held that the five major companies i.e. Apollo, MRF, J. K. Tyre, Birla and Ceat had acted in concert in violation of Sections 3(3)(a) and 3(3)(b) of the Competition Act. In his view price parallelism indicated a collusive behaviour by the tyre manufacturers. He found that cost analysis and sales realisations had increased substantially during the period of investigation and that the tyre companies had resorted to frequent price changes. The DG was also of the view that the tyre companies were limiting supply by under utilization of their capacities during the period of investigation. He also observed that that the benefit of excise duty was not passed on by the tyre companies to the consumers.

32. In his conclusion the DG noted that five domestic companies as mentioned above accounted for 95% of the market share which showed a

very high concentration. The conduct of ATMA showed that the tyre companies had a meeting of minds on various issues and therefore in his view there was a violation of Sections 3(3)(a) and 3(3)(b) of the Competition Act by the tyre companies.

33. The D.G. collected details of agreements between the tyre companies, their stockists, C&F agents etc. These agreements are sample agreements and are only illustrative. The first such agreement was between Birla Tyres (a unit of Kesoram Industries Ltd.) and Eastern Tyres as C&F agent. According to this agreement, the billing limit was to be fixed by Birla Tyres. The C&F agent was also obliged by this agreement to keep the goods of Birla Tyres in a separate godown. The second agreement was an agreement entered into by Ceat Tyres Ltd. and Ganesh Auto Parts where Ganesh Auto Works Pans appointed a distributor for Chennai. In accordance with the agreement, Ganesh Auto Parts could deal only with the products of Ceat India Ltd. Thus, this agreement was an exclusive sales agreement. The third agreement is an agreement between Dunlop India Ltd. and Seven Day Foods Pvt. Ltd. who were appointed C&F agent for an area in North Bengal. According to the terms of the agreement the C&F agent could not become the C&F agent for any other company during the period of the existing agreement and for a period of one year after the termination of the agency. This agreement is also in the nature of exclusive sales agreement. The fourth agreement is an agreement between Bridgestone India Pvt. Ltd. and Rainbow Tyres. It is a dealership agreement. According to the terms of the agreement Bridgestone put a restriction on the dealer that it would not sell its products to a competitor. Bridgestone reserved the right to control the retail price of its products. This amounts to resale price maintenance. The dealer was also obliged by this agreement not to sell the goods of the company above the maximum price fixed by it. The dealer also could not sell its goods below the minimum price fixed by it. This is also a case of resale price maintenance. The fifth agreement format is that of Michelin India Tyres Pvt. Ltd. The dealer in this case was appointed as a non exclusive dealer but the sales were to be made by the dealer on prices

fixed by Michelin. This is also a case of resale price maintenance. The D.G. has not enclosed dealership agreements between MRF Ltd., J.K. Tyres and Apollo Tyres Ltd. But in the case of J.K.Tyres Ltd. and Apollo Tyres Ltd. copies of invoices and terms and conditions were submitted. In the terms of J.K.Tyres Ltd., the dealers are not authorised to export the goods purchased from it. In the case of Apollo Tyres Ltd., the prices appear to be fixed by the company. Considering these facts it is seen that many of the companies are indulging in exclusive sales agreements and/or resale price maintenance. The agreements also talk of tie in arrangements as along with tyres, flaps and tubes were required to be sold.

34. A copy of JNU report has been annexed with DG's report. The JNU report mentions that the tyre industry is a very concentrated industry and that three top companies i.e. Bridgestone, Michelin and Goodyear control 53% of the market. The next four i.e. Continental, Sumitomo, Pirelli and Yokhama have a world market share of 18%. The report then lists out cases of Europe where Michelin has been fined by the European Commission and some national Competition Authorities for anticompetitive behaviour. The report estimated the turnover for the entire tyre industry at Rs.14,500Crores in Financial Year 2005-06. It has been stated in the report that 62% of the market of tyres was of Truck and Bus Tyres. The total utilisation of the installed capacity was only 78%. These figures were on the basis of ATMA report for June 2006. It has been stated the major players were Apollo, MRF, J.K.Tyres and Ceat and they accounted for 80% of the market. Incidentally in India there are 43 companies having 59 factories all over India. This was the position in Financial Year 2005-06. The report mentions that though imports accounted for a small percentage of the consumption of tyres, antidumping duties introduced an anticompetitive element in the industry. The report also talks of exclusive sales agreement, resale price maintenance and tie in arrangements. By tie in arrangement, the report states that a dealer has to buy along with tyres, other items such as

tubes and flaps.

35. The other annexures in DG's report are reports of the Bureau of Industrial Costs and prices of 1985 and the orders of the Designated Authority under the Anti Dumping Rules. The annexures are letters written to the tyre companies by ATMA for data requirement to move antidumping petition before the Anti Dumping Authority. These letters are dated October, 2010. According to the DG, it shows concerted efforts on the part of the tyre companies to protect their turf.

36 The D.G. had obtained minutes of the meetings held in the premises of ATMA but had not enclosed the minutes in his report. The D.G. subsequently made it an annexure to this report.

37. In this annexure the DG has dealt with the meetings of ATMA on 11.04.2005, 18.07.2005, 23.05.2006, 21.08.2006 and 23.03.2007. The minutes of the meetings show that the tyre companies were aggrieved that the customs duty on rubber was higher than that of the finished products which were the tyres. The companies were also aggrieved with the fact that the sales to OEMs were at unsustainable prices because of the increase in the input costs. Regarding the other raw materials also the tyre companies felt that as the price increases were substantial, they would decrease their profitability. The minutes show that the tyre companies wanted to increase their export realisation by US$2. The tyre companies were also concerned with the import of used tyres. They were aggrieved that the low-priced Chinese tyres had low quality. As in the meetings the tyre companies decided that the customs authorities should be pursued to value the Chinese truck tyres for the purpose of duty at US$50/tyre. The customs authorities accepted the view of the tyre companies. The tyre companies also wanted to introduce low-priced tyres in the market. In order to preserve their market the tyre companies wanted that the BIS marking be introduced in the tyre industry. The Association was incurring expenses with respect to anti-dumping

proceedings in the case of the import of rubber chemicals. It was also discussed in the meetings that the Association was the petitioner before Anti Dumping Directorate for levying anti-dumping duties on tyres imported from China. The minutes also show that Bridgestone India Private Limited became a member of the association with effect from 01.04.2007. The Association was also concerned with the anti-dumping duty levied by the anti dumping authority of Egypt on the export of tyres from India. Regarding the regional trade agreements which India entered with the Asean countries, it was a view of the members of the association that the government should be approached to include the tyres in the negative list which was to be prepared by the government. This meant that the imports from Asean Countries would not be at concessional custom rates. The tyre companies and the association took upon themselves the work of fixation of suitable advisory prices of bias tyres and radial truck and bus tyres. The association wanted that the bias tyres should be valued at US$99 per tyre and the radial tyres at US$125 a piece by the customs authorities at the time of import. The meetings show that the tyre companies wanted the government to stop the exports of rubber from India. The tyre companies also wanted to increase the use of synthetic rubber in place of natural rubber as far as possible. The minutes show that the meetings were attended by the Managing Director of Ceat India Ltd. as Chairman, the Managing Director of Goodyear India Ltd. as Vice-Chairman, Managing Director and other members of Apollo Tyres ltd., representatives of Birla Tyres, Ceat Tyres, J.K. Tyres and MRF. The DG did not take into account the details of all the meetings of the Association. He has been very selective and he has not considered the meetings after 20.03.2007. One of the major issues was that tyre should be BIS certified. This has been discussed in all the meetings from April 2005 till January 2010. The minutes of 27th April 2006 show that the tyre companies wanted to increase export target of tyres and allocate the export market of tyres among the tyre companies who were members of ATMA.

38. The D.G. did not include all the minutes in this annexure. Some of the tyre companies have taken inspection of the minutes but even if they had not taken inspection, they were parties in the ATMA meetings and therefore they had full knowledge of the decisions taken. One of these meetings was about a study of tyre demand projection in the next 5-6 years. This information was to be obtained from the tyre companies by ATMA. This also showed sharing of information by the tyre companies among themselves. In this meeting in Jan 2010, it was decided in the premises of ATMA, that the production date of member tyre companies can be shared with ETRMA (European Tyre and Rubber Manufacturer Association) on industry level but not on individual company level.

39. After the receipt of DG's report, the Commission sent them to the following companies for their response.

(i) MRF Tyres Ltd.
(ii) Apollo Tyres Ltd.
(iii) Ceat Tyres Ltd.
(iv) Kesoram Industries Ltd. (prop. of Birla Tyres)
(v) J.K. Tyres Ltd.
(vi) Goodyear India Ltd.
(vii) Dunlop India Ltd.
(viii) Bridgestone India Pvt. Ltd.
(ix) Michelin India
(x) Modi Rubber Ltd.

The tyre companies appeared for oral hearing and also submitted written submissions. Goodyear India Ltd. appeared and stated that it did not manufacture truck and bus tyres and as the D.G. had dealt mainly with LUG BIAS truck & bus tyres, they should be exempted from being a party. It was also stated that they are not mentioned in D.G.'s report. There was no response from Dunlop India Ltd. primarily because the company had stopped operations. Dunlop India was also not been considered by the Director General in his report. Bridgestone India Pvt. Ltd. was also not mentioned in the report. It was also stated on behalf of Bridgestone

that it manufactured only car tyres and that it sold truck and bus tyres after importing them. It was also stated that it was not the subject of investigation by the Director General. As far as Michelin India Ltd. is concerned, it was not the subject matter of DG's investigation as it had no tyre manufacturing facility in India. Modi Rubber stated that its plants are closed and it was not manufacturing since 2001. Considering these facts, the Commission deleted the names of Goodyear India Ltd., Dunlop India Ltd., Bridgestone India Pvt. Ltd., Michelin India Ltd., and Modi Rubber Ltd. from the list of opposite parties.

40. An argument has been raised that the Commission had no jurisdiction in this case and therefore before the issues are taken up for consideration the issue of jurisdiction should be decided. It was stated that the case was transferred from the MRTP Commission to the Competition Commission of India in accordance with Section 66(6) of the Competition Act 2002. It was also stated that the entire information relates to period prior to 2007 or earlier years. It was stated that the investigation should be carried out only under the MRTP law and that the new substantive law i.e. the Competition Act would not apply to the old petitions. The counsel of the different parties brought to the attention of the Commission the provisions of Section 66 of the Act. In this connection it is necessary to refer to the **explanation of section 66(1)** which reads as under:

> *For the removal of doubts, it is hereby declared that nothing in the proviso shall confer any jurisdiction or power upon the Monopolies and Restrictive Trade Practices Commission to decide or adjudicate any case or proceeding arising under the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) on or after the commencement of this Act.*

41. Attention was invited to **Section 66(1)(A)** of the Act which reads as follows

The repeal of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) shall, however, not affect,-

(a) the previous operation of the Act so repealed or anything duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under the Act so repealed; or

(c) any penalty, confiscation or punishment incurred in respect of any contravention under the Act so repealed; or

(d) any proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, confiscation or punishment as aforesaid, and any such proceeding or remedy may be instituted, continued or enforced, and any such penalty, confiscation or punishment may be imposed or made as if that Act had not be repealed.

Section 66(3) of the Act reproduced as under:

All cases pertaining to monopolistic trade practices or restrictive trade practices pending (including such cases, in which any unfair trade practice has also been alleged), before the Monopolies and Restrictive Trade Practices Commission shall, after the expiry of two years referred to in the proviso to sub-section (1) stand transferred to the Appellate Tribunal and shall be adjudicated by the Appellate Tribunal in accordance with the provisions of the repealed Act as if that Act had not been repealed.

The section is very clear that any case which was pending with the MRTP Commission would stand transferred to the Appellate Tribunal and same would be adjudicated by the Appellate Tribunal as if the MRTP Act had not been repealed. Therefore any case pending with the MRTP Commission would be transferred to the Competition Appellate Tribunal which would adjudicate the case in accordance with the MRTP Act.

42. **Section 66(6)** of the Act is reproduced as under:

All investigations or proceedings, other than those relating to unfair trade practices, pending before the Director General of Investigation and Registration on or before the commencement of this Act shall, on such commencement, stand transferred to the Competition Commission of India, and the Competition Commission of India may conduct or order for conduct of such investigation or proceedings in the manner as it deems fit.

A reading of Section 66(6) shows that all investigations pending with Director General (I&R) of the MRTP Commission were required to be transferred to Competition Commission of India and the Competition Commission of India would conduct or order for conduct of such investigations or proceedings in the manner as it deemed fit. But the Act nowhere states that the Competition Commission would implement the MRTP Act while dealing with such cases. Further reading of sections 66(3) & 66(6) shows that the legislature wanted to treat the cases pending with the MRTP Commission on a different footing from the cases pending investigation with DG (I&R). Section 66(8) of the Act is on the same lines as section 66(6) of the Act. Section 66(10) states that the matter referred to in sub sections (3) to (8) Section 66 of the Act shall not affect the general application of section 6 of General Clause Act 1897 with regard to the effect of repeal.

43. Incidentally the Act was brought in force for enforcement on 20th May 2009 and therefore after the said date MRTP Commission could not decide or adjudicate the proceedings under the MRTP Act 1969. But it is necessary to see section 6 of the General Clauses Act. **Section 6 of the General Clauses Act** is as under:

Effect of repeal – Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not –

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything due done or suffered thereunder; or

(c) affect any right, privilege obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

any such investigation, legal proceeding or remedy may in instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

A perusal of the above Section shows that the question to be examined was whether any right, privilege, obligation or liability is acquired or accrued to a person by filing of a complaint before the MRTP Commission. Under the provisions of Section 66(6) & 66(8) of the Competition Act, cases where the investigation was pending were to be transferred to the Competition Commission. Does it mean that if a complaint was received under repealed Act the party mentioned in the complaint would be acquiring right, privilege, obligation or liability under the said repealed Act. A common sense approach would show that no right, privilege, obligation or liability is acquired by any party when a complaint is received for investigation by an authority. Further the Parliament has provided in the provisions of the Section 66 of the Competition Act that the Competition Commission would deal with the complaints as it deems fit. The Competition Act nowhere states that the adjudication would be in accordance with the MRTP Act. This is clear from the fact that the legislature has stated that all the proceedings pending with the MRTP Commission would be transferred to Competition Appellate Tribunal and

said Tribunal would adjudicate them in accordance with the MRTP Act. But for the Competition Commission of India, the Legislature has not enacted a similar provision. Therefore the intention of the Parliament is very clear that it never intended the MRTP Act to be applied to all pending cases under Sections 66(6) and 66(8) of the Act. In the case of M. S. Shivananda vs. K.S. R. T. Corporation AIR 1980 SC 77, it was held by the Supreme Court that Section 6 of the General Clauses Act, 1897 is not intended to preserve the abstract rights and that it only applies to specific rights given to an individual upon the happening of one or other of the events specified in the statute. It has been held in various other cases that if there was no contrary intention in the repealing Act then section 6 would step in. The only intention of enactment of Section 6 of the General Clause Act is that the transactions past & closed could not be vacated by the repealing Act. It has been held in the various cases that Section 6 of the General Clauses Act cannot be applied in every repeal provision without regard to the intention of the Parliament and the language used in the repealing provisions and the object of the repeal and the existence of repealing clauses. In this particular case the intention of the legislature is very clear that investigations pending with the DG (I&R) of the MRTP Commission were to be treated differently from the cases pending with the MRTP Commission.

44. The Parliament intended that the Competition Commission would deal with the pending investigations in the manner it deemed fit. The Competition Commission of India is a creature created by the Competition Act 2002 and therefore it cannot work under any other Act except the Competition Act. Therefore, any direction or order of the Competition Commission would be in accordance with the Competition Act 2002. This view has been approved by the Delhi High Court in the cases of (i) Interglobe Aviation Ltd. W.P.(c) 6805/2010 and (ii) Gujarat Guardian Ltd. W.P.(c) 7766/2010. In this particular case the Commission after examining the complaints on record received from DG (I&R) MRTP Commission came to the conclusion that a prima-facie case is made out. The Commission, therefore, directed the Director General to investigate

the case. There is no legal or procedural error which the Commission had committed. There is also no material in any statute which would show that Commission was required to implement the MRTP Act. If the Competition Commission started implementing the MRTP Act then it would go against intention of the Parliament and it would be illegal. This is clear from the wordings of Section 66 of the Competition Act. Therefore, the arguments raised by the different opposite parities are without any merit and are rejected.

45. Another issue raised by the tyre companies is that as the issue was raised before the MRTP Commission in 2007, no investigation for a period after that date can be carried out. It was argued that as the D.G. had continued his investigation for a period beyond 2007, he had exceeded his jurisdiction. It was further argued that the Director General had taken into account data from 2005-2010 i.e. for a period 2005-09 when the Competition Act was not into force, he had exceeded his jurisdiction. It was argued that Sections 3 and 4 of the Competition Act were notified w.e.f. 20.05.2009 and for this reason, neither the D.G. nor the Commission had any jurisdiction for any period prior to 20.05.2009. It was argued that the Competition Act had a prospective operation and therefore the Commission and the Director General had no power to look prior to 20.05.2009. Further as the complaint related to 2007, therefore the D.G. and the Commission had no jurisdiction to extend the investigation till 2010. It was further argued that the D.G. had exceeded his jurisdiction as he had gone beyond the jurisdiction conferred on him under Section 26(1) of the Act. It was further argued that the Commission itself had closed many cases where the contravention took place prior to 2009. It was also argued that this case cannot be regarded as a suo moto investigation by the Commission as the Commission itself had not initiated the case on suo moto basis.

46. The Commission has considered the arguments raised on behalf of the tyre companies. There is no doubt that the complaint was received

by the MRTP Commission in 2007. The said Commission referred the matter to the DG(I&R), MRTP Commission for investigation. The investigation was pending with D.G.(I&R) when the Competition Act was brought in force w.e.f. 20.05.2009. In accordance with the explanation to Section 66(1) of the Act, the MRTP Commission had no power to decide or adjudicate any case after the commencement of the Act. Under the proviso to Section 1 of the Competition Act, commencement of the Act means a reference to the coming in force of the provisions of the Act which have been notified by the Central Government in the Official Gazette. Thus, after the said notification w.e.f. 20.05.2009, the MRTP Commission had no power to decide or adjudicate any case. But then Section 66(3) of the Act conferred jurisdiction to the MRTP Commission over cases pending with the MRTP Commission. According to the proviso to Section 66(1) of the Act, Section 66(3) of the Act, the MRTP Commission was required to decide and adjudicate all cases pending with it as if the MRTP Act was not repealed. A perusal of Section 66 of the Act makes a distinction between the MRTP Commission and the D.G.(I&R) , MRTP Commission i.e. cases which were pending investigation were put on a different footing from the cases pending adjudication and decision by the MRTP Commission. In accordance with provision of Section 66(6) and 66(8) of the Act, certain cases pending with D.G.(I&R) MRTP Commission stood transferred to the Competition Commission and the Commission could conduct or order conduction of investigation or proceedings in the manner as it deemed fit. The legislative intention is very clear and no other interpretation is required especially as there is no ambiguity in the Act. This in accordance with the view of the Supreme Court in SAIL's case.

47. When the case was transferred to the Commission in 2010, the investigation was pending with D.G.(I&R)for the last two years. If the arguments of the learned counsels of the opposite parties are accepted, then in all cases which have been transferred to the Commission no investigation would be possible because in all these cases the complaint

would have been received prior to 20.05.2009. Thus, if the arguments of the learned counsels of the opposite parties are accepted, the provisions of Section 66(6) and 66(8) would be reduced to nullity. The Commission considered these facts. It, therefore, decided to continue the investigation in accordance with the provisions of the Competition Act, 2002. The information provider had alleged that the tyre companies were indulging in anticompetitive activities. The Commission also was of the view that antidumping duty on import of tyres may be restricting competition in the markets and as the antidumping duty was to continue for five years from 2007, the effect of anticompetitive elements was a continuing effect. The tyre companies in 2005 had decided to move a petition before the Designated Authority, Anti Dumping Authority and the D.G. received the directions under Section 26(1) of the Act in 2010. Therefore the D.G. selected the period of anticompetitive behaviour from 2005 to 2010. In these directions under 26(1) of the Act, the Commission referred to the behaviour of five tyre companies namely Apollo tyres Ltd., Ceat Tyre of India, J.K. Tyres Ltd., Kesoram Industries Ltd. and MRF Ltd. The Commission had not fixed a period for investigation and therefore the D.G. had not done anything which was not in accordance with law.

48. There is no doubt that the Competition Act had no retrospective operation and therefore the Commission cannot penalise any person for any contravention for a period prior to 20.05.2009. But if an anticompetitive practice which was started in a period prior to 20.05.2009 but was continuing even after 20.05.2009, then the Commission certainly had jurisdiction. This is what was held by the Bombay High Court in the case of Kingfisher Airlines. Further, investigation is nothing but a fact finding exercise. It has been held that by the Supreme Court and various High Courts that investigation does not cause harm to the parties being investigated. Therefore the courts have not stopped investigations carried out by various authorities. There is, therefore, no error in considering the issues till 2010. The next aspect to be considered is to the level to which investigation can be carried out by the D.G.

49. First of all, one has to distinguish between inquiry and investigation. Under the laws of India, a court, a tribunal or a quasi judicial authority carries out an inquiry. Inquiry leads to rights conferred on parties and penalty is levied on those contravening the law through adjudication or a decision. The court of quasi judicial authority has to rely on the principles of natural justice and common law. But investigation does not confer any rights and no penalties can be levied during investigation. The Supreme Court in SAIL's case (supra) held that the Commission carries inquiry while DG carries out investigation. But investigation of a contravention of a statute to a large extent cannot be limited in scope, otherwise it would defeat the very purpose of the Act. In a criminal or a civil case the investigation is the cornerstone on which the inquiry by the court/quasi judicial authority is built. The Supreme Court in the case of Hindustan Development Corporation has held that restrictive trade practices are anticompetitive practices and breaking such practices is for public good.

50. In the light of this decision of the Supreme Court and the provisions of the Act, the limitations on the DG's power to investigate a case has got to be examined. The Central Government appoints the Director General for the purpose of assisting the Commission in conducting inquiry into contraventions of any of the provision of the Act and for performing such other functions as are, or may be, provided by or under the Act. This is in accordance with the Section 16(1) of the Act. Thus the D.G. has not only been given the power to assist the Commission in its work of inquiry but also can perform other functions as are provided under the Act or regulations. The power of investigation becomes clear from the provisions of Section 26(1) of the Act. If the Commission finds a prima facie case then it can direct the D.G. to investigate the case. No limitations on the power to investigate a case has been provided under Section 26(1) of the Act. Section 41(1) of the Act states that the D.G. on the directions of the Commission is required to assist the Commission in investigating into any contravention of the provisions of Act or rules or

regulations. In this provision also there are no fetters on the DG's powers except that the DG on his own cannot start an investigation. The investigation has to be carried out on the directions of the Commission. But if during the course of investigation, the DG finds some other areas of contravention over another period of time by some other persons which was not in the knowledge of the Commission, then the Act does not put any limitation on the powers of the D.G. The D.G. can investigate and report the issues to the Commission. This would be clear from the numerous decisions of the Supreme Court under the Income Tax Act. When an assessing officer finds that some income assessable to tax has escaped assessment then with the approval of the Competent Authority he can reopen the assessment. But when during the course of investigation he finds more sources of income which had not been subjected to tax, then he need not go to the Competent Authority to reopen the assessments again. The Supreme Court has held that when the assessment is reopened it is opened for all purpose and there are no fetters on his powers and therefore all sources of income not hitherto subjected to tax can be taxed without reference to the Competent Authority. In the case of the D.G. as there are no limitations on his powers except that he can investigate only on the directions of the Commission, the D.G. can investigate the contravention over a period of time and of numbers of person not mentioned in the Commission's directions but contravening the law. This would apply especially in the case of a cartel where the Commission may have a few names but the D.G. may find more members of the cartel. As the law stands today, D.G. can investigate the issues without reference to the Commission. If the Commission wants to limit the DG's powers, it can make regulations to that effect. But there are no regulations putting a brake on the powers of the D.G.

51. In this particular case, the facts in the complaint were of the year 2007. It was the duty of the D.G. to investigate whether the anticompetitive practices of 2005 were continuing after 20.05.2009. The D.G. was not debarred under statute to limit his investigation only for the

period after 20.05.2009. The parties could not be penalised for any contravention prior to 20.05.2009 but investigation which causes no harm could be carried out for a period prior to 20.05.2009 and it was for the D.G. to establish that the anticompetitive practices started in 2005 or 2007 were continuing even after 20.05.2009. Considering these facts, there is no merit in the arguments of the opposite parties that the D.G. had exceeded his mandate and jurisdiction.

52. Before taking the discussion further it is necessary to examine an overview of the tyre industry on the basis of report by ICRA. The Indian Tyre Industry had seen enormous growth primarily due to the growth of the economy as well as the sales of cars, trucks and buses. The tyre industry showed strong recovery in Financial Year 2009-10 mainly due to a low cost structure. But from December 2009 the rubber price surged which impacted the margins and the tyre companies made price revisions of tyres on various occasions. The ICRA Report states that the replacement demand would increase but would be affected by the increasing demand for the imported tyre especially as the tyre prices would escalate. There is material to hold that the domestic industry did not invest in the manufacture of radial truck and bus tyre. In the consequences there was a demand especially for cheap Chinese truck and bus radial tyres and this restricted the domestic players in passing on the price increases on the basis of the input cost. Mainly due to the high demand in the market for radial tyres of truck and bus, the industry is pumping 17500crores in order to increase capacity by 47% by the year 2013. ICRA has estimated that the raw material accounted for 65-70% of the production cost of the tyres which is made up for the following components:

Natural Rubber – 43% of the total raw material

Synthetic Rubber – 15%

Nylon tyre cord fabric – 18%

Carbon black – 11%

Rubber Chemicals – 5%.

The ICRA report states that on an average tyre manufacturers in India import about 30-40% of their total raw materials. Thailand, Indonesia, Malaysia and India are the four largest cultivators of natural rubber accounting for 82% of the global output of over 9.4 million metric tonnes. Thailand, Indonesia and Malaysia are the largest exporters of rubber in the world whereas India which is producing around 0.85 million metric tonnes per annum is a net importer. In fact, the Indian tyre industry consumed 0.95million metric tonnes of natural rubber in the calendar year 2010. The ICRA report talks about the duty structure i.e. the duty on natural rubber stands at 20% as compared to 10% customs duty on the import of tyres. ICRA report stated that the raw material costs were low in the period 2008-09 and therefore the tyre industry enjoyed a very healthy profit in 2009-10. In the report it is also mentioned that the OEM segment was critical for the tyre manufacturers but the margin on sales in the OEM was low due to the bulk orders placed by OEM manufacturers. It was stated that the pricing power in the replacement market has been curbed to a large extent because of the lower prices of the Chinese imports. The report also states that the capacity constraints in domestic markets led some pricing power to tyre manufacturers and therefore there were at various times price increases by the manufacturers in the last 12 months i.e. 12 months prior to 2011. In the replacement market the manufacturers play a big role but in this area tyre retreading industry is going to play, especially as tyre prices increase considerably. The tyre industry split into two tyres i.e. cross ply or radial tyres. The radial tyres are being manufactured since 1940s but in India, in the truck and bus segment the introduction of radial tyre is only 9-10% compared to a world average of 68%. It is thus clear that the industry did not invest in the production of radial tyres. The radial tyre has a longer life 80% higher and fuel efficiency and effectively cheaper when compared to cross ply tyres. According to the ICRA Report the world majors Bridgestone and Goodyear which cater to 85% domestic tyres for passenger cars want to make India as a hub for the manufacture of radial tyres. The report

also shows that the Indian tyre manufacturers invested 0.2-3% of turnover R&D which is much below to global average of over 2-3%. The Indian tyre industry enjoyed a turnover of Rs.25,000 Crores in 2009-10. India imported tyres worth Rs.1,430 crores and exported tyres Rs.3,000 crores to over 60 countries. According to this report MRF is the largest manufacturer in India with a market share of about 30-32% whereas Apollo's market share is 20-22% and J.K. Tyres had a share of 15-16%. In the truck and bus segment the shares of different companies are as follows:

	T&B
Apollo	21%
Birla	18%
Bridgestone	0%
Ceat	13%
Falcon	0%
Goodyear	0%
J K Tyre	22%
Metro Tyres Ltd.	0%
Modi Tyres	4%
MRF	21%
TVS Srichakra	0%
Others	1%

The estimate is based on ATMA Report. Truck and bus tyres dominate the industry revenues as 65% of the industry turnover comes from this segment. Over 51% by volumes of the production of tyres in the T&B segment goes to the replacement sales and 44% goes to the OEMs and the balance to exports. The Indian tyre industry consist of 39 companies with 60 manufacturers plants and key players are in Industry Apollo, MRF, Birla, Bridgestone, Goodyear, J.K.Tyres etc.

53. During the course of the proceedings and after the receipt of submissions of DG's report, oral and written submissions were made on behalf of Apollo Tyres Ltd. It was stated that there were no specific allegations against Apollo and that the company had never entered into an agreement which was in violation of the provisions of Section 3(1) and

3(3) of the Competition act. It was argued that DG's findings were based purely on circumstantial evidence of parallel behaviour which according to the DG was a violation of the Competition Act. It was stated that price parallelism cannot be considered as an evidence of collusive conduct. It was stated that DG's report was purely based on speculation and that the conclusions of parallel behaviour were not sustainable as there existed no specific or direct evidence relating to Apollo in particular or the alleged cartel generally. It was argued that the DG's case was based on hollow allegations and that it displayed a lack of understanding of the Indian tyre industry and that the tests under Section 3(3) of the Act were not satisfied. It was also stated that the time frame of infringement was not discussed and that the D.G. on his own cannot extend the period and scope of the investigation beyond 2008 without any direction from the Commission. It was also argued that there was no material with the D.G. to indicate that the infringement occurred during the period 2005 to 2010. It was stated that there was no material with the Commission to extend the investigation of infringement beyond 20.05.2009. It was therefore argued that in the absence of the time frame when the alleged contravention occurred, the report of the D.G. was flawed and therefore the DG's report should be dismissed in its entirety. It was stated that in competition jurisprudence for a cartel to survive there has to be a mechanism which leads to (a) coordination and the functioning of the cartel (b) monitoring the behaviour and conduct of the members of the cartel (c) punishing members of the cartel who do not fall in line with the decisions of the cartel. As the D.G. has not found any such element, he has failed to establish that a cartel existed. It was stated that the tyre industry was fragmented, the market shares of each player were unstable and there were no barriers to entry. It was further stated that the findings of the D.G. were without any substance and showed a bias against Apollo. Apollo Tyres Ltd. denied that it had entered into an agreement of anticompetitive behaviour. It was stated that the D.G. had not understood the economic principles to support his findings and that his findings were based on conjectures, absence of direct evidence &

presumptions and therefore should be rejected. It was argued that there existed no direct, precise and coherent evidence which was necessary to establish an agreement. Reliance was placed on the decision of the Commission in the case of Neeraj Malhotra vs. Deutsche Post Bank where it was stated that for finding an infringement of Section 3(1) read with Section 3(3) of the Act, an agreement should be established unequivocally. As no agreement has been established in this case, the proceedings were required to be dropped in this case. It was argued that there existed no price fixing, no limitation of production and no price parallelism in this case. It was also stated that the number of products manufactured were many which were not substitutable, no cartel can operate in such a market. It was further stated that Apollo's plants were working at 89% to 94% of available capacity which could not be considered as withholding production. It was pointed out that the capacity utilisation in the tyre industry was 70% to 90%. It was also stated that the prices of tyres were not above the competitive level in the case of Apollo. It was stated that the input costs had increased but the costs were absorbed by the companies themselves and that the margins of the companies had reduced and many companies had disclosed losses. This also did not indicate cartelisation.

54. It was further argued on behalf of Apollo Tyres Ltd. that the Indian tyre industry was very competitive. Further large imports are coming to India and the largest companies in the world are investing in setting up tyre manufacturing facilities in India. Further different types of tyres were being manufactured by the tyre companies which are neither substitutable nor interchangeable. A chart was submitted which showed the shares of different tyre companies and imports in respect of Truck and Bus Tyres (Bias) for the period 2005-2010.

Share of the key domestic tyre manufacturers for Truck and Bus (Bias) Production for the Period 2005-10

Company	2005-06	2006-07	2007-08	2008-09	2009-10
Apollo	25.5	23.5	24.7	23.5	23.7

Birla	8.6	15.1	10.3	13.9	18.1
Ceat	14.7	13.4	13.9	13.4	12.5
Goodyear	3.3	2.5	2.5	1.6	1.3
JK/Vikrant	23.4	20.9	20	19.3	17.5
MRF	19.3	17.8	18.7	19.6	17.9
Imports	4.1	6.2	9.2	7.9	8.4
Others	1.1	0.6	0.7	0.8	0.6

It was argued that there has been a shift in market shares of different companies which is contrary to alleged cartelisation in the tyre industry. It was further argued that when there are low barriers to entry, collusion or cartelisation is unlikely in such an industry.

55. On behalf of Apollo Tyres Ltd., a concept of capacity available for production has been introduced in the arguments. The D.G. had observed that the capacity utilisation was moving downwards over the years. It was argued that capacity utilisation was relatable to the available capacity and this was the correct measure and not the installed capacity.

56. It was further argued that capacity utilisation depends on various factors such as supply of raw materials, labour, power and political stability. These factors affect the capacity utilisation levels and that the DG has completely neglected these important factors while calculating the capacity utilisation figures. The arguments raised as above are not correct because the DG has relied on the capacity utilisation furnished by Apollo tyres itself before him.

57. It was further argued that the balance sheet of the last day of the financial year takes into account the new capacity which has been brought into existence but it does not take into account the date on which the capacity was put to use. Therefore though the installed capacity may have increased it would not show enhanced production for the entire 12 months because the capacity will be added during the accounting period and therefore reliance on installed capacity would give a wrong figure. It was argued that all the tyre manufacturers were adding capacity and the details of capacity added in different years is given in the chart below

Installed capacity (5 major manufacturers)

(nos. in lakh units)

	2005-06	2006-07	2007-08	2008-09	2009-10
JK	62.96	75.98	87	87.93	91.44
Apollo	79.34	88.22	96.59	98.97	131.54
Birla	11.66	13.08	14.58	13.8	13.8
CEAT	43.1	43.1	45.42	45.42	47.26
MRF	32.06	33.6	32.93	33.55	35.69
Total	**229.12**	**253.98**	**276.52**	**279.67**	**319.73**

Subsequently, the counsel for Apollo Tyre Ltd. went through the provisions of the Act wherein agreement and cartel were defined. The counsel then relied on the majority decision in the case of Neeraj Malhotra vs. Deutsche Post Bank and others, it was held as follows:

> *"17.7 For an agreement to exist there has to be an act in the nature of an arrangement, understanding or action in concert including existence of an identifiable practice or decision taken by an association of enterprises or persons…..*

It was argued that an agreement is a conscious and congruous act that has to be associated to a point in time. Reliance was again placed on the decision in the case of Neeraj Malhotra where the Commission had held that the DG report had not produced any precise and coherent proof of any agreement of the nature covered in Section 3. It was argued that even in this case the DG has failed to prove the existence of an "agreement". It was argued that parallel behaviour is insufficient to prove that an agreement existed. It was stated that mere price parallelism is not sufficient to establish the contravention of the Act. In this connection reliance was placed on the following decisions:

(i) In Alkali and Chemical of India Ltd. and Bayer Ltd. case, RTPE 21 of 1981.

(ii) State Road Transport Undertakings vs. Kar Mobiles Ltd.

(iii) Ahlstrom Osakeyhtio and Others. Vs. Commission

(iv) Company Royale Asturienne des Mines SA and Rheinzink Gmbh (ECJ)

(v) Theatre Enterprises vs. Paramount Film Distributing, 346 U.S. 537 (1954)

(vi) Bell Atlantic Corp. vs. Twombly 127 S.Ct. 1955 (2007)

(vii) Monsanto co. vs. Spray-Rite Service Corp, 465 U.S. 752, 768 (1984)

(viii) Petruzzi's IGA Supermarkets vs. Darling – Delaware Company, 998 F.2d 1224 (1993) US Court of Appeals (1993)

(ix) Baby Food Antitrust Litigation, 166 F.3d 112 US Court of Appeals (Third Circuit) (1999)

it was stated that instances of competitors responding the same way in the same set of circumstances do not constitute evidence of conspiracy and therefore an element of parallel conduct and does not lead to an association of conspiracy. It was stated that it was not in the public interest to start an investigation under the competition law issue on every point wherever there was price parallelism. It was also argued that proof of parallel business behaviour does not conclusively establish an agreement or that it constitutes an anti competitive offence. It was stated that unilateral independent conduct of competitors should not be punished mainly because the evidence of conscious parallelism is circumstantial in nature. This means that there should be plus factors in addition to price parallelism to establish a conspiracy. It was also argued that legal analysis should show that collusion existed and that some form of actual agreement among the participants should be there to establish anti-competitive behaviour. It was argued when that there was considerable volatility in the market, cartelisation is unlikely. It was argued that even the economic literature also states that conscious parallelism is not meaningful and that some other factors should indicate some sort of agreement between the concerned parties. It stated that the economists have come to the conclusion that conscious parallelism under the Sherman Act was recognition of the fact that parallel pricing is typically unavoidable in an oligopoly. It was argued that the DG had relied purely on circumstantial evidence to come to a finding that there was

collusive behaviour in the tyre industry. Reliance was also placed on economic literature to show when trade volatility exists cartelisation is unlikely. If entry in the market is easy then it is not expected that there would be collusion in the market. It was argued that the DG had rushed to conclusions on half-hearted attempt proof of price parallelism. In addition to price parallelism, it was argued that there was no evidence of cartelisation in the tyre industry. It was argued that on the basis of the decision of the Commission itself an agreement between enterprises must be established unequivocally, precisely and coherently. It was further stated that only one tyre has been selected for the examination by the DG of each company on the basis of input of AITDF. It was argued that the correct tyre of Apollo tyres which should have been selected is not XT – 7 but Haulug brand. It was also stated that the comparison of price by the DG was based on yearly averages which is questionable, as prices changed several times during a year. Therefore the findings of the DG of price parallelism were not correct. It was stated that the DG himself had stated that the price of tyres of Apollo was different from the price of other manufacturers and therefore there was no price parallelism. It was further argued that mere price parallelism does not establish an agreement under Section 3(3) of the Competition Act.

58. It was further argued that there was no limitation of supply and that high-capacity additions were made in the tyre industry and the utilisation of capacity also increased. It was argued that the capacity available for production should have been considered by the DG rather than the installed capacity. It was also stated that one of the key objectives of a cartel is to enhance profits of the cartel members by fixing prices at monopoly levels. It was stated that in a cartel situation surplus capacity is kept by the players to bring into line any player who does not move along with the cartel members. It was stated that the industry has not reduced production but in fact had put in extra installed capacity. It was stated that the production of tyres is a highly capital intensive industry and the investment required for producing 16,000 PCR and 6000 TBR tyres per day to of Rs. 2200 crores. It was argued that Apollo Tyres Ltd had

increased its capacity substantially to produce tyres. It was also stated that 100% of installed capacity was never available for production. It was conceded that according to the estimates the tyre industry had a capacity utilisation of anything between 70% and 90%. It was argued that in the financial years 2008-09 and 2009-10 there were lockouts in the factories of Apollo tyres Ltd which reduced its available capacity. It was argued that even after the lockouts in 2009-10 the production of Apollo tyres Ltd had gone up by 23%. In this connection reliance was also placed on findings of the Designated Authority of the and Anti Dumping Directorate who held as follows:

> "41(b) The **investigation has not shown that the domestic industry has deliberately withheld production…**
>
> *As regards the* ***allegation of artificial shortage in the market created by the domestic industry*** *by withholding supplies****, no evidence to this effect has been provided by the Respondent exporter."***

It was therefore stated that Apollo tyres had capacity utilisation of over 90% in the last five years despite the constraints suffered by it.

59. It was further argued that the price of tyres was not above the competitive level and that the price of tyres depends on the raw materials consumed. It was stated that the prices of all the raw materials have gone up and this was the reason for the price increase.

60. It was argued that the DG had not considered the price of the other materials which were mostly petroleum based products. As far as natural rubber is concerned the average price of natural rubber increased from Rs.67 per kg to Rs.240 per kg from 2005-06 to 2010-11. It was stated that the DG had erred in holding that change in the price of natural rubber had no impact on the cost of production. It was stated that even if DG's report is accepted the price of lug tyres increased only 3.21% in 2010-11 as compared to the price in 2009-10. In any case it was stated that the analysis of the DG was not correct as he had only looked at the

increase in the prices of natural rubber and not of the other raw material in tyre manufacture. It was stated that the other charges such as salary, wages etc. had increased during the period 2005-10 by 25-30%. It was also stated that the costs increased substantially during this period. It was therefore argued that there was no material with the DG to hold that the prices of tyres had increased much above the competitive levels.

61. Arguments were raised against the impact of excise duty. The DG had made general observations that the benefits of the decreased excise duty was not passed on to the consumers by the tyre manufacturers. In this connection the chart was submitted to show that the prices were decreased after reduction in excise duty.

Date of revision in Excise Duty	**Existing rate of Excise Duty on date of revision**	**New Rate of Excise Duty**	**Price Revision date**	**Price Revision % on Net Dealer Price (NDP)**
1 March 2008	16.48%	14.42%	1 March 2008	Decreased by 1.5%
7 December 2008	14.42%	10.3%	8 December 2008	Decreased by 3%
24 February 2009	10.30%	8.24%	25 February 2009	Decreased by 1.5%
27 February 2010	8.24%	10.3%	Respondent has not increased prices immediately	Increased with effect form 1 April 2010 (after absorbing costs for more than one month

It was therefore argued that the findings of the DG on this issue were incorrect. It was stated that the movement in net dealer price and the excise duty cannot be similar. It was also argued that the excise duty did not always go down and that in February 2010 the excise duty was increased from 8.24% to 10.30%. It was further stated that excise duty is one of the factors that influence the price of tyre and the DG erred in not taking into account the increase in the price of raw materials. It was therefore stated that Apollo Tyres had passed on the decreased price of excise duty to the consumers.

62. The DG defined “margin” as a difference between sales realization and the cost of sales. The DG further compared the Net Dealer Price and

the margins for the same period and on this basis the DG came to the conclusion that the profits margins of the tyre manufacturers were high and the manufacturers were not passing on the benefits to the consumers. It was argued that in the absence of a reasonable return on capital employed tyre companies will have no incentive to invest in new capacities and efficient technology. It was stated that Apollo Tyres profit had fallen over the year as the market conditions were volatile and competitive. Further it was stated that the profitability was not directly linked to distortion in the market. Another chart was submitted showing the margins earned by the different companies in the different financial year.

Margins (in%)

Company	**2005-06**	**2006-07**	**2007-08**	**2008-09**	**2009-10**
Apollo	10.3	9.5	13.6	9.5	14.1
JK Tyre	0.7	0.6	5.8	1.0	7.9
Ceat Ltd.	1.7	1.9	5.1	-3.4	1.5
MRF Ltd.		6.0	4.1	7.1	6.5
Birla Tyres	6.1	6.5	8.3	3.6	0.2

It was further stated that the working of the DG was incorrect because he did not take the export of tyres into consideration where the margins were much lower. In fact it was stated that the export sales were made below cost. It was also argued that the net profit to the turnover in the case of Apollo tyres was on an average 4% and this concludes that the tyre manufacturers had not been operating at a large margin. It was also argued that the return on capital for Apollo Tyres was 9.4% which cannot be considered as unreasonable. It was further stated that quarterly report of CEAT Tyres and Birla Tyres for the Financial Year 2011-12 shows that they were earning losses and that the net operating margins of the tyre industry had come down to 3.4% in 2010-11 from 5.1% in 2007-08. It was stated that the DG had not produced any evidence to show that the higher margins earned by the tyre manufacturers were as a result of collusive conduct. It was further argued that earning healthy profits does not lead to the conclusion of contravention of the Competition Act.

63. The DG in his report had stated that the five domestic tyre companies accounted for 95% share of the total production of truck and bus tyres. The DG worked out the market share of the five key players in the industry. It was argued that the DG had failed to consider the import of tyres in India into consideration as the import of tyres varied from 5% to 7% to the total consumption of tyres in India. It was argued that as the DG had not taken import of tyres into consideration, a higher market share of each of the five manufacturers had been worked out. It was further argued that the market shares of the manufacturers fluctuated and in the case of such volatility collusion has to be regarded as absent. It was therefore argued that the argument of the DG that there existed some form of agreement in violation of provisions of the Competition Act is without any merit. A chart was submitted showing shares of key manufacturers of tyres in India. This chart is based on data given by Automotive Tyre Manufacture Association (ATMA).

Shares of key tyre manufacturers including import data

Company	2005-06	2006-07	2007-08	2008-09	2009-10
Apollo	25.5	23.5	24.7	23.5	23.7
Birla	8.6	15.1	10.3	13.9	18.1
CEAT	14.7	13.4	13.9	13.4	12.5
Goodyear	3.3	2.5	2.5	1.6	1.3
JD/Vikrant	23.4	20.9	20	19.3	17.5
MRF	19.3	17.8	18.7	19.6	17.9
Imports	4.1	6.2	9.2	7.9	8.4
Others	1.1	0.6	0.7	0.8	0.6

It was argued that the chart shows significant changes of market shares over the years in the case of different manufacturers of tyres and this does not show any collusion among the tyre manufacturers. It was argued that the DG had also talked of the dependence of OEM customers on the tyre industry. It was argued that the OEM customers were very big in terms of economic strength and as they were bulk buyers they were able to get tyres very cheap. It was therefore argued that findings of the DG of the dependence of OEMs on the tyre manufacturers were not correct.

64. Regarding price leadership of Apollo Tyres, it was submitted that the findings of the DG that Apollo Tyres Ltd. was the price leader is without any basis. It was further argued that if some competitors follow the price of another manufacturer it does not amount to contravention of the Competition Act. It was also argued that the Apollo Tyres Ltd. had not colluded with any other tyre manufacturers in violation in the Competition Act.

65. Arguments were advanced on the role of Automotive Tyre Manufacturer's Association (ATMA). It was argued that the DG had held that ATMA was a forum for collusive and cartel activities. Apollo Tyre Ltd. has been a member of ATMA since its inception and that the activities of the ATMA were limited to promoting and representing its own interest before the Government bodies on matters concerning trade and commerce. It was argued that the DG had not produced convincing or conclusive evidence in the form of the minutes of the ATMA meetings or otherwise which suggested that ATMA indulged in anti-competitive activities. It was further argued that anti-dumping proceedings which were initiated by ATMA on behalf of tyre manufacturers cannot be regarded as anti-competitive as such measures were taken to protect the domestic industry against the exporters who were dumping cheap goods in India and thus causing injury to the domestic industry. It was argued that anti dumping duty is a way of checking the market power of foreign firms and preventing price discrimination. It was argued that anti-dumping and antitrust complement each other in the domestic markets. It was further argued that anti-dumping levies are a policy decision of the Government and therefore Commission has no jurisdiction to sit in judgements over the levies in such duties. In this connection Reliance was placed on the judgement of the US Supreme Court in the case of Noerr Pennington which is reproduced as under:

> *"We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below –* ***that no violation of the Act can be predicated***

upon mere attempts to influence the passage or enforcement of laws. *It has been recognized, at least since the landmark decision of this Court in Standard Oil Co. vs. United States, that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." Accordingly,* ***it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.*** *These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution."*

(emphasis added)

"...[J]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, *either standing alone or as part of a broader scheme itself violative of the Sherman Act".*

It was therefore argued that in view of the ratio of the US Supreme Court, the findings of DG were erroneous and should be rejected.

66. Regarding the collective black-listing of importers of ATMA, it was argued that many of the tyre importers were indulging in illegal activities by circumventing the Government duties by wrong classification and mis-declaration and for this reason issues were taken up with the Customs Authorities and the manufacturers set up teams at four places namely Delhi, Mumbai, Vijaywada and Indore, to locate under-valuation of imported tyres for the purpose of custom duties. It was stated that this was done with a view to assist Custom Authorities in checking tax evasion. It was further argued that Apollo Tyres Ltd. being a responsible

corporate citizen of India wanted to ensure that there was no revenue loss to the Government and therefore agreed for the detection of tax evasion by the tyre dealers.

67. Regarding low cost tyres it was argued that as Chinese tyre exporters were dumping low cost tyre in India, the tyre companies who were ATMA members considered producing low cost tyres in order to meet the competition in the area of low cost tyres. It was argued that discussions on development, production and supply of low cost tyres cannot be considered as anti-competitive.

68. Regarding export realisation it was stated that under Section 3(5) of the Competition Act the provisions of the Competition Act are not applicable to exports. It was therefore argued that any discussion relating to export realisation in respect of tyres would be exempted from the provisions of the Competition Act. It was therefore stated that the DG has erred in considering this issue.

69. The next issue raised in the arguments was against the findings of the DG in respect of exchange of information among the tyre manufacturers in the premises of ATMA. On behalf of Apollo Tyres, it was stated that the company had not indulged in any exchange of information which can be considered as anti-competition. Reliance was placed on the decision of US Supreme Court in the case of Maple Flooring Manufacturers Association vs. United States 268 U.S. 563 an extract of which is reproduced as under:

> "It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent over-production and to avoid the economic disturbances produced by business crises resulting from

overproduction. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individual engaged in commerce, and its consequent effect in stabilizing production and price, **can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful...".**

It is the consequences of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. **Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction."**

It was therefore argued that in view of this judgement of the US Supreme Court the sharing of information helps the customers and helps them make better and informed choices and also promotes the interests of the domestic industry. It was argued that this cannot be treated as a contravention of the Competition Act

70. It was argued that the reliance of the DG on old historical data some of them 25 year old would not have been considered by the DG as it leads to an incorrect picture and divorced from the reality of the present day. They also could not have circumstantial evidence as some cases were more than 35 years old. It was stated that even the JNU report is a generic report and was prepared when the Competition Act had not been

brought into force. It was argued that the JNU report was a mere academic report without any proper data and was out of date and therefore the reliance of the DG of the said report was not correct. As far as the Tariff Commission reports were concerned they were 26 years and 23 years old and were prepared in a different economic scenario and had no relevance to the issue at hand. Therefore the reliance of the DG on such material was not correct. Apollo Tyres Ltd then relied on the findings of the Designated Authority of the Anti-Dumping Directorate who had held that profitability of the domestic industry had deteriorated because of dumped imports. In fact great reliance was placed on the findings of the Designated Authority who also held that the domestic tyre manufacturers did not withhold production. It was further argued that anti-dumping duty was a part of policy and policy does not fall within the ambit of the Competition Act. For this proposition reliance was placed on European Commission cases commission in France versus Ladbroke Racing [1997] ECR 1-6265 [1998] 4 CMLR 27. It was stated that imports of tyres in India especially of truck and bus radial tyres had increased substantially. But later on the Government because of lobbying by companies like Bridgestone Tyre India Ltd., Tata Motors Ltd. and the Chinese tyre companies removed anti-dumping duty on truck and bus radial tyres imported from China and Thailand with effect from August 2011. It was argued that sharp increase in the imports of tyres which reduced the margin of the domestic tyre industry. It was also argued that the tyre manufacturers cannot dictate prices to OEM buyers as the OEM buyers are bulk buyers who also imported tyres from abroad. Regarding the findings of the MRTP commission in 1974 of the existence of a cartel in the tyre industry it was argued that the issue is 35 years old and should not have taken up by the DG.

71. It was argued that no agreement existed between Apollo Tyres Ltd and any other tyre manufacturer in accordance with the Sections 3(1), 3(3)(a) and 3(3)(b) of the Act. It was argued that whenever circumstantial evidence is relied upon there are clear limitations on the inference which can be drawn. It was stated that the economic evidences

drawn by the DG also suffer from limitations. It was argued that the prevalent market conditions do not establish the existence of an agreement or a cartel and therefore the findings of the DG were erroneous. It was argued that the tyre market is a very competitive market and each competitor had an independent response to the market conditions as well as economic pressures. It was stated that as the existence of an agreement was not established the findings of the DG are totally incorrect. Regarding the proceedings against Apollo Tyres, South Africa initiated by the Competition Commission of South Africa, it was stated that the price fixing being looked into by the said Commission had no relationship with the behaviour of the company in India. Further if any contravention took place in South Africa it does not mean that a similar contravention took place in India. It was further stated that the reports as well as comments by a Minister in the govt. regarding cartelisation in the tyre industry could not influence of the findings of the DG. In respect of miscellaneous expenses it was argued that there was no material with the DG to come to a finding that the tyre companies had inflated their miscellaneous expenses charged to their accounts. It was therefore stated that the findings of the DG should be rejected and the case should be closed.

72. JK Tyres Ltd submitted oral arguments and also written arguments. The arguments raised were similar to those raised by Apollo Tyres Ltd. JK Tyres had challenged the continuation of proceedings started under the MRTP Act and continued under the Competition Act. It was stated on behalf of J. K. Tyres that the Commission should have taken the issues under the MRTP Act and that enquiry under the Competition Act could not be authorised. It also challenged the extension of period of investigation from 2007 to 2010. These two issues have been dealt with the earlier in this order and there is therefore no need to consider them again. It was argued that the there is no information with the Commission on which it could order an investigation. It was also stated that it can be treated as a suo-moto case because the Commission itself had stated in this order under Section 26(1) of the Act that it had received the case of transfer

from the MRTP Commission. It was also argued that the DG had erred in adding new parties like Modi Rubber, Goodyear and ATMA and in treating AITDF as an informant. It was also argued that the letters of AITDF could not be treated as information either by the DG or by the Commission. It was further stated that as the minutes of the meetings of ATMA had not made available to JK Tyres Ltd then it amounted to a denial of natural justice. J K Tyres Ltd also denied that any cartel existed which determined the sale prices and limited the production. It was also stated that there was no material to hold that an agreement existed between the tyre manufacturers and as an agreement is necessary for finding of violation of Section 3 of the Act the entire investigation is without any basis and needs to be dropped. The other arguments regarding anti-dumping proceedings, low-priced tyres, OEM pricing and blacklisting of importers were argued upon but the issues raised were similar to those raised by Apollo tyres Ltd. It was further argued that price parallelism does not establish the existence of a cartel. It was further stated that the finding of all the manufacturers were charging the same prices is contrary to the facts that each manufacturer had its own price for the tyres manufactured by it. Arguments were advanced that the Office of Fair Trading of the United Kingdom had held that three basic characteristics/ factors that must exist for a cartel to be possible are (i) Product homogeneity (ii) stable turnover over a sustained period of time (iii) stable market shares. It was argued that if a cartel was to exist two of the three characteristics should exist. It was stated that there is no product homogeneity in the case of tyre manufacturers because radial tyres and bias tyres though being a part of the same relevant product market are not substitutable because radial tyres are 25% - 35% costlier than bias tyres. It was also stated that the market shares of other tyre manufacturers were not stable because the market share in the case of bias tyres of JK tyres declined from 24.1% in 2005 – 2006 to 19.3% in 2010 – 2011. On the other hand the market share of the Birla's had increased from 9.6% in 2005 – 2006 to 18% in 2010 – 2011. In the same period the shares of Apollo Tyres decreased from 28.9% to 23.6%

and 16.1% to 15.7%. In the case of MRF the market share increased from 21.2% to 23.5%. It was also stated that the market was not stable as the market was shifting from bias tyres to radial tyres. It was further argued that the DG had erred in relying only on bias tyres when bias tyres was an obsolete technology and were being replaced by a superior technology of radial tyres in respect of the domestic tyre market. It was stated that big world majors like Bridgestone and Michelin were entering the market and the market was suffering from extreme volatility. It was argued that in view of this increase in competition a cartel in the tyre industry could not exist. It was further argued that there were no barriers to entry in the market and that anybody would enter the market. It was therefore stated that in view of the provisions of Section 19(3) no cartel existed in the tyre market. It was also argued that the price charged by the tyre manufacturers were reflected in their costs and was not above the normal market prices. It was also argued that the tyre industry had one of the lowest margins in the entire automobile manufacturing sector. It was stated that there was no material with the DG to come to a conclusion that the alleged members of the cartel were earning supra-normal profits. Reliance was placed on the order of Central Excise & Service Tax Appellate Tribunal where it was held that the return on capital tyre manufacturers were low and varied from 10% to 16%. It was stated that JK Tyres had a return of less than 8% on the capital employed. It was therefore stated that the Commission should close the enquiry as there was no agreement of cartel formation or restriction of production or earning of any supra-natural profit. It was argued that the market is very competitive and as there was in existence no cartel, the DG report should be ignored and the case should be closed.

73. Similar oral and written arguments as in the case of Apollo Tyres Ltd. & J K Tyres Ltd. (prop. Of Birla Tyres) were advanced in the cases MRF Ltd. & Ceat Tyres Ltd. In the case of Birla Tyres it was argued that it was producing tyres at nearly 100% of its installed capacity and that there was no reason to cut down production. The cases relied upon by the tyre companies in support of their arguments were the same. To sum

up, the arguments of the five parties revolved around issues which are as follows:-

(i) There was no agreement between the tyre companies in order to control, limit or attempt to limit the production, distribution, sale of price of, or trade in goods or provision of services. It has been argued that as there was no agreement the tyre companies did not enter into a cartel. Even there was no material to hold that an attempt to cartelise existed in this case.

(ii) There was no price parallelism in this case and the findings of the D.G. were incorrect. Even if there was price parallelism, there was nothing illegal unless the D.G. established that price parallelism was due to concerted action. Further to establish that price parallelism was anticompetitive, there was a need to establish plus factors. These factors did not exist in this case. Therefore anticompetitive behaviour was not established.

(iii) The price rise in the sale of tyres was mainly due to the price increase of raw materials such as rubber, carbon black etc. and that the D.G. had not brought on record any material to establish that the price of tyres increased due to cartelisation.

(iv) Levy of anti dumping duty is a policy decision of the government and that the levy of such duty is pro-competition. Further the Commission cannot sit on judgement over the functioning of a statutory authority like the Directorate of Anti Dumping Authority.

(v) The reduction in excise duty had been passed on to the consumers and that there was no competition issue which arises out of reduction of excise duty.

74. Arguments were also advanced in the case of Automotive Tyre Manufacturers Association (ATMA). It was argued that in the original complaint, ATMA did not figure. It was D.G. who made ATMA a party. It

was therefore pleaded that ATMA should be removed from being a party to the proceedings. It was argued that ATMA was a law abiding association which was incorporated as a Section 25 company and that it had not contravened any provision of the Competition Act. On behalf of ATMA it was denied that it had functioned as a platform for any anticompetitive behaviour by its members. It was stated that the D.G. had failed to establish the credibility of the informant and that AITDF had resorted to filing baseless and unsubstantiated complaints against the tyre manufacturers. Reliance was placed on the findings of the Designated Authority in the Directorate of Anti Dumping Authority wherein the Designated Authority had thrown out the complaints of AITDF and recommended the levy of antidumping duty. It was further argued that the D.G. had erred in not considering the arguments of ATMA and making ATMA a party to these proceedings. It was argued on behalf of ATMA that due to the unprecedented demand for tyres in India, the prices of the raw materials for the manufacture of tyres increased leading to a rise in the price of tyres. It was argued that the D.G. had erred in treating 'Cross Ply' and 'Radial Tyres' as part of the same relevant market when in fact they are separate products. It was argued that the production facility for radial tyres is a different from cross ply tyres and that the investment required for radial tyres was substantially higher. In the consequence the price of radial tyres was much higher than that of a cross ply (bias) tyres. It was stated that the D.G. has erred in working out the percentage cost of raw materials. A chart was submitted which is reproduced as under:-

RAW MATERIAL	**% Share in Total Cost as per ATMA**	**% of total raw materials as per DG Report**
Natural Rubber	30	42
Nylon Tyre Cord Fabric	14	20
Excise duty	10	
Synthetic Rubber	8	12
Carbon Black	8	11
Rubber Chemicals	7	

It was also argued that the D.G. erred in holding that ATMA functioned as a place/forum for exchange of information and price fixing. It was stated that pricing of tyres was done by the individual manufacturers and that ATMA functioned as a forum for legitimate activities of the industry. It was also stated that the OEM market was a smaller market as compared to the replacement market but the expenses on account of OEM market were lower than the replacement market. As far as prices are concerned the prices of tyres in the OEM market were lower than the prices in the replacement market. Regarding price parallelism, it was argued that the product prices in the tyre industry tend to be similar or move in tandem because of market forces. It was stated that price movement in the tyre industry is a consequence of price parallelism as opposed to collusive behaviour.

75. It was stated that price parallelism arises because of product homogeneity and similar source of inputs. It was argued that prices of products in the tyre industry are highly visible which allows businesses to collect real time market intelligence and monitor each other's prices closely and match price competitor movements. It was argued if the DG erred holding that ATMA was a platform for the exchange and sharing of information relating to price, export, import, OEM producers. It was argued that the association discussed issues which were negatively effecting and are common to all the domestic tyre manufacturers. It was also stated that the DG's report suffers incompleteness and the report has not considered the backdrop on which the tyre market operates. It was also stated that the DG overlooked important practical facts. It was considered that to arrive at his conclusion the DG had focused on five different issues which were discussed in the ATMA meeting:

(i) Anti Dumping Petition

(ii) Low Cost Tyres

(iii) Blacklisting importers

(iv) Export Realization

(v) Supply of tyres to OEM's

It was argued that antidumping actions were taken by ATMA for the benefit of the tyre industry. It was stated that dumping of tyres in India was creating harm to the domestic tyre industry. As far as low cost tyres are concerned it was argued that as the Chinese tyre manufacturers had introduced low cost tyres, in order to meet competition, the tyre companies thought of introducing low cost tyres in the Indian market. This had no competition concern. In respect of blacklisting of importers, it was stated that the importers were under invoicing their imports thus evading taxation and as a good citizen the tyre companies helped the custom authorities in the tackling evasion of tax. As far as export realization is concerned the tyre companies wanted to realise extra money for the exports and this cannot be regarded as anti-competitive. As far as supply to OEM companies are concerned, there was a concern for the tyre industry because the margins which were available to the tyre companies were very low and sometime un-remunerative. This also according to ATMA had no competition concern. It was therefore argued that the report of DG is on assumption and without proper reasoning and therefore the proceedings against ATMA need to be dropped.

76. During the course of hearings, though Michelin India Tyres Pvt. Ltd. was not made a party, the Commission allowed Michelin to submit arguments in the case in order to understand the issues. The D.G. had also taken submissions from Michelin as a third party information provider. The submission of Michelin placed reliance on the findings of the D.G. who had found that though the rubber prices had fallen by 10% in 2009-10, the companies showed a higher cost of production. The D.G. had recorded that no satisfactory explanation for this abnormality was provided by the tyre companies. The D.G. had found that the production costs of Birla Tyres and MRF Tyres had increased by 22.8% and 41% respectively in the period 2009-10 though the rubber prices had declined by 10%. On the other hand, Apollo Tyres and Ceat Tyres had shown a decline in production costs of 3% and 3.8%. For this reason, the D.G.

came to the conclusion that the tyre companies were inflating expenses so as to reduce the profits. The D.G. also recorded a finding that the decrease in the cost of rubber in 2009-10 cannot be said to have an impact on the cost of production because the tyre companies raised the price of the tyres.

77. Michelin has alleged that the five tyres companies were fixing their output in order to retain their market share. It was stated that this was evident from the analysis of the D.G. for the period 2005-10. It was stated by Michelin that the analysis by the D.G. for the period 2005-10 showed the following trends:-

(i) The five tyre companies had increased their installed capacity.

(ii) In the case of the two of the companies the capacity utilisation had decreased inspite of additions of large capacity.

(iii) The market share of these five companies in the total production of tyres had remained constant during the period.

It was stated that no manufacturer would install capacity and not produce goods. It was stated that it goes against the self interest of the domestic manufacturers. It was therefore argued that it was mainly done to fix output and this showed cartelisation in the industry. To support these submissions, a chart was submitted in respect of installed capacity which is reduced as under:-

Installed Capacity (In Lakhs)

	2005-06	**2006-07**	**2007-08**	**2008-09**	**2009-10**
Apollo	79	88	97	99	132
JK Tyre	63	76	87	88	91
MRF	32	34	33	34	36
Birla	12	13	15	14	14
Ceat	43	43	45	45	47

The production of Truck and Bus Tyres by these five companies were submitted and these are as under:-

Production (In Lakhs)

	2005-06	2006-07	2007-08	2008-09	2009-10
Apollo	71	79	89	86	105
JK Tyre	64	70	75	75	79
MRF	24	27	27	27	32
Birla	11	12	14	11	14
Ceat	39	39	38	34	38
Total Production	**208**	**226**	**243**	**233**	**269**

It was stated after placing reliance on the data gathered by D.G. that these five companies had captured 96%-97% of the market. Another chart was submitted in respect of the five OPs (ignoring the smaller producers) which showed their share in the total production of truck and bus tyres. The chart is reproduced below:

Production in Percentage

	2005-06	2006-07	2007-08	2008-09	2009-10
Apollo	34	35	37	37	39
JK Tyre	31	31	31	32	29
MRF	12	12	11	12	12
Birla	5	5	6	5	5
Ceat	19	17	16	15	14

It was argued that though there was an increase in production by a massive amount in the case of Apollo Tyres its market share remained more or less constant.

78. Michelin then submitted a copy of an order dated 29.04.2011 issued by CESTAT against the order of the Designated Authority (DA) of the Anti Dumping Authority dated 19.02.2010 imposing antidumping duty on bus and truck radial tyres imported from China and Thailand. Michelin then relied on the extracts from CESTAT's orders. In the order CESTAT has recorded that though installed capacity increased from 26270MTs to 37636MTs, the production increased from 18622 MTs to 27364MTs. The Tribunal found that the capacity utilisation increased from 70.89% to 72.71%. This was for the period 2004 to 2008. The D.A. had also recorded that though the demand had increased, production had come

down. Michelin has termed it as output parallelism as the percentage share of each player in the total production has been nearly constant. It was argued that the relative position in terms of production, where the installed capacity was different, can be explained only with reference to an agreement between the manufacturers. It has been argued that production parallelism can only arise out of agreements especially when each producer had increased installed capacity substantially.

79. The counsel of Michelin then went through the theories regarding cartels such as raising prices, restricting output, sharing market, theory of games, market concentration, oligopolistic market, barriers to entry, homogeneous goods, market transparency, output restrictions, limiting production, role of trade association, punishment for deviation from cartel directives etc. In this connection reliance was placed on the following decisions: - (i) Williamson Tobacco Corp, 637 F.2d 205, 208 (3rd ct.) U.S. (ii) Venzie Corporation 521 F.2d 1309, 1314 (3rd Gr.) (iii) Petruzz's IGA Supermarkets 998F.2d 1224C.A.3 (Pa)1993 (iv) Poller vs. Columbia Broadcasting System 368 US 464 (1962) (v) Bogosian vs. Gulf Oil Corpn. 561 F.2d 434, 446 (3rd Gr1977) 434 US 1086 (vi) I.C.I Case no. 48-69(1975) ECR 1663 (vii) Commission vs. Anic Partecipazioni SPA (1999) ECR 1-4125. It was argued that the tyre manufacturers have not only tried to limit the quantity by fixing outputs but also by creating hurdles in the path of tyre importers through concerted action, one of which is the levy of anti dumping proceedings.

80. The opposite parties in this case i.e. the five tyre companies have relied heavily on the findings of the D.A. in the Directorate of Anti Dumping but they have conveniently not submitted or talked about the order of CESTAT dated 29.04.2011. Against the order of the D.A. appeal was submitted by Bridgestone, Michelin, Tata Motors Ltd. and two Chinese companies. The Anti dumping proceedings had been initiated by ATMA on 21.10.2008. The Tribunal observed that the data on which the D.A. had relied was not made available to the Tribunal. The Tribunal found that during the period 2004-2008, the sales by domestic industry

increased 2.5 times. During the same period imports increased from 1361 MTs to 28386MTs. Thus, the demand was very high during the said period. The turnover, profits and return of capital of the domestic industry increased but the capacity utilisation was 72%. In fact during the proceedings Tata Motors Ltd. the largest OEM buyer in India stated that the domestic players failed to give supply of tyres which was contracted by them. As a result, Tata Motors imported tyres at a higher price from China. It was also stated the radial tyres produced by the domestic industry was of poor quality. The Tribunal has recorded that the supplies to OEMs were at the cost price of the tyres plus a reasonable profits but even then the domestic industry was not supplying the goods to OEMs which led to imports. This invariably leads to the conclusion that the goods were being diverted to the replacement market and not to OEMs. The profits in the replacement market are higher. The D.A. observed that the profits of the domestic tyre companies increased from Rs.260.17lakhs to Rs.1101.45lakhs during the period under consideration. During the same period capital employed increased from Rs.12,923lakhs to Rs. 27,159lakhs and the return on investments changed from negative of 0-62 to a positive figure of 0.40. The Tribunal on the basis of the facts came to the conclusion that the DA had not established injury to the domestic industry and therefore the Tribunal setaside the orders of D.A. The Tribunal also observed that if antidumping duties remain, there would be an incentive to the tyre companies to increase the prices of tyres. This would not be in public interest.

81. The opposite parties objected to the submission of Michelin Tyres Pvt. Ltd. It was argued that the oral arguments made by Michelin are beyond the jurisdiction of the present proceedings, as Michelin has added new allegations against domestic tyres manufacturers. It was also stated that Michelin was not a party to the complaint that therefore there was no legal jurisdiction for Michelin to be party in present proceedings. It was also stated that Michelin was not an informant in this case. It was also argued that Michelin was not importing any bias tyres into India and therefore there was no case for grievance. It was stated that Michelin was

not a manufacturer of tyres in India. It was also argued that even the DG had stated that Michelin was importing bus and truck radial tyres from its affiliates and selling them in India through its distributor. It was stated on behalf of the tyre manufacturers that the DA had held that there was cutthroat competition between the domestic tyre producers. It was argued that there was no legal basis on which the investigation could be expanded to include Michelin. It was also stated that Michelin had made an abuse of the process of the Commission. It was brought to the notice of the Commission that the Michelin had been penalised by the European Competition Authority for anti competitive practices and therefore any submissions made by Michelin would be suspect. It was conceded that entry barriers in tyre industry were high due to the heavy investment required in the tyre industry but this did not debar the foreign players like Michelin, Bridgestone and Continental etc. to enter in tyre manufacture in India as they had deep pockets. It was also stated that Michelin is not independent expert body which can stand on judgement. It was argued that there was a deliberate attempt on the part of the tyre companies to control of production by under utilization of capacity. Reliance was placed on the findings of DA who in the case of the import of bias tyres had held recommended the levy of antidumping duty. It was also stated that the said order of the DA was confirmed by CESTAT. It was also argued that the DG as well as Michelin had adopted a theoretical approach while dealing with the whole issue. It was also stated that the prices of the tyre companies were as a result of independent pricing decisions. It was also argued that there were no barriers in the market to enter and that there was total transparency in the market. It was also stated that the allegations of cartel cannot be concluded on the basis of price parallelism. It was therefore stated that the findings of DG and Michelin are incorrect and should be rejected.

82. During the course of the hearing Shri S. P. Singh convener of AITDF submitted arguments. In his arguments Shri Singh stated that the findings of the DG in his investigation report are correct. He repeated the allegations which he had made earlier. He also stated that price

parallelism by the five opposite parties had been established by the DG and that these five companies controlled 95% of the production. In his view the DG had limited his investigation to the truck and bus tyres for establishing parallelism with reference to a particular tyre size. In the opinion of Shri Singh if the DG had picked up the other sizes of tyres for bus and trucks the result would have been the same. He stated that the behaviour of the five tyre companies was a concerted action. As far as the radial tyres were concerned Shri Singh stated that hardly any radial tyres were being manufactured in India prior to 2006 and therefore in manufacture of radial tyres price parallelism could not be looked into. It was argued by Shri Singh that the tyre size taken by the DG was absolutely identical for all the manufacturers. It was therefore argued that the argument of the opposite parties that the DG has erred in comparing one type of tyre with the other tyres is not correct. It was stated that there was no question of comparing apples with oranges. Shri Singh then referred to increase in the rubber prices in the year 2006 and he also referred to circulars issued by the tyre companies advising the dealers that as the rubber prices had increased the prices of tyres would have increased. The price of rubber increased up to June 2006 but the manufacturers did not roll back the price of the tyres when the price of rubber fell. In his view this was a clear-cut case of price parallelism. Shri Singh then referred to similar situation which arose in 2008 where the rubber based raw materials had a price increase and this led to a rise in prices of tyres. But when the prices of raw materials came down the tyre companies did not reduce the price of tyres. In November 2010 the rubber price had gone up from Rs.180 per kg. to Rs.240 per kg and the tyre prices as a consequence increased , but in May 2011 when the price of rubber fell, tyre prices were not reduced. As far as excise duty was concerned, in 2004, the excise duty on tyres was 32% which was subsequently reduced to 16% and later to 8% but the benefits of the reduction in excise duty was not passed on by the tyre companies to the consumers. It was also stated that the submissions made by Michelin Tyres India Pvt. Ltd. were correct. The tyre companies had resorted to

price parallelism and under utilisation of capacity. Shri Singh also referred to the order of CESAT by which it setaside the order of the Designated Authority levying antidumping duty on radial tyres. It was argued that the tyre companies had cartelised and restricted the import of tyres into the Indian market by getting anti-dumping duty imposed. It was also alleged by Shri Singh that the balance sheet and the other financial data submitted by the tyre companies were doctored accounts. It was therefore argued that penalty should be levied on all the five opposite parties.

83. An analysis of the return on capital of the five companies involved was carried out. The figures are based on as was available on stock broking websites as well as on financials made available by the companies is as follow:

S.No.	Name of Company	Return of Capital Employed					
		Mar-11	Mar-10	Mar-09	Mar-08	Mar-07	Average
1	MRF Ltd (As on 30th Sep)	15	23.5	21.2	13.3	18.4	18.28
2	CEAT	9.6	25.8	4.5	20	15.1	15
3	Apollo	12.7	28	13.4	24	17.5	19.12
4	J K Tyres	11.2	22.6	9.6	14.7	7.5	13.12
5	Kesoram Industries Ltd.(Birla Tyres)	1.7	14	18.7	32.7	29.4	19.3

Another analysis with the net cash of the operating activities, investing activities, financing activities in the net cash flow of the five companies for different years is reproduced as under:

CASH FLOW STATEMENT FOR MAJOR TYRE MANUFACTURERS

S.No.	Company Name	Net cash from Operating Activities				
		2007	2008	2009	2010	2011
1	MRF Ltd (As on 30th Sep)	-	-	846.76	157.00	277.00
2	CEAT	104.90	20.47	131.21	232.67	138.64
3	Apollo	357.47	427.77	324.58	702.65	152.36
4	J K Tyres	266.35			544.22	-21.26

5	**Kesoram Industries Ltd**	-370.26	448.86	370.26	256.55	173.11
S.No.	**Company Name**	**Net cash from Investing Activities**				
		2007	**2008**	**2009**	**2010**	**2011**
1	**MRF Ltd (As on 30th Sep)**	-	-	614.53	-627.9	-833.75
2	**CEAT**	-14.15	61.80	-52.68	-238.41	-483.68
3	**Apollo**	-399.87	-168.70	482.59	1053.11	854.46
4	**J K Tyres**	349.73			-169.3	-283.82
5	**Kesoram Industries Ltd**	0.00	703.95	1034.71	-1252.34	-564.42
S.No.	**Company Name**	**Net cash from Financing Activities**				
		2007	**2008**	**2009**	**2010**	**2011**
1	**MRF Ltd (As on 30th Sep)**			657.03	-614.22	845.75
2	**CEAT**	-89.81	-81.24	81.40	-55.58	252.80
3	**Apollo**	-169.58	-165.218	180.456	326.45	587.43
4	**J K Tyres**	96.15			-353.64	327.09
5	**Kesoram Industries Ltd**	0.00	268.39	680.76	1019.38	384.50
S.No.	**Company Name**	**Net increase/Decresh in cash and cash equivalent**				
		2007	**2008**	**2009**	**2010**	**2011**
1	**MRF Ltd (As on 30th Sep)**	-	-	-42.46	-14.7	12.06
2	**CEAT**	93.87	103.57	159.93	-61.48	-92.34
3	**Apollo**	-59.36	93.85	2.24	-2.40	-114.84
4	**J K Tyres**	12.77			21.28	22.01
5	**Kesoram Industries Ltd**		13.30	16.31	23.59	-6.8

Note: 1) Apollo purchased assets of Rs. 893.9 Cr, Rs.858.54 Cr, Rs. 466.29 Cr, Rs.158.57Cr and Rs. 148.71 Cr for F.Y. 2011 - 2007

2) Ceat purchased assets of Rs. 52 Cr, Rs. 20 Cr., Rs. 41 Cr, Rs. 238 and Rs.483 Cr. 2007-2011

3) MRF purchased assets of Rs. 1126 Cr, Rs. 870 Cr. And Rs. 162.28 Cr. For F.Y. 2009-11

4) JK Purchased assets of Rs. 323 Cr., Rs. 173 Cr and Rs. 290 Cr. For 2007-2011

5) Birla Tyres purchased assets of Rs. 989 Cr, Rs. 688 Cr, Rs. 562 Cr and Rs.1252 Cr for F.Y. 2008-11 *(combined for all segments)*

(Cement, Tyre etc.)

(-) indicates figures not available

84. These figures show that all the tyre companies within the period 2007 and 2010 were having positive cash flow from operating activities. Further, the data on the return on capital shows that the tyre companies were doing quite well during the period under review. Normally worldwide return on capital in tyre companies is 10% to 16% and anything in excess of it would be an excessive return on capital. This is a finding of CESTAT in the case decided against the tyre manufacturers. In fact in March 2010 all the tyre companies had return on capital more than 22%. The only exception is Birla Tyres. Even in March 2011 return on capital was more or less above 9.6%. In March 2009 Ceat Tyres suffered a lockout but the other companies had a return on capital of over 18%. This clearly shows that the tyre companies were doing exceedingly well. Even CESTAT has recorded a finding that the tyre companies were performing well and that they had not been able to meet the local demand which led to an increase in import of tyres. This has also been confirmed by Tata Motors Ltd the largest OEM manufacturer before CESTAT. The issue to be looked into is whether there was a concerted action on the part of the tyre companies or some practices carried out which led to an appreciable adverse effect on competition in India.

Findings -

85. We have to examine the arguments raised on behalf of the OPs. The first argument was that there was no agreement and therefore the tyre companies did not form a cartel. There was no material on record to show that the tyre companies had entered into a written agreement to introduce anticompetitive features in the tyre market. But whether any agreement existed in accordance with the definition of agreement in the Act has to be examined with reference to the behaviour of the tyre companies. But in the arguments the tyre companies have not submitted any material/evidence to show that no agreement between the tyre companies existed. On the other hand various factors which lead to the existence of agreement have been discussed in subsequent para.

86. The second argument raised is that parallel pricing of tyres does not exist and even if it exists it does not raise any competition concerns. But no material or evidence has been brought on record to establish that the findings of the D.G. are incorrect. There is no doubt that parallel pricing by itself is not sufficient to establish anticompetitive behaviour. Some plus factors are needed to establish parallel pricing behaviour as anticompetitive. The tyre companies mentioned that the D.G. had not found any plus factors to establish that the tyre companies had anticompetitive behaviour during the period under consideration.

87. The third argument raised is against the findings of the D.G. that the tyre companies had curtailed production to reduce the supplies in the market and thus increase the price of the tyre in the market. DG's case is also that though there was large capacity addition, in order to keep the market share of each of the participant in the market constant, the companies curtailed their production. The OPs have denied the findings of the D.G. but they had not furnished reasons as to why they did not fully utilise their full capacity for the production of tyres especially when the demand for tyres in the market was quite high. They have also not brought on material any record to establish that the findings of the DG were incorrect.

88. The fourth argument raised mainly by M/s Apollo Tyres Ltd. was the concept of the "capacity available for production". It was argued that sometimes capacity is added in the last month of the accounting year and though the capacity increased towards the end of the accounting period, the capacity available for major part of the year was lower as the new capacity was not available for the major part of the year. Sometimes due to breakdown, fires etc. or because of strikes and lockouts the capacity available for production gets lowered. Capacity available for production would be available for production would be over a period of time. But such capacity would be variable from day to day whereas the installed capacity is not a variable figure but a fixed figure. The capacity available for production would be dependent on the whims of the management as

the capacity can be reduced due to breakdown or lockouts. In fact, capacity gets reduced by strikes and lockouts. But strikes arise due to the action of the workers which leads to the stoppage of production whereas lockouts are imposed by the management and this also leads to the curtailment of production. Normally in many industries lockouts are resorted to on some pretext or the other to reduce production, create shortage and increase prices due to shortage. The concept of "capacity available for production" is a variable concept and cannot be the basis of any analysis. On the other hand, installed capacity is an absolute and fixed item which forms part of the accounting standards and is reflected in the accounts. After relying on these arguments, the representative of M/s Apollo Tyres Ltd. stated that the capacity utilisation of Apollo Tyres was 90%. The working to arrive at this figure at 90% was not submitted. On the other hand the company before the D.G. had stated that the capacity utilisation for the Financial Year 2009-10 was 80%. Therefore the arguments raised on this issue are without any basis and have to be rejected. It was to be accepted that the capacity utilisation of Apollo Tyres was only 80%.

89. Another issue raised during the arguments was the issue of selection of one type of tyre by the DG for the purpose of his analysis. The facts are that in the tyre industry the main segment which gives the maximum revenue is the truck and bus segment. In fact this segment gives revenue of 65% to the tyre industry (ICRA report). The track and bus segment gets revenue from two sources namely OEM market and the replacement market. The profits in the OEM market is low because the sale price in the OEM market is cost of production plus a fixed percentage of profits based on the cost of production. But the OEM market in India consumes 44% of the T&B tyres produced in India. On the other hand in the replacement market the prices are higher but it consumes 51% of the total T&B tyres produced in India. Various types of tyres are manufactured by the tyre companies in India but the type selected by the D.G. for his analysis is the one which is mainly used in the OEM and the replacement market. Thus the selection of one type of tyre by the DG as

representative of the industry is correct. Further this tyre gives the maximum revenue to the industry. It was not necessary to take any other tyre for the analysis.

90. The next issue raised by all the OPs is against the jurisdiction of the Commission in this case and extension of investigation of the D.G. from 2007-2010. These issues have been dealt at the preliminary stage in this report and there is no necessity to deal with them now. It has already been held that the Commission and the D.G. had jurisdiction and the powers to extend the scope of inquiry. The only aspect to be considered is that as Sections 3 and 4 of the Competition Act were notified w.e.f. 20.05.2009 the Commission can take cognisance of the case only w.e.f. 20.05.2009 and for the behaviour after that date, if found fit, the companies could be penalised. The behaviour of the companies prior to 20.05.2009 can be studied in order to understand the behaviour after 20.05.2009 but the companies could not be penalised by the Commission for any anti-competitive behaviour prior to 20.05.2009. But any anti-competitive behaviour started prior to 20.05.2009 and continued after that date has got to be inquired by the Commission.

91. Another argument raised by the OPs is that the Designated Authority (D.A.) of the Anti Dumping Directorate is a statutory authority and the orders of the D.A. cannot be questioned as he is working under a statute. In fact the orders of the D.A. are quasi judicial orders which can be appealed against. There is no doubt that many orders of the D.A. may be anticompetitive as they reduce the competition in the market by making the imports costlier and thus reducing the consumer choice. But the main objective of the D.A. is to protect the domestic industry mainly when the domestic industry is threatened by dumping of imports from certain foreign countries. There is no doubt that the D.A. can be treated as an enterprise as it falls within the definition of Section 2(h) of the Competition Act. But then the question arises whether the Competition Commission, a statutory authority, can question the decision of another statutory authority which is the D.A. in this case. This cannot be done

but the Competition Act gives a mandate to the Commission to term the orders of D.A. as anticompetitive because the orders of the D.A. would reduce the supply of goods in the market and could also lead to increase in the price of goods in the market. Many times, a group of producers of a commodity, in order to protect their market share, can raise the bogey of dumping before the Designated Authority, Anti Dumping Directorate and if the D.A. is satisfied it can start the investigation of antidumping of the said commodities in India. The producers can lobby before the D.A. and if the D.A. is satisfied it can pass an order declaring certain imports of the commodity from certain countries as dumping in India. Aware of this fact, the main five tyre companies moved the D.A. twice for imposing antidumping duties on tyres imported from Thailand and China. In the first instance in 2005 these five tyre companies moved a petition before the D.A. for the levy of antidumping duty on the import of lug tyres from Thailand and China. The D.A. after examining the facts of the case held that there was dumping in respect of imports of tyres from these two countries. The matter was taken in appeal before CESTAT. CESTAT confirmed the orders of the D.A. Thus, till today the imports of lug tyres from Thailand China are subject to antidumping duty. In turn, the Indian consumer is deprived of choosing a cheap tyre which used to be imported earlier. This also gave a license to the tyre companies to increase the price of their tyres to the price of the tyres which were imported into India after the levy of antidumping duty. This increased the bottomlines of the five tyre companies. In fact after the levy of the antidumping duty in 2007, the return on capital employed as on 31.03.2008 of Ceat, Apollo, J.K.Tyres and Birla Tyres increased to 20%, 24%, 14% and 32.7% from 15.1%, 17.5%, 7.5% and 29.5% as on 31.03.2007 respectively. As the accounting period of MRF closes on 30th September, its profit appear in the subsequent year. In fact in the accounting year ending on 30th September, 2008, MRF's return on capital was 21.2% against 13.3% in the immediately preceding year. Thus the levy of antidumping duty led to price increases and lowering of choice of the consumers and higher prices.

92. In the second instance, the five tyre companies through ATMA moved the D.A. again for the levy of redial T&B tyres from China and Thailand. Incidentally, prior to 2006 hardly any radial tyres were being manufactured in India. These tyres were being imported into India by Bridgestone, Michelin, OEM players like Tata Motors and others. In order to protect their turf, the five tyre companies felt it necessary to put an impediment on these imports. Accepting their plea, the D.A. vide his order in 2010 held that radial T&B tyres from Thailand and China were being dumped in India and for this reason the D.A. recommended to the Customs Authorities to levy antidumping duties on the import of T&B radial tyres. This order of the D.A. was challenged by Bridgestone and Tata Motors before CESTAT. CESTAT held that before coming to a conclusion it was the duty of the D.A. to establish that harm had been caused to the domestic industry. In the opinion of CESTAT as this was not established, no antidumping duty could be levied on the imports of T&B radial tyres. Therefore the orders of the D.A. passed in January 2010 was setaside in 2011 and T&B radial tyres could now be imported into India without the payment of antidumping duty. But for a few months in 2010, the tyre companies had the benefit of having no competition from imported radial T and B tyres.

93. The next issue to be examined is the fixing of BIS standards for tyres. In fact in all the meetings of ATMA since 2005 the tyre companies were of the view that BIS standards be fixed for tyres. ATMA moved the concerned authorities for fixing the standard for tyres to be sold in the Indian market. In May 2011 the Bureau of Indian Standards issued an order and on the basis of this order no tyre having no BIS standards mark could be sold in India. Tyres have been imported in India since 1947 and no defects were found in those tyres. But it is always better to have a standardised product and after the fixing of the standards only quality products would be available to the consumers. But the main aim of the tyre companies was not the fixing of standards but to create an impediment for the importers. In this manner they wanted to protect their turf and ensure that the imported goods do not curtail the market for

their goods. Therefore the main reason for the tyre companies was the curtailment of competition in the market making imports difficult. They found a convenient way of getting BIS standards approved for the Indian tyre market.

94. An argument has been raised that the tyre companies do not decide the issue of anti-dumping as well as fixing standards for the tyres sold in the market. One of the arguments advanced in the course of hearing was that lobbying to achieve an objective does not all foul of the Competition Act. It was stated in support of this argument that the US Supreme Court had held that lobbying had no competitive concern. The facts are that anti-dumping duty and standards are set up by statutory authorities under different laws. But under these laws someone has to move the two authorities so that the authorities could come to a decision after following a process. But the fact is that the authorities on their own do not fix standards or impose anti-dumping duty. Someone has to move the authorities either for the levy of anti-dumping duty or fixing standards. Tyres were being imported into India for a large number of years and there was no material to hold that these tyres did not have the quality or were substandard. It was only in May 2011 that due to the action taken by ATMA on behalf of the five tyre companies that standards were set in India for the sale of tyres. Now no tyre can be sold in India which does not have BIS standard. Similarly as far as anti-dumping duty is concerned these tyre companies through the agency of ATMA again move the Designated Authority of the Anti Dumping Directorate and the DA after examining the facts recommended the levy of anti-dumping duty. The orders of the authorities like the DA cannot be the subject matter of examination by the competition authorities except that it can be mentioned by them that such action has anti-competitive effects in the market. But the prime movers for the levy of anti-dumping duty and standards were the five tyre companies and this shows a concerted effort on the part of the tyre companies to protect their turf and impede competition in the market.

95. It has already been mentioned in the report of ICRA that radial tyres have a life which 80% more than that of cross ply tyres and that radial tyres also increase fuel efficiency of the vehicles. First time radial tyres were manufactured in 1940 but the tyre companies in India in order to ensure that their investments in the manufacture of cross ply tyres do not become bad did not invest any amount in the production of radial truck and bus tyres. Thus the Indian consumers were denied the benefit of a more efficient tyre. Further the sale of cross ply tyre resulted in higher consumption of petroleum because the fuel efficiency of cross ply tyre much lower than that of radial tyres. Thus the decision not to manufacture radial truck and bus tyres was not correct in public interest. In Europe in the Truck and Bus segment, radial tyres constitute 100% of the tyres used but in India it is only 10% approximately. Thus there was denial of good products to the Indian consumer because very low investment in T&B radial tyres by the tyre companies.

96. Another interesting issue in this case is the fact that these five tyre companies have tried to fix the importers of tyres. First of all they moved the custom authorities to fix the price of imported cross ply and radial tyres. Many times the custom authorities accepted the arguments of the tyre companies in respect of fixing the price. This led to a larger outgo for the importer of tyres as on a higher price the custom duty would be high. The second fact to be considered is that these five tyre companies also constituted groups at Delhi, Indore and other places to find out underinvoicing of tyre imports by the importers. This was mainly done to harass the importers. If due to the difficulties created the importers exited the market then these five tyre companies were in a position to reduce competition from imported tyres in the market. This is also an anti-competitive behaviour, though the plea of the tyre companies was that this was done mainly in public interest. It was stated that such activities were resorted to by the tyre companies to ensure that the government got goods revenue. This argument is not acceptable for the simple reason that the only motive of the tyre companies was self gain. The idea of gain led them to fix the importers by ensuring that they paid

higher custom duty. Their action also ensured that the price of the imported goods would go up which is anti consumer. Further the imported tyres would not be able to compete with the tyres manufactured by these five tyre companies.

97. Another interesting aspect in the case of tyre companies is that the they had curtailed production on various occasions. Normally in industrial unit whenever a strike takes place, it leads to curtailment of supply. But in the case of tyre companies the curtailment of supply arose out of the lockout brought in force by the management. It is a fact that in many Indian industries the management resorts to lockouts on because of labour trouble but the fact is that sometimes the lockouts are on account of some other ulterior. In the case of tyre companies whether it is Apollo or Ceat, lockouts were resorted by the management to reduce the supply in the market.

98. On a perusal of the order of CESTAT in 2011, it is seen that these tyre companies did not supply the entire contracted tyres to the OEMs. This is evident from the statement of Tata Motors before CESTAT. Tata Motors stated that though the tyre companies had contracted to supply tyres they failed to supply even though there was a contract. As a result the OEMs had to import tyres from abroad and this led to added costs for the OEMs. On the other hand the tyre companies exported large quantities of tyres to foreign countries. The tyre companies have stated that the exports resulted in losses for the tyre companies. It is not clear as to why the tyre companies exported tyres but failed to supply contracted amount of tyres to the OEMs. CESTAT has held that the demand for tyres in the Indian market was very huge and the tyre companies were not in a position to meet the demand and that demand was met out of import from abroad. A perusal of the minutes of the meetings of ATMA show that the tyre companies were not willing to supply tyres to the OEMs because the profit margin was low. The orders of CESTAT show that though the demand was high the tyre companies were exporting tyres at loss to foreign countries. In fact in the case of

exports to Egypt anti dumping duty was levied by the Egyptian authorities on the tyre companies. In any case the behaviour shows that though the demand in the Indian market was quite high, the tyre companies were not willing to supply to the Indian OEM manufacturers and this was done by exporting the goods.

99. The minutes of the meeting of ATMA show that the five tyre companies agreed to divide the export market among themselves. The division of a market among manufacturers is a clear sign of cartelised industry. But under the Competition Act 2002 in Section 3(5)(ii) it is stated that nothing in section 3 would restrict the right of a cartel to export goods from India. This means that an export cartel is exempted from the operation of the Competition Act by an express provision in the Act. But this does not mean that there was no cartel in existence in India. It is an exemption provided under law to a cartel which is engaged in exports but the existence of a cartel cannot be doubted. The behaviour of the tyre companies shows that if they were a cartel or had anti-competitive behaviour on various issues then this arrangement of distributing exports among themselves would be a basis to arrive at a conclusion of the existence of a cartel in tyres in India.

100. It has already been discussed above that many of these tyre companies were resorting to tie in arrangement. Tie-in arrangement existed in the business as in addition to the tyres the dealer had to sell tubes and flaps along with tyres to the retail buyers. If this is not tie in arrangement it is not clear as to what would be a tie in arrangement. It has already been discussed that many of the tyre companies had exclusive supply agreement with their dealers. This means that these dealers cannot sell the goods of any other person other than that of the principal with whom he had entered into a contract. There is also a case of resale price maintenance. In many cases the tyre companies had directed the dealers that the sale price of the goods sold by them would be a price fixed by the tyre companies. This is clearly an anti-competitive behaviour. The tie in arrangement, exclusive supply agreement and resale

price maintenance are practices followed by the tyre companies which can be classified as anticompetitive practices.

101. Before taking this discussion further it is necessary to analyse the history of the tyre industry in India. In the Tariff Commission reports of 1985 and 1988 it was found that the intercompany price variation was a matter of concern especially when the prices moved in tandem. The Bureau of Industrial Cost and Prices in 1983 had held that the tyre industry was a big cartel and that it was the duty of the government to ensure competition. The bureau also held that the industry had excess capacity which it was not utilising and that the prices of tyres moved in unified and coordinated manner. This according to the Tariff Commission and BICP clearly showed that cartelisation in the tyre industry existed in India in the 1980s. In this analysis though the reports of 1980s are not very relevant in the present time frame, it certainly throws light on the behaviour pattern of the tyre companies. In this analysis we have to find out whether these practices were followed by the tyre companies in the current scenario.

102. The next issue to be decided is the issue as to whether any parallel pricing existed in the tyre market and whether the price of the tyres moved in tandem so as to have an anti-competitive effect. In the 1980s the Bureau of Industrial Costs and Prices and the Tariff Commission had held that the price variation among the five companies was a matter of concern and that the prices increased in tandem. It has to be examined whether the same situation exists after 2009 or not. The Director General in his report which is reproduced in para 20 of this order had established that the prices of the lug tyres selected by him moved in tandem from 2005-2006 to 2009-2010. The price in 2005 of the lug tyres of Apollo was higher than that of the other manufacturers. Similar was the situation in the years 2006-07 to 2008-09. But in 2010 the prices of all the manufacturers of the lug tyre selected was more or less the same. The DG in his report has stated that the Apollo tyres was the market leader and the others were the followers. There is no doubt that the prices of the

lug tyres of Apollo Tyres were 1000 rupees higher that the lowest costing tyres in the years 2005, 2006 and 2007. The gap decreased to Rs.400 in 2008 and in 2009 the prices of lug tyres of Apollo Tyres were again Rs.1000/- more than the lowest priced tyres. In 2010, the prices of the tyres of all the companies were more or less the same. Normally when a person enters the market he examines the prices of similar products of other manufacturers and the new entrant then fixes his prices in accordance with the prices of the products of other manufacturers who produce the same goods. This is natural and this does not raise any competition concerns. But if there are some other factors which exist that leads to an increase in prices in coordinated manner i.e. an action in concert, then it certainly raises competition concerns. In the five years under consideration for the first four years a similar gap existed in prices between the lug tyres of Apollo and the prices of the other manufactures. The pricing in such a coordinated manner could not have existed if there was no prior consultation. In the year 2010 the prices of the lug tyres under consideration of all the five manufacturers became more or less same. Thus a coordinated behaviour on the basis of prices is seen in all the five years under consideration. There is therefore a case for parallel pricing. But parallel pricing by itself is no evidence of cartelisation. For cartelisation to be established other plus factors have to be seen. The DG in his report has held that there was parallel pricing. On the other hand it was the duty of the tyre companies to produce material on record to establish that the findings of the DG were erroneous. The OPs in this case have disputed the findings of the DG but have not established as to how the working of the DG on account of parallel pricing was incorrect. They have stated that the prices of the tyres were changed at many times during an accounting period and that the DG by taking a price which is an average price and not adjusted price has erred in taking the prices adopted by him. But then it was the duty of the OPs to give the correct price and to establish that the working of the DG was not correct. This onus has not been discharged by the OPs. Therefore parallel pricing is held to be established in this case.

103. The next issue to be considered is the capacity utilisation by each of the tyre companies. The DG in his report in para 22 of this order has considered capacity utilisation by the five OPs inflation from 2005-2006 to 2009-2010. In the case of Apollo Tyres the capacity utilisation as furnished by Apollo Tyres itself reduced to 80% in Financial Year 2009-10 from the earlier capacity utilisation ranging from 89-92%. In the case of Birla Tyres the capacity utilisation has varied from 81.59% in 2008-2009 to 104.57% in 2009-2010. In the case of MRF the capacity utilisation has increased from 74.7% in the earlier years to 89.04% in 2009-2010. In the case of Ceat Tyres which the capacity utilisation was 75% in the financial year 2008- 2009, 81% in 2009-10, 91% in 2006-07. In the case of JK tyres the capacity utilisation has been going down. It was 101% in 2005-06 and has now come down to the 86.7% in 2009-10. Large capacities have been added in the case of Apollo Tyres but the capacity has not been utilised. On the other hand Birla Tyres has increased its capacity utilisation. In the case of MRF capacity utilisation was much lower in the earlier years but has been increasing in the subsequent years. In the case of Ceat Tyres and J.K.Tyres the capacity utilisation has been going down between the years 2005-2006 and 2009-10. CESTAT in its order had held that the local industry was not able to cater to the demand in the market and for this reason large imports have taken place. In view of this finding of CESTAT there is no reason as to why the capacity utilisation of Apollo Tyres, Ceat Tyres and JK tyres had been falling. On the other hand Birla Tyres and MRF Tyres have increased their capacity utilisation because there is more demand for the products in the market. Normally one of the ways in which a cartel operates is to cut capacity utilisation so as to ensure shortage of the material and therefore an increase in prices. In fact in India in the year 2009-10 the demand was much more than what the local industry could cater. There is no reason for three of the largest companies to reduce their capacity utilisation. Therefore the DG is correct in holding that the capacity utilisation in most of the companies have gone down in the period under review.

104. Another issue to be discussed is the sharing of information by the five tyre companies. According to the DG, ATMA provided the platform for the sharing of information. Various meetings were held in the premises of ATMA which is a registered company and is an association of the tyre manufacturers in India. These five tyre companies are very active in the activities of ATMA. ATMA is also functioning as the body for all the tyre manufacturers. The production data, the cost of production and other details of each tyre companies are submitted to ATMA. ATMA maintains all the data and provides the details to government and other bodies. The information furnished by the Companies are also shared among themselves. In fact the petitions for introducing anti-dumping duties on imports from China and Thailand as well as setting standards for tyres in India was moved by ATMA at the behest of the five tyre companies. In fact in one of the meetings held in August 2006, it was decided that the monthly import level of natural rubber for all the companies should be ascertained by the ATMA Secretariat and the details so obtained should be submitted to the managing directors of the companies. In the premises of ATMA, it was also discussed that awareness should be created among the tyre companies that there was a necessity of imports in the country to meet the increasing demand and that there was no intention to fix the amount of quantity of import. Thus there is material is to be hold that not only the export quota was fixed among the members of the association which are the five tyre companies. Discussion among the members showed an intention to fix an import quota. The sharing of information among the tyre companies has led to fixing similar prices for the tyres and also probably to the underutilisation of the capacity by the tyre companies. The opposite parties have relied on the ratio laid down in the case of Maple Flooring Manufacturers Association (Supra) a U.S. Supreme Court decision. In that case the US Supreme Court has held that sharing of information regarding trade which leads to a uniformity of price and trade practice as well as supplies of merchandise can hardly be deemed to be a restraint of commerce. According to the US Supreme Court such sharing leads to more scientific knowledge or business conditions and

leads to stability of production and price. In the opinion of the Supreme Court competition means a free and open market and that free distribution of knowledge does not lead to anti-competitive behaviour. These observations of the US Supreme Court has been delivered in some context. Without seeing the context of the decision it has no meaning. If the sharing of information leads to anti-competitive behaviour such as price fixing sharing of markets, foreclosure of competition in the markets and curtailment of production then such sharing information has to be regarded as anti competitive. There is no doubt that the observations of the US Supreme Court would have been proper in the relevant context but if the sharing of information was for the purpose of anti-competitive behaviour then such sharing information also has to be regarded as the anti competitive.

105. Another issue raised by the informant is that the cut in the Central excise duty had not been passed on by the tyre companies to the consumers. Though during the course of hearing the OP's have tried to explain that the entire relief granted in the form of excise duty to them have been passed order to the consumers, in fact this is not correct. The excise duty used to form a big chunk in the price of tyres and was nearly 60% of the cost of tyres around 10 years ago. But in 2009 the excise duty was reduced to 8% of the cost of tyres and at present it is 10% of the cost of tyres. The cut in excise duty has a direct co-relation in the price of tyres and if there was a reduction in the excise duty then this should have been passed on to the consumers. This has not been done. Some relief has been granted to the consumers but the major part of excise duty had been cornered by the tyre companies themselves

106. Entry in the tyre industry requires large amount of capital and therefore entering the market of the tyre production is difficult. In fact the entry barriers arise due to the high costs involved in setting up a tyre manufacturing units. Therefore India is not having many new manufacturers of tyres in India. The tyre manufacturing companies in India which are OPs in this case have hardly made any investment in

research and development. Tyre companies all over the world spend 3% to 4% of their turnover in research and development but in India the tyre companies spend only 0.3% to 10% of their turnover for research and development. Thus the companies want to maintain the status, protect their turfs and not spend any amount in giving greater benefits to the consumers. Thus, the companies do not offer any innovation their area of business.

107. Another issue raised by the Director General is a comparative study of the market share of each of the five OPs. The information of market share was compiled by ATMA and the details of the compiled by ATMA were used by the DG and have been reproduced in para 24 of this order. The market share of Apollo Tyres, Birla Tyres, Ceat Tyres, Goodyear Tyres and J.K. Tyres for the financial year 2009-10 are 25.83%, 19.74% 13.59% 1.45%, 19.07% and 19.55% respectively. A perusal of the chart would show that the market share of Apollo Tyres has remained in the vicinity of 26% but has varied within a range of 10% in different years. In the case of Birla Tyres the market share has been increasing since 2005-06. In the case of Ceat tyres the market share has remained in the vicinity of 15% with variation of 10%. In the case of J.K. Tyres the market share has remained in the vicinity of 22% with aviation of 10% both ways. In the case of MRF market share has remained within the vicinity of 20% with again small variation. Thus market share of this five OPs have to be regarded as constant over all the years with the exception of Birla tyres. In the case of Birla tyres and there has been an increase in the market share whereas in the other four cases the market shares have remained more or less constant. A constant market share does not mean that in each financial year the market share would be arithmetically the same. There can be a variation of 10% which is accepted norm. Therefore it can be stated out of the five OPs, four of them had a constant market share over different years in the production of tyres. In the arguments though the OPs have argued that the market shares are not constant but no material has been submitted or any arguments advanced to establish that the working of the DG was incorrect.

108. The Office of the Fair Trading (OFT) of the United Kingdom has circulated a paper that the three basic factors which must exist for a cartel to be possible are (i) product homogeneity (ii) stable turnover sustained over a period of time and (iii) stable market share. In the opinion of the OFT if two out of the three factors exist in a given situation then there is a possibility of the existence of a cartel. In this particular case out of the five tyre companies four of them had a stable market share. In the case of Birla Tyres there is an increase in market share as the demand for T&B tyres in the market was very high. The market share may have increased also due to added capacity or better utilisation of capacity. But as there was a shortage of tyres in the market, Birla Tyres produced more tyres and therefore its market share had gone up. On the whole therefore it can be assumed that the Cos. had a stable market share. The products of all the five tyre companies for a particular segment such as the truck and bus segment were homogenous i.e. the goods of one company could be substituted by the goods of another company. Therefore it can be said that product homogeneity existed in the market of tyres. As far as stable turnover is concerned it is not established because the prices of tyres had gone up for the reason that the rubber and other raw materials prices had gone up. But the fact is that in financial year 2009-10, though the cost of rubber declined the prices of tyres were increased considerable. This is evident on the basis of the returns on the capital employed in each company which has already been discussed above. Thus, it is clear that out of three factors mentioned by OFT, two of the factors exist in the market for tyres. Therefore there was a reason for the cartel to exist.

109. In Competition Act, 2002, a cartel has been defined in Section 2(c) as follows –

Section 2(c) *"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.*

Thus the basic ingredient for a cartel to exist is an agreement between the cartel members. The effect of the agreement in the cartel is seen through a limit or control or an attempt to control the production or distribution prices or trade in goods or provision of services. In pursuance of this definition one will have to examine whether there was any arrangement or understanding or action in concert among the tyre companies.

110. Section 2(b) of the Competition Act defines agreement as follows

Section 2(b) *"Agreement includes any arrangement or understanding or action in concert–*

(i) Whether or not, such arrangement, understanding or action is formal or in writing or,

(ii) Whether or not, such arrangement, understanding or action is intended to be enforceable by legal proceedings.

For an agreement to exist it has to be examined whether there was any arrangement or understanding or action in concert among the tyre companies. It is not necessary that the agreements would be in writing or formal or enforceable by legal proceedings. This means that it is not necessary to establish that there was a written agreement in existence. An agreement can be presumed on the basis of circumstances of a case. In any of the elements of an arrangement or an understanding or action in concert exists it can be said there was an agreement. Therefore for a cartel investigation on the basis of the Competition Act the first issue to be established is as to whether there was an agreement and then the behaviour of the members of the cartels had to be seen with reference to the said agreement. On the basis of the behaviour of the members of the alleged cartels, an agreement can be presumed. It is necessary to examine as to whether any agreement existed between the tyre companies and for this purpose the various factors discussed in these orders have to be looked into. The various factors are reproduced as under

(i) There was a price parallelism in this case and this fact has not been controverted by any of the tyre companies.

(ii) The tyre companies have not utilised the full capacity to produce tyres and they also failed to supply the contracted amount of tyres to the OEMs though they have been exporting tyres abroad.

(iii) The tyre companies have divided the export market among themselves in certain proportion and they have claimed that formation of cartels for exports is exempted under the Competition Act. But the fact is that that there was a cartel for dividing the market and the exemption from the contravention of Section 3 is provided within the Act. But it cannot be denied that there was no cartel.

(iv) The Tyre companies together through the agency of ATMA moved the anti-dumping authority for the levy of anti-dumping duty on imports from China and Thailand both for cross ply tyres and radial tyres. This was done with the intention of reducing competition by making imports unviable. It also amount to foreclosure of competition.

(v) The tyre companies through the agency of ATMA also moved petition for having BIS standard on all the tyres sold in India. The main aim of having BIS standards showed an intention protection of turf and the market and was therefore anti-competitive in nature. There was a foreclosure of competition by hindering the entry of imported goods.

(vi) There was exchange of information through the agency of ATMA which allowed the companies to have a fixed market share and identical prices. The details gathered during investigation also show that the companies had shared information in respect of the raw material purchased.

(vii) The tyre companies did not pass-on excise duty relief granted by the government to them to the consumers. This amounts

to unfair pricing and is anti competitive because it leads to lowering benefits to the consumers.

(viii) In the year 2009-10 which is the period of this analysis. The return on capital of all the tyre companies was excessively high because the tyre companies had increased the price of tyres though the prices of rubber had gone down. This behaviour of the tyre companies was found to be similar in the cases of each of the five companies.

(ix) It is observed that some of the tyre companies resorting to lock-out in order to curtail production on the plea of labour unrest. If there was a strike then it should have been done by the labourers but lock-out is something which is imposed by the management.

(x) The tyre companies have not invested in research and development and also have not brought improvement by installing plants which would lead to better products, better consumers satisfaction and production of more efficient tyres.

(xi) The tyre companies in one of the ATMA meetings decided that due to high demand in India, imports were necessary and there was an intention to fix the quantity of import.

(xii) Another factor which shows a concerted action by the tyre companies was the attempt to influence the custom authorities to levy high customs duty on the tyres imported and also supply of information in respect of tyres by the importers.

(xiii) The practices followed by the tyre companies were similar to the practices which were followed in the 1980s. The practices are available through the reports of the Tariff Commission as well as the Bureau of Industrial Costs and Prices .

The above issues show that there was an action in concert by the five tyre companies. There was also an understanding between the tyre companies and these factors lead to the conclusion that there existed an agreement between this five tyre companies.

111. As an agreement has been established it is necessary to examine as to which of the clauses in Section 3(3) of the Act are attracted in this case. The tyre companies have similarly priced their products and therefore together they have determined the sale price of tyres. Thus Section 3(3)(a) is clearly attracted. As the tyre companies have limited the supply and control the production, Section 3(3)(b) is also attracted. Under the provisions of the law the presumption in Section 3(3)(b) is rebuttable but the five tyre companies have not discharged their onus by producing any material to establish that they did not indulge in the above activities. Therefore, it has to be presumed in this case that there was an appreciable adverse effect on competition due to the implicit agreement between the five tyre companies.

112. The next issue to be examined is whether the practices carried out by the tyre companies were anti-competitive or not. We have to examine the legal provisions of the Act. Under Section 3(3) of the Act, agreements, decisions taken by an association and practices are all deemed to be an agreement. This is also clear from a reading of Section 27 wherein all the three items have been treated as anticompetitive agreements. Therefore, by the virtue of the Act all the three items though having a different meaning are deemed to be anticompetitive agreements.

113. We have to examine whether these five OPs were following the same practice. The Supreme Court in the case of Hindustan Lever Ltd. vs. MRTP AIR 1977 SC 1285 had dealt with the word trade practice as defined under the MRTP Act. The Supreme Court was dealing with restrictive trade practices. Under the MRTP Act trade practice has been defined as under:-

> *(u) 'trade practice' means any practice relating to the carrying on of any trade, and includes (i) anything done by any person which controls or affects the price charged by or the method of trading of, any trader or any class of traders. (ii) a single or isolated action of any person in relation to any trade.*

Practice has been defined under Section 2(m) of the Competition Act as follows:-

> *"practice" includes any practice relating to the carrying on of any trade by a person or an enterprise.*

The definition under the MRTP Act is an exhaustive definition whereas the definition under the Competition Act is an inclusive definition. Thus for the purpose of the Competition Act one can adopt the definition of trade practices under the MRTP Act. Further, in the case of Hindustan Lever Ltd. (Supra), the Supreme Court has held that even a clause in an agreement is a practice for the purpose of the examination of anticompetitive practice. The Supreme Court has also held that an agreement is a restraint on trade and it is through a rule of reason and the provision of law that anticompetitive behaviour has to be determined. Therefore, according to the Supreme Court one has to look at the provisions of the Indian laws and rule of reason and come to a conclusion.

114. In this particular case, it was found that in the 1980s on the basis of the reports of Tariff Commission and the Bureau of Industrial Costs and Prices that there used to be a difference in the prices of the tyres of the different tyre companies but the prices of the tyre companies used to increase together. In the period of analysis, for the period 2005-06 to 2008-09, there used to a difference in the prices of tyres of each manufacturer and this used to be maintained. But in 2009-10, the difference in the tyre prices were done away with and the prices became similar. Thus, the practices followed earlier had been confirmed in the year 2009-10, which is the period for consideration of the Commission.

115. In the 1980s again, the Tariff Commission and the BICP had observed that though the tyre companies had capacity to produce larger amounts of tyres, they did not use their capacity. In the year under consideration i.e. 2009-10, the tyre companies with the exception of Birla Tyres did not utilise their capacity. Thus the practice followed in 1980s in respect of capacity was being followed in 2009-10.

116. Further under the Competition Act, in Section 3 and 4, certain situations are mentioned which are treated as anticompetitive. There are five such situations mentioned in Section 3(4) of the Competition Act. Under Section 4, any practice which imposes unfair or discriminatory conditions in purchase or sale of goods or similar conditions in respect of prices can be taken as an anticompetitive practice for the purpose of Section 3(3) of the Act. Even any limitation or restriction placed on the production of goods or technical and scientific development can be regarded as an anticompetitive practice for the purpose of Section 3(3) of the Act. Even the provisions mentioned in Section 4(2)(c), 4(2)(d) and 4(2)(e) can be considered as an anticompetitive practice for the purpose of Section 3(3) of the Act. Some of the anticompetitive elements mentioned in Section 20(4) of the Act can also be considered for the purpose of practices for the purpose of Section 3(3) of the Act. But before applying the practices mentioned in the different provisions of the Act, it is necessary to examine whether the clauses (a), (b), (c) and (d) mentioned are applicable in this case.

117. Now, two of the practices mentioned above are hit by the provisions of Section 3(3)(a) i.e. fixing of prices and Section 3(3)(b) i.e. limiting supplies. Further if a clause in an agreement can be held to be an anticompetitive practice, as held by the Supreme Court in the case of Hindustan Lever Ltd. (Supra), the other practices followed by the tyre companies such as tie in arrangement, exclusive supply agreement, and resale price maintenance can be regarded as an anticompetitive practices followed by the tyre companies. Resale price maintenance leads to fixing of prices as mentioned in Section 3(3)(a) of the Act. Any agreement which is a tie in arrangement or exclusive supply agreement is hit by the provisions of Section 3(3)(b) of the Act as it limits and controls the market.

118. The five OPs have been following anticompetitive practices even in respect of not passing on the excise duty cut benefits to the consumers. The five OPs have been increasing prices of tyres when the raw material

prices increased. But when the raw material prices fell in 2009-10, especially of rubber, the five OPs instead of reducing the price of tyres increased the prices of tyres. This can also be regarded as an anticompetitive practice. There was an economic slowdown world over in 2008. In order to give a boost to the economy, government reduced the excise duty from 10% to 8%. But this benefit was not passed on by the OPs to the consumers. Similarly, when the cost of raw materials fell, the prices of tyres were increased in 2009-10. Thus, the pricing of tyres by the five OPs was unfair. Thus, by this unfair practices as well as the unjust practice not passing on the excise duty cut to the consumers, the OPs have fixed the prices within the meaning of Section 3(3)(a) of the Act.

119. For all the above noted anticompetitive practices, the OPs have not given any explanation. They have just stated that the excise duty cut has been passed on to the consumers but this has not been established on the basis any material. Thus, the OPs were indulging into anticompetitive practices.

120. For the purpose of Section 3(3) of the Act, if onus cast on the parties is not discharged then appreciable adverse effect on competition is presumed. In such a case, it is not necessary to consider the factors mentioned in Section 19(3) of the Act. But there is no harm in considering those factors in this case. In the case of tyre manufacture as the investment required is high, it acts as a barrier to new entrants. The tyre companies by getting antidumping duties on imported tyres and standard setting have foreclosed competition by hindering entry for imported goods in the market. By not passing on the benefit of cut in excise duty to the consumers and also by not reducing prices when the rubber prices fell, there has been no accrual of benefit to consumers. In fact, the consumers have been losers. Even technical development was not carried out by producing longer lasting and more efficient tyres for the consumers. Thus, the factors given under clauses (c), (d) and (f) of Section 19(3) of the Act are very much present in this case.

121. To sum up, in the financial year 2009-10, the five OPs have operated as a cartel and have followed anticompetitive practices. ATMA which is an association of tyre manufacturers is also involved in the anticompetitive practices and is an extension of the cartel i.e. it is also a part of the cartel.

122. Thus, according to me the Opposite Parties have been indulged into contravention of section 3(3) (a) and 3(3) (b) read with section 3(1) of the Act.

Determination of Penalty

Since the Tyre companies in the present case have been found to be in cartel, determination of amount of penalty is to be done in terms of proviso to section 27(b) of the Act, which reads as under;

"27. Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:-

(a) .....

(b) impose such penalty, as it may deem fit which shall be not more than ten Per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.'

Provided that in case any agreement referred to in section 3 has

been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher."

The calculation of penalty limit based on turnover in terms of section 27(b) is as under:

Name	Gross Turnover for 2009-10 (Rs. In Million) taking into account period of contravention post notification i.e. 20.05.2009 on pro-rata basis (Rs. In Million)	10% of turnover as calculated in column 2 (Rs. In Million)
Apollo	46,963.86	4696.39
J K Tyres	34,245.31	3424.53
CEAT	25,880.94	2588.09
MRF	53,164.10	5316.41
Birla Tyres	43,458.17	4345.82

Name	Net profit for 2009-10 (Rs. In Million) taking into account period of contravention Post notifications i.e. 20.05.2009 on pro-rata basis (Rs. In Million)	3 times of Net Profit as calculated in column 2 (Rs. In Million)
Apollo	3,592.10	10776.30
J K Tyres	1,414.98	4244.94
CEAT	1,393.96	4181.87
MRF	3,064.02	9192.06
Birla Tyres	2,054.37	6163.10

It would be seen from the above that the amount of three times of net profit calculated as above is higher than 10% of the turnover. Since as per the provisions of Proviso to Section 27(b) the penalty has to be determined on the basis of net profit or turnover whichever is higher, in this case the net profit has been taken into account by the Commission. Therefore, considering the totality of the facts and circumstances of the instant case, I am of the view of imposing a penalty of 0.5 times of net profit for 2009-10 (From 20.05.2009) in case of each Tyre manufacturer mentioned in the Table. Accordingly, the penalty amount is determined as under:-

Name	Net profit for 2009-10 (Rs. In Million) taking into account period of contravention Post notifications i.e. 20.05.2009 on pro-rata basis (Rs. In Million)	0.5 times of Net Profit as calculated in column 2 (Rs. In Million)
Apollo	3,592.10	1796.05
J K Tyres	1,414.98	707.49
CEAT	1,393.96	696.97
MRF	3,064.02	1532.01
Birla Tyres	2,054.37	1027.18

As regards ATMA since it has provided platform to the tyre manufacturers and facilitated cartelization, for the purposes of this case, I decide to impose a penalty of 10% of its total receipts for the year 2009-10 in terms of section 27(b) as under;

i) The Opposite Parties should 'cease and desist' from indulging in any activity relating to agreement, understanding or arrangement on prices, production arid supply of tyre in the market.

ii) The Opposite Parties should disengage and disassociate itself from collecting wholesale and retail prices through the member tyre companies and also from circulating the details on production and dispatches of tyre companies to its members.

The above directions above must be complied within 90 days of receipt of this order. The amount of penalty determined in case of different entities must also be deposited within a period of 90 days from the date of receipt of this order.

Secretary is directed to communicate this order as per regulations to all the parties.

sd/-
(R. Prasad)
Member (R)