

(5) If an inquiry has been initiated by a listed company in case of leak of unpublished price sensitive information or suspected leak of unpublished price sensitive information, the **relevant intermediaries and fiduciaries shall co-operate** with the listed company in connection with such inquiry conducted by listed company.

4.3 - Takeover Code

- **Takeover:** When an "Acquirer" takes over the control of the "Target Company", it is termed as Takeover.
- **Substantial acquisition of shares:** When an acquirer acquires "substantial quantity of shares or voting rights" of the Target Company, it results into substantial acquisition of shares.
- **Acquirer** means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company.
- **Control:** the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.
- **Frequently traded shares:** shares of a target company, in which the traded turnover on any stock exchange during the **12 calendar months preceding the calendar month in which the public announcement is made is at least 10% of the total number of shares** of such class of the target company.
- **Tendering period:** means **10 working days period** to take within the offer period.
- **Offer Price:** Price at which the acquirer announce to acquire the share from the public revision can be made up to 3 days prior to opening of the offer. It may be noted that the promoter shall not be entitled for any share.
- **Identified date:** means 10 working days after closer of the offer, the acquiree shall make payment to the shareholder for offer shares have been acquired.
- **Volume weighted average market price:** the product of the number of equity shares traded on a stock exchange and the price of each equity share divided by the total number of equity shares traded on the stock exchange.
- **Volume weighted average price:** the product of the number of equity shares bought and price of each such equity share divided by the total number of equity shares bought.
- **Friendly takeover:** Promoter of the target company voluntarily sell off shares to the acquirer at an attractive price offered by acquirer.
- **Hostile takeover:** Promoter of the target company don't want to give away the ownership / control of their company and fight back to defend their ownership/control.
- **Horizontal takeover:** Takeover of one company by another in same industry.
- **Vertical takeover:** Takeover of one Co. of its suppliers or customers i.e. Backward or Forward integration.
- **Conglomerate takeover:** Takeover of one company by another company operating in totally different industries.

1. Requirement of open offer process & compliance

Any acquirer, along with PAC, if any, while acquiring shares of the Target Company, where by pursuant to such acquisition their post-acquisition holding in the Target Company reaches or exceeds 25% of the voting rights in such Target Company then initial trigger is said to be touched by such acquirer. It casts an obligation on the acquirer to make public announcement of an open offer for acquisition of additional 26% shares of Target Company, entitling him to exercise 25% or more voting rights in such Target Company).

An acquirer can, who has reached at a level of 25% but less than maximum permissible nonpublic shareholding or more and wants to acquire five percent or more share within the financial year, has to again make public offer to receive 26% (or) more shares subject to delisting level.

As per Reg. 3(2): any acquirer, along with PAC (if any), who has already acquired 25% or more shares of the Target Company, shall not acquire more than 5% shares of such Target company within any financial year (starting April 1st) without making prior public announcement of an open offer for acquiring additional 26% shares of Target Company.

Provided that:

Post-acquisition holding of such acquirer together with its PAC must not exceed the maximum permissible non -public shareholding, thus maintaining the minimum public float of 25% in such Target company.

4. Pre conditions to voluntary open offer

- (a) Prior holding of **at least 25% or more of voting rights** in the Target Company
- (b) No acquisition was made in the preceding 52 weeks without attracting the obligation to make a public announcement to make an open offer i.e. no creeping acquisition.
- (c) No acquisition of shares during the offer period except under the open offer
- (d) No further acquisition of shares for a period of 6 months after the completion of open offer except by way of another voluntary open offer or competing offer.
- (e) An acquirer may make an offer conditional by prescribing minimum level of acceptance

5. Withdrawal of Offer (Reg.23)

Permitted conditions:

- i) Statutory approvals required have been refused.
- ii) Acquirer being a natural person has died.
- iii) Any condition stipulated in the agreement for acquisition,
- iv) Any such circumstances as in the opinion SEBI merits withdrawal.
- v) Within 2 working days merchant banker (manager to open offer) make an announcement in Newspapers

Providing reasons & grounds for withdrawal of offer simultaneously inform -i) SEBI; ii) Stock Exchanges; iii) Registered Office of the Target Company.

6. Open offer process.

The following process has to be taken by the acquirer.

- (i) **Submission of draft letter of offer:** The acquirer shall submit a draft letter of offer to SEBI **within 5 working days** from the date of detailed public announcement along with a

non-refundable fee as applicable. Simultaneously, a copy of the draft letter of offer shall be sent to the target company at its registered office and to all the stock exchanges where the shares of the company are listed.

- (ii) **Dispatch of letter of offer:** Within **maximum 7 working days** from the date of receipt of communication of comments from SEBI or where no comments are offered, **within 7 working days from the expiry of 15 working days** from the date of receipt of draft letter of offer by SEBI.
- (iii) **Opening of the offer:** the tendering period shall start **within maximum 12 working days from date of receipt of comments from SEBI and shall remain open for 10 working days.**
- (iv) **Completion of requirements:** within 10 working days from the last date of the tendering period.


7. Escrow account


An escrow account has to be **opened at least 2 working days prior to detail Public Statement** with an object of payment and security against Performance of his obligations under Takeover Regulations which may be in any of the following forms:

- (a) Cash deposited with Scheduled Commercial Bank
- (b) Bank Guarantee issued in favor of the manager of the Open Offer
- (c) Deposit of Frequently Traded & Free transferable equity shares or other freely transferable securities with appropriate margin.
- (d) Bank Guarantee / Deposit of Securities

The manager to the open offer shall not release the escrow account **until the expiry of 30 days** from the completion of payment of consideration to shareholders or on fulfilling other compliances under the regulations.

 **Concerned Ministry:** Ministry of Law and Justice


 **Competition:** "A situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective, for example, profit, sales, or market share"

 **Need of Competition:** When a market is competitive, businesses will have greater incentives to **lower prices**, to improve the **quality** of their products and services, and to provide buyers with more options.

That is, businesses

will need to **innovate** to make their products different and better than the rest.

Consequently, lower prices of goods and services will mean more **purchasing power**, which would, in turn, **boost** the **economy** & improve **quality of life**. Simply put, in a market with healthy competition, consumers will ultimately win

 **Competition Policy vs Law:** Competition Law is a sub-set of Competition Policy Competition policy has two elements:

- a. Putting in place a set of **policies** that enhance competition in local and national market
- b. A **Law** designed to prevent anti-competitive business practices and unnecessary govt. intervention

 **Evolution of Competition Act, 2002:**

- This act governs Indian competition law.
- A High-Level Committee on Competition Policy and Law was constituted on 15th September 1999 under the Chairmanship of **Mr. S.V.S. Raghavan** (Raghavan Committee) for framing a Law
- The Competition Bill, 2001 was introduced in Lok Sabha by Finance Minister **Arun Jaitley** on **6 August 2001**
- The Bill received the assent from the President on **13th Jan 2003** and became an Act
- This Act replaced the archaic "The Monopolies and Restrictive Trade Practices Act, 1969"
- Under this legislation, the **Competition Commission of India** was established to prevent the activities that have an **appreciable adverse** effect on competition in India. This act extends to whole of India.

 **Scheme of the Act:**

- 9 chapters containing a total of 66 sections.
- Later in 2007, Chapter VIII A (containing section 53A to 53U) inserted regarding 'Comp. Appellate Tribunal'.
- Later in 2017, through Finance Act 2017 'Competition Appellate Tribunal' is substituted with 'Appellate Tribunal', being the NCLAT constituted u/s 410 of the Companies Act 2013.

 **Objects behind the enactment:** An Act to provide, keeping in view of the economic development of the country, for the establishment of

a **Commission** to:

- Prevent practices having **adverse effect** on competition,
- Promote and **sustain competition** in markets,

- Protect the interests of **consumers** and
- Ensure **freedom of trade** carried on by other participants in markets, **in India**, and for matters connected therewith or incidental thereto.



Important Definitions: Section 2:

- (a) "**Acquisition**" means, directly or indirectly, acquiring or agreeing to acquire
- (i) **shares**, voting rights or assets of any enterprise; or
 - (ii) **control** over management or control over assets of any enterprise;
- (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;
- (ba) "Appellate Tribunal" = NCLAT
- (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

A cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement:

- to **fix prices**,
- to **limit** production and supply,
- to **allocate** market share or sales quotas, or
- to engage in collusive bidding or **bid-rigging** in one or more markets.

An important dimension in the definition of a cartel is that it requires an **agreement between competing enterprises not to compete** or to restrict competition.

- (d) "**Consumer**" means any person who:
- (i) buys any **goods** for a **consideration** which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and **includes any user of such goods** other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, **whether such purchase of goods is for resale or for any commercial purpose or for personal use**;
 - (ii) hires or avails of any **services** for a **consideration** which has been paid or promised or partly paid and partly promised, or under any system of deferred payment **and includes any beneficiary of such services** other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person **whether such hiring or availing of services is for any commercial purpose or for personal use**;

Note - A person purchasing goods not for personal use, but for resale can be considered as a 'consumer' under the Competition Act, 2002 (unlike Consumer Protection Act, 2019)

(e) "Enterprise" means a **person** or a **department of the Government**, who or which is, or has been, **engaged in any activity**, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but **does not include any activity of the Government relating to the sovereign functions** of the Government including all activities carried on by the departments of the Central Government dealing with **atomic energy, currency, defence and space**.

Explanation.--For the purposes of this clause,--

(a) "Activity" includes profession or occupation;

(b) "Article" includes a new article and service includes a new service;

(c) "Unit" or "division", in relation to an enterprise, includes--

(i) a **plant or factory** established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service;

Sovereign functions are those actions for which **state is not answerable** before the Court of Law. It includes matters **such as defence** of the country, raising and maintaining **armed forces, space**, and making **peace** in retaining territory

Supreme Court of Calcutta in 1861- *Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India*: Read from ICAI Module

(i) "**Goods**" means goods as defined in the **Sale of Goods Act, 1930** and includes:

(A) **products** manufactured, processed or **mined**;

(B) **debentures, stocks and shares after allotment**;

(C) in relation to goods supplied, distributed or controlled in India, goods **imported** into India;

(l) "**Person**" includes:

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v) an AOP or a body of individuals, whether **incorporated or not, in India or outside India**;
or

(vi) any corporation established by or under any Central, State or Provincial Act or a Government

company as defined in section 617 of the Companies Act, 1956 (Section 2(45) of Companies Act 2013)

(vii) any body corporate incorporated by or under the laws of a country outside India;

(viii) a co-operative society registered under any law relating to co-operative societies;

(ix) a local authority;

(x) every artificial juridical person, not falling within any of the preceding sub-clauses;

- (f) "Price", in relation to the sale of any goods or to the performance of any services, **includes every valuable consideration**, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services **although ostensibly relating to any other matter or thing**;
- (g) "Relevant Market" means the **market** which may be **determined by the Commission** with reference to the **Relevant Product Market** or the **Relevant Geographic Market** or with reference to both the markets
- (h) "Relevant Geographic Market" means a **market comprising the area** in which the **conditions** of competition for supply of goods or provision of services or demand of goods or services are **distinctly homogenous and can be distinguished** from the conditions prevailing in the **neighboring areas**;

Notes:

- The Relevant Geographic Market can be **as narrow as one metropolitan area or as broad as the nation as a whole**.
 - **Marking** the relevant geographic markets are basically involves the identification of geographical areas **within which separate degree, nature, and conditions of competition take place**.
- (i) "Relevant Product Market" means a **market comprising all those products** or services which are regarded as **interchangeable** or **substitutable** by the consumer, by reason of **characteristics** of the products or services, their **prices** and intended **use**;

Belaire Owner's Association v. DLF Ltd:

<https://lawbhoomi.com/case-brief-belaire-owner-s-assoviation-v-dlf-ltd/>

Prohibition of certain agreements, Abuse of dominant position & Regulation of combinations [Chapter 2]



Section 3 - Anti-competitive Agreements:

1. **No** enterprise or association of enterprises or **person** or association of persons **shall enter into any Agreement** in respect of:

production

supply

distribution

storage

acquisition

control of
goods

provision of
services

which **causes** or is likely to cause an **Appreciable Adverse Effect on Competition within India (AAEC)**

Note:

- Read definition of **Agreement**
- Anti-competitive agreement (ACA) includes, but are not limited to:
 - agreement to **limit** production and/or supply;
 - agreement to **allocate** markets;
 - agreement to **fix price**;

- **bid rigging** or collusive bidding;
- conditional purchase/ sale (tie-in arrangement);
- **exclusive** supply / distribution arrangement;
- **resale price maintenance**; and
- **refusal to deal**

- c. Section 19(3) - While deciding whether or not an agreement is likely to have an AAEC in the market, the Commission shall bring into **consideration** any or all of the following factors:
- a. creation of **barriers** to new entrants in the market;
 - b. driving **existing** competitors out of the market;
 - c. **foreclosure** of competition by hindering entry into the market;
 - d. accrual of **benefits** to consumers;
 - e. **improvements** in production or distribution of goods or provision of services; and
 - f. **promotion** of technical, scientific and economic development by means of production or distribution of goods or provision of services.

2. Any **agreement** entered into in contravention of the provisions u/ss (1) shall be void.

3. Horizontal Anti-competitive Agreements:

Any **agreement** entered into **between enterprises** or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, **engaged in identical or similar** trade of goods or provision of services, which:

- (a) directly or indirectly **determines** purchase or sale **prices**;
- (b) **limits** or controls production, supply, markets, technical development, investment or provision of services;
- (c) **shares the market** or source of production or provision of services by way of allocation of **geographical area** of market, or type of goods or services, or number of customers in the market or any other similar way;
- (d) directly or indirectly results in **bid rigging** or collusive bidding, shall be presumed to have an AAEC.

Provided that **nothing** contained in this sub-section shall apply to any **agreement** entered into by way of **joint ventures** if such agreement **increases efficiency** in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation: For the purposes of this sub-section, "**bid rigging**" means any **agreement**, between enterprises or persons referred to in sub-section (3) **engaged in identical or similar** production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

Bid Rigging:

Bid rigging takes place when bidders **collude** and keep the **bid amount** at a **pre-determined level**. Such pre-determination is by way of **intentional manipulation** by the members of the bidding group. Bidders could be actual or potential ones, but they **collude and act in concert**.

Collusive bidding or bid rigging may occur in various ways. Some of the most commonly adopted ways are by entering in an **agreement**:

- **to submit identical bids**
- as to who shall submit the **lowest bid**,
- for the submission of cover bids (voluntarily inflated bids)
- **not to bid** against each other,
- on **common norms** to calculate prices or terms of bids
- to **squeeze out** outside bidders
- An agreement **designating bid winners** in advance on a rotational basis, or on a geographical or customer allocation basis
- as to the bids which any of the parties may offer at an auction for the sale of goods or any agreement through which any party agrees to **abstain from bidding** for any auction for the sale of goods, which eliminates or distorts competition

Forms of Bid rigging

- **Bid Suppression**: In this, one or more **competitors** who otherwise would be expected to bid, or who have previously bid, **agree to refrain from bidding** or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.
- **Complementary Bidding**: In this some competitors agree to **submit bids** that are either **too high** to be accepted or **contain special terms** that will not be acceptable to the buyer. Such bids are **not intended to secure** the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding (Example: OLX purchase)
- **Bid Rotation**: In this all **conspirators** submit bids but **take turns to be the lowest bidder**. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator.
- **Sub-contracting**: In this the **competitors**, who **agree not to bid** or to submit a losing bid, **frequently receive sub-contracts** or supply contracts in exchange from the successful bidder. In some schemes, a **low bidder will agree to withdraw its bid in favour of the next low bidder** in exchange for a lucrative sub-contract that divides the illegally obtained higher price between them.

4. Vertical Anti-competitive Agreements:

Any agreement amongst **enterprises** or persons at **different stages or levels of the production chain in different markets**, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including:

- (a) tie-in arrangement
- (b) exclusive supply agreement;
- (c) exclusive distribution agreement;
- (d) refusal to deal;
- (e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation: For the purposes of this sub-section:

- (a) "**tie-in arrangement**" includes any **agreement requiring a purchaser** of goods, as a condition

of such purchase, **to purchase some other goods**;

- (b) "exclusive supply agreement" includes any agreement **restricting** in any manner **the purchaser** in the course of his trade from acquiring or otherwise dealing in any **goods other than those of the seller** or any other person;
- (c) "exclusive distribution agreement" includes any agreement to **limit**, restrict or withhold the **output** or supply of any **goods** or allocate any area or market for the disposal or sale of the goods;
- (d) "refusal to deal" includes any agreement which **restricts**, or is likely to restrict, by any method the **persons** or classes of persons **to whom goods are sold** or from whom goods are bought;
- (e) "resale price maintenance" includes any **agreement to sell goods** on condition that the **prices to be charged** on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

5. Nothing contained in this section shall restrict:

- (i) the **right** of any person to restrain any infringement of, or to impose **reasonable conditions**, as may be **necessary for protecting any of his rights** which may have been conferred upon him under:
 - (a) the **Copyright Act, 1957**;
 - (b) the **Patents Act, 1970**;
 - (c) the **Trade and Merchandise Marks Act, 1958** or the **Trademarks Act, 1999**;
 - (d) the **Geographical Indications of Goods (Registration and Protection) Act, 1999**
 - (e) the **Designs Act, 2000**;
 - (f) the **Semi-conductor Integrated Circuits Layout-Design Act, 2000**;
- (ii) the **right** of any person to **export goods from India** to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Note:

- 1. Adverse effect on competition shall be **appreciable** and must be **within India** (exclusive export cartel are not classified as anti-competitive under the Competition Act, 2002).
- 2. In case of Horizontal agreement, it is presumed that such agreement have an **appreciable** adverse effect on competition, **hence onus lies with defendant to prove otherwise**.



Section 4: Abuse of dominant position

- 1. **No enterprise or group shall abuse its dominant position.**
Note - Dominance is not considered bad per se but its abuse is.
- 2. There shall be an **abuse** of dominant position u/ss (1), **if** an enterprise or a group:
 - a) directly or indirectly, imposes **unfair or discriminatory**:
 - (i) **condition** in purchase or sale of goods or service; or
 - (ii) **price** in purchase or sale (including **predatory price**) of goods or service.

Explanation: For the purposes of this clause, the unfair or discriminatory condition or price referred to in sub-clause (i) and (ii) above **shall not include such discriminatory condition or price which may be adopted to meet the competition**; or

- b) **limits** or restricts:
 - (i) **production** of goods or provision of services or market therefor; or
 - (ii) technical or **scientific development** relating to goods or services to prejudice of consumers; or
- c) indulges in practice or practices resulting in **denial of market access** in any manner; or
- d) makes **conclusion of contracts** subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- e) **uses** its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation: For the purposes of this section, the expression:

- a) "**dominant position**" means a **position of strength**, enjoyed by an enterprise, in the **relevant market, in India**, which enables it to:
 - (i) **operate independently** of competitive forces prevailing in the relevant market; or
 - (ii) **affect** its competitors or consumers or the relevant market in its **favour**;

Factors determining the dominant position

Dominance has been traditionally defined in terms of market share of the enterprise or group of enterprises concerned. However, a number of other factors play a role in determining the influence of an enterprise or a group of enterprises in the market. These include:

- market **share**,
 - the size and **resources** of the enterprise;
 - size and importance of **competitors**;
 - **economic power** of the enterprise;
 - **vertical integration**;
 - **dependence** of consumers on the enterprise;
 - extent of entry and exit **barriers** in the market;
 - countervailing **buying power**;
 - **market structure** and size of the market;
 - **source** of dominant position viz. whether obtained due to statute etc.;
 - social costs and obligations and contribution of enterprise enjoying dominant position to economic development.
 - The CCI is authorized to take into account any other factor which it may consider relevant for the determination of dominance.
- b) "**predatory price**" means the sale of goods or provision of services, **at a price which is below the cost**, as may be determined by regulations, of production of the goods or provision of services, **with a view to reduce competition or eliminate the competitors**;

Predation is **exclusionary behavior** and can be indulged in only by enterprises(s) having **dominant position** in the concerned relevant market.

The major elements involved in the determination of predatory behaviour are:

- a. Pricing **below cost** for the **relevant product** in the **relevant market** by the **dominant enterprise**.
- b. **Intention** to reduce competition or eliminate competitors.

This is traditionally known as the **predatory intent test**.

Note:

1. Abuses as specified in the Act fall into two broad categories: **Exploitative** (excessive or discriminatory pricing) and **exclusionary** (for example, denial of market access).



Section 5: Combination

The **acquisition** of one or more enterprises by one or more persons or **merger or amalgamation** of enterprises **shall be a combination** of such enterprises and persons or enterprises, if:

(a) any acquisition where:

- (i) the **parties** to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired **jointly have**:

(A) either, **in India**, the **assets of the value of more than Rs. 1,000 crores or turnover more than Rs. 3,000 crores**; or

(B) **in India or outside India**, in **aggregate**, the **assets of the value of more than \$500 mn or turnover more than \$1,500 mn**; or]

- (ii) the **group**, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, **would belong after the acquisition, jointly have** or would jointly have:

(A) either in India, the **assets of the value of more than Rs. 4,000 crores or turnover more than Rs. 12,000 crores**; or

(B) **in India or outside India**, in aggregate, the **assets of the value of more than \$2 Bn or turnover more than \$6 Bn**;

- (b) **acquiring** of control by a person over an enterprise when such **person has already** direct or indirect control over another enterprise engaged in production, distribution or trading of a **similar or identical or substitutable goods** or provision of a similar or identical or substitutable service, if:

- (i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control **jointly have**:

(A) in India, the **assets of the value of more than Rs. 1,000 crores or turnover more than Rs. 3,000 crores**; or

(B) **in India or outside India**, in **aggregate**, the **assets of the value of more than \$500 Mn or turnover more than \$1,500 Mn**; or

- (ii) the **group**, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, **jointly have** or would jointly have:

(A) either in India, the **assets of the value of more than Rs. 4,000 crores or turnover more than Rs. 12,000 crores**; or

(B) **in India or outside India**, in aggregate the **assets of the value of more than \$2 Bn or turnover more than \$6 Bn**;

- (c) any **merger or amalgamation** in which:

- (i) the enterprise remaining **after merger** or the enterprise created as a result of the amalgamation, as the case may be, have:

- (A) in India, the **assets** of the value of more than Rs. 1,000 crores or turnover more than Rs. 3,000 crores; or
- (B) in India or outside India, in **aggregate**, the assets of the value of more than \$500 Mn or **turnover** more than \$1,500 Mn; or
- (ii) the **group**, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have:
 - (A) in India, the assets of the value of more than Rs. 4,000 crores or turnover more than Rs. 12,000 crores; or
 - (B) in India or outside India, in aggregate, the **assets** of the value of more than **\$2 Bn** or **turnover more than \$6 Bn**;

Explanation - For the purposes of this section:

- (a) "**control**" includes controlling the affairs or management by:
 - (i) one or more **enterprises**, either jointly or singly, **over another enterprise or group**;
 - (ii) one or more **groups**, either jointly or singly, **over another group or enterprise**;
- (b) "**group**" means two or more enterprises which, directly **or indirectly**, are in a position to:
 - (i) exercise **26% or more** of the **voting rights** in the other enterprise; or
 - (ii) **appoint more than 50%** of the members of the **board of directors** in the other enterprise; or
 - (iii) **control the management** or affairs of the other enterprise;

S.O. 673 (E) dated 4th March 2016, the government has **exempted** "Group" exercising **less than 50% of voting rights** in other enterprise from the application of section 5 of the Act for a period of **5 years** w.e.f., 4th March 2016

Vide notification number S.O. 675(E) dated 4th March 2016, in the exercise of the powers conferred by section 20 (3), the **CG enhances**, the value of assets and the value of turnover, **by 100%** w.e.f. 4th March 2016. Hence the above table (threshold under section 5) shall be read as:

Threshold applicable to		Enterprises Level	Group Level
In India	Joint Assets	₹ 2,000 Cr	₹ 8,000 Cr
	Joint Turnover	₹ 6,000 Cr	₹ 24,000 Cr
In India and Outside	Joint Total Assets	US\$ 1000 Million	US\$ 4000 Million
	Minimum Indian Component	₹ 1000 Cr	₹ 1000 Cr
	Joint Total Turnover	US\$ 3000 Million	US\$ 12000 Million
	Minimum Indian Component	₹ 3000 Cr	₹ 3000 Cr

Notifications granting Exemption from application of Sec 5 - Combination

As per section 54(a), the **Central Government may by notification, exempt** any class of enterprises from the application of this act, or any provision thereof in the **public interest**.



Section 6: Regulation of Combinations:

1. No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within relevant market in India and such a combination shall be void.
 2. Subject to the provisions contained u/ss (1), any person or enterprise, who or which proposes to enter into a combination, may, at his or its option, give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within 7 days of:
 - a. approval of the proposal relating to merger or amalgamation, referred to in 5(c), by the board of directors of the enterprises concerned;
 - b. execution of any agreement or other document for acquisition referred to in section 5(a) or acquiring of control referred to in clause (b) of that section.
- Section 2A - No combination shall come into effect until 210 days have passed from day on which the notice has been given to Commission or Commission has passed orders u/s 31, whichever is earlier

Vide notification S.O. 2039(E) dated 29th June 2017

In the exercise of the powers conferred by 54(a), the Central Government, in the public interest, exempts every person or enterprise who is a party to a combination as referred u/s 5 from giving notice within 7 days mentioned u/s 6(2), but subject to the provisions of section 6(2A) and section 43A, for a period of 5 years from the date of publication of this notification in the Official Gazette

Note - Exemption is from the time limit. Exemption is not from filing of notice to commission.

3. The Commission shall, after receipt of notice u/ss (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.
4. Exemption:

The provisions of this section shall NOT apply to:

 - Share subscription or
 - Financing facility or
 - any acquisition by a:
 - public financial institution,
 - foreign institutional investor,
 - bank or
 - venture capital fund,

pursuant to any covenant of a loan agreement or investment agreement.
5. The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub-section (4), shall, within 7 days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

Note: Here days shall mean calendar days

Green Channel to certain combination:

It is worth noting here that notification dated 13th August 2019 has amended the regulations to **introduce Green Channel** for **certain specified categories of combinations**. A combination notified under Green Channel would be **deemed** to have been **approved upon filing a notice**.

However, the parties have to **self-assess** and **determine** whether their combination is eligible for being subjected to Green Channel.

Chapter 3 - Competition commission of India



Section 7 - Establishment of Commission:

1. With effect from such date, as the **Central Government** may, by notification, appoint, there shall be established, for purposes of this Act, a Commission to be called the "Competition Commission of India"
2. The Commission shall be a **body corporate** by the name aforesaid having **perpetual succession** and a **common seal** with power, subject to the provisions of this Act, to acquire, hold and dispose of **property**, both movable and immovable, and to **contract** and shall, by the said name, **sue or be sued**.
3. The **head office** of the Commission shall be at such place as the Central Government may decide from time to time. - **New Delhi**.
4. The Commission **may establish offices** at other places in India.



Section 8 - Composition of the Commission:

1. The Commission shall consist of a **Chairperson** and **not less than 2 and not more than 6** other Members to be **appointed by the Central Government**.
2. The Chairperson and every other Member shall be a **person of ability**, integrity and standing and who has special knowledge of, and such **professional experience of not less than 15 years** in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.
3. The Chairperson and other Members shall be **whole-time Members**.



Section 9 - Selection Committee for Chairperson and Members of Commission

1. The Chairperson and other Members of the Commission shall be **appointed by the Central Government from a panel of names** recommended by a **Selection Committee**. The selection comm. shall consist of:
 - a. the **Chief Justice of India** or his nominee - **Chairperson**;
 - b. the **Secretary** in the Ministry of Corporate Affairs - **Member**;
 - c. the **Secretary** in the **Ministry of Law and Justice** - **Member**;
 - d. **2 experts** of repute who have special knowledge of, and **professional experience** in international trade, economics, business, commerce, law, finance, accountancy, management,

industry, public affairs or competition matters including competition law and policy - Members.

2. The **term** of the Selection Committee and the manner of selection of panel of names shall be such as may be **prescribed**.



Section 10 - Term of office of Chairperson and other Members.

1. The Chairperson and every other Member shall hold office as such for a term of **5 years** from the date on which he enters upon his office and shall **NOT** be **eligible for re-appointment**.

Provided that the Chairperson or other Members shall not hold office as such after he has attained the **age of 65 years**.

2. A **vacancy** caused by the **resignation** or **removal** of the Chairperson or any other Member u/s 11 or by **death** or otherwise shall be **filled by fresh appointment** as per the provisions of sections 8 and 9.
3. The Chairperson and every other Member shall, **before entering upon his office**, make and subscribe to an **oath** of office and of **secrecy** in such manner and before such authority, as may be prescribed.

For Unit 5.1 - Competition - Meaning, Objectives, Extent and Applicability

5.1.3.3. Inquiry into combination by Commission

- (1) The Commission may, upon its own knowledge or information relating to acquisition or acquiring of control or merger or amalgamation referred to in clause (c) of that section, **inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India**.

The Commission **shall not initiate any inquiry** under this subsection **after the expiry of one year from the date on which such combination has taken effect**.

- (2) The Commission shall, on receipt of a notice, Inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India.
- (3) Notwithstanding anything contained in section 5, the Central Government shall, on the **expiry of a period of two years** from the date of commencement of this Act and thereafter every two years, in consultation with the Commission, by notification, **enhance or reduce**, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, **the value of assets or the value of turnover**, for the purposes of that section.
- (4) For the purposes of determining **whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market**, the Commission shall have due regard to all or any of the **following factors**, namely:—
 - (a) Actual and potential level of competition through imports in the market
 - (b) Extent of barriers to entry into the market;
 - (c) Level of combination in the market;

- (d) Degree of countervailing power in the market;
- (e) Likelihood that the combination would result in the parties to the combination being able to increase prices or profit margins;
- (f) Extent of effective competition likely to sustain in a market;
- (g) Extent to which substitutes are available;
- (h) Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- (i) Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- (j) Nature and extent of vertical integration in the market;
- (k) Possibility of a failing business;
- (I) Nature and extent of innovation;
- (m) Relative advantage, by way of the contribution to the economic development;
- (n) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

The Commission shall meet at such times and places, and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations. All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson/ the Member presiding, shall have a second or/casting vote.

The quorum for such meeting shall be three Members.

5.1.3.4. Procedure for investigation of combination

- (i) When the Commission is of the opinion that there exists a prima facie case, **it shall direct the Director General to cause an investigation to be made into the matter.** The Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit. The Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.
- (ii) If, after consideration of the objections and suggestions referred to in sub section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit. If further investigations are called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

Where the Commission is of the primary opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition, **it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days.**

The Commission may call for a report from the Director General and such report shall be submitted by the Director General. if it is forms prima facie opinion that the combination has, or is **likely to have, an appreciable adverse effect on competition, it shall, within 7 working days direct the parties to publish details of the combination within 10 working days of such direction, the knowledge or information of the public and persons affected or likely to be affected by such combination, who can file his objections, if any, before the Commission within 15 working days.**

The additional information shall be furnished by the parties within fifteen days. After receipt of all information and within a period of forty-five working days from the expiry of the period specified in sub-section (5), the Commission shall proceed to deal with the case in accordance with the provisions contained in section 31.

5.1.3.5. Orders of Commission on certain combinations

- (i) Where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under sub-section (2) of section 6.
- (ii) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, **it shall direct that the combination shall not take effect.**
- (iii) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination.
- (iv) The parties, who accept the modification proposed by the Commission under, shall carry out such modification within the period specified by the Commission but those fail within the period specified by the Commission, such combination shall be deemed to have an appreciable adverse effect on competition.
- (v) If the parties to the combination **do not accept the modification** proposed by the Commission under, such parties may, **within 30 working days of the modification proposed by the Commission, submit amendment to the modification** proposed by the Commission under that sub-section.
- (vi) If the Commission agrees with the amendment submitted by the parties under subsection (6), it shall, by order, approve the combination.
If the Commission does not accept the amendment submitted, then, the parties shall be **allowed a further period of 30 working days** within which such parties shall accept the modification proposed by the Commission.
- (vii) If the parties fail to accept the modification proposed by the Commission within thirty working days or within a further period of thirty working days the combination shall be deemed to have an appreciable adverse effect on competition and be dealt with in accordance with the provisions of this Act.
- (viii) Where the Commission has directed that the combination shall not take effect or the combination is deemed to have an appreciable adverse effect on competition, then, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, the Commission may order that such combination shall not be effective.
If the Commission does not, on the expiry of a period of **210 days** from the date of notice given to the Commission, pass an order or issue direction in accordance with the provisions of sub-section (1) or sub-section (2) or sub-section (7), **the combination shall be deemed to have been approved by the Commission.**
Explanation.—for the purposes of determining the period of 210 days specified in this subsection, the period of thirty working days specified in sub-section (6) and a further period of 30 working days specified in sub-section (8) shall be excluded.
- (ix) Where the Commission has ordered a combination to be void, the acquisition or acquiring of

control or merger or amalgamation referred to in section 5, shall be dealt with by the statutory or judicial authorities under any other law for the as if such acquisition or acquiring of control or merger or amalgamation had not taken place. Any proceeding initiated or which may be initiated under any other law shall be void.

Orders by Commission after inquiry into agreements or abuse of dominant position

Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, it may pass all or any of the following orders, namely:

- (a) Direct any enterprise or association of enterprises involved in such agreement, or abuse of dominant position, **to discontinue and not to re-enter such agreement or discontinue;**
- (b) **Impose such penalty, as it may deem fit:** However, 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 3 times of its profit for each year of the continuance of such agreement or 10% of its turnover for each year of the continuance of such agreement, whichever is higher (Imp).**
- (c) Direct that the agreements shall stand **modified** to the extent and in the manner as may be specified in the order by the Commission;
- (d) Direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;
While passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

5.2.4. Division of enterprise enjoying dominant position

The Commission may, direct division of an enterprise to ensure that such enterprise does not abuse its dominant position because of its size. The order may provide for all or any of the following matters, namely:—

- (a) the transfer or vesting of property, rights, liabilities or obligations;
- (b) the adjustment of contracts;
- (c) the creation, allotment, surrender or cancellation of any shares, stocks or securities;
- (d) the formation or winding up of an enterprise
- (e) amendment of the memorandum of association or articles of association

5.2.5. Power of Commission to regulate its own procedure

- (1) The Commission shall be guided by the principles of natural justice and subject to the Act and Rules, shall have the powers to regulate its own procedure. The Commission shall have, powers as are vested in a Civil Court. Commission may issue interim orders.
- (2) The Commission may call upon such experts, to assist the Commission in the conduct of any inquiry by it.

5.2.6. Orders of Commission imposing monetary penalty

If a person fails to pay any monetary penalty imposed the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations. Including procedure of recovery of income tax.

5.2.7. Acts taking place outside India but having an effect on competition in India

The Commission shall pass orders notwithstanding that,—

- (a) An agreement referred to in section 3 has been entered into outside India; or
- (b) Any party to such agreement is outside India; or
- (c) Any enterprise abusing the dominant position is outside India; or
- (d) A combination has taken place outside India; or
- (e) Any party to combination is outside India; or
- (f) Any other matter or practice or action arising out of such agreement or dominant position or combination is outside India,

5.2.8. Contravention of orders of Commission

- (1) The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.
- (2) If any person, without reasonable cause, fails to comply with the orders or directions of the Commission, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.
- (3) If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall, be punishable with imprisonment.

5.2.9. Penalty for failure to comply with directions of Commission and Director General

If any person fails to comply, without reasonable cause, with a direction given by the Commission or the Director General, such person shall be punishable with fine which may extend to 1 lakh for each day during which such failure continues subject to a maximum of 1 crore.

If any person or enterprise who fails to give notice to the Commission under sub-section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent, of the total turnover or the assets, whichever is higher, of such a combination.

5.2.10. Penalty for making false statement or omission to furnish material information

If any person, being a party to a combination,—

- (a) Makes a statement which is false in any material particular, or knowing it to be false; or
- (b) omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than 50 lakhs but which may extend to rupees one crore, as may be determined by the Commission.

5.2.11. Penalty for offences in relation to furnishing of information

Without prejudice to the provisions of section 44, if a person, who furnishes or is required to furnish under this

Act any particulars, documents or any information,—

- (a) Makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or
- (b) Omits to state any material fact knowing it to be material; or
- (c) Willfully alters, suppresses or destroys any document which is required to be furnished as aforesaid, such person shall be punishable with fine which may extend to 1 crore as may be determined by the Commission.

The Commission may, if it is satisfied impose lesser penalty that any person has made a full and true disclosure in respect of the alleged violations, a lesser penalty. However, lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure.

Lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission. The Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,—

- (a) Not complied with the condition on which the lesser penalty was imposed by the Commission; or
- (b) Had given false evidence; or
- (c) The disclosure made is not vital,
and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

5.2.12. Establishment of Appellate Tribunal

The National Company Law Appellate Tribunal constituted under section 410 of the companies Act, 2013 shall be the Appellate Tribunal for the purpose of this Act and the said appellate Tribunal shall -

- (a) To hear and dispose of appeals against any direction issued or decision made or order passed by the Commission.
- (b) To adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission.

Any person, aggrieved by any direction, decision or order **may prefer an appeal to the Appellate Tribunal within a period of 60 days from the date on which a copy of the direction or decision or order made by the Commission is received by the aggrieved party.**

On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

5.2.13. Procedures and powers of Appellate Tribunal

The Appellate Tribunal, though having powers of civil court, shall not be bound by the procedure laid down in the Code of Civil Procedure, but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Appellate Tribunal shall have power to regulate its own procedure including the places at which they shall have their sittings.

5.2.14. Execution of orders of Appellate Tribunal

Every order made by the Appellate Tribunal shall be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Appellate Tribunal to send, in case of its inability to execute such order, to the court within the local limits of whose jurisdiction,-

- a) In the case of an order against a company, the registered office of the company is situated; or
- b) In the case of an order against any other person, place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated.

- 2) The Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court. If any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he shall be liable for a penalty of not exceeding rupees one crore or imprisonment for a term up to three years or with both.

5.2.15. Appeal to Supreme Court

The Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order of the Appellate Tribunal.

5.2.16. Powers of Central Government (CG)

- (i) The Central Government may, by notification, make rules to carry out the provisions of this Act;
- (ii) CG shall have power to decide the staff and officers and decide on their salaries
- (iii) The Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period
- (iv) Power of Central Government to issue directions
- (iv) The Central Government may, under emergent situation supersede the Commission for such period, not exceeding 6 months, as may be specified in the notification.

[Effective from 1st June, 2000]

"No one studies this chapter; everyone regrets not studying this chapter!"**Purpose of the Act:**An Act to **consolidate** and amend the law relating to foreign exchange with the **objective** of:

- **facilitating** external trade and payments and
- for **promoting** the orderly **development** and **maintenance** of forex market in India

With liberalization of Indian economy in 1991, the flow of foreign exchange into India increased thus increasing the Foreign Exchange Reserve (FER) substantially. This act enables mgt. of FER for the country.

Enforcement of the Act - Directorate of Enforcement (ED)**Forex Regulation Act 1947, 1973 vs FEMA 1999:**

	FERA	FEMA
Objective of Act	Conserve Forex	Promote and develop the forex
PRI	Based on citizenship	Based on stay in India
Strictness	Forex transaction is prohibited unless permitted	Forex transaction is permitted unless restricted
Mens-rea (guilty mind)	Presumption of existence of mens-rea	Mens-rea not presumed. Responsibility of prosecution to prove
Compounding of offence	Not allowed	All offences are compoundable

**Broad Division of Act:**

Preliminary [Sec 1-2]	Reg and Mgt. of Forex [Sec 3-9]	Authorised Person [Sec 10-12]	Contravention and Penalty [Sec 13-15]	Adjudication and Appeal [Sec 16-35]	Directorate of Enforcement [Sec 36-38]	Misc. [Sec 39-49]
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**Sec 1: Applicability**

This Act extends to **whole of India**. It also applies to all BOA **outside India** owned or controlled by PRI

**Sec 2: Definition**

➤ Authorised Person [Sec 2(c)] means an:

Authorised
Dealer (AD)Money
ChangerOff-shore
banking unitOther person auth. u/s 10
to deal in Forex or Forse

➤ Foreign Currency [Sec 2(m)] means any currency other than Indian Currency

➤ Foreign Exchange [Sec 2(n)] means Foreign Currency and includes:

Deposits, credits and
bal. payable in any FCDraft, TC, LoC, BoE drawn
in IC but payable in FCDrafts, TC, LoC, BoE drawn by Banks or
Person outside India but payable in IC

➤ Foreign Security [Sec 2(o)] means:

- Any **security** in form of - Stock, shares, bond, debentures or other inst.
- **Denominated** in FC,
- And includes - Sec. denominated in FC but redemption or returns (int./div) payable in IC

• Capital Account Transaction [Sec 2(e)]: means a transaction which **alters**:

- Asset or Liabilities (incl. contingent liab) o/s India of PRI
- A/L in India of PROI

□ Current Account Transaction [Sec 2(j)] means transaction other than CAT

Without prejudice to the generality of the definition, CUAT includes:

Payments w.r.t., foreign trade, current business, services, & **short-term banking** & credit fac. in **OCOB**

Payments w.r.t., **interest on loans** & as net income from investments

Remittances for **living expenses** of parents, spouse and children residing abroad

Expense w.r.t. foreign **travel, edu. and medicare** of parents, spouse and children

Section 2(u) - "Person" includes:

i. an individual,	v. an association of persons or a body of indiv., whether incorporated or not,
ii. a HUF,	vi. every artificial juridical person, and
iii. a company,	vii. any agency, office or branch owned or controlled by such person;
iv. a firm,	

Section 2(v) - "Person Resident in India" means:

In case of Individual

A person residing in India for **more than 182** days during the course of the preceding **FY** but **does not include**:

(A) a person who has **gone out of India** or who stays outside India, in either case:

- for or on taking up **employment** O/S India, or
- for carrying on O/S India a **business** or **vocation** outside India, or
- for any other purpose, in such circumstances as would indicate his **intention** to stay outside India for an **uncertain period**;

(B) a person who has **come to** or stays in India, in either case.

However, if such person has come to or stays in India for any of the following purpose, he shall be considered as PRI (**irrespective of no. of days of stay in India in preceding FY**):

- for or on taking up **employment** in India, or
- for carrying on in India a **business** or vocation in India, or
- for any other purpose, in such circumstances as would indicate his **intention** to stay in India for an **uncertain period**;

Artificial Person

any person or body corporate **registered** or **incorporated** in **India**

any **BOA in India** owned or **controlled** by a person resident **outside** India

a **BOA outside** India owned or **controlled** by a person resident **in** India

Section 2(w) - "Person Resident outside India" means a person who is not Resident in India

Concept Clarity Check:

1. **Citizenship** is not relevant for determining PRI or PROI
2. If in FY 2019-20, a person resides in India for 200 days. On 1st June 2020, the person leaves India for employment o/s India. Determine whether PRI or PROI? - **For the period 1st April 2020 to 1st June 2020, such person shall be PRI and from 2nd June 2020 onwards, he will be a PROI (irrespective of the fact that he resides for more than 182 days in preceding FY)**
3. Mr. S comes to India on 1st June 2019 for visiting his parents. However, his parents fall sick and he is certain that he will not be able to return for an year. **He ends up staying with them till 31st July 2020. Is he a PRI in FY 20-21? - No, in FY 20-21, Mr. S will be considered as PROI. Even though he resided in India for more than 182 days in FY 19-20, he has not come for any of the 3 purpose (employment, business or uncertain period) and hence he is not a PRI in FY 20-21**
4. Residential status is **not for a year**. It's on a particular date. (Unlike Income Tax Act, 1961)
5. Is it mandatory for a person to reside in India for more than 182 days to be considered as PRI? - Umm, No! **(This is highly debatable topic and we intend to stick to ICAI answer)**
6. Where a student is leaving India for **higher studies**, RBI has clarified that they shall be **treated as PROI** majorly because of their intention to stay outside India for an uncertain period and the fact that they start working there to take care of their expenses



Sec 3: Dealing in Foreign Exchange, etc.

No person (**PRI & PROI**) shall:

Deal in or transfer **Forex** or **Forse** to any person other than AP

make any payment to/for **credit** of PROI

Receive any payment from **PROI** otherwise through an AP*

Enter into **Financial Transaction** in India as consideration for acq. of asset o/s India

*Where any such payment is received without **corresponding inward remittance**, it shall be **deemed** to be received through **person other than AP**

However, the above restricted transactions may be carried on:

- i. If otherwise provided in this Act, Rules or Regulation, **or**
- ii. With **permission of RBI** (general or special)

Note -

1. For this section - Financial transaction means:

payment to/credit of any person or

receiving payment for or on behalf of any person or

to **draw/issue/** negotiate any BoE or

trf. security or acknowledge debt

2. Purpose of this section is to regulate inflow and outflow of Forex in regulated manner and through APs only.

Read examples given in Pg. 1.13 of Study mat! (Only during first revision. Not thereafter)



Sec 4: Holding of Forex

Except as provided in this Act, no PRI shall Acquire, Hold, Own, Possess or Transfer [HA! TOP] any Forex, Forsee or **Immovable Property situated o/s India.**



Sec 5: Current Account Transactions:

Any person may sell or draw Forex to or from an authorised person if such sale or drawal is a CUAT. CG may, in consultation with RBI, impose **reasonable** restrictions on CUAT.

Note: RBI cannot, on its own, impose any restriction on current account transaction. Restrictions can be imposed only by CG (in consultation with RBI)

Examples of CUAT:

1. Import in India of machinery for installation in factory from a UK vendor by payment in cash
2. Import in India of machinery for installation in factory from a UK vendor on credit for 3 months (this is CUAT because short term banking and credit facilities covered as CUAT)
Note - In case of Import, the credit period can be upto 6m. For credit period in excess of 6m, it will be considered as loan. In case of Export, the period of realization is upto 9m.
3. Gift (say \$1,000) by a PRI to PROI (note: Gift is given in FC)
4. Gift (say Rs. 1,000) by a PRI to PROI in India - This will be a CAT and not CUAT as this results in alteration of asset of the PROI in India. Although it is a CAT, such gifting is permitted as per Rules.

General Rule:

CUAT is **freely permitted** unless specifically restricted.

Schedules of FEM(CUAT) Rules, 2000

Schedule I - Drawal of forex by any person for following purpose is prohibited:

1. Remittance out of **lottery** winnings,
2. Remittance of income from **Racing/riding** etc. or any other hobby,
3. Remittance for **purchase** of lottery tickets, banned magazines, football pools, sweepstakes etc.,
4. Payment of **commission** on exports made towards equity investment in JV / WOS abroad of Indian cos.,
5. Remittance of **dividend** by any company to which the requirement of dividend balancing is applicable,
6. Payment of **commission** on exports under Rupee State Credit Route, **except** commission up to **10%** of invoice value of exports of tea and tobacco.
7. Payment related to "**Call Back Services**" of telephones,
8. Remittance of **interest income** on funds held in Non Resident Special Rupee Account Scheme [NRSRAS]
[i.e., if any of the above remittance/payments is to be done by a PRI to a PROI, the PRI cannot go to AP and draw \$s because these are **prohibited**]

Note - Drawal of forex is also prohibited for - travel to Nepal or Bhutan or transaction with person resident in Nepal or Bhutan

Schedule II - Transactions which require prior approval of GoI for drawal of forex

Purpose of Remittance	Ministry / Dept. of GoI who approval is required
Cultural Tours	Ministry of Human Resources Development, Dept. of Education and Culture (Now known as Ministry of Education)
Advt. in foreign print media by a SG and its PSUs > \$ 10,000 Except where such advt. is for the purposes of promotion of tourism, foreign investments and international bidding Note: PSUs of CG not covered!	MoFinance, Dept. of Economic Affairs
Remittance of freight of vessel chartered by a PSU	MoSurface Transport, (Chartering Wing)
Payment of import (through ocean transport) by a Govt. Department or a PSU on C.I.F. basis (i.e. other than F.O.B and F.A.S. basis)	MoSurface Transport, (Chartering Wing)
Multi-modal transport Operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
Remittance of hiring charges of transponders: a. TV Channels b. Internet service providers	Ministry of Information and Broadcasting Ministry of Communication and Info. Tech
Remittance of container detention charges > the rate prescribed by Director General of Shipping	Ministry of Surface transport (Director General of Shipping)
Remittance of prize money / sponsorship of sports activity abroad by a person other than International/ National/State Level sports bodies, if the amt. involved > US\$ 100,000	Ministry of Human resources Development (Department of Youth Affairs and Sports) (Now - Mo Youth Affairs and Sports)
Remittance for membership of P & I Club (protection and indemnity insurance)	Ministry of Finance (Insurance Division)

Schedule III - Transactions which in excess of limits require prior approval of RBI for drawal of forex: [Liberalised Remittance Scheme]

1. Individuals - Avail forex facility for the following purpose within limit of USD 2,50,000 only. Additional remittance beyond limit shall require prior approval of RBI:
 - a. Private visits to any country (except Nepal and Bhutan)
 - b. Gift or donation
 - c. Going abroad for employment
 - d. Emigration (permanently settling in a country)
 - e. Maintenance of close relatives abroad
 - f. Travel for:

business	attending a conference	specialized training	for meeting expense of medical treatment/ check up abroad or accompanying a patient
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g. Expenses in connection with **medical treatment** abroad

h. **Studies** abroad

i. Any other current account transaction

Provided, for (d), (g) and (h), individual may avail forex facility in excess of \$2,50,000 if it so required by country of emigration, medical institute offering treatment or the university, respectively

Provided further that, where **individual "Remits" any** amount under this scheme in a **FY**, the applicable limit shall be **reduced from \$250K** by such amount remitted (**i.e., the limit of \$250,000 is aggregate in FY**)

Provided also that for a PRI but not permanently resident in India and

a. is a **citizen** of a foreign State other than Pakistan; or

b. is a citizen of India, who is on **deputation (to India)** to the office or branch of a foreign co. or subsidiary or JV in India of such foreign co.,

may make remittance up to his **net salary** (after deduction of taxes, PF, etc.)

Explanation: For this schedule, A PRI on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which is not > 3 years, is a resident but not permanently resident.

2. Facilities for person other than individuals: Following shall require **prior approval** of RBI:

Particulars	Purpose	Limit
Donation	Donation for: a. creation of Chairs in reputed edu. Inst., b. contri to funds (not being an invst. fund) promoted by edu. Inst; and c. contri to a technical inst./body in the field of activity of the donor co	> Lower of 1% of Forex Earnings during last 3 FY or \$5Mn
Sale of flats/ plots in India	Commission (per transaction) to agent abroad for sale of residential flats or commercial plots in India	> Higher of \$25,000 or 5% of Inward Remittance
Consultancy per project	Remittance for any consultancy w.r.t Infra projects and	> \$10Mn per project
	For other consultancy procured from o/s India	> \$1 Mn per project
Pre-incorp expense	Remittance as reimbursement of pre-incorporation expense	> Higher of 5% of Investment brought into India or \$100K

Note - Limit of \$250,000 is irrelevant in case of person other than individuals

Additional Note:

1. Procedure for Drawal/remittance of Forex under Sch III shall be same as applicable under LRS
2. Approval for transaction under Sch II and III shall **not be required** where remittance is from **RFC A/C**.
3. Approval for transaction under Sch II (except for remittance for membership of P&I club) and Sch III (except for commission/pre-incorp) shall **not be required** where drawal is out of funds in **EEFC A/c**

4. If a person is on visit abroad, he can incur expenditure stated in Sch III if he incurs it through **International Credit Card (ICC)**

Note - If a transaction is not listed in any of the three schedule, it can be freely undertaken.

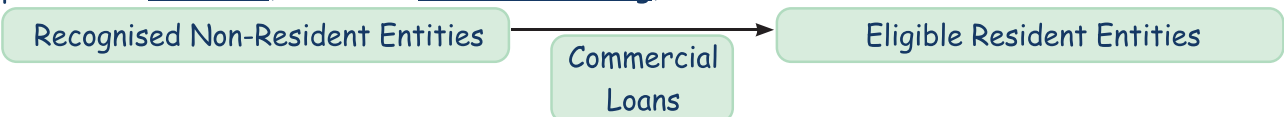
Frameworks for raising loan through External Commercial Borrowings (ECBs):

Definitions:

All-in-Cost: It includes rate of interest, other fees, expenses, charges, guarantee fees, ECA charges, whether paid in foreign currency or INR **but will not include: (a) commitment fees and (b) withholding tax payable in INR.**

Provisions as per Master Direction of RBI related to ECB:

1. ECB are **commercial loans** raised by eligible resident entities from recognised non-resident entities. ECB should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc.



2. ECB comes with 2 configuration - Foreign Currency ECB (**FCY ECB**) and Indian Currency ECB (**INR ECB**) The framework is as shown below:

Parameters	FCY denominated ECB	INR denominated ECB
Currency of Borrowing	Any Freely Convertible FC (unlike Brazil Currency)	INR
Forms of ECB	<ul style="list-style-type: none"> • Loans including bank loan • floating/ fixed rate notes/ bonds/ debentures (other than fully and compulsorily convertible instruments) • Trade Credit > 3 years • FCCBs, FCEBs and • Finance Lease <p>*FYI - Conversion is optional in FCCBs</p>	<ul style="list-style-type: none"> • Loans including bank loan • floating/ fixed rate notes/ bonds/ debentures / Pref. shares (other than fully and compulsorily convertible instruments) • Trade Credit > 3 years • FCCBs, FCEBs and • Finance Lease • Plain vanilla Rupee Denominated Bonds
Eligible Borrowers (to raise ECBs)	<ul style="list-style-type: none"> • All entities eligible to receive FDI. • Port Trusts; • Units in SEZ; • SIDBI; and • EXIM Bank of India. 	<ul style="list-style-type: none"> a) Entities eligible to raise FCY ECB (as mentioned in left); and b) Registered entities engaged in micro-finance activities, viz., registered NPO companies, registered societies/trusts/ cooperatives and NGOs.

Recognised lenders	<ul style="list-style-type: none"> • Resident of FATF or IOSCO compliant countries, or • Multilateral and Regional Financial Inst. where India is a member country (WHO, World Bank, etc.) • Individuals only if they are foreign equity holders (of borrower) or for subscription to bonds/debentures listed abroad • Foreign branches / subsidiaries of Indian banks (only for FCY ECB, except FCCB, FCEBs) subject to applicable prudential norms. 										
Minimum Average Maturity Period (MAMP)	<ul style="list-style-type: none"> • MAMP = 3 years • Call/Put options on ECB not to be exercised prior to completion of MAMP • For specified cases, separate MAMP: <table border="1"> <thead> <tr> <th>Category</th> <th>MAMP (in yrs)</th> </tr> </thead> <tbody> <tr> <td>ECB raised by mfg. co. <= \$50 Mn per FY</td> <td>1</td> </tr> <tr> <td>ECB raised from foreign eq. holder for WCP, GCP or repayment of Rupee loans</td> <td>5</td> </tr> <tr> <td>ECB raised for: (i) WCP or GCP (ii) on-lending by NBFCs for WCP or GCP</td> <td>10</td> </tr> <tr> <td>ECB raised for: i. repayment of Rupee loans availed domestically for capex ii. on-lending by NBFCs for capex</td> <td>7</td> </tr> </tbody> </table>	Category	MAMP (in yrs)	ECB raised by mfg. co. <= \$50 Mn per FY	1	ECB raised from foreign eq. holder for WCP, GCP or repayment of Rupee loans	5	ECB raised for: (i) WCP or GCP (ii) on-lending by NBFCs for WCP or GCP	10	ECB raised for: i. repayment of Rupee loans availed domestically for capex ii. on-lending by NBFCs for capex	7
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All-in-cost ceiling per annum	Benchmark rate + 450 bps spread. (i.e., 4.5% spread)										
Other costs	Prepayment charge/ Penal interest, if any, for breach of covenants, not > 2 % over and above the contracted rate of interest on the o/s principal amount and will be outside the all-in-cost ceiling.										
End-uses (Negative list)	<p>ECB proceeds cannot be utilized for the following:</p> <ol style="list-style-type: none"> Real estate activities. Investment in capital market. Equity investment. WCP, except in case of ECB mentioned at v(b) and v(c) above. GCP, except in case of ECB mentioned at v(b) and v(c) above. Repayment of Rupee loans, except as mentioned in v(d) and v(e) above. On-lending to entities for the above activities, except as per v(c), (d) & (e) 										

Exchange rate (for change of currency i.e., FCY to INR or vice versa)	Rate prevailing on date of agreement for such change or rate less than the rate prevailing on such date, if consented to by the ECB lender	For conversion to Rupee, the exchange rate shall be the rate prevailing on the date of settlement .
Hedging provision	<p>ECB Borrowers are reqd. to follow hedging guidelines w.r.t., forex exposure.</p> <p>For Infra Cos:</p> <ul style="list-style-type: none"> • Cos. to have BoD approved risk management policy. • Mandatorily hedge 70 % of ECB exposure where MAMP is < 5 years. • Designated AD-I bank to verify that 70% hedging requirement is complied with & report the position to RBI (Form ECB 2) 	<p>Overseas investors are eligible to hedge their exposure in Rupee through <u>permitted derivative products</u> with AD-I banks in India.</p> <p>The investors can also access the domestic market through:</p> <ol style="list-style-type: none"> branches/subsidiaries of Indian banks abroad or branches of foreign banks with Indian
	<p>Following operational aspects with respect to hedging should be ensured:</p> <p><u>Coverage</u>: Cover the principal as well as the coupon through financial hedges throughout the period of ECB.</p> <p><u>Tenor and rollover</u>:</p> <p>Min. tenor of 1 year for the financial hedge with periodic rollover, duly ensuring that the exposure is hedged</p> <p><u>Natural Hedge (in lieu of fin. Hedge)</u>: Considered only to the extent of offsetting projected cash flows / revenues in matching currency, net of all other projected outflows.</p> <p>For this purpose, an ECB may be considered naturally hedged if the offsetting exposure has the maturity/cash flow within the same accounting year.</p>	
Change of currency of borrowing	Change from one freely convertible FC to any other freely convertible FC as well as to INR is freely permitted .	Change from INR to any freely convertible foreign currency is not permitted .

ECB framework is not applicable w.r.t., investments in NCD in India made by Regt. FPI

Limit and leverage:

- All eligible borrowers can **raise ECB up to \$750 Mn** or equivalent per FY under the automatic route.
- In case of FCY ECB raised from direct foreign eq. holder, **ECB liability-equity ratio** for ECB raised under the **automatic route cannot exceed 7:1**. [Ratio N.A. if o/s ECB (total incl. proposed) < \$5Mn]
- Borrowing entities to be governed by guidelines on **debt equity ratio**, issued, by concerned regulator.

Author's Note - FCY ECB can be used for repayment of Rupee loans availed domestically. But, Refinancing of INR ECB with FCY ECB is not permitted

3. Issuance of **Guarantee** by Indian Banks, AIFI or NBFC w.r.t., ECB is **not permitted**. Further, Indian banks, AIFI or NBFCs shall **not invest in FCCBs or FCEBs**.
4. ECB proceeds are **permitted** to be **parked** abroad as well as domestically in the manner given below:

Parking abroad:

ECB proceeds meant only for FC exp. can be parked abroad pending utilisation in following liquid assets:

- (a) **deposits** or other products offered by **banks** rated > AA (-) by S&P/Fitch IBCA or Aa3 by Moody's;
- (b) **T-bills** and other inst. (1 year maturity) having min. rating as indicated above and
- (c) deposits with foreign branches/subsidiaries of **Indian banks** abroad

Parking Domestically:

ECB proceeds meant for Re. expenditure should be repatriated immediately to AD-1 bank. Allowed to park in **unencumbered** term deposits with AD-I banks for **max. 12m** cumulatively. W.e.f., April 07, 2021, unutilised ECB proceeds drawn down on/before Mar 01, 2020 can be parked in term deposits with AD-1 banks in India **prospectively**, for an **additional** period up to March 01, 2022 (i.e., for more than 12 months)

5. Procedure of raising ECB:

Automatic Route:

All ECB can be raised under the automatic route if they conform to the parameters of this framework. Entities desirous to raise ECB under the automatic route **may approach** an **AD-I bank** with their proposal along with duly filled in **Form ECB**.

Approval Route:

The borrowers may **approach** the **RBI** with an application in Form ECB for **examination** through their AD-I bank. RBI to consider keeping in view the **overall guidelines, macroeconomic situation & merits** of specific proposals. ECB proposals of > certain threshold limit - Place before **Empowered Committee(EC)** set up by RBI, consider its recommendation and **RBI will take a final decision**

6. Reporting Requirements:

Loan Registration Number (LRN): **Draw down** of ECB allowed only after obtaining LRN from RBI.

To obtain the LRN:

- (a) submit duly certified **Form ECB** in duplicate to the designated **AD-I bank**
- (b) AD-1 bank will forward a copy to the **Director**, RBI (DSIM, ECB Division, BKC)
- (c) copies of **loan agreement not reqd.** to be submitted to RBI.

Changes in terms and conditions of ECB: Any changes in T&C of ECB (incl. **reduced repayment** by mutual agreement) to be reported to DSIM, RBI through **revised Form ECB** at the earliest (not later than **7 days** from the **changes effected**)

Monthly Reporting of actual transactions: Borrower to report **actual** ECB transactions in **Form ECB 2 Return** via AD-I bank on **monthly** basis so as to reach **DSIM** in **7 working days** from close of month. Changes in ECB parameters to be incorp. in Form ECB 2 Return (**in addition to revised Form ECB above**)

Late Submission Fee (LSF) for delay in reporting:

Type of Return/Form	Period of delay (from due date)	Applicable LSF
Form ECB 2	Up to 30 days	INR 5,000
Form ECB 2/Form ECB	Up to 3 years from submission/drawdown	INR 50,000 per year
Form ECB 2/Form ECB	Beyond 3 years from submission/drawdown	INR 100,000 per year

LSF to be paid via **DD** in favor of RBI SOP for Untraceable Entities ("UE"):

What is untraceable entity (UE)?

ECB borrower will be treated as UE if entity/auditors/promoters are **not reachable/responsive for > 2 Quarters after >= 6** documents comms/reminders and fulfils **all** the following condition:

- a. Entity **not** found to be **operative** at the regt. office address as per records avl. with AD Bank, **and**
- b. Entities have not submitted Stat. Auditor's Certificate for last **> = 2 years**
- c. Entity has failed to submit returns under this framework for the **past 8 quarters**

Action to be undertaken by Designated AD-1 bank w.r.t., UE: [FFAWE - Form Fresh Auto Writeoff ED]

- File **Revised Form ECB**, if required, and last **Form ECB 2 Return** w/o certification from co. with 'UE' written in bold on top. The O/S amount of ECB will be treated as **written-off** from external debt liability of country but may be retained by lender in books for recovery through judicial, etc. means;
- **No fresh ECB** application by the entity should be examined/processed by the AD bank;
- **ED** should be informed whenever any entity is designated 'UE'; and
- **No inward remittance** or debt servicing will be permitted under **auto route**. (i.e., **block incoming funds**)

7. Powers delegated to AD-I banks to deal with ECB cases

The designated AD-I banks can approve any requests from borrowers for changes w.r.t, ECB, except for FCCBs/FCEBs, ensuring compliance with extant **ECB norms** and that changes are with **consent** of lender(s).

Further, the following can also be undertaken under the **automatic route**:

- **AD-I bank can be changed** subject to obtaining **NoC** from the existing AD-I bank.
- **Cancellation of LRN**: Designated AD-I banks may **directly** approach **DSIM** for **cancellation** of LRN provided that **no draw down** against the said LRN has taken place + **monthly ECB-2** returns till date w.r.t, allotted LRN have been submitted to DSIM.
- **Refinancing** of existing ECB by fresh ECB by eligible borrower provided that:
 - **O/S maturity** of the original borrowing (existing ECB) is not reduced and
 - **AIC** of fresh ECB < AIC of existing ECB (equal to hoga toh nahi chalega)

➤ **Conversion of ECB into equity [ACPRPLE:**

Conversion of ECB, **incl. matured but unpaid ECB**, into equity is permitted subject to following conditions:

- a) **Activity** of Borrw. Co. is covered under **auto route** for FDI or CG approval is received per FDI norms
- b) The conversion (with lender's consent & without additional cost) should **not breach sectorial cap**;
- c) Applicable **pricing guidelines** for shares are complied with;
- d) In case of partial/full conversion of ECB into equity, the **reporting to RBI** will be as under:

Conversion	Form
Partial	Report converted portion in Form FC-GPR + Monthly Form ECB 2 Return with remarks
Full	Report entire portion in Form FC-GPR + Monthly Form ECB 2 Return with remarks. Subsequent filing of ECB 2 not required
Phases	Report in Form FC-GPR and ECB 2 will also be in phase

- e) If ECB Borrower has availed of **other credit facilities** from the Indian banking system, including foreign branches/subsy of Indian banks, comply with applicable **prudential guidelines**;
- f) **Consent** of other lenders, if any, to the same borrower is **available** or at least information regarding conversions is exchanged with other lenders of the borrower.
- g) **Exchange rate** prevailing on the **date** of the **agreement** for such conversion, or any **lesser rate** can be applied with a **mutual agreement** with the ECB lender.
Note - The **fair value** of the eq. shares to be issued to be worked out w.r.t, **date of conversion only**.

➤ **Security for raising ECB:**

AD-I banks are permitted to allow **creation of charge** on Imm./mov. assets/Finsec and issue guarantees in favour of lender/security trustee **to secure ECB** provided that:

- a. the underlying ECB is in **compliance** with the extant ECB guidelines,
- b. there exists **security clause** in **Loan Agreement** requiring ECB borrwr. to create/cancel such charge

- c. **NoC** from the **existing lenders in India** has been obtained

Once the above conditions are met, the AD-I bank may permit creation of charge subject to following:

1. Creation of Charge on Immovable Assets:

- a. Subj. to FEM (Acq. and Trf. of IP in India) Reguln, 2017
- b. Permission **not to** be construed as **permission to acquire IP in India**, by the lender/sec trustee.
- c. In the event of **enforcement** of the charge, the IP will have to be **sold only to a PRI** and the sale proceeds shall be repatriated to liquidate the o/s ECB (and not any other borrowings).

2. Creation of Charge on Movable Assets:

In case of enforcement of charge, claim of lender will be **restricted to o/s claim against the ECB**. Encumbered mov. assets may be taken out of country subject to **NoC** from domestic lenders

3. Creation of Charge over Finsec: The arrangements may be permitted subj to following:

- a. **Pledge of shares** of borrower co. (Eg. Jio) held by promoters (Eg. Ambani) or shares of domestic associate cos. (Ex. Jio) of borrower is **permitted**.
Pledge on other Finsec., viz. bonds and debentures, Govt.fin, Govt. Savings Certificates, deposit receipts of securities and units of UTI or of MF, held by borrower/promotor is also **permitted**.
- b. **Security interest** over all current and future **loan assets** and all **current assets** including CCE, including Rupee accounts of borrower with ADs in India, standing in the name of the borrower/promoter, can be used as security for ECB. The **Rupee accounts** of the borrower/promoter can also be in form of **escrow arrangement** or **debt service reserve A/C**.
- c. In case of **invocation** of pledge, transfer Finsec as per extant FDI/FII policy.

4. Issue of **Corp. or Personal Guarantee**: The arrangement shall be subject to obtaining the following:

- a. A copy of **Board Resl.** specifying **name** of officials auth. to execute guarantees.
- b. **Specific req.** from **individuals** to issue personal guarantee indicating detail of ECB.
- c. ECB can be guaranteed by overseas party **only** if they fulfil criteria of **Recognised lender**.

Such security shall be **subject** to provisions contained in the FEM (Guarantees) Regulations, 2000

➤ Additional Requirements: While approving changes to ECB, AD-I banks should ensure that:

- a. Changes are in **conformity** with the appl. ceilings/guidelines and in compliance with appl. guidelines.
- b. Changes are reported to DSIM and reflected in **Form ECB 2** appropriately.

8. Special Dispensations under the ECB framework

- ECB Facility for Oil Marketing Companies (IOCL/BPCL):
 - o Public Sector OMCs can raise ECB for WCP with MAMP of 3 years under auto route w/o

- mandatory **hedging** and individual limit requirements.
- o The **overall ceiling** for such ECB shall be **\$10 billion** or equivalent (**this is not per annum**)
- o OMCs should have a **Board approved** forex mark to market procedure and **risk management policy**.
- o All other provisions under the ECB framework will be applicable to such ECB.
- ECB facility for Startups - AD-I banks are permitted to allow Startups to raise ECB under **automatic route** as per the following framework

Eligibility	Entity recognized as Startup by the CG as on date of raising ECB
MAMP	3 years
Recognised lender	Resident of a FATF (IOSCO) compliant country. However, Foreign br/ suby of Indian banks and overseas entity in which Indian entity has made ODI will not be Recog. lender
Forms	Loans/Non-convertible, optionally convertible or partially convertible preference shares
Currency	Any freely conv. Currency/INR /combination thereof. In case of INR ECB, NR lender to mobilise INR through swaps/outright sale undertaken through AD-I bank in India.
Amount	The borrowing per Startup will be limited to \$3Mn or eq. per FY (in any currency)
All-in-cost	Mutually agreed between borrower and lender
End uses	Business exp. of borrower
Conversion into equity	Freely permitted subject to relevant Regulation
Security	Choice of security is left to the borrowing entity. Compliance with norms is necessary Issuance of guarantee is allowed . NR can issue guarantee only if NR qualifies as recognized lender under ECB for Startups. Issuance of guarantee, LoC, LoU, etc. by Indian bank, AIFO and NBFCs is not permitted .
Hedging	In case of INR ECB, overseas lender will be eligible to hedge its INR exposure through permitted derivative products with AD- I banks. They can also access domestic mkt. through br./suby of Indian banks abroad or br. of foreign bank with Indian presence <u>Note:</u> Startups raising ECB in FC are exposed to currency risk due to exchange rate movements and are advised to ensure having an appropriate risk management policy

Conversion rate	In case of borrowing in INR, the FC- INR conversion will be at the market rate as on the date of agreement .
Other Provisions	Same as per ECB framework. However, provisions on leverage ratio and ECB liability: Equity ratio will be NA Further, the Start-ups can also raise ECB under the general ECB route/framework .

9. Borrowing by Entities under Investigation:

All entities against which investigation/adjudication/appeal (IAA) by the law enforcing agencies for **violation of FEMA is pending, may raise ECB**, if they are otherwise eligible, **notwithstanding the pending investigations**, etc. without prejudice to the outcome of such IAA

Borrowing entity shall **inform** about **pendency** of such IAA to **AD-I bank/RBI**. Accordingly, AD-I Banks/RBI shall, while approving proposal, **intimate the agencies** concerned by endorsing a copy of the **approval letter**.

10. ECB by entities under restructuring/ ECB facility for refinancing stressed assets:

An entity which is under a CIRP can raise ECB only if specifically **permitted** under the **resolution plan**.

Eligible corporate borrowers (in Mfg./Infra Sector) who have availed Rupee loans domestically for capex and which have been classified as **SMA-2 or NPA** can **avail ECB** for **repayment** of these loans under any one time settlement with **lenders**. Lender banks are also permitted to **sell such loans (to NR)** to eligible ECB lenders.

Foreign branches/ overseas subsidiaries of Indian banks are **not eligible** to lend for the above purposes.

Eligible borrowers, who are participating in the CIRP under IBC, 2016 as resolution applicants, can **raise ECB** from all Recognised lenders, except foreign branches/subsidiaries of Indian banks, for repayment of Rupee **term loans** of the target company. Such ECB will be considered under the **approval route**

11. Dissemination of info.: For greater transparency, info. w.r.t, name of borrower, amount, purpose and maturity of ECB under both Auto. and Approval routes are put on RBI's website monthly, with 1m lag.

12. Compliance with the guidelines: The **primary responsibility** is of **borrower** concerned. Any contravention will invite **penal action under the FEMA**.

The designated AD-I bank is also expected to ensure **compliance** with ECB guidelines by their **constituents**.

FDI in India - Master Directions on FDI

1. Few stipulations of foreign investment in India as per Master Directions'

(i) Foreign Direct Investment' (FDI) is the investment through capital instruments by a person resident outside India

(a) in an **unlisted Indian company**; or

(b) in **10% or more** of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company.

If an existing investment by a person resident outside India in capital instruments of a listed Indian company falls to a level below 10% of the post issue paid-up equity capital on

a fully diluted basis, the investment will continue to be treated as FDI.

(ii) **'Foreign Portfolio Investment'** is any investment made by a person resident outside India in capital instruments where such investment is

(a) less than 10% of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company or

(b) less than 10% of the paid up value of each series of capital instruments of a listed Indian company.

(iii) A person resident outside India may hold foreign investment either as Foreign Direct Investment or as Foreign Portfolio Investment in any particular Indian company, issued outside India, the underlying of which a security is issued by a person resident in India.

(iv) **'Investment Vehicle'** is an entity registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose and will be Real Estate Investment Trusts (REITs) governed by the SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (InvITs) governed by the SEBI (InvITs) Regulations, 2014 and Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012.

A **Venture Capital Fund (VCF)** registered under the Securities and Exchange Board of India **will not be considered as an Investment Vehicle.**

(v) Any equity held by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned under the sectoral cap.

2. Prohibited sectors/ persons - Important question

FDI is **prohibited** in the following sectors:

(1) Lottery Business including Government/ private lottery, online lotteries.

(2) Gambling and betting including casinos.

(3) Chit funds (except for investment made by NRIs and OCIs on a non- repatriation basis).

(4) Nidhi company.

(5) Trading in Transferable Development Rights (TDRs).

(6) Real Estate Business or Construction of Farm Houses.

(7) Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.

(8) Activities/ sectors not open to private sector investment viz., (i) Atomic energy and (ii) Railway operations

(9) Any investment by a person who is a citizen of Bangladesh or Pakistan or is an entity incorporated in Bangladesh or Pakistan requires prior Government approval.

(10) A person who is a citizen of Pakistan or an entity incorporated in Pakistan can, only with the prior Government approval, invest in sectors/activities other than defense, space, atomic energy and sectors/activities prohibited for foreign investment.

3. Capital Instruments

The capital instruments are equity shares, debentures, preference shares and share warrants issued by the Indian company. **Twenty five percent of the total consideration amount (including share premium, if any), has to be received upfront** and the balance consideration towards fully-paid equity shares should be received within a period of twelve months from the date of issue of partly-paid shares. Other instruments are fully convertible debentures and fully convertible preference shares.

Entry Routes

Automatic Route not require the prior Reserve Bank approval or Government approval.

Government Route is the entry route which requires prior Government approval. Concerned ministry shall give the approval.

Sectoral caps

Foreign investment in the sectors/activities is permitted up to the limit indicated against each sector/ activity, subject to applicable laws/ regulations, security and other conditions.

Foreign investment is permitted up to 100% on the automatic route, subject to applicable laws/ regulations, security and other conditionality, in sectors/activities not listed in Regulation 16 of FEMA 20(R) and not prohibited under Regulation.

- Wherever there is a requirement of minimum capitalization, it will include premium received along with the face value of the capital instrument, only when it is received by the company upon issue of such instruments to a person resident outside India. Amount paid by the transferee during post-issue transfer beyond the issue price of the capital instrument, cannot be taken into account while calculating minimum capitalization requirement.
- Foreign Investment in investing companies not registered as Non-Banking Financial Companies core investment companies (CICs), will require prior Government approval. Foreign investment in investing companies registered as Non-Banking Financial Companies (NBFCs) with the Reserve Bank, will be under 100% automatic route.

9.1 - Definition of MSME

1. Composite Criteria and Classification of MSME:

Classification	Micro	Small	Medium
Manufacturing Enterprises and Enterprises rendering Services	Investment in Plant and Machinery or Equipment: Not more than ₹1 crore and Annual Turnover; not more than ₹5 crores	Investment in Plant and Machinery or Equipment: Not more than ₹10 crores and Annual Turnover; not more than ₹50 crores	Investment in Plant and Machinery or Equipment: Not more than ₹50 crores and Annual Turnover; not more than ₹250 crores

Note:

- In course of doing business, if a MSME unit goes to next category or is out of preview, it shall continue to avail non-tax benefit which it was originally entitled to for the next 3 years of coming to the next category.
- Turnover shall **exclude Exports**.

3.2 - Rights available to MSME, Measures for Promotion of MSME under MSMED Act, 2006

- Handled by **the Ministry of Micro, Small and Medium Enterprises**.
- "Appointed day"** means the day following immediately after the expiry of the period of **fifteen days** from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier.
- "The day of acceptance"** means -
 - The day of the actual delivery of goods or the rendering of services; or
 - where any objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier;
- "the day of deemed acceptance"** means, where no objection is made in writing by the buyer regarding acceptance of goods or services within 15 days from the day of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services;
- National Board for MSME shall meet for every **3 months** in a year.

1. Establishing MSME Process:

- Any person who intends to establish,--
 - A micro or small enterprise, may, at his discretion; or
 - A medium enterprise engaged in providing or rendering of services may, at his discretion; or
 - a medium enterprise engaged in the manufacture or production of goods pertaining to any industry, shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government.

However, any person who, before the commencement of this Act, established--

- (i) a small scale industry and obtained a registration certificate, may, at his discretion; and
- (ii) an industry engaged in the manufacture or production of goods pertaining to any industry having investment in plant and machinery of more than ₹1 crore but not exceeding ₹10 crore filed an Industrial Entrepreneur's Memorandum, shall within 180 days from the commencement of this Act, file the memorandum, in accordance with the provisions of this Act.

2. MSME Dispute Resolution Process:

- (1) Any party to a dispute may, with regard to any amount due under section 17, make a reference to the **Micro and Small Enterprises Facilitation Council**.
- (2) On receipt of a reference the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or center providing alternate dispute resolution services by making a reference to such an institution or center, for conducting conciliation
- (3) Every reference made under this section shall be decided within a period of 90 days from the date of making such a reference.

3. Delayed payments to micro and small enterprises

To MSME units shall exceed 45 days from the date of acceptance or the day of deemed acceptance., failing which the buyer shall be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, 'as the case may be; from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

4. Various schemes by Central Govt

a. Single window registration process

The champions control room under the ministry and development institute/ DICs shall facilitate single point registration.

b. Framework for revival and rehabilitation of MSME

Respective banks, which has extended loan to MSME may revive the re-payment schedule of loan based on certain criteria. Banks shall form Committee which will look into each such MSME and suggest corrective action. The Restricting shall be monitoring by the debt restricting cell of the particular bank (notified on 27/5/2015 by MSME Dept.)

c. Delay in payment to MSME

The **MSME - Samadhan** (Delayed Payment Monitoring System) is a portal created by the Office of DC (MSME), Ministry of Micro, Small and Medium Enterprises (MSME) where Micro and Small Enterprises (MSEs) can file their applications online regarding delayed payments.

The portal also has a dashboard giving information about the pending amount of MSEs with individual CPSEs/ Central Ministries, State Governments, etc. The CEO of PSEs and the Secretary of the concerned Ministries will be able to monitor the cases of delayed payment and issue necessary instructions to resolve such issues.

e. Procurement Preference Policy

Section 11 of the Act provides that Central Govt/State Govt. shall issue preference policy notification for preference to be given to MSME in public procurement. Detailed notification was issued on 23/3/2012 by MSME Dept. The notification details the extent and method of processing from MSME units. The policy provides for reservation of certain items to be from MSME only, price preference, preference to women entrepreneurs, on programmes to MSMEs, special renter development etc.

f. Establishment of Fund

The CG has under the powers used in section 12 have established a fund called MSME Fund to be utilized exclusively for means specified in Act. to micro and small enterprises and assurance of a scheme for easing the closure of business by these enterprises are some of the other features of the MSMED Act Establishment of specific funds for the promotion, development and enhancing the competitiveness of these enterprises, notification of schemes/ programs for this purpose, progressive credit policies, and practices, preference in Government procurements to products and services of the micro and small enterprises, more effective mechanisms for mitigating the problems of delayed payments.

g. Establishment of MSME Facilitation Centre

Has established under 18 to facilitate MSME units and has to power to settle disputes between MSME and other party, section, SG can also establish such facilitation council. MSMEs have the right to place their grievances to the council.

h. Role of National Small Industries Corporation Limited (NSIC)

NSIC, established in 1955, main function of the Corporation is to promote, aid and foster the growth of micro and small enterprises in the country, generally on commercial basis. It provides a variety of support services to micro and small enterprises in different areas like raw material procurement; product marketing; credit rating; acquisition of technologies; adoption of modern management practices, etc.

NSIC implements its various programmes and projects throughout the country through its 9 Zonal Offices, 39 Branch Offices, 12 Sub Offices, 5 Technical Services Centers, 3 Technical Services Extension Centers, 2 Software Technology Parks, 23 NSIC-Business Development Extension Offices and 1 Foreign Office.

i. Digital MSME Scheme

The Digital MSME is a Government scheme for MSME that was launched for promoting Information and Communication Technology (ICT) in the MSME Sector by adopting ICT tools and applications in the production and business process of MSMEs. The services that will be available for MSMEs through various service providers include-

- ERP, Accounting, Manufacturing Design, Regulatory compliance including GST.

The Digital MSME Scheme is aimed at creating awareness, supporting developments and e-platforms, thereby creating literacy, training and promoting digital marketing in MSME sectors.

j. ECLGS or Emergency Credit Line Guarantee Scheme

The ECLGS or the Emergency Credit Line Guarantee Scheme was launched by the Government of India as a special scheme, considering the **COVID-19** crisis. The Scheme aims to provide 100% guarantee coverage to banks and NBFCs to enable them to extend emergency credit facilities to business enterprises / MSMEs in view of COVID- 19 to meet their additional term loan or additional working capital requirements.

Recently, the Government extended the ECLGS to 31st March 2022 with the purpose to provide relief to MSMEs.

100% guarantee coverage for the additional funds sanctioned under the Emergency Credit Line Scheme. The interest rate charged is capped at **9.25% for banks and 14% for NBFCs**. A maximum tenure of 4 years from the date of disbursement is stipulated under the Scheme. The moratorium period on the principal amount is 12 months.

k. Secured Business Loan for MSME - SIDBI

SIDBI is a primary financial institution that promotes, develops and finances Micro, Small and Medium Enterprises (MSME) through various schemes.

One such scheme is Secured Business Loan or SBL which was developed to provide faster dispensation of credit to MSMEs, especially those in the manufacturing segment and service sector. The maximum quantum of open term loan under the SBL Scheme will be up to Rs.10 crore for the eligible MSME units. With maximum repayment tenure is 10 years, which includes the moratorium period. The Scheme also provides foreign currency assistance for the creation of tangible assets subject to natural hedges and other terms and conditions.

l. PMEGP Scheme

The Prime Minister Employment Generation Programme or PMEGP is a **credit-linked subsidy scheme** introduced by the Government of India. The aim of introducing the Scheme is to promote the generation of employment opportunities through the establishment of micro-enterprises in rural as well as urban areas.

Training

The **National Institute for Entrepreneurship and Small Business Development** is the premier organization of the Ministry of Skill Development and Entrepreneurship, engaged in training, consultancy, research, etc. in order to promote entrepreneurship and Skill Development.

Recent announcement by Govt. as relief to MSME sector (MCQs - Data)

The Finance ministry of the Govt. has announced few financial relief package in the last budget. Some important issues are mentioned below.

- (i) **Three lakh crore** Emergency Working Capital Facility for Businesses, including MSMEs:
- (ii) With an objective to provide relief to the business, additional working capital finance of 20% of the outstanding credit (as on February 29, 2020), in the form of a Term Loan at a concessional rate of interest.

- (iii) **₹20,000 crores Subordinate Debt for Stressed MSMEs:** Provision made for ₹20,000 crores subordinated debt for 2,00,000 MSMEs which are NPA or are stressed. The government will support them with ₹4,000 crores to Credit Guarantee Trust for Micro and Small Enterprises (CGTMSE).
- (iv) Banks are expected to provide the subordinate-debt to promoters of such MSMEs equal to **15%** of his existing stake in the unit subject to a maximum of ₹75 lakhs; ₹50,000 crores equity infusion through MSME Fund of Funds (FoF): Govt will set up an FoF with a **corpus of ₹10,000 crores** that will provide equity funding support for MSMEs. The FoF shall be operated through a Mother and a few Daughter funds. It is expected that with leverage of 1:4 at the level of daughter funds, the FoF will be able to mobilize equity of about ₹50,000 crores.

**10.1 - Information Technology Act, 2000 and Rules framed there under, Sensitive Personal Data Rules****1. Initial Notes:**

- a. **Place of Dispatch** shall be the Place of Business.
- b. **The Controller of Certifying Authority (CCA)** is to be appointed by Central govt. to recognize, license, regulate, standardize and supervise the certifying authorities.
- c. **Certifying authorities, who are licensed by CCA** shall issue digital signature certificate and perform other acts as specified by the Controller and perform other functions as decided by Controller.

2. Settlement of disputes:

- a. Central Govt. has appointed adjudicating authorities having it and legal knowledge. Cyber Regulations Appellate Tribunal has also been constituted.
 - b. Any person not satisfied with the order of controller or adjudicating authorities may appeal within **45 days**.
 - c. Decision of appellate tribunal can be appealed to **High Court within 60 days**.
3. **Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.**
 - a. **IT Act, 2000** came into force on October 17, 2000.
 - b. Information Technology (Amendment) Act, 2008 whose provisions came into force on **October 27, 2009**.
 - c. The **right to privacy in India** was declared a fundamental right by the Hon'ble Supreme Court of India on **August 24, 2017**.
 - d. Above rules apply only to bodies corporate and persons located in India.

Important Provisions of IT Act related to Data Protection

- **Section 43A of the IT Act** explicitly provides that whenever a corporate body possesses or deals with any **sensitive personal data or information**, and is negligent in maintaining a reasonable security to protect such data or information, which thereby causes wrongful loss or wrongful gain to any person, then such body corporate shall be liable to pay damages to the person(s) so affected.
- Further, **Section 72A** provides for the punishment for disclosure of information in breach of lawful contract and any person may be punished with
 - imprisonment for a term not exceeding three years, or with a fine not exceeding up to five lakh rupees, or with both in case disclosure of information is made in breach of lawful contract.

Lawful Collection of Information:

Rule 5 provides the guidelines that need to be followed by a Body Corporate while collecting information and imposes the following duties on the Body Corporate:

Obtain consent from the person(s) providing information.

- a. **Information shall not be collected unless it is for lawful purpose, and is considered necessary for the purpose.** The information collected shall be used only for the purpose for which it is collected and shall not be retained for a period longer than which is required;

- b. Ensure that the person(s) providing information are aware about the fact that the information is being collected, its purposes & recipients, name and addresses of the agencies retaining and collecting the information;
- c. Offer the person(s) providing information an opportunity to review the information provided and make corrections, if required;
- d. Maintain the security of the information provided; and
- e. Designate a Grievance Officer, whose name and contact details should be on the website who shall be responsible to address grievances of information providers expeditiously.



10.2 - Basic Principles of Data Privacy and Business Intelligence

1. Business Intelligence:

Business Intelligence (BI) is a technology-driven process for analyzing data and delivering actionable information that helps executives, managers and workers make informed business decisions. As part of the BI process, organizations collect data from internal IT systems and external sources, prepare it for analysis, run queries against the data and create data visualizations, BI dashboards and reports to make the analytics results available to business users for operational decision-making and strategic planning.

2. How the business intelligence process works?

A business intelligence architecture includes more than just BI software. Business intelligence data is **typically stored in a data warehouse** built for an entire organization or in smaller data marts that hold subsets of business information for individual departments and business units, often with ties to an enterprise data warehouse. BI data can include historical information and real-time data gathered from source systems as it's generated, enabling BI tools to support both strategic and tactical decision-making processes. Before it's used in BI applications, **raw data from different source systems generally must be integrated, consolidated and cleansed using data integration** and data quality management tools to ensure that BI teams and business users are analyzing accurate and consistent information.

Steps in BI can be:

- (a) Data preparation, in which data sets are organized and modelled for analysis;
- (b) Analytical querying of the prepared data;
- (c) Distribution of key performance indicators (KPIs) and other findings to business users; and
- (d) Use of the information to help influence and drive business decisions.

Initially, BI tools were primarily used by BI and IT professionals. However, now, business analysts, executives and workers are using business intelligence platforms themselves, thanks to the development of self-service BI and data discovery tools. Self-service business intelligence environments enable business users to query BI data, create data visualizations and design dashboards on their own.

3. Types of business intelligence tools and applications

The list of BI technologies that are available to organizations includes the following:

Ad hoc analysis.

It's the process of writing and running queries to analyze specific business issues on casual or temporary basis.

Online analytical processing (OLAP).

OLAP tools enable users to analyze data along multiple dimensions, which is particularly suited to complex queries and calculations.

Mobile BI.

Here, BI applications and dashboards **available on smartphones and tablets**. This may only display two or three data visualizations and KPIs so they can easily be viewed on a device's screen.

Real-time BI.

In real-time BI applications, data is analyzed as it's created, collected and processed to give users an up-to-date view of business operations, customer behavior, financial markets and other areas of interest. The real-time analytics process often involves streaming data and supports decision analytics uses, such as credit scoring, stock trading and targeted promotional offers.

Operational intelligence (OI).

Also called operational BI, this is a form of real-time analytics that delivers information to managers and frontline workers in business operations.

Open source BI (OSBI).

Business intelligence software that is open source typically includes two versions: **a community edition that can be used free of charge and a subscription-based commercial release** with technical support by the vendor.

Embedded BI.

Embedded business intelligence tools put **BI and data visualization functionality directly into business applications**. That enables business users to analyze data within the applications they use to do their job. Embedded analytics features are most commonly incorporated by application software vendors, but corporate software developers can also include them in home grown applications.

Collaborative BI.

This is more of a process than a specific technology. It involves the **combination of BI applications and collaboration tools to enable different users to work together on data analysis and share information with one another**. For example, users can annotate BI data and analytics results with comments, questions and highlighting via the use of online chat and discussion tools.

Location intelligence (LI).

This is a specialized form of BI that enables users **to analyze location and geospatial data, with map-based data visualization functionality incorporated**. Location intelligence offers insights on geographic elements in business data and operations. Potential uses include site selection for retail stores and corporate facilities, location-based marketing and logistics management.



10.3 - Cybercrime/Cyber Fraud - Meaning, Remedies and penalties

Cybercrime:

Cybercrime is a broad term that is used to define **criminal activity in which computers or computer networks are a tool, a target, or a place of criminal activity and include everything from electronic wracking to denial of service attacks**. It is a general term that covers crimes like phishing, Credit card frauds, bank robbery, illegal downloading, and industrial espionage, child pornography, kidnapping children via chatrooms, scams, cyber terrorism, and creation of viruses. It also covers that traditional crimes in which computers or networks are used to enable the illicit activity.

Types of Cyber crimes

Cybercrimes can be basically divided into three major categories:

A. Cybercrimes against persons are:

Cyber-Stalking: It means to create physical threat that creates fear to use the computer technology such as internet, e-mail, phones, text messages, webcam, websites or videos.

Obscenity: It includes **Indecent exposure/ Pornography** (basically child pornography), hosting of web site containing these prohibited materials.

Defamation: It is an act of imputing any person to **lower down the dignity of the person** by hacking his mail account and sending some mails with using vulgar language to unknown persons.

Hacking: unauthorized control/access over computer system and act of hacking completely destroys the whole data as well as computer programmes.

Cracking: Cracking means that a **stranger has broken into your computer systems without your knowledge and consent** and has tampered with precious confidential data and information.

Spoofing: A spoofed **e-mail** may be said to be one, which **misrepresents its origin**. It shows its origin to be different from which actually it originates.

Spoofing is a blocking through spam which means the unwanted uninvited messages. Wrongdoer steals mobile phone number of any person and sending SMS via internet and receiver gets the SMS from the mobile phone number of the victim.

Carding: It means **false ATM cards i.e. Debit and Credit cards used by criminals for their monetary benefits** through withdrawing money from the bank account malafidely.

Fraud: It means the person who is doing the act of cybercrime i.e. stealing password and data storage has done it with having guilty mind which leads to fraud and cheating.

Threat: refers to threatening a person with fear for their lives or lives of their families through the use of a computer network i.e. E-mail, videos or phones.

B. Cybercrimes against property

There are certain offences which affects person or properties which are as follows:

Squatting: It means where two persons claim for the same Domain Name either by claiming that they had registered the name first on by right of using it before the other or using something similar to that previously.

Vandalism: Vandalism means **deliberately destroying or damaging property of another**. Thus cyber vandalism means destroying or damaging the data when a network service is stopped or disrupted. It may include within its purview any kind of physical harm done to the computer of any person.

Hacking: Hacktivism attacks those included Famous Twitter, blogging platform by unauthorized access/control over the computer. Due to the hacking activity there will be loss of data as well as computer.

Virus: Viruses are programs that attach themselves to a computer or a file and then circulate themselves to other files and to other computers on a network. They usually affect the data on a computer, either by altering or deleting it. Worm attacks plays major role in affecting the computerize system of the individuals.

Trespass: It means to **access someone's computer without the right authorization of the owner** and does not disturb, alter, misuse, or damage data or system by using wireless internet connection.

C. Cybercrimes against Government

There are certain offences done by group of persons intending to threaten the international governments by using internet facilities. It includes:

- **Terrorism:** Cyber terrorism is a major burning issue in the domestic as well as global concern. The common form of these terrorist attacks on the Internet is by distributed denial of service attacks, hate websites and hate e-mails, attacks on sensitive computer networks etc. Cyber terrorism activities endanger the sovereignty and integrity of the nation.
- **Warfare:** It refers to politically motivated hacking to damage and spying. It is a form of information warfare sometimes seen as analogous to conventional warfare although this analogy is controversial for both its accuracy and its political motivation
- **Piracy:** It means distributing pirated software from one computer to another intending to destroy the data and official records of the government.
- **Unauthorized Information:** It is very easy to access any information by the terrorists with the aid of internet and to possess that information for political, religious, social, ideological objectives.

The various offenses related to internet which have been made punishable under the IT Act and the

IPC are enumerated below:

1. Cybercrimes under the IT Act:

- (i) Tampering with Computer source documents - Sec.65
- (ii) Hacking with Computer systems, Data alteration - Sec.66
- (iii) Publishing obscene information - Sec.67
- (iv) Unauthorized access to protected system Sec.70
- (v) Breach of Confidentiality and Privacy - Sec.72
- (vi) Publishing false digital signature certificates - Sec.73

2. Cyber Crimes under IPC and Special Laws:

- (i) Sending threatening messages by email - Sec 503 IPC
- (ii) Sending defamatory messages by email - Sec 499 IPC
- (iii) Forgery of electronic records - Sec 463 IPC
- (iv) Bogus websites, cyber frauds - Sec 420 IPC
- (v) Email spoofing - Sec 463 IPC
- (vi) Web-Jacking - Sec. 383 IPC
- (vii) E-Mail Abuse - Sec.500 IPC

3. Cyber Crimes under the Special Acts:

- (i) Online sale of Drugs under Narcotic Drugs and Psychotropic Substances Act
- (ii) Online sale of Arms - Arms Act

[W.e.f., 1st July, 2005]

Short forms used:

AA	Adjudication Authority	ML	Money Laundering
Co-op	Co-operative	OG	Official Gazette
C/BO	Client/Beneficial Owners	PoC	Proceeds of Crime
GoI	Government of India	RE	Reporting Entity
JS	Joint Secretary	SCN	Show Cause Notice
IP	Immovable Property	SpC	Special Court
LoR	Letter of Request	UIDAI	Unique Identification Authority of India
TDF and OSBS - Targeted Delivery of Financial and Other Subsidies, Benefits and Services			

Twin Purpose of the Act:

1. Prevent Money Laundering
2. Provide for **confiscation** of property derived from/involved in ML

Preamble to the Act says that:

- On 23rd Feb, 1990 - In its 17th Special session - the General Assembly of UN adopted Political Declaration and Global Programme of Action
- Later, on the 20th Special session held on 8th to 10th June, 1990, the adopted Political Declaration calls upon the Member States to adopt national money-laundering legislation and programme;
- It is considered necessary to implement the aforesaid resolution and the Declaration.

Some ideas of ML (what to do with black money):

1. Smuggle money o/s India and then invest back into India (Round Tripping)
2. Show excess income in cash [Service industry]
3. Pay salaries in Cash
4. Buy a real estate and sell for higher profits
5. Casino Gambling Income
6. Hawala [Robert Vadra Case]

Important Definitions:

1. Money Laundering [Sec 2(1)(p)] - Meaning as assigned in Section 3

Section 3: Following person shall be guilty of offence of ML:

Whosoever, directly or indirectly:

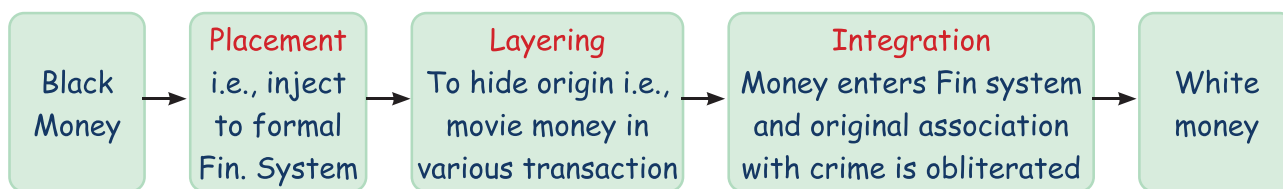
- i. Attempts to indulge,
- ii. Knowingly assists or knowingly is a party, or
- iii. is actually involved

In any process/activity connected with
Proceeds of Crime

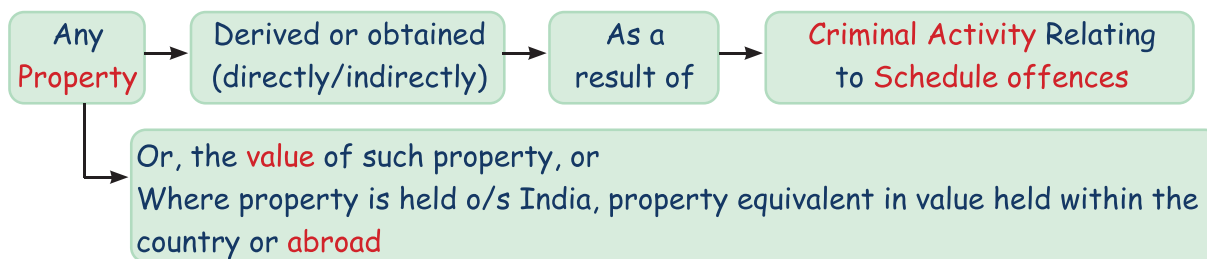
Including:
Concealment, Possession, Acquisition, Use, Projecting or claiming it as untainted

The process or activity connected with PoC is a **continuing activity**

Process of Money Laundering:



2. Proceeds of Crime [Sec 2(1)(u)]:



3. Property [Sec 2(1)(v)]

Means property/asset of every description:

- Corporeal or incorporeal
- Movable or immovable
- Tangible or intangible

And includes **deeds/instruments** evidencing title/interest thereof

Property includes property used in commission of offence in this Act (E.g., hammer)

4. Scheduled offences [2(1)(y)]: Offence specified under **Part A, Part B (if >= 1 crore)** or **Part C** of Schedule
5. Attachment: Prohibition on transfer, conversion or movement of property
6. AA: As appointed u/s 6(1)

Money laundering vis-a-vis siphoning of funds:

Mere earning of money or income or deriving any property by committing a crime does not amount to money laundering, though it may mount to siphoning of funds. Deriving or obtaining any property by committing a crime which amounts to a Scheduled offence, and then projecting such property as untainted property amounts to money laundering.



Section 4: Punishment for ML:

	Offence of ML	PoC relates to Offence of Para 2 of Part A of Sch. [Narcotic Drugs & Psychotropic Substance Act 1985]
Rigorous imprisonment AND	3 to 7 years, &	3 years to 10 years and
Fine	Without limit	Without limit

P Chidambaram vs. ED Criminal Appeal (Supreme Court) - Offences under PMLA are cognizable and non-bailable offence

Obligations of RE:



Section 12: RE to maintain Records:

1. Every RE shall:
 - a. Maintain record of all **transactions** so as to be able to reconstruct individual transaction [For **5 years from of transaction between client and RE**] (Refer Rule 3 below)
 - b. **Furnish** info. to Dir. info. w.r.t, such transaction executed/attempted of such nature or value as presc.
 - c. Maintain records of docs evidencing **identity** of C/BO + Account files and biz. correspondence of client [For **5 years** from after **end** of business relation or close of account **W.E.Later**]
2. Every info → Confidential
3. Time period for maintenance of record: Mentioned above
4. CG may exempt RE, by notification, from obligation under this Chapter

Special Court



Section 43: Formation of SpC:

- CG + Chief Justice of HC
- For **speedy** trial of offence under this Act
- Designated one/more court of sessions as Special Court



Section 44: Jurisdiction: (Sec 44 overrides CCP, 1973)

1. Offence punishable **u/s 4** shall be triable by SpC constituted for area where offence committed
2. Cognizance of offence:
 - Upon complaint made by Authorised Authority
 - SpC may take cognizance u/s 3
 - Without the accused being committed to it for trial
3. If any other court has taken cognizance - Transfer to SpC and deal with it from stage at which trfd
4. Trial to be conducted as per CCP, 1973

The Prevention of Money Laundering Act, 2002

1. Enforcement Directorate (ED)

The **Directorate of Enforcement** is responsible for enforcement of the Foreign Exchange Management Act, 1999 (FEMA) and certain provisions under the Prevention of Money Laundering Act. Work relating to **investigation and prosecution of cases under the PML has been entrusted to Enforcement Directorate**. The Directorate is under the administrative control of Department of Revenue for operational purposes.

2. Financial Intelligence Unit - India (FIU-IND)

'Financial Intelligence Unit - India was set by the Government of India during November 2004 as the central national agency responsible for receiving, processing, analyzing and disseminating information relating to suspect financial transactions.

3. STR (Suspicious Transaction Reports)

The Prevention of Money laundering Act, 2002 and the Rules made there under require every banking company to furnish details of suspicious transactions whether or not made in cash. Suspicious transaction means a transaction whether or not made in cash which, to a person acting in good faith:

- Gives rise to a reasonable ground of suspicion that it may involve the proceeds of crime, or
- Appears to be made in circumstances of unusual or unjustified complexity or
- Appears to have no economic rationale or bonafide purpose.

Central KYC records Registry

A central KYC registry has been constituted in 2015 to keep centralized data which would include analysis, dissemination transforming of data. The registry will comply with the instructions issued the Regulation.

Digital KYC process

The Regulations have made detailed process of accepting, verifying, authenticating and certifying KYC records of the clients, which is on line and secured. Digital payments, electronic record, live transactions are some of the systems which will reduce illegal and immoral transactions of people. The Aadhaar, telephone, bank account, income tax all are inter linked and hence all transactions now shall be transparent.