

Directorate of Distance Education

UNIVERSITY OF JAMMU

JAMMU



SELF LEARNING MATERIAL

B.COM (SEM - V)

**SUBJECT: ECONOMIC REGULATIONS OF
DOMESTIC & FOREIGN EXCHANGE**

UNIT: I-IV

C. NO.: 504

LESSON NO.: 1 - 12

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UNIVERSITY OF JAMMU
B.COM. FIFTH SEMESTER
ECONOMIC REGULATIONS OF DOMESTIC AND
FOREIGN EXCHANGE MARKETS

C.No. BCG 504	Max Marks	= 100
Time: 3 Hrs.	Internal Assessment	= 20
	External Exam.	= 80

(Syllabus for examination to be held in Dec. 2016, 2017, 2018)

UNIT I: INDUSTRIES DEVELOPMENT REGULATION

An overview of current Industrial Policy; Regulatory mechanism under Industries Development and Regulation Act, 1951. The Micro, Small and Medium Enterprises Development Act., 2006.

UNIT II: CONSUMER PROTECTION ACT 1986

The Consumer Protection Act, 1986-Definitions; Restrictive Trade Practice, Unfair Trade Practice; Central Consumer Protection Council, State Consumer Protection Councils and the District Consumer Protection Council, Power of and procedure application to the National Commission.

UNIT III: COMPETITION ACT, 2002

Definitions: Acquisition, Agreement, Cartel, Consumer, Enterprise, Goods, Person, Price, Service, Trade, Prohibition of agreements, Anti-competitive, Abuse of Dominant Position, Combination, Regulation of Combinations. Competition Commission of India: Establishment of Commission, Composition of Commission, Term of office of Chairperson and other members, Duties powers and functions of commission.

UNIT IV: FEMA, 2000

Definitions:- Authorized person, Capital account Transaction, Current account transaction, Foreign exchange, Person, Person resident in India, Repatriate to India. Current legal framework of FEMA 2000, Scope of FEMA 2000, Regulation and management of foreign exchange: Dealing in foreign exchange, holding of foreign exchange, current account transactions, capital account transactions,

SKILL DEVELOPMENT (GUIDELINES FOR CLASS ROOM TEACHING AND INTERNAL ASSESSMENT)

- ❖ Enable students to understand the various provisions of law with the help of case studies.
- ❖ Create deep understanding of all concepts specified in the syllabus.

BOOKS RECOMMENDED

1. J.P. Sharma, Sunaina Kanojia, Economic Regulations of Domestic And Foreign Exchange Markets, Ane Books Pvt Ltd, New Delhi
2. R.G. Lipsey & K.A. Chrystal-Principles of Economics, Oxford Univ. Press.
3. Taxmann's Students Guide to Economics Laws, Taxman Allied Services Pvt. Ltd, New Delhi.
4. Taxman's, Consumer Protection Law Manual with Practice Manual, Taxmann Allied Services Pvt. Ltd., New Delhi.
5. Suresh T. Vishwanathan, Law & Practice of Competition Act. 2002, Bharat Law House, New Delhi.
6. Study Material Economic and Labour Laws (Paper 5) – The Institute of Company Secretaries of India.

Note: Latest edition of text book may be used.

NOTE FOR PAPER SETTER

Equal weightage shall be given to all the units of the syllabus. The external paper shall be of the two sections viz, A & B.

Section-A: This section will contain four short answer questions selecting one from each unit. Each questions carries 5 marks. A candidate is required to attempt all the four questions. Total weightage to this section shall be 20 marks.

Section-B: This section will contain eight long answer questions of 15 marks each. Two questions with internal choice will be set from each unit. A candidate has to attempt any four questions selecting one from each unit. Total weightage to this section shall be 60 marks.

**MODEL QUESTION PAPER
ECONOMIC REGULATIONS OF DOMESTIC
AND FOREIGN EXCHANGE MARKETS**

Max marks: -80

Time allowed: -3 hrs

Section A (20 Marks)

Attempt all the questions. Each question carries five marks.

1. List the salient features of micro enterprises as per the Micro, Small and Medium Enterprises Development Act 2006?
2. What are unfair trade practices?
3. Explain anti-competitive agreements?
4. Who is called Person Resident in India?

Section B (60 Marks)

Attempt any four questions selecting one question from each unit. Each question carries 15 marks

1. Explain the salient features of current Industrial Policy?

OR

Explain the salient features of Micro, Small and Medium Enterprises Development Act., 2006.

2. Explain the salient features of Consumer Protection Act, 1986?

OR

Explain the powers of National Commission under consumer protection Act 1986?

3. Explain the composition of Competitive Commission of India?

OR

What are the duties, powers and functions of Competition Commission of India?

4. Explain the Scope of FEMA 2000?

OR

Write short notes on:

- a) current account transactions,
- b) capital account transactions?

STRUCTURE

- 1.1 Introduction
- 1.2 Objectives
- 1.3 An overview of current industrial policy
 - 1.3.1 Meaning
 - 1.3.2 Importance of Industrial policy
 - 1.3.3 Industrial Policies Prior to 1991
 - 1.3.4 Review of Pre-1991 Industrial Policy
 - 1.3.5 New Industrial Policy, 1991
 - 1.3.6 Pre vs. Post 1991 Policy
 - 1.3.7 Impact of Industrial Policy, 1991
- 1.4 Industries Development and Regulation Act, 1951
 - 1.4 (A) Objectives of the Act
 - 1.4 (B) Scope of the Act
 - 1.4.1 Regulatory Mechanism
- 1.5 Micro, Small and Medium Enterprises Development Act, 2006
 - 1.5.1 Micro, Small and Medium Enterprises
 - 1.5.2 The salient features of MSMED Act 2006
- 1.6 Summary
- 1.7 Self Assessment Questions
- 1.8 Suggested Reading

The industrial policy of a country, sometimes denoted IP, is its official strategic effort to encourage the development and growth of part or all of the manufacturing sector as well as other sectors of the economy. The government takes measures “aimed at improving the competitiveness and capabilities of domestic firms and promoting structural transformation.” A country’s infrastructure (transportation, telecommunications and energy industry) is a major part of the manufacturing sector that often has a key role in IP. Industrial policies are sector-specific, unlike broader macroeconomic policies. Examples of the latter, which are horizontal, economy-wide policies, are tightening credit and taxing capital gains. Traditional examples of industrial policy that involves vertical, sector-specific policies include protecting textiles from imports and subsidising export industries. More contemporary industrial policies include measures such as support for linkages between firms and support for upstream technologies. Industrial policies are interventionist measures typical of mixed economy countries.

Many types of industrial policies contain common elements with other types of interventionist practices such as trade policy and fiscal policy. An example of a typical industrial policy is import-substitution-industrialisation (ISI), where trade barriers are temporarily imposed on some key sectors, such as manufacturing. By selectively protecting certain industries, these industries are given time to learn (learning by doing) and upgrade. Once competitive enough, these restrictions are lifted to expose the selected industries to the international market.

Therefore, an industrial policy means the procedures, principles, policies rules and regulations which control the industrial undertaking of the country and pattern of industrialisation. It explains the approach of Government in context to the development of industrial sector. In India the key objective of the economic policy is to achieve self-reliance in all sectors of the economy and to develop socialistic pattern of society. The industrial policy in the pre-reform period i.e. before 1991 put greater emphasis on the state intervention in the field of industrial development. These policies no doubt have resulted into the creation of diversified industrial structure but caused a number of inefficiencies, distortions and rigidities in the system. Thus during late 70’s and 80’s, Government initiated liberalisation measures in the

industrial policy framework. The drastic liberalisation measures were however, carried out in 1991.

1.2 OBJECTIVES

After reading this unit you would be able:

- To understand the concept of industrial policy.
- To know about industries development and regulation Act, 1951.
- To understand Micro, Small and Medium Enterprises Development Act, 2006.

1.3 AN OVERVIEW OF THE INDUSTRIAL POLICY

The traditional arguments for industrial policies go back as far as the 18th century. Prominent early arguments in favour of selective protection of industries were contained in the 1791 Report on the Subject of Manufacturers of US economist and politician Alexander Hamilton, as well as the work of German economist Friedrich List. List's views on free trade were in explicit contradiction to those of Adam Smith, who in *The Wealth of Nations*, said that "the most advantageous method in which a landed nation can raise up artificers, manufacturers and merchants of its own is to grant the most perfect freedom of trade to the artificers, manufacturers and merchants of all other nations" The arguments of list and others were subsequently picked up by scholars of early development economics such as Albert Hirschman and Alexander Gerschenkron, who called for the selective promotion of key sectors in overcoming economic backwardness.

The relationship between government and industry in the United States has never been a simple one and the labels used in categorising these relationships at different times are often misleading if not false. In the early nineteenth century, for example, "it is quite clear that the *laissez faire* label is an inappropriate one. In the US, an industrial policy was explicitly presented for the first time by the Jimmy Carter administration in August 1980, but it was subsequently dismantled with the election of Ronald Reagan the following year.

Historically, there is a growing consensus that most developed countries, including United Kingdom, United States, Germany and France, have intervened actively in their domestic

economy through industrial policies. These early examples are followed by interventionist ISI strategies pursued in Latin American countries such as Brazil, Mexico or Argentina. More recently, the rapid growth of East Asian economies, or the newly industrialised countries (NICs), has also been associated with active industrial policies that selectively promoted manufacturing and facilitated technology transfer and industrial upgrading. The success of these state-directed industrialisation strategies are often attributed to developmental states and strong bureaucracies such as the Japanese MITI. According to Princeton's Atul Kohli, the reason Japanese colonies such as South Korea developed so rapidly and successfully was down to Japan exporting to its colonies the same centralised state development that it had used to develop itself. Many of these domestic policy choices, however, are now seen as detrimental to free trade and are hence limited by various international agreements such as WTO, TRIM or TRIPS. Instead, the recent focus for industrial policy has shifted towards the promotion of local business clusters and the integration into global value chains.

During the Reagan administration, an economic development initiative called Project Socrates was initiated to address US decline in ability to compete in world markets. Project Socrates, directed by Michael Sekora, resulted in a computer-based competitive strategy system that was made available to private industry and all other public and private institutions that impact economic growth, competitiveness and trade policy. A key objective of Socrates was to utilise advanced technology to enable US private institutions and public agencies to cooperate in the development and execution of competitive strategies without violating existing laws or compromising the spirit of "free market". President Reagan was satisfied that this objective was fulfilled in the Socrates system. Through the advances of innovation age technology, Socrates would provide "voluntary" but "systematic" coordination of resources across multiple "economic system" institutions including industry clusters, financial service organisations, university research facilities and government economic planning agencies. While the view of one president and the Socrates team was that technology made it virtually possible for both to exist simultaneously, the industrial policy vs. free market debate continued as later under the George H. W. Bush administration, Socrates was labeled as industrial policy and de-funded.

Following the Financial Crisis of 2007-08, many countries around the world - including the USA, the United Kingdom, Australia, Japan and most countries of the European Union - have embraced industry policies. However contemporary industry policy generally accepts globalisation as a given and focuses less on the decline of older industries, and more on the growth of emergent industries. It often involves government working collaboratively with industry to respond to challenges and opportunities.

The main criticism against industrial policy arises from the concept of government failure. Industrial policy is seen as harmful as governments lack the required information, capabilities and incentives to successfully determine whether the benefits of promoting certain sectors above others exceeds the costs and in turn implement the policies. While the East Asian Tigers provided successful examples of heterodox interventions and protectionist industrial policies, industrial policies such as import-substitution-industrialisation (ISI) has failed in many other regions such as Latin America and Sub-Saharan Africa. Governments, in making decisions with regard to electoral or personal incentives, can be captured by vested interests, leading to industrial policy only supporting the rent-seeking political elite while distorting the efficient allocation of resources by market forces at the same time.

The industrialisation is not only helpful in the development of industries but it also promotes agriculture, trade, transport, foreign trade, services and social sectors of the economy. It increases employment opportunities, national income, per capita income and living standard of the populace. Therefore, an industrial policy is required to establish healthy traditions of industrialisation and to guide, regulate and control (if required) industrial development. The industrial policy of a country is influenced by the ideology and principles of the concerned government. The industrial policy helps the country making it self-sufficient and prosperous by preparing a structure and basis of industrial development. Hence, the industrial policy of the govt. must be well defined, clear and progressive. Moreover, it should be adhered to and implemented earnestly.

1.3.1 Meaning

The industrial policy refers to such formal declaration by the government through which general policies for industries adopted by the govt. are made public. Any industrial policy may have mainly two parts first, the ideology of the govt. which determines the nature of

industrialisation and second, the governing rules and principles which provide a certain framework behind existing ideology. Thus, industrial policy is a comprehensive concept which provides guidance and out-lines of the policy for establishment and working of industries

1.3.2 Importance of Industrial policy

Importance of an industrial policy can be explained through following points:

1. **Deployment of Natural Resources:** The industrial policy helps in full deployment of natural resources of the country. It helps in identifying, collecting and using resources properly. It facilitates increase in national income of the country.
2. **Augment Industrial Production:** The main objective of the industrial policy is to augment industrial production of the country. It provides an impetus to rapid development of industries and industrial growth.
3. **Modernisation:** The industrial policy encourages modernisation for increasing industrial output and productivity. It envisages the use of modern and latest production techniques in industrial sector. It facilitates maximum output at minimum cost of production.
4. **Balanced Industrial Development:** The industrial policy envisages balanced industrial development of the country. It also facilitates balanced development of various sectors of the economy.
5. **Balanced Regional Development:** The industrial policy helps in balanced regional development of the country. The industrial policy may contain provisions regarding providing facilities or concessions for rapid development of industrially backward areas/regions of the country.
6. **Coordination between Basic and Consumer Industries:** The balanced development of basic and consumer industries is essential for economic growth. The industrial policy encourages development of basic and key industries on the one hand, while attention is paid to the development of consumer industries also

on the other. Thus, by balanced and coordinated development of both types of industries it provides a pace to economic growth.

7. **Coordination between Small Scale and Large Scale Industries:** The industrial policy plays a vital role in coordinated development of small scale or cottage industries and large scale industries. These industries can be made mutually helpful to each other through the provisions of industrial policy.
8. **Area Determination:** The industrial policy determines the area of operation under public and private sector. Proper direction can be shown to private sector through the country's industrial policy.
9. **Cordial Industrial Relations:** A comprehensive industrial policy is needed to establish cordial relations between workers and management. Cordial industrial relations are essential for rapid and sustainable industrialisation.
10. **Proper Utilisation of Foreign Assistance/investment:** An appropriate industrial policy envisages to attract foreign capital and entrepreneurs. It helps rapid industrial development of the country; a well thought of industrial policy checks the demerits of "foreign assistance. The foreign aid can be used in the national interest if an appropriate industrial policy is pursued by the country.

1.3.3 Industrial Policies Prior to 1991

I. Industrial Policy Resolution, 1948

The first important industrial policy statement was made in the Industrial policy Resolution (IPR), 1948. The main thrust of IPR, 1948 was to lay down the foundation of mixed economy whereby the private and public sector was accepted as important components in the development of industrial economy of India. The policy divided the industries into four broad categories:

(i) *Industries with Exclusive State Monopoly:* It included industries engaged in the activity of atomic energy, railways and arms and ammunition.

(ii) *Industries with Government Control*: It included the industries of national importance and so needs to be registered. 18 such industries were put under this category eg. fertilisers, heavy chemical, heavy machinery etc.

(iii) *Industries in the Mixed Sector*: It included the industries where private and public sector were allowed to operate. Government was allowed to review the situation to acquire any existing private undertaking.

(iv) *Industries under Private Sector*: Industries not covered by above categories fell in this category.

IPR, 1948 gave public sector vast area to operate. Government took the role of catalytic agent of industrial development. The resolution assigned complementary role to small-scale and cottage industries. The foreign capital which was seen with suspect in the pre-independent era was recognised as an important tool to speed up industrial development.

II. Industrial Policy Resolution, 1956

IPR, 1956 is the next important policy statement. The important provisions are as follows:

(1) *New classification of Industries*: IPR, 1956 divided the industries into the following three categories:

(a) *Schedule A industries*: The industries that were the monopoly of state or Government. It included 17 industries. The private sector was allowed to operate in these industries if national interest so required.

(b) *Schedule B industries*: In this category of industries state was allowed to establish new units but the private sector was not denied to set up or expand existing units e.g. chemical industries, fertiliser, synthetic, rubber, aluminium etc.

(c) *Schedule C industries*: The industries not mentioned in the above category formed part of Schedule C. Thus the IPR, 1956 emphasised the mutual existence of public and private sector industries.

(2) *Encouragement to Small-scale and Cottage Industries*: In order to strengthen the small-scale sector supportive measures were suggested in terms of cheap credit, subsidies, reservation etc.

(3) *Emphasised on Reduction of Regional Disparities*: Fiscal concessions were granted to open industries in backward regions. Public sector enterprises were given greater role to develop these areas.

The basic rationale of IPR, 1956 was that the state had to be given primary role for industrial development as capital was scarce and entrepreneurship was not strong. The public sector was enlarged dramatically so as to allow it to hold commanding heights of the economy.

III. Monopolies Commission

In April 1964, the Government of India appointed a Monopolies Inquiry Commission “to inquire into the existence and effect of concentration of economic power in private hands.” The Commission looked at concentration of economic power in the area of industry. On the basis of recommendation of the commission, Monopolistic and Restrictive Trade Practices Act (MRTP Act), 1969 was enacted. The act sought to control the establishment and expansion of all industrial units that have asset size over a particular limit.

IV. Industrial Policy Statement, 1973

The Policy Statement of 1973 drew up a list of industries to be started by large business houses so that the competitive effort of small industries was not affected. The entry of competent small and medium entrepreneurs was encouraged in all industries. Large industries were permitted to start operations in rural and backward areas with a view to developing those areas and enabling the growth of small industries around. The main elements of the new policy were:

- i. Development of Small-Scale Sector:** The main thrust of the new industrial policy was an effective promotion of cottage and small industries. Government initiated wide-spread promotional and supportive measures to encourage small sector. The small sector was classified into 3 categories viz. Cottage and household industries which provide self-employment; tiny sector and small-scale industries. The purpose of the classification was to specifically design policy measures for

each category. The policy statement considerably expanded the list of reserved items for exclusive manufacture in the small-scale sector.

- ii. **Restrictive Approach Towards Large Business Houses:** The large scale sector was allowed in basic, capital goods and high-tech industries. The policy emphasised that the funds from financial institutions should be made available largely for the development of small sector. The large sector should generate internal finance for financing new projects or expansion of existing business.
- iii. **Expanding Role of Public sector:** The industrial policy stated that the public sector would be used not only in the strategic areas but also as a stabilising force for maintaining essential supplier for the consumer.

Further, the policy statement reiterated restrictive policy towards foreign capital whereby the majority interest in ownership and effective control should rest in Indian hands.

V. Industrial Policy, 1980

The industrial policy 1980 emphasised that the public sector is the pillar of economic infrastructure for reasons of its greater reliability, for the large investments required and the longer gestation periods of the projects crucial for economic development. The IPR, 1956 forms the basis of this statement. The important features of the policy were:

- **Effective Management of Public Sector:** The policy emphasised the revival of efficiency of public sector undertaking.
- **Liberalisation of Industrial licensing:** The policy statement provided liberalised measures in the licensing in terms of automatic approval to increase capacity of existing units under MRTP and FERA. The asset limit under MRTP was increased. The relaxation from licensing was provided for large number of industries. The broad-banding concept was introduced so that flexibility is granted to the industries to decide the product mix without applying for a new license.
- **Redefining Small-Scale Industries:** The investment limit to define SSI was increased to boost the development of this sector. In case of tiny sector the

investment limit was raised to Rs.1 lakh; for small scale unit the investment limit was raised from Rs.10 lakh to Rs.20 lakh and for ancillaries from Rs.15 lakh to Rs. 25 lakh.

Industrial policy, 1980 focused attention on the need for promoting competition in the domestic market, technological up gradation and modernisation. The policy laid the foundation for an increasingly competitive export based industries and for encouraging foreign investment in high-technology areas.

Era of Liberalisation after 80's: After 1980, an era of liberalisation started and the trend was gradually to dilute the strict licensing system and allow more freedom to the entrepreneurs. The steps that were taken in accordance with the policy included:

(i) Re-endorsement of licenses: The capacity indicated in the licenses could be re-endorsed, provided it was 25 percent more than the licensed capacity (1984).

(ii) Liberalisation of 1990: The measures were as follows:

- a) Exemption from licensing for specific new units.
- b) Investment of foreign equity up to 40 percent was freely allowed.
- c) Location restrictions were removed.

Major Features of Pre-1991 Industrial Policy:

1. Protection to Indian Industries: Local industries were given shelter from international competition by introducing partial physical ban on the imports of products and high imports tariffs. Protection from imports encouraged Indian industry to undertake the manufacture of a variety of products. There was a ready market for all these products.

2. Import-Substitution Policy: Government used its import policy for the healthy development of local industries. Barring the first few years after Independence, the country was facing a shortage of foreign exchange and so save scarce foreign exchange imports-substitution policy was initiated i.e. Government encouraged the production of imported goods indigenously.

3. Financial Infrastructure: In order to provide the financial infrastructure necessary for industry, the Government set up a number of development banks. The principal function

of a development bank is to provide medium and long-term investments. They have to play a major role in promoting the growth of enterprise. With this objective, Government established the Industrial Finance Corporation of India (IFCI) (1948), Industrial Credit and Investment Corporation of India (ICICI) (1955), Industrial Development Bank of India (IDBI) (1964), Industrial Reconstruction Corporation of India (1971), Unit Trust of India (UTI) (1963) and the Life Insurance Corporation of India (LIC).

4. Control over Indian Industries: Indian industries were highly regulated through legislations such as Industrial licensing, MRTP Act, 1969 etc. These legislations restricted the production, expansion and pricing of output of almost all kinds of industries in the country.

5. Regulations on Foreign Capital under the Foreign Exchange and Regulation Act (FERA): FERA restricted foreign investment in a company to 40 percent. This ensured that the control in companies with foreign collaboration remained in the hands of Indians. The restrictions were also imposed on technical collaborations and repatriations of foreign exchange by foreign investors.

6. Encouragement to Small Industries: Government encouraged small-scale industries (SSIs) by providing a number of support measures for its growth. Policy measures addressed the basic requirements of the SSI like credit, marketing, technology, entrepreneurship development and fiscal, financial and infrastructural support.

7. Emphasis on Public Sector: The Government made huge investments in providing infrastructure and basic facilities to industries. This was achieved by establishing public sector enterprises in the key sectors such as power generation, capital goods, heavy machineries, banking, telecommunication, etc.

1.3.4 Review of Pre-1991 Industrial Policy

The pre 1991 industrial policies created a climate for rapid industrial growth in the country. It has helped to create a broad-base infrastructure and basic industries. A diverse industrial structure with self-reliance on a large number of items had been achieved. At the time of independence the consumer goods industry accounted for almost half of the industrial production. In 1991 such industries accounted for only about 20 percent. In contrast

capital goods production was less than 4 percent of the total industrial production. In 1991 it had gone up to 24 percent. Industrial investment took place in a large variety of new industries. Modern management techniques were introduced. An entirely new class of entrepreneurs has come up with the support system from the Government and a large number of new industrial centers have developed in almost all parts of the country. Over the years, the Government has built the infrastructure required by the industry and made massive investments to provide the much-needed facilities of power, communications, roads etc. A good number of institutions were promoted to help entrepreneurship development, provide finance for industry and to facilitate development of a variety of skills required by the industry.

However, the implementation of industrial policy suffered from shortcomings. It is argued that the industrial licensing system has promoted inefficiency and resulted in the high-cost economy. Licensing was supposed to ensure creation of capacities according to plan priorities and targets. However, due to considerable discretionary powers vested in the licensing authorities the system tended to promote corruption and rent-seeking. It resulted into pre-emption of entry of new enterprises and adversely affected the competition. The system opposite to its rationale favoured large enterprises and discriminate against backward regions. Government announced a number of liberalisation measures in the industrial policy of 1970, 1973 and 1980. However, the dramatic liberalization efforts were made in the industrial policy, 1991.

1.3.5 New Industrial Policy, 1991

India's New Industrial Policy announced in July 1991 (hereafter NIP) was radical compared to its earlier industrial policies in terms of objectives and major features. It emphasised on the need to promote further industrial development based on consolidating the gains already made and correct the distortion or weaknesses that might have crept in and attain international competitiveness. The liberalised Industrial Policy aims at rapid and substantial economic growth and integration with the global economy in a harmonised manner. The Industrial Policy reforms have reduced the industrial licensing requirements, removed restrictions on investment and expansion and facilitated easy access to foreign technology and foreign direct investment.

1.3.6 Pre vs. Post 1991 Policy

NIP had two distinctive objectives compared to the earlier industrial policies:

i) Redefinition of Concept of Self-Reliance: NIP redefined the concept of economic self-reliance. Since 1956 till 1991, India had always emphasised on Import Substitution Industrialisation (ISI) strategy to achieve economic-self reliance. Economic self-reliance meant indigenous development of production capabilities and producing indigenously all industrial goods, which the country would demand rather than importing from outside. The goal of economic self-reliance necessitated the promotion of ISI strategy. It helped to built up the vast base of capital goods, intermediate goods and basic goods industries over a period of time. NIP redefined economic self-reliance to mean the ability to pay for imports through foreign exchange earnings through exports and not necessarily depending upon the domestic industries.

ii) International Competitiveness: NIP emphasised the need to develop indigenous capabilities in technology and manufacturing to world standards. None of the earlier industrial policies, either explicitly or implicitly, had made reference to international technology and manufacturing capabilities in the context of domestic industrial development (Ministry of Commerce and Industry, 2001). For the first time, NIP explicitly underlined the need for domestic industry to achieve international competitiveness.

To achieve these objectives, among others, NIP initiated changes in India's industrial policy environment, which gained momentum gradually over the decade.

The important elements of NIP can be classified as follows:

1. Public Sector De-Reservation and Privatisation through Dis-Investment: Till 1991, Public Sector was assigned a pre-eminent position in Indian Industry to enable it to achieve "commanding heights of the economy" under the Industrial Policy Resolution (IPR), 1956. Accordingly, areas of strategic importance and core sectors were exclusively reserved for public sector enterprises. Public enterprises were accorded preference even in areas where private investments were possible.

Since 1991, the public sector policy consists of:

- (i) *Reduction in the number of industries reserved for public sector:* Now only two industries (atomic energy and railway transport) are reserved for the Public Sector. They are known as “Annexure I” industries (Ministry of Commerce and Industry, 2001). The essence of government’s Public Sector Undertakings (PSUs) policy since 1991 has been that the government should not operate any commercial enterprises. The policy emphasised to bring down government equity in all non-strategic PSUs to 26 percent or lower, restructure or revive potentially viable PSUs, close down PSUs, which cannot be revived and fully protect the interests of workers. Government’s withdrawal from non-core sectors is indicated on considerations of long-term efficient use of capital, growing financial un-viability and the compulsions for these PSUs to operate in an increasingly competitive and market oriented environment (Disinvestment Commission, 1997).
- (ii) *Implementation of Memorandum of Understanding (MOU):* As a part of the measures to improve the performance of public enterprises, more and more of public sector units have been brought under the purview of Memorandum of Understanding (MoU) system. A memorandum of understanding is a performance contract a freely negotiated document between the Government and a specific public enterprise.
- (iii) *Referral to BIFR:* Many sick public sector units have been referred to the Board for Industrial and Financial Reconstruction (BIFR) for rehabilitation or where necessary, for winding up.
- (iv) *Manpower Rationalisation:* In order to make manpower rationalisation Voluntary Retirement Scheme (VRS) has been introduced in a number of PSUs to shed the surplus manpower.
- (v) *Private Equity Participation:* PSUs have been allowed to raise equity finance from the capital market. This has provided market pressure on PSUs to improve their performance.
- (vi) *Disinvestment and Privatisation:* Disinvestment and privatization of existing PSUs has been adopted to improve corporate efficiency, financial performance and competition amongst PSUs. It involves transfer of Government holding in PSUs to the private shareholders.

2. Industrial Delicensing: The removal of licensing requirements for industries, domestic as well as foreign, commonly known as “de-licensing of industries” is another important feature of NIP. Till the 1990s, licensing was compulsory for almost every industry, which was not reserved for the public sector. This licensing system was applicable to all industrial enterprises having investment in fixed assets (which include land, buildings, plant & machinery) above a certain limit. With progressive liberalization and deregulation of the economy, industrial license is required in very few cases. Industrial licenses are regulated under the Industries (Development and Regulation) Act 1951. At present, industrial license is required only for the following:

- (i) Industries retained under compulsory licensing (five industries are reserved under this category).
- (ii) Manufacture of items reserved for small scale sector by larger units: An industrial undertaking is defined as small scale unit if the capital investment does not exceed Rs. 10 million (approximately \$ 222,222). The Government has reserved certain items for exclusive manufacture in the small-scale sector. Non small-scale units can manufacture items reserved for the small-scale sector if they undertake an obligation to export 50 percent of the production after obtaining an industrial license.
- (iii) When the proposed location attracts locational restriction: Industrial undertakings to be located within 25 kms of the standard urban area limit of 23 cities having a population of 1 million as per 1991 census require an industrial license.

Thus, excluding these, investors are free to set up a new industrial enterprise, expand an industrial enterprise substantially, change the location of an existing industrial enterprise and manufacture a new product through an already established industrial enterprise. The objective of industrial delicensing would be to enable business enterprises to respond to the fast changing external conditions. Entrepreneurs will be free to make investment decisions on the basis of their own commercial judgment. This will facilitate the technological dynamism and international competitiveness. Further industries will have freedom to take advantage of ‘economies of scale’ as well as ‘economies of scope’ in the current industrial policy environment.

3. Amendment of Monopolies and Restrictive Trade Practices (MRTP) Act, 1969: An important objective of India's earlier industrial policies was to prevent emergence of private monopolies and concentration of economic power in a few individuals. Accordingly, Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 was enacted and MRTP Commission was set up as a permanent body to periodically review industrial ownership, advise the government to prevent concentration of economic power, investigate monopolistic trade practices and inquire into restrictive trade practices, which are prejudicial to public interest. An MRTP firm was mainly defined in terms of asset size. An MRTP company had to obtain prior approval of the government for setting up a new enterprise as well as for expansion. However, MRTP Act was applicable only to private sector companies.

Since 1991 MRTP Act has been restructured and pre-entry restrictions have been removed with regard to prior approval of the government for the establishment of a new undertaking, expansion, amalgamation, merger, take over, and appointment of directors of companies. The asset restriction and market share for defining an MRTP firm has been done away with. MRTP Act is now applicable to both private and public sector enterprises and financial institutions. Today only restrictive trade practices of companies are monitored and controlled. The MRTP act has been replaced by the Competition Act, 2002. This law aims at upholding competition in the Indian market. The competition commission has been established in 2003 which mainly control the practice that have an adverse impact on competition.

4. Liberalised Foreign Investment Policy: India's earlier industrial policies welcomed FDI but emphasized that ownership and control of all enterprises involving foreign equity should be in Indian hands. The Balance of Payments (BoP) difficulties in the mid 1960s forced the country to adopt a more restrictive approach towards FDI through the setting up of a Foreign Investment Board, which classified industries into two groups: banned and favoured for foreign technical collaboration and FDI. The number of industries for foreign investment was steadily narrowed down and by 1973 there were only 19 industries where FDI was permitted (Kucchal, 1983). The enactment of FERA, 1973 marked the beginning of the most restrictive phase of India's foreign investment policy. The NIP radically reformed foreign investment policy to attract foreign investment.

The important foreign investment policy measures are as follows:

a) **Repeal of FERA, 1973:** FERA, 1973 has been repealed and Foreign Exchange Management Act (FEMA) has come into force with effect from June 2000 (RBI, 2003). Investment and returns can be freely repatriated except where the approval is subject to specific conditions such as lock-in period on original investment, dividend cap, foreign exchange neutrality, etc. as specified in the sector specific policies. The condition of 'dividend balancing' was withdrawn for dividends declared. A foreign investor can freely enter, invest and operate industrial enterprises in India.

b) **Dilution of Restrictions on Foreign Direct Investment (FDI):** FDI is allowed in all sectors including the services sector except atomic energy and railway transport. FDI in small scale industries is allowed up to 24 percent equity. Use of brand names/trade marks is allowed.

5. Foreign Technology Agreement: The automatic approvals for technology agreement are allowed to industries within specified parameters. Indian companies are free to negotiate the terms of technology transfer with their foreign counterparts according to their own commercial judgment.

6. Dilution of Protection to Small Scale Industries (SSI) and Emphasis on Competitiveness: SSIs enjoyed a unique status in Indian economy due to its diversified presence across the country and thereby utilising resources and skills, which would have otherwise remained unutilised. Due to their potential to generate large-scale employment, produce consumer goods of mass consumption, alleviate regional disparities, etc., industrial policies protected the sector for its growth. The principal protective measures for SSI comprised: (i) Demarcating SSI from the rest of industry through a definition under the IDR Act, 1951, (ii) Concessional credit from the banking system, (iii) Fiscal concessions, (iv) Exemption from industrial licensing and labour legislations, (v) Preferential access to scarce raw materials, both domestic and imported, (vi) Market support from the government through reservation of products for government purchase and price preferences, and (vii) Reservation of products for exclusive manufacturing in SSIs and restrictions on the growth of output and capacity in the large-scale sector for products reserved for SSI manufacturing. These policy measures protected SSIs from both internal and external competition.

However, since 1991 the protective emphasis of SSI policy has undergone dilution. In August 1991, government of India brought out an exclusive policy for SSI. The policy marked: (i) the beginning of an end to protective measures to small industry and (ii) promotion of competitiveness by addressing the basic concerns of the sector namely technology, finance and marketing. Subsequently, the number of items reserved exclusively for small industry manufacturing has been gradually brought down. This policy has lost its relevance to a large extent because though these products could not be manufactured by large enterprises domestically, they can be imported from abroad due to the removal quantitative and non-quantitative restrictions on most imports by April 1, 2001 (Ministry of Finance, 2002). Concession element in lending rates for small industry has been largely withdrawn during the 1990s (RBI, 2003). The number of products reserved exclusively for purchase from small industry by the government has been reduced to 358 items from 409 items. Measures have been adopted to improve technology and export capabilities of SSIs. Thus the overall promotion orientation of SSI has shifted from protection towards competitiveness.

1.3.7 Impact of Industrial Policy, 1991

The all-round changes introduced in the industrial policy framework have given a new direction to the future industrialisation of the country. There are encouraging trends on diverse fronts. Industrial growth was 1.7 per cent in 1991-92 that has increased to 9.2 percent in 2007-08. The industrial structure is much more balanced. The impact of industrial reforms is reflected in multiple increases in investment envisaged, both domestic and foreign. This is due to encouraging response from the private sector. There has been dramatic increase in FDI since 1991. The foreign investment as a percentage of total GDP has increased from 0.5 percent in 1990-91 to 5.7 percent in 2006. Investments in infrastructure sector such as power generation have surged from players of various sizes in different states. The capital goods have grown at an accelerated pace, over a high base attained in the previous years, which augurs well for the required industrial capacity addition.

1.4 INDUSTRIES DEVELOPMENT AND REGULATION ACT, 1951

IDRA, 1951 is the key legislation in the industrial regulatory framework. IDRA, 1951 gave powers to the government to regulate industry in a number of ways. The main instruments were the regulation of capacity (and hence output) and power to control prices.

It specified a schedule of industries that were subject to licensing. Even the expansion of these industries required prior permission of the government which means the output capacity was highly regulated. The Government was also empowered to control the distribution and prices of output produced by industries listed in the schedule. The IDR Act gave very wide powers to the Government. This resulted in more or less complete control by the bureaucracy on the industrial development of the country.

The main provisions of the IDRA, 1951 were

- a) All existing undertakings at the commencement of the Act, except those owned by the Central Government were compulsorily required to register with the designated authority.
- b) No one except the central Government would be permitted to set up any new industrial undertaking “except under and in accordance with a licence issued in that behalf by the Central Government.”
- c) Such a license or permission prescribed a variety of conditions, such as, location, minimum standards in respect of size and techniques to be used, which the Central Government may approve.
- d) Such licenses and clearances were also required in cases of ‘substantial expansion’ of an existing industrial undertaking.

1.4 (A) Objectives of the Act

- 1. Implement the Industrial Policy:** The Act provides the necessary means to the Central Government in order to implement its industrial policy.
- 2. Regulation and Development of Important Industries:** The Act brings under the control of the Central Government the development and regulation of a number of important industries listed in the first schedule attached to the Act as the activities of such industries will affect the country as a whole and, therefore, the development of such important industries must be governed by the economic factors of all India importance.

- 3. Planning and Future Development of New Undertakings:** A system of licensing is introduced under the Act to regulate planning and future development of new undertaking on sound and balance lines and may be deemed expedient in the opinion of the Central Government.

The Act confers on the Central Government power to make rules for the registration of existing undertakings for regulating the production and development of the industries specified in the schedule attached to the Act. The Act also provided for the constitution of the Central Advisory Council and Development Council.

1.4 (B) Scope of the Act

This Act applies to the whole of India including the State of Jammu & Kashmir. The provision of the Act apply to industrial undertaking, manufacturing any of the articles mentioned in the first schedule. An industrial undertaking (also called a factory) for the purpose of the Act is the one where manufacturing process is being carried on:

- (a) With the aid of power provided that fifty or more workers are working or were working on any day of the preceding twelve months; or
- (b) Without the aid of power provided that one hundred or more workers are working or were working on any day of the preceding twelve months.
- (c) The Act applies only on industrial undertakings. Trading houses and financial institutions are outside the purview of the Act.

Exemption from the Act:

The Act empowers the Central Government to grant exemption from this Act in certain cases. Section 29B of the Act provides that if the Central Government is of opinion that it would not be in public interest to apply all or any provision of this Act to any industrial

undertaking, then the Central Government, by notification in the Official Gazette, may exempt any industrial undertaking or class of industrial undertakings from the operation of all or any of the provision of this Act.

For grant exemptions, the Central Government will take into consideration the small of the number of workers employed or the amount invested in any industrial undertaking or to the desirability of encouraging small undertakings generally or to the stage of development of any scheduled industry.

This section further provides that any notification as aforesaid can be cancelled by the Central Government and on such cancellation, no industrial undertaking, which was earlier exempted, shall carry on the business of the undertaking, after the expiry of such period as may be specified in the notification cancelling the exemption by the Central Government. Under the provisions of Sec. 29B, the Central Government has been issuing notifications from time to time granting exemptions.

Following are the notifications;

- (a) Notification issued in 1973 granting exemption from the operation of section 10, 11, 11A and 13 to small-scale units, ancillaries and other undertaking, with an investment of Rs. 3 crores (Now raised to Rs. 5 crores) each.
- (b) Delicensing of certain industries (notification dated 1st November, 1975).
- (c) Excess capacity over licensed capacity allowed, in certain industries (notification dated 1st November, 1975).
- (d) Exemption of industrial undertakings pertaining to the manufacture of an article on the basis of technology developed by CSIR (Notification dated March 25, 1980)

(e) List of industries in which automatic expansion to the extent of 5 percent per annum of 25 percent in the five-year plan period over and above the licensed capacity permitted (Notification dated 14th August, 1980).

(f) List of industries where full utilisation of installed capacity without limit is permitted (notification dated 4th Sep. 1980).

(g) Exemption granted on exports (notification dated 17th March, 1981).

(h) Exemption to industrial undertaking from the operation of sections 10, 11, 11A and 13 of the Act subject to fulfilment of certain conditions (video notification no. 477 (E) dated July 25, 1991)

Provisions of the Act:

The Act has 31 sections. All of them can be classified into three broad categories depending upon the purposes they seek to serve:

A. Preventive Provisions:

Preventive provisions provide for:

(i) Registration and Licensing;

(ii) Investigation; and

(iii) Revocation of Licence.

(i) Registration of an existing undertaking:

Sec. 10 provides that the owner of every industrial undertaking other than the Central Government shall get his undertaking registered within a specified period. The industrial undertaking of which the Central Government is the owner. On registration, the owner shall be issued a certificate of registration containing the production capacity of the industrial undertaking and other particulars.

In specifying the production capacity in the certificate of registration the Central Government takes into consideration the following factors:

- (i) The productive or installed capacity as specified in the application.
- (ii) The level of production immediately before the date on which the application for registration was made;
- (iii) The level of the biggest annual production during the three years immediately preceding the introduction of an Amendment Bill to this Act in 1973;
- (iv) The extent to which production during the said period was used for export; and
- (v) Such other factors as may be considered relevant, including the extent of underutilisation of capacity, if any.

Registration Abolished:

As a consequence to the new industrial policy, existing schemes of registration have been abolished.

Licensing of Undertakings:

Licence is required for establishing a new undertaking, for manufacturing a new article by an existing undertaking, for effecting substantial expansion by an existing unit, for changing location of an existing undertaking and for carrying on issues by an existing undertaking.

(a) Licensing of New Undertaking:

Sec. 11 of the Act provides that no person or authority, other than the Central Government, shall establish, after the commencement of this Act, a new undertaking without a licence issued by Central government. A State Government also needs a license to set-up a new unit.

(b) Production of New Article:

Sec. 11A provides that no owner of an industrial undertaking other than the Central Government, which is registered under sec. 10 of this Act or licensed or permitted under Sec. 11. of the Act, shall produce or manufacture a new article without obtaining a licence to do so.

(c) Licence of effecting Substantial Expansion:

Sec. 13 lays down that no owner of an industrial undertaking other than Central Government, shall effect a substantial expansion of an undertaking which has been registered or licensed, without a licence issued to that effect by the Central Government. What is substantial expansion in not made clear in this Act.

However from the various notifications issued by the Central Government from time to time, it has been made clear the expansion up to percent will be regularised. In other words, expansion upto 25 per cent will not be considered as substantial.

(d) Licence for Shifting Location:

Sec. 13 lays down that without obtaining licence to the effect, no owner can change the location of the whole or any part of industrial undertaking which has been registered.

(a) Licence to carry on Business:

Licence is also necessary to carry on business (COB) by an existing undertaking to which licensing provision of the Act did not originally apply on account of exemption order issued by the government and subsequently became applicable as a result of cancellation of the exemption order under certain other circumstances as provided in the Act.

Licensing Abolished:

As per Government Notification No. 477(E), dated July 5, 1991, Sec. 1, 11A and 13 have been made in operative.

(ii) Investigation:

Sec. 15 empowers the Central Government to cause an investigation into an industrial undertaking on the happening of:

- (a) A substantial fall or likely fall, in the volume of production in respect of any article or class of articles relating to particular undertaking or an industry; or
- (b) A deterioration or likely deterioration in the quality of the product which could have been or can be avoided; or
- (c) A rise or likely rise (unjustifiable) in price of any article or class of articles; or
- (d) When it becomes necessary to take action of the conservation of any resources of national importance which are utilised by any undertakings or

(e) Where any industrial undertaking, scheduled or otherwise, is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest.

The purpose of investigation proves that action is desirable; the Central Government will take necessary action under Sec. 16 of the Act. Sec. 16 of the Act provides that the Central Government may issue such directions to the industrial undertaking concerned as may be appropriate in the circumstances for all or any of the following purposes:

- (a) Regulating the production of any article or class of articles by the industrial undertaking and fixing the standard of production.
- (b) Controlling the price or regulating the distribution of any article of class of articles being the subject matter of investigation.

(iii) Revocation of Registration of Licence:

Sec. 10A of the Act empowers the Central Government to revoke the registration when:

- (a) Registration was obtained by misrepresentation of an essential fact; or
- (b) Undertaking has ceased to be registrable by reason of any exemption granted under the Act, or
- (c) Registration has become useless or ineffective.

Sec. 12 of the Act empowers the Central Government to revoke or amend any licence granted for establishing a new undertaking, or license granted for manufacturing a new article, on finding that the licence has, without reasonable cause failed to establish or to take effective steps to implement the licence within the time allowed.

B. Curative Provisions:

Curative provision includes the following:

- (i) Taking over management or control; and
- (ii) Control of supply, price and distribution of certain commodities.

Power to take over management or control:

Sec. 18A of the Act provides that the Central Government may by a notified order authorise any person or body a person's to take over the management or to exercise control over a specified industrial undertaking if the Central Governmental is of the opinion that:

- (i) The concerned industrial undertaking has failed to comply with directions issued under Sec. 16 of the Act,
- (ii) The affairs of an undertaking in respect of which an investigating has been ordered under sec. 15 of the Act, are being managed in a manner highly detrimental to the scheduled industry concerned or public interest.

The period of takeover was five years, to be extended further for a period of two years subject to a maximum of twelve years.

Power of Take over without investigation:

Sec. 18A provides for the takeover after investigation. The Act, under Sec. 18AA, also provides for the takeover without investigation, provided that the Central Government, is satisfied, on the basis of any documentary or other evidence in its possession, that in relation to an industrial undertaking the person in-charge of such industrial undertaking have, by seek-less investment or creation of encumbrances on the assets of the industrial undertaking or by diversion of funds, brought about a situation which is likely to affect the production of articles manufactured or produced in the industrial undertaking and that

immediate action is necessary to prevent such situation, or industrial undertaking has been closed for a period of not less than three months and such closure is prejudicial to the concerned scheduled industry, and that the financial condition of the company owning the industrial undertaking and the condition of its plant and machinery makes it possible to restart the undertaking in the interest of the general public. The period to takeover is to be five years, to be extended by a further period of two years, subject to the maximum of 12 years.

Takeover of management or control of industrial undertaking owned by companies in liquidation:

Sec. 18FA empowers the Central Government to authorise any person or body of person with permission of the High Court concerned to take over the management or control of industrial undertakings owned by the companies in liquidation provided that the Central Government is of opinion that there are possibilities of running or restarting such undertakings for maintaining or increasing the production, supply or distribution of articles or class of articles in the public interest. The period of such takeover is to be 5 years, to be extended 6 times of two years each.

No state government or local authority can take over the management or control of a scheduled undertaking.

Power of Control supply and price of certain articles:

In order to secure equitable distribution and availability at fair price of any article or class of articles relating to any scheduled industry, the Central Government may, so by a notified order. The notified order may provide for:

- (a) Controlling by prices at which any such article or class thereof may be bought or sold.
- (b) Regulating by licence, permits, or otherwise the distribution, transport, disposal, acquisition, use or consumption of any such article or class;

(c) Prohibiting the withholding from sale of any such article or class thereof, ordinarily kept for sale;

(d) Requiring any person manufacturing, producing or holding any stock in such article or class thereof to sell the whole or part, of the articles so manufactured or produced during a specified period or to sell the whole or a part of the articles so held in stock, to such person or class of person as may be specified in the order.

(e) Regulating persons engaged in the distribution and trade and commerce in any such article or class thereof to mark the article expose are detrimental to the public interest.

(f) Regulating or prohibiting any class of commercial or financial transaction relating to such article or class thereof, which in the opinion of the authority making order, are detrimental to the public interest.

(g) Collecting any information or statistics with a view to regulating or prohibiting any of the a pre-said matters; and

(h) Any incidental or supplementary matter including the grant of issue of licences, permits for their document and the charging fees thereof.

C. Creative Provisions:

The Creative provisions are positive in nature and involve co-operation between the Central Government, industry, workers and consumers of goods produced by scheduled industries. Following are the specific creative measures:

Constituting Development Councils:

Central Government may by a notified order establish in respect of any scheduled industry or group of scheduled industries, a Development Council which shall consist of members who in the opinion of the Central Government are;

(a) Person capable of representing the interest of the owners of industrial undertaking in the scheduled industry or group of scheduled industries;

(b) Person capable of representing the interest of persons employed in the industrial undertaking in the scheduled industry and group of scheduled industries;

(c) Person having special knowledge of matters relating to the technical or other aspects of the scheduled industry or group of scheduled industries;

(d) Persons not belonging to any of the aforesaid categories who are capable of representing the interest of consumers of good manufactured or produced by the scheduled industry of group of scheduled industries.

Functions of the Council:

The Development Council shall perform the following functions as laid down in the second schedule of the Act:

1. Commanding targets of production, coordinating production programmes and reviewing progress from time to time;

2. Promoting arrangements for better marketing and helping in the division of a system of distribution and sale of the produce of the industry which would be satisfactory to the consumers;

3. Promoting standardisation of products;

4. Suggesting norms of efficiency with a view to eliminating waste, obtaining maximum production, improving quality and reducing costs;
5. Recommending measures of securing the full utilisation of the installed capacity and for improving the working of the industry particularly of the less efficient units;
6. Assisting in the distribution of controlled materials promoting arrangement for obtaining materials for industry;
7. Promoting the training of persons engaged or proposing engagement in the industry and their education in technical or artistic subjects relevant thereto;
8. Promoting or undertaking inquiry as to materials and equipment and as to methods of productions, management and labour utilisation, including the discovery and development in new materials, equipment and methods of improvement in those already in use;
9. Promoting the retraining in alternative occupations of personal engaged in or retrenched from the industry;
10. Promoting or undertaking scientific and industrial research into matters affecting industrial psychology and research into matter relating to production and consumption or use of goods and service supplied by the industry;
11. Promoting or undertaking the collection and formulation of statistics;
12. Promoting improvements and standardisation of accounting and costing methods and practice;
13. Investigation possibilities of decentralising stages and processes of production with a view to encouraging the growth of allied, small-scale and cottage industries;
14. Undertaking arrangement for making available to the industry information obtained and for advising on matters with which the Development Councils are concerned in the exercise of any of their functions;

15. Promoting the adoption of measures for increasing the productivity of labour including measures of securing safer and better working conditions;

16. Advising on any matter relating to the industry (other than remuneration and conditions of employment) as to which the Central Government may request the Development Council to advise and undertaking inquiries for the purpose of enabling the Development Council so to advise.

Levy and Collection of Cess:

Section 9 of the Act provides that the Central Government may by a notified order, levy and collect a cess for the purposes of this Act on all goods manufactured or produced in any scheduled industry as may be specified in this behalf by the Central Government, a duty of excise at such rate as may be notified by the Central Government and different rates may be specified for different classes of goods, provided that no such rate shall in any case exceed two percent of the value of the goods.

The cess may be recovered in the same manner as an arrear of land revenue. The Central Government may, after collecting the proceeds of the cess, hand over the same to the Development Council which shall utilise the said proceeds for the following purposes;

- (a) To promote improvements in design and quality with reference to the products of such industry or group of industries.
- (b) To provide for the training of the technicians and labour in such industry or group of industries.
- (c) To meet such expenses as may be necessary in the exercise of its functions and its administrative expenses.

(d) To promote scientific and industrial research with reference to the scheduled industry or group of scheduled industries in respect of which the Development Council is established.

Central Advisory Council:

Section 5 of the Act provides the establishment and functions of the Central Advisory Council. It is established for the purpose of advising the Central Government on matters concerning the development and regulation of scheduled industries.

The Central Advisory Council shall be composed of a chairman and such other members not exceeding 13 members as may be appointed by the Central Government from among the persons who are in the opinion of the Central Government capable of representing the interests of the owners of industrial undertakings covered by scheduled industries, persons employed in industrial undertakings in scheduled industries, consumers of goods manufactured or produced by scheduled industries and such other class of persons including primary producers as in the opinion of the Central Government ought to be represented on the Advisory Council.

It is made obligatory for the Central Government to consult the Central Advisory Council in regard to the making of any rules other than the first rules to be framed by the Central Government.

Other provisions:

Other provisions of the Act are as follows:

1. Power of the Central Government to provide relief to Certain Undertakings

With an objective to maintain the proper production in any scheduled industry the Central Government is empowered to take certain actions under Sec. 18FB of the Act under this section the Central Government may examine the undertaking whose management and

control have been taken over from the Industrial Disputes Act 1947, the Minimum Wages Act 1948 and the Industrial Employment (standing orders) Act 1946.

Similarly, the Central Government may suspend assurance, contracts, settlements, awards, standing orders or other instruments in force against the said undertaking. Sec 18FB is invoked to prevent fall in the volume of production of any of the said undertaking.

2. Delegation of power by Central Government

Under the provisions of Sec. 25 the Central Government is empowered to delegate its powers under the Act by a notified order to such office or authority as may be specified by the Central Government in its notification.

The Act also provides full protection to the officer or authority acting under the provisions of the Act. No suit, prosecution or other legal proceedings can be initiated against the officer or authority.

3. Power to Make Rules

Sec. 30 of the Act empowers the Central Government to make rules for carrying out the provisions of the Act subject to the condition of the previous publication of the rules framed by the Central Government. The rule making authority of the Central Government under sec 30 of the Act will relate to the following matters:

- (a) The constitution of the Advisory Council and the Development Councils and incidental matters relating to the appointment of members and conduct of affairs of the Advisory council and the Development Council.
- (b) The matters which may be taken into account in granting or issuing of licences and permission and the matters which require previous consultations by the Central Government.
- (c) The facilities to be provided by any industrial undertaking for the training of technicians and labour.

- (d) The collection of any information or statistics in respect of any scheduled industry.
- (e) The manner in which the industrial undertaking may be registered and the levy of a fee therefore.
- (f) The procedure to be followed in making any investigation under this Act.
- (g) The creditors which may be included in any licence or permission including the conditions on which the licences and permission may be valid or amended.
- (h) The maintenance of books, accounts and records relating to an industrial undertaking.

D. Penalties

The Act contains penalties for contravention of the provisions of the Act and for making false statement by any person under the provisions of the Act. The penalty for contravention is imprisonment upto six months, or a fine upto Rs. 5,000 or both.

In case of continuing contravention the person may be punished with an additional fine which may extend to Rs. 500 for everyday during which the contravention continues after the conviction for first contravention. Penalty for making false statement is imprisonment upto three months or a fine which may extend to Rs. 2,000 or both.

1.4.1 Regulatory Mechanism

The Industries Development and Regulation Act, (IDRA), came into force from 8th May 1952 under a notification of the Central Government published in the Gazette of India. The Act extends to whole of India including the state of Jammu & Kashmir with a view to being under Central and regulation of a number of important industries, the activities of which affect the country as a whole and the development of which must be governed by economic factors of all India importance.

I. Registration of existing industrial undertakings:

(1) The owner of every existing industrial undertaking, not being the Central Government, shall, within such period as the Central Government may, by notification in the Official Gazette, fix in this behalf with respect to industrial undertakings generally or with respect to any class of them, register the undertaking in the prescribed manner.

(2) The Central Government shall also cause to be registered in the same manner every existing industrial undertaking of which it is the owner.

(3) Where an industrial undertaking is registered under this section, there shall be issued to the owner of the undertaking or the Central Government, as the case may be, a certificate of registration containing the productive capacity of the industrial undertaking and such other particulars as may be prescribed.

(4) The owner of every industrial undertaking to whom a certificate of registration has been issued under this section before the commencement of the Industries Development and Regulation Amendment Act, 1973 (67 of 1973), shall, if the undertaking falls within such class of undertakings as the Central Government may, by notification in the Official Gazette, specify in this behalf, produce, within such period as may be specified in such notification, the certificate of registration for entering therein the productive capacity of the industrial undertaking and other prescribed particulars.

(5) In specifying the productive capacity in any certificate of registration issued under sub-section (3), the Central Government shall take into consideration the productive or installed capacity of the industrial undertaking as specified in the application for registration made under sub-section (1), the level of production immediately before the date on which the application for registration was made under sub-section (1), the level of the highest annual production during the three years immediately preceding the introduction in Parliament of the Industries Development and Regulation amendment Bill, 1973, the extent to which production during the said period was utilised for export and such other factors as the Central Government may consider relevant including the extent of underutilisation of capacity, if any, during the relevant period due to any cause.

II. Revocation of registration in certain cases

If the Central Government is satisfied that the registration of any industrial undertaking has been obtained by misrepresentation as to an essential fact or that any industrial undertaking has ceased to be registrable under this Act by reason of any exemption granted under this Act becoming applicable thereto or that for any other reason the registration has become useless or ineffective and therefore requires to be revoked the Central Government may after giving an opportunity to the owner of the undertaking to be heard revoke the registration.

III. Licensing of new industrial undertakings

No person or authority other than the Central Government, shall, after the commencement of this Act, establish any new industrial undertaking, except under and in accordance with a licence issued in that behalf by the Central Government:

- Provided that a Government other than the Central Government may, with the previous permission of the Central Government, establish a new industrial undertaking.
- A licence or permission under sub-section (1) may contain such conditions including, in particular, conditions as to the location of the undertaking and the minimum standards in respect of size to be provided therein as the Central Government may deem fit to impose in accordance with the rules, if any, made under section 30.

IV. Licence for producing or manufacturing new articles

The owner of an industrial undertaking not being the Central Government which is registered under section 10 or in respect of which a licence or permission has been issued under section 11 shall not produce or manufacture any new article unless-

(a) in the case of an industrial undertaking registered under section 10, he has obtained a licence for producing or manufacturing such new article; and

(b) in the case of an industrial undertaking in respect of which a licence or permission has been issued under section 11, he has had the existing licence or permission amended in the prescribed manner.

V. Power of Central Government to specify the requirements which shall be complied with by small scale industrial undertakings –

(1) The Central Government may, with a view to ascertaining which ancillary and small scale industrial undertakings need supportive measures, exemptions or other favourable treatment under this Act to enable them to maintain their viability and strength so as to be effective in :-

(a) Promoting in a harmonious manner the industrial economy of the country and easing the problem of unemployment, and

(b) Securing that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good, specify, having regard to the factors mentioned in sub-section

(2) By notified order, the requirements which shall be complied with by an industrial undertaking to enable it to be regarded, for the purposes of this Act, as an ancillary, or a small scale, industrial undertaking and different requirements may be so specified for different purposes or with respect to industrial undertakings engaged in the manufacture or production of different articles:

Provided that no industrial undertaking shall be regarded as an ancillary industrial undertaking unless it is, or is proposed to be, engaged in -

(i) The manufacture of parts, components, sub-assemblies, toolings or intermediates; or

(ii) Rendering of services, or supplying or rendering, not more than fifty per cent of its production or its total services, as the case may be, to other units for production of other articles.

(2) The factors referred to in sub-section (1) are the following, namely:-

(a) the investment by the industrial undertaking in -

(i) plant and machinery, or

(ii) land, buildings, plant and machinery;

(b) The nature of ownership of the industrial undertaking;

(c) The smallness of the number of workers employed in the industrial undertaking;

(d) The nature, cost and quality of the product of the industrial undertaking;

(e) Foreign exchange, if any, required for the import of any plant or machinery by the industrial undertaking; and

(f) Such other relevant factors as may be prescribed.

(3) A copy of every notified order proposed to be made under sub-section (1) shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the proposed notified order or both Houses agree in making any modification in the proposed notified order, the notified order shall not be made, or, as the case may be, shall be made only in such modified form as may be agreed upon by both the Houses.

(4) Notwithstanding anything contained in sub-section (1), an industrial undertaking which, according to the law for the time being in force, fell, immediately before the commencement of the Industries Development and Regulation Amendment Act, 1984, under the definition of an ancillary, or small scale, industrial undertaking, shall, after such commencement, continue to be regarded as an ancillary, or small scale, industrial undertaking for the purposes of this Act until the definition aforesaid is altered or superseded by any notified order made under sub-section (1).

VI. Revocation and amendment of licences in certain cases :-

(1) If the Central Government is satisfied, either on a reference made to it in this behalf or otherwise, that any person or authority, to whom or to which, a licence has been issued under section 11, has, without reasonable cause, failed to establish or to take effective steps to establish the new industrial undertaking in respect of which the licence has been issued within the time specified therefore or within such extended time as the Central Government may think fit to grant in any case, it may revoke the licence.

(2) Subject to any rules that may be made in this behalf, the Central Government may also vary or amend any licence issued under section 11:

Provided that no such power shall be exercised after effective steps have been taken to establish the new industrial undertaking in accordance with the licence issued in this behalf.

(3) The provisions of this section shall apply in relation to a licence issued under section 11A or where a licence has been amended under that section, to the amendment thereof, as they apply in relation to a licence issued under section

Further provision for licensing or industrial undertakings in special cases –

(1) No owner of an industrial undertaking, other than the Central Government, shall -

(a) in the case of an industrial undertaking required to be registered under section 10, but which has not been registered within the time fixed for the purpose under that section, carry on the business of that undertaking after the expiry of such period, or

(b) in the case of an industrial undertaking the registration in respect of which has been revoked under section 10A, carry on the business of the undertaking after the revocation, or

(c) in the case of an industrial undertaking to which the provisions of this Act did not originally apply but became applicable after the commencement of this Act for any reason, carry on the business of the undertaking after the expiry of three months from the date on which the provisions of this Act became so applicable, or

(d) effect any substantial expansion of an industrial undertaking which has been registered or in respect of which a licence or permission has been issued, or

(e) change the location of the whole or any part of an industrial undertaking which has been registered, except under, and in accordance with, a licence issued in that behalf by the Central Government, and, in the case of a State Government, except under and in accordance with the previous permission of the Central Government.

(2) The provisions of sub-section (2) of section 11 and of section 12 shall apply, so far as may be, in relation to the issue of licences or permissions to any industrial undertaking referred to in this section as they apply in relation to the issue of licences or permissions to a new industrial undertaking.

Explanation:- For the purposes of this section, A substantial expansion@ means the expansion of an existing industrial undertaking which substantially increases the productive capacity of the undertaking, or which is of such a nature as to amount virtually to a new industrial undertaking, but does not include any such expansion as is normal to the undertaking having regard to its nature and the circumstances relating to such expansion.

VI. Procedure for the grant of licence or permission –

Before granting any licence or permission under section 11, section 11A, section 13 or section 29B, the Central Government may require such officer or authority as it may appoint for the purpose, to make a full and complete investigation in respect of applications received in this behalf and report to it the result of such investigation and in making any such investigation, the officer or authority shall follow such procedure as may be prescribed.

VII. Power to cause investigation to be made into scheduled industries

Where the Central Government is of the opinion that -

(a) in respect of any scheduled industry or industrial undertaking or undertakings

(i) there has been, or is likely to be, a substantial fall in the volume of production in respect of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be; for which, having regard to the economic conditions prevailing, there is no justification; or

(ii) there has been, or is likely to be, a marked deterioration in the quality of any article or class of articles relatable to that industry or manufactured or produced in the industrial

undertaking or undertakings, as the case may be, which could have been or can be avoided; or

(iii) there has been or is likely to be a rise in the price of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, for which there is no justification; or

(iv) it is necessary to take any such action as is provided in this Chapter for the purpose of conserving any resources of national importance which are utilised in the industry or the industrial undertaking or undertakings, as the case may be; or

(b) any industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest, the Central Government may make or cause to be made a full and complete investigation into the circumstances of the case by such person or body of persons as it may appoint for the purpose.

IX. Power to investigate into the affairs of a company in liquidation –

Where a company, owing an industrial undertaking, is being wound up by or under the supervision of the High Court, and the business of such company is not being continued, the Central Government may, if it is of opinion that it is necessary, in the interests of the general public and, in particular, in the interests of production, supply or distribution of articles or class of articles relatable to the concerned scheduled industry, to investigate into the possibility of running or restarting the industrial undertaking, make an application to the High Court praying for permission to make, or cause to be made, an investigation into such possibility by such person or body of persons as that Government may appoint for the purpose.

(2) Where an application is made by the Central Government under sub-section (1), the High Court shall, notwithstanding anything contained in the Companies Act, 1956 (7 of 1956), or in any other law for the time being in force, grant the permission prayed for.

X. Powers of Central Government on completion of investigation under section 15-

(1) If after making or causing to be made any such investigation as is referred to in section 15 the Central Government is satisfied that action under this section is desirable, it may issue such directions to the industrial undertaking or undertakings concerned as may be appropriate in the circumstances for all or any of the following purposes, namely:-

(a) regulating the production of any article or class of articles by the industrial undertaking or undertakings and fixing the standards of production;

(b) requiring the industrial undertaking or undertakings to take such steps as the Central Government may consider necessary to stimulate the development of the industry to which the undertaking or undertakings relates or relate;

(c) Prohibiting the industrial undertaking or undertakings from resorting to any act or practice which might reduce its or their production, capacity or economic value;

(d) Controlling the prices, or regulating the distribution, of any article or class of articles which have been the subject-matter of investigation.

(2) Where a case relating to any industry or industrial undertaking or undertakings is under investigation, the Central Government may issue at any time any direction of the nature referred to in sub-section (1) to the industrial undertaking or undertakings concerned, and any such direction shall have effect until it is varied or revoked by the Central Government.

XI. [Special provisions for direct control by Central Government in certain cases.] Rep. by the Industries (Development and Regulation) Amendment Act, 1953 (26 of 1953), s.12 (w.e.f. 1-10-1953).

XII. Power of person or body of persons appointed under section 15 to call for assistance in any investigation –

(1) The person or body of persons appointed to make any investigation under section 15 [or section 15A] may choose one or more persons possessing special knowledge of any matter relating to the investigation to assist him or it in holding the investigation.

(2) The person or body of persons so appointed shall have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908), for the purpose of taking evidence on oath (which he or it is hereby empowered to administer) and of enforcing the attendance of witnesses and compelling the production of documents and material objects, and the person or body of persons shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (5 of 1898).

Growth of the industrial sector at a higher rate and on a sustained basis is a major determinant of a country's overall economic development. In this regard, the Government of India has issued industrial policies, from time to time, to facilitate and foster the growth of Indian industry and maintain its productivity and competitiveness in the world market.

In order to provide the Central Government with the means to implement its industrial policies, several legislations have been enacted and amended in response to the changing environment. The most important being the Industries (Development and Regulation) Act, 1951 (IDRA) which was enacted in pursuance of the Industrial Policy Resolution, 1948. The Act was formulated for the purpose of development and regulation of industries in India by the Central Government.

The main objectives of the Act is to empower the Government:-

(i) to take necessary steps for the development of industries; (ii) to regulate the pattern and direction of industrial development; (iii) to control the activities, performance and results of industrial undertakings in the public interest. The Act applies to the 'Scheduled Industries' listed in the First Schedule of the Act. However, small scale industrial undertakings and ancillary units are exempted from the provisions of this Act.

The Act is administered by the Ministry of Industries & Commerce through its **Department of Industrial Policy & Promotion (DIPP)**. The DIPP is responsible for formulation and implementation of promotional and developmental measures for growth of the industrial sector. It monitors the industrial growth and production, in general, and selected industrial sectors, such as cement, paper and pulp, leather, tyre and rubber, light electrical industries, consumer goods, consumer durables, light machine tools, light industrial machinery, light engineering industries etc., in particular. It is also

responsible for facilitating and increasing the foreign direct investment (FDI) inflow into the country as well as for encouraging acquisition of technological capability in various sectors of the industry.

The various provisions of the Act are:-

1. Establishment of a 'Central Advisory Council' for the purpose of advising the Central Government on matters concerning the development of the industries, making of any rules and any other matter connected with the administration of the Act. Its members shall consist of representatives of the owners of industrial undertaking, employees, consumers, primary suppliers, etc.
2. Establishment of a 'Development Council' for the purpose of development of any scheduled industry or group of scheduled industries. This council shall consist of the members representing the interests of the owners, employees, consumers, etc. and persons having special knowledge of matters relating to the technical or other aspects of the industries.
3. The development council shall perform the following functions assigned to it by the Central Government:- (i) recommending targets for production, co-ordinating production programmes and reviewing progress from time to time. (ii) suggesting norms of efficiency with a view to eliminating waste, obtaining maximum production, improving quality and reducing costs. (iii) Recommending measures for securing the fuller utilisation of the installed capacity and for improving the working of the industry, particularly of the less efficient units. (iv) promoting arrangements for better marketing and helping in the devising of a system of distribution and sale of the produce of the industry which would be satisfactory to the consumer. (v) promoting the training of persons engaged or proposing engagement in the industry and their education in technical or artistic subjects relevant thereto, etc.
4. The development council shall prepare and transmit to the Central Government and the advisory council a report (annually) setting out what has been done in the discharge of its functions during the financial year last completed. The report shall

include a statement of the accounts of the development council for that year, together with a copy of any report made by the auditors on the accounts.

5. The IDRA empowers the Central Government to regulate the development of industries by means of licensing with suitable exemptions as decided by the Government. Accordingly, the entry into a business or the expansion of an existing business may be regulated by licensing. A licence is a written permission from the Government to an industrial undertaking to manufacture specified articles included in the Schedule to the Act. It contains particulars of the industrial undertaking, its location, the articles to be manufactured, its capacity on the basis of the maximum utilisation of plant and machinery, and other appropriate conditions which are enforceable under the Act.
6. If an application for licence is approved and further clearance (such as that of foreign collaboration and capital goods import) are not involved and no other prior conditions have to be fulfilled, an industrial licence is issued to the applicant. In other cases, a letter of intent is issued, which conveys the intention of the Government to grant a licence subject to the fulfilment of certain conditions such as approval of foreign investment proposal, import of capital goods, etc.
7. The Government may order for investigation before the grant of licence to an industrial undertaking. It can make a full and complete investigation if it is of the opinion that in the respect of any schedule industry or undertaking, there has been or is likely to be:- (i) a substantial fall in the volume of output; or (ii) a marked deterioration in the quality of output or an unjustifiable rise in the price of the output. Also, if it is of the opinion that any industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to the public interest, it orders investigation.
8. As a result of such investigations, the Government is empowered to issue directions to the industrial undertaking for all or any of the following purposes:-

- Regulating the production of output by the industrial undertaking and fixing the standards of production;
- Requiring the industrial undertaking to take such steps as the Central Government may consider necessary to stimulate the development of the industry to which the undertaking relate.
- Prohibiting the industrial undertaking from resorting to any act or practice which might reduce its production, capacity or economic value;
- Controlling the prices, or regulating the distribution, of an output for securing its equitable distribution and availability at fair prices.
- The Act also provides that any such directions may be issued by the Central Government at any time when a case relating to any industrial undertaking is under investigation. These directions shall have effect until they are varied or revoked by the Central Government.
- The power of control entrusted to the Central Government under the Act extends to that of the takeover of the management of the whole or any part of an industrial undertaking which fails to comply with any of the directions mentioned above. The Government can also take over the management of an undertaking which is being managed in a manner highly detrimental to the scheduled industry concerned or to the public interest. Further, the Central government can take over the management of industrial undertaking owned by a company under liquidation, with the permission of the High Court, if the Government is of the opinion that the running or restarting the operations of such an undertaking is necessary for the maintaining or increasing the production, supply or distribution in the public interest.

Until liberalisation, the industrial licence was required for the establishment of a new industrial undertaking, manufacturing of a new item by an existing undertaking, change of location of an industry, substantial expansion of existing capacity and for all other purposes. But the new industrial policy liberalised this and exempted many industries from obtaining industrial licence. In today's scenario, only 6 categories of industries require industrial licensing

under the Industries (Development and Regulation) Act, 1951 (IDRA). Such industries file an Industrial Entrepreneur Memoranda (IEM) with the Secretariat of Industrial Assistance (SIA), Department of Industrial Policy and Promotion to obtain an acknowledgement.

1.5 MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT, 2006

This is an act for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for the matters connected therewith or incidental thereto. The act was published in gazette of India on June 16, 2006. However, it came into force from 2nd October, the birth date of the father of the nation.

1.5.1 Micro, Small and Medium Enterprise

An enterprise, engaged in the manufacture or production of goods pertaining to any industry specified in the first schedule to the Industries (Development and Regulation) Act, 1951, (IDR Act, 1951) is said to be:

- (a) a micro enterprise, where the investment in Plant and Machinery does not exceed Rs.25lakhs;
- (b) a small enterprise, where the investment in Plant and Machinery is more than Rs.25clakhs but does not exceed Rs.5 crore;
- (c) a medium enterprise, where investment in Plant and Machinery is more than Rs.5 crore but does not exceed Rs.10 crores.

Also, the limit for small scale industry has increased from Rs.1 crore to Rs.5 crore. An enterprise, engaged in providing or rendering of services is said to be:

- (a) a micro enterprise, where the investment in equipment does not exceed Rs.10 lakhs;
- (b) a small enterprise, where the investment in equipment is more than Rs.10 lakhs but does not exceed Rs.2 crore;

(c) a medium enterprise, where the investment in equipment is more than Rs.2 crore but does not exceed Rs.5 crore.

Table 1.1

Manufacturing Sector	
Enterprises	Investment in plant & machinery
Micro Enterprises	Does not exceed twenty five lakh rupees
Small Enterprises	More than twenty five lakh rupees but does not exceed five crore rupees
Medium Enterprises	More than five crore rupees but does not exceed ten crore rupees
Service Sector	
Enterprises	Investment in equipments
Micro Enterprises	Does not exceed ten lakh rupees:
Small Enterprises	More than ten lakh rupees but does not exceed two crore rupees
Medium Enterprises	More than two crore rupees but does not exceed five core rupees

With a view to boost the development of small enterprises in the country, the Government of India has recently enacted “Micro Small and Medium Enterprises Development (MSMED) Act, 2006 and also set up a separate Ministry of Micro Small and Medium Enterprises.

Table 1.2

As per the Micro Small and Medium Enterprises Act, 2006, the MSMEs are defined as follows:

<i>Manufacturing Enterprises</i>	
• Micro Enterprises	• Investment up to ₹ 25 Lakh.
• Small Enterprises	• Investment above ₹ 25 Lakh & up to ₹ 5 Crore.
• Medium Enterprises	• Investment above ₹ 5 Crore & upto ₹10 Crore.
<i>Service Enterprises</i>	
• Micro Enterprises	• Investment up to ₹ 10 Lakh.
• Small Enterprises	• Investment above ₹ 10 Lakh & up to ₹ 2 Crore.
• Medium Enterprises	• Investment above ₹ 2 Crore & up to ₹ 5 Crore.

1.5.2 The salient features of MSMED Act 2006

I. Recent Initiatives

1. By enacting the Micro, Small and Medium Enterprises Development Act, 2006, the Government of India has recently fulfilled one of the needs felt and articulated by this segment for long. This Act seeks to facilitate promotion and development and enhancing competitiveness of these enterprises. It provides the first-ever legal framework for recognition of the concept of “enterprise” (comprising both manufacturing and services) and integrating the three tiers of these enterprises, namely, micro, small and medium. Apart from clearer and more progressive classification of each category of enterprises, particularly the small, the Act provides for a statutory consultative mechanism at the national level with wide representation of all sections of stakeholders, particularly the three classes of enterprises and with a wide range of advisory functions.

Establishment of specific Funds for the promotion, development and enhancing competitiveness of these enterprises, notification of schemes/programmes 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 to micro and small enterprises and simplification of the process of closure of business by all three categories of enterprises are some of the other features of this legislation.

2. The Government has also announced a Policy Package for Stepping up Credit to Small and Medium Enterprises assuring, inter alia, a 20 per cent year-on-year growth in credit flow.

3. Significant improvements have also been made in the Credit Linked Capital Subsidy Scheme for Technological Up-gradation, leading to a spurt in the number of units availing of its benefits.

II. Promotional Package

In fulfillment of the assurance in the National Common Minimum Programmes (NCMP), the following Package is announced:

(A) Legislation

1. With a view to facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises, the Micro, Small and Medium Enterprises Development Bill, 2006 has been passed. The Government will take up effective and expeditious implementation of this legislation in close collaboration with all stakeholders.

2. The Government will also soon enact a law on Limited Liability Partnerships covering, among others, micro, small and medium enterprises, with a view, inter alia, to facilitating infusion of equity and venture capital funding in these enterprises.

(B) Credit Support

1. In line with the Policy Package for Stepping up Credit to Small and Medium Enterprises (SME), the Reserve Bank of India (RBI) has already issued guidelines to the public sector banks to ensure 20 per cent year-on-year growth in credit to the SME. Action has also been initiated to operationalise other elements of the said Policy Package. Implementation of these measures will be closely monitored by the RBI and the Government.

2. The Small Industries Development Bank of India (SIDBI) will scale up and strengthen its credit operations for micro enterprises and cover 50 lakh additional beneficiaries over five years beginning 2006-07. Government will provide grant to SIDBI to augment SIDBI's Portfolio Risk Fund for this purpose.

3. Government will also provide grant to SIDBI to enable it to create a Risk Capital Fund (as a pilot scheme in 2006-07) so as to provide, directly or through intermediaries, demand-based small loans to micro enterprises.

4. SIDBI's direct lending operations will be expanded by increasing the number of branches from 56 to 100 in two years beginning 2006-07, with a view to catering to the credit needs of more clusters of micro and small enterprises (MSEs).

5. The eligible loan limit under the Credit Guarantee Fund Scheme will be raised to Rs. 50 lakh. The credit guarantee cover will be raised from 75 per cent to 80 per cent for micro enterprises for loans up to Rs. 5 lakh. Accordingly, to strengthen the Credit Guarantee Fund, the corpus of the Fund will be raised from Rs. 1189 crore as on 01 April 2006 to Rs. 2500 crore over a period of five years (with contribution by the Government and SIDBI in the existing ratio of 4:1).

6. Moreover, to encourage public sector banks and public financial institutions to contribute to the corpus of the Fund, the feasibility of allowing deduction of their contributions to the Fund for income tax purposes would be examined.

7. The Fund will continue to be maintained with and managed by the "Credit Guarantee Fund Trust for Small Industries (CGTSI)." The Trust will be renamed as "Credit Guarantee Fund Trust for Micro and Small Enterprises" (CGTMSE)."

III. Fiscal Support

Taking into consideration all the relevant factors, including the new definition of small manufacturing enterprises, under the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006, the Government will examine the feasibility of:

1. Increase in the General Excise Exemption (GEE) limit and the existing eligibility limit for GEE;
2. Extending the time limit for payment of excise duty by micro and small enterprises; and
3. Extending the GEE benefits to small enterprises on their graduation to medium enterprises for a limited period.

IV. Support for Cluster Based Development

For comprehensive and speedier development of clusters of micro and small enterprises, the earlier guidelines of the Small Industries Cluster Development Programme (SICDP), are renamed as “Micro and Small Enterprises Cluster Development Programme” (MSECDP) and reviewed during 2006-07 to accelerate holistic development of clusters, including provision of Common Facility Centres (CFC), developed sites for new enterprises, up-gradation of existing industrial infrastructure and provision of Exhibition Grounds/Halls and also for creation and management of infrastructure-related assets in the public-private partnership mode. The ceiling on project cost is raised to Rs. 10 crore.

V. Technologies and Quality Upgradation Support:

Following are the provisions made for the upgradation of technologies and quality of small enterprises:

1. Four Training-cum-Product Development Centres (TPDCs) for agro & food processing industries would be set up at identified existing Small Industries Service Institutes (SISIs) to facilitate promotion and development of micro and small enterprises in the food processing sector.

2. The two existing Central Footwear Training Institutes (CFTIs) (at Chennai and Agra) will be further strengthened to expand their outreach and assist the MSE in upgrading their technology.

3. Vertical Shaft Brick Kiln (VSBK) Technology would be promoted for adoption by MSEs engaged in manufacturing bricks to make them energy efficient and eco-friendly. For this, one-time capital subsidy (limited to 30 per cent of the cost or Rs. 2 lakh, whichever is less) will be provided to micro and small brick manufacturing enterprises.

4. With a view to promoting energy efficiency in electrical pumps and motors manufactured by MSEs, a special programme of assistance will be launched after a detailed technical study.

5. The existing scheme of assisting the attainment of ISO 9000 and 14001 standards will be operated as a continuing scheme during the 11th Five Year Plan.

6. The scope of the above-mentioned scheme will be expanded to cover “Hazard Analysis and Critical Control Points” (HACCP) Certification obtained by MSE.

7. A Technology Mission will be established with a view to assisting micro, small and medium enterprises (MSMEs) in technology upgradation, energy conservation and pollution mitigation.

VI. Marketing Support

The National Manufacturing Competitiveness Programme (NMCP) announced in the Budget Speech of 2006-07 will include components relating to marketing support to MSE. Implementation of the NMCP will be taken up soon.

VII. Supports for Entrepreneurial and Managerial Development

As many as 20 per cent of the entrepreneurship development programmes (EDP) will be organised for Scheduled Castes (SC) / Scheduled Tribes (ST), women and physically

challenged persons with a stipend of Rs. 500 per capita per month for the duration of the training.

1. 50,000 entrepreneurs will be trained in information technology, catering, agro and food processing, pharmaceuticals, biotechnology, etc., through specialised courses run by SISIs, over the period co-terminus with the XI Plan.

2. A new scheme will be formulated to provide financial assistance to select management/ business schools and technical institutes, to conduct tailor- made courses for new as well as existing micro and small entrepreneurs.

3. A new scheme will also be formulated to provide financial assistance to 5 select universities/ colleges to run 1200 entrepreneurial clubs.

4. A new scheme will be launched for capacity building, strengthening of database and advocacy by Industry/Enterprise Associations, after consultation with the Associations and States.

5. A comprehensive study will be conducted to assess the needs and scope of Government intervention required for enhancing the competitiveness of micro and small enterprises in the service/ business sector.

VIII. Empowerment of Women Owned Enterprises

These include:

1. Under the Credit Guarantee Fund Scheme, 80 per cent guarantee cover will be provided to micro and small enterprises operated and/or owned by women.

2. Under the SICDP/MSECDP financial assistance of up to 90 per cent of the cost, subject to ceiling of Rs. 9 crore, will be provided for clusters developed exclusively for micro and small enterprises operated and/or owned by women.

3. Associations of women entrepreneurs will be assisted under the SICDP/ MSECDP in establishing exhibition centres at central places for display and sale of products of women-owned micro and small enterprises.

4. To encourage entrepreneurship among women, 50 per cent concession in fees would be given to women candidates in entrepreneurship/ management development programmes conducted by SISIs.

5. To facilitate export by women entrepreneurs, the National Small Industries Corporation Ltd. (NSIC) will assist them to participate in 25 exhibitions over the period co-terminus with the XI Plan.

IX. Strengthening of Prime Minister's Rozgar Yojana (PMRY)

1. The Prime Minister's Rozgar Yojana (PMRY), introduced in 1993, has been one of the important credit-linked subsidy schemes to generate self-employment opportunities for the educated youth by assisting them in setting up viable micro enterprises. By the end of 2005-06, it has provided self-employment opportunities to 38.09 lakh persons. A recent review has, however, established the need to improve its effectiveness as a measure for self-employment through this route.

2. The design parameters of the PMRY, in terms of family income limits for eligibility, project cost ceilings, corresponding ceilings of subsidy, rates of assistance to States towards training of beneficiaries before and after selection, etc., will be improved with effect from 2007-08, keeping in view the findings of the review.

X. Strengthening of Data Base for MSME Sector:

1. To strengthen the data base for the MSME sector, statistics and information will be collected in respect of number of units, employment, rate of growth, share of GDP, value of production, extent of sickness/closure and all other relevant parameters of micro, small and medium enterprises, including khadi and village industry units set up under Rural Employment Generation Programme and Prime Minister's Rozgar Yojana as well as coir units, through annual sample surveys and quinquennial census.

2. The quinquennial census and annual sample surveys of MSMEs will also collect data on women-owned and/or managed enterprises.

3. A scheme will also be formulated and implemented to regularly collect data on exports of products/services manufactured/provided by micro, small and medium enterprises, including khadi and village industries.

1.6 SUMMARY

There is a growing consensus in recent development theory that state interventions are often necessary when market failures prevail. Market failures often exist in presence of externalities and natural monopolies. These market failures hinder the emergence of a well-functioning market and corrective industrial policies are required to ensure the allocative efficiency of a free market. Even relatively sceptical economists now recognise that public action can boost certain development factors “beyond what market forces on their own would generate. In practice, these interventions are often aimed at regulating networks, public infrastructure, R&D or correcting information asymmetries. While the current debate has shifted away from dismissing industrial policies overall, the best ways of promoting industrial policy are still widely debated.

One key question is which kinds of industrial policy are most effective in promoting economic development. For example, economists debate whether developing countries should focus on their comparative advantage by promoting mostly resource- and labour-intensive products and services, or invest in higher-productivity industries, which may only become competitive in the longer term.

Much debate also still surrounds the issue whether government failures are more pervasive and severe than market failures. Some argue that the lower the government accountability and capabilities, the higher the risk of political capture of industrial policies, which may be economically more harmful than existing market failures.

Of particular relevance for developing countries are the conditions under which industrial policies may also contribute to poverty reduction, such as a focus on specific

industries or the promotion of linkages between larger companies and smaller local enterprises.

The Government policies and procedures in the pre-1991 period aimed at industrial development of the country, but the enactment of the IDR Act, procedures laid down for obtaining industrial licensing and various rules acted as a great deterrent to the growth of industries in the country. The bureaucracy acquired unprecedented powers and authority over all kinds of industrial activities. The NIP announced in July 1991, unshackle the industries from the cobweb of bureaucratic control to allow it to achieve international competitiveness. NIP encouraged foreign investment in the economy and opened it to greater domestic and international competition.

To facilitate the promotion and development of and enhancing the competitiveness of micro, small and medium, enterprises and for matters connected therewith or incidental thereto.

Nature of Enterprises	Manufacturing or production of goods	Providing or rendering service
Micro	Investment in plant and machinery up to Rs. 25.0 lakhs.	Investment in equipment up to Rs. 10.0 lakhs.
Small	Investment in plant & machinery above Rs. 25.0 lakhs but not exceeding Rs. 5.0 crores.	Investment in equipment above Rs. 10.0 lakhs but not exceeding Rs. 2.0 crores.
Medium	Investment in plant & machinery above Rs. 5.0 crores but not exceeding Rs. 10.0 crores.	Investment in equipment above Rs. 2.0 crores but not exceeding Rs. 5.0 crores

Nature of Enterprises Manufacturing or production of goods Providing or rendering service
Micro Investment in plant and machinery up to Rs. 25.0 lakhs. Investment in equipment up to Rs. 10.0 lakhs.
Small Investment in plant & machinery above Rs. 25.0 lakhs but not exceeding Rs. 5.0 crores. Investment in equipment above Rs. 10.0 lakhs but not exceeding Rs. 2.0 crores.
Medium Investment in plant & machinery above Rs. 5.0 crores but not exceeding Rs. 10.0 crores. Investment in equipment above Rs. 2.0 crores but not exceeding Rs. 5.0 crores

1.7 SELFASSESSMENT QUESTIONS

Q 1. What are the objectives of NIP, 1991 that distinguish it from pre-1991 policy?

Q 2. Give the distinctive features of new public sector policy.

Q 3. Explain Small, Micro and Medium enterprises development Act 2006.

1.8 SUGGESTED READING

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- R.G. Lipsey & K.A. Chrystal- Principles of Economics, Oxford Univ. Press.
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STRUCTURE

- 2.1 Introduction
- 2.2 Objectives
- 2.3 Consumer Protection Act 1986
 - 2.3.1 Definitions.
 - 2.3.2 Importance of Consumer Protection
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 - 2.3.4 Consumer Responsibilities
 - 2.3.5 Ways and Means of Consumer Protection
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2.1 INTRODUCTION

The consumer movement in India has led to the formation of various organisation locally known as “Consumer Organisation” or “Consumer Forum”. These voluntary organisations guide consumers on how to file cases in the consumer courts. On many occasions, they also represent individual consumers in the consumer courts. Till 1970s, they were largely engaged in writing articles and holding exhibitions against unethical and unfair trade practices. But a major step taken in 1986 by the Indian government was the enactment of the ‘consumer protection Act 1986’.

This act is also known as ‘COPRA’. India has been observing 24 December as the national Consumer Day, because use on this day the Indian Parliament enacted the COPRA.

2.2 OBJECTIVES

The main objectives of this Unit are:

- To know about consumer protection act 1986
- To understand restrictive trade practices and unfair trade practices
- To know about central consumer protection council, state consumer protection council and the district consumer protection council
- To identify power of and procedure application to the national commission.

2.3 CONSUMER PROTECTION ACT 1986

Under the modern concept of marketing consumer is treated as the king and the business is expected to provide maximum possible satisfaction to consumers. But in reality consumers are often exploited due to their ignorance and lack of unity among them. Misleading advertisements, adulterated products, underweighing, overcharging, are some of the examples of exploitation of consumers. Unscrupulous and greedy businessmen exploit consumers. As a result consumers are deprived of their basic right.

An Act to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers disputes and for matters connected therewith. Enactment of consumer protection act, 1986 was one of the most important steps taken to protect the interest of consumers. The provisions of the act came into force with effect from 1 July, 1987. The act recognises consumers right to safety, right to be informed, right to choose, right to be heard, right to seek redressal and right to consumer education. The central and state level consumer protection councils are functioning in all states/union territories.

Some of the salient features of this act are:

- (1) It extends to the whole of India except the State of Jammu and Kashmir.
- (2) It shall come into force on such date as the Central Government may, by notification, appoint and different dates may be appointed for different States and for different provisions of this Act.
- (3) Save as otherwise expressly provided by the Central Government by notification, this Act shall apply to all goods and services.
- (4) Covers all the sectors whether private, public or cooperative.
- (5) Provisions of the act are compensatory in nature. In other words, the act gives consumers an additional remedy besides those which may be available to them under

the provisions of other existing laws and they are free to choose the remedy at their discretion.

(6) Enshrines the consumer's rights related to safety, information, choice, representation, redressal, and consumer education.

(7) Empower consumers seeking discontinuance of certain unfair and restrictive trade practices, defects or deficiencies in services, and stopping in services, or withdrawal of hazardous goods from the market.

2.3.1 Definitions.

In this Act, unless the context otherwise requires:

(A) Appropriate Laboratory means a laboratory or organisation-

- (i) recognised by the Central Government;
- (ii) recognised by a State Government, subject to such guidelines as may be prescribed by the Central Government in this behalf; or
- (iii) any such laboratory or organisation established by or under any law for the time being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect;

(B) Branch Office means-

- (i) any establishment described as a branch by the opposite party; or
- (ii) any establishment carrying on either the same or substantially the same activity as that carried on by the head office of the establishment;

(C) Complainant means-

- (i) a consumer; or
 - (ii) any voluntary consumer association registered under the Companies Act, 1956 (1 of 1956) or under any other law for the time being in force; or
 - (iii) the Central Government or any State Government,
 - (iv) one or more consumers, where there are numerous consumers having the same interest;
 - (v) in case of death of a consumer, his legal heir or representative; who or which makes a complaint;
- (D) Complaint** means any allegation in writing made by a complainant that-
- (i) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;
 - (ii) the goods bought by him or agreed to be bought by him; suffer from one or more defects;
 - (iii) the services hired or availed of or agreed to be hired or availed by him suffer from deficiency in any respect;
 - (iv) a trader or service provider, as the case may be, has charged for the goods or for the service mentioned in the complaint a price in excess of the price :—
 - a. *fixed by or under any law for the time being in force*
 - b. *displayed on the goods or any package containing such goods ;*
 - c. *displayed on the price list exhibited by him by or under any law for the time being in force;*
 - d. *agreed between the parties;*
 - (v) goods which will be hazardous to life and safety when used or being offered for sale to the public,—
 - a. *in contravention of any standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;*

b. *if the trader could have known with due diligence that the goods so offered are unsafe to the public;*

- (vi) services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety;”

(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, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(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 but does not include a person who avails of such services for any commercial purposes;

Explanation.- For the purposes of this clause, “commercial purpose” does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;

(E) Consumer dispute means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint.

(F) Defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods;

(G) Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;

(H) District Forum means a Consumer Disputes Redressal Forum established under clause (a) of section 9;

(I) Goods means goods as defined in the Sale of Goods Act, 1930 (3 of 1930);

(J) Manufacturer means a person who-

(i) Makes or manufactures any goods or part thereof; or

(ii) Does not make or manufacture any goods but assembles parts thereof made or manufactured by others; or

(iii) Puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer;

Explanation. — Where a manufacturer dispatches any goods or part thereof to any branch office maintained by him, such branch office shall not be deemed to be the manufacturer even though the parts so dispatched to it are assembled at such branch office and are sold or distributed from such branch office;

(J1) Member includes the President and a member of the National Commission or a State Commission or a District Forum, as the case may be;

(K) National Commission means the National Consumer Disputes Redressal Commission established under clause (c) of section 9;

(L) Notification means a notification published in the Official Gazette;

(M) Person includes,—

(i) a firm whether registered or not;

(ii) a Hindu undivided family;

(iii) a co-operative society;

(iv) every other association of persons whether registered under the Societies Registration Act, 1860 (21 of 1860) or not;

(N) Prescribed means prescribed by rules made by the State Government, or as the case may be, by the Central Government under this Act;

(N1) 'regulation' means the regulations made by the National Commission under this Act;

(N2) 'restrictive trade practice' means a trade practice which tends to bring about manipulation of price or conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include—

(a) Delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;

(b) Any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent to buying, hiring or availing of other goods or services;

(O) Service means service of any description which is made avail-able to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

(O1) *'spurious goods and services' mean such goods and services which are claimed to be genuine but they are actually not so;*

(P) State Commission means a Consumer Disputes Redressal Commission established in a State under clause (b) of section 9;

(Q) Trader in relation to any goods means a person who sells or distributes any goods for sale and includes the manufacturer thereof, and where such goods are sold or distributed in package form, includes the packer thereof.

2.3.2 Importance of Consumer Protection

1. **Business is a means of human welfare:** Business serves the customers and thus is a means not an end in itself. To serve well is in the interest of both the consumer as well as business person. Ignoring the interests of consumers may be a sure death of business.
2. **Growth with social justice:** In the preamble of our constitution, it is declared that India is a socialist secular democratic republic. Growth with social justice is the cornerstone of our economic philosophy. Exploitation of consumers is against the directive principles of state policy laid down in the constitution.
3. **Single vs multiple objectives:** Business works for various stakeholders and is thus to take care of the interests of all including customers. Business is both a social as well as an economic institution and thus, profit making cannot be the only goal as a part of society, business cannot ignore the interests of society including consumers.
4. **Stakeholder approach:** The success and survival of the business depends on the efforts made by a number of stakeholders, such as owners, consumers, employees, public and government. To sustain its survival and growth business must work for the interests of the stakeholders in general and consumers in particular.

5. **Power centre:** Business has considerable power and influence over society and government. It moulds and creates living styles, food and dress habits, etc. therefore, it is the responsibility of the business to set standards that may not damage the cause of the society and serve the interests of only a few persons.
6. **Self interest:** After liberalisation and globalisation, it is in the interest of the firm to produce quality goods and maintain its reputation as a good corporate citizen. Unless companies become consumer oriented, they are likely to be beaten by competition from multinationals. Business persons who violate the laws are likely to lose their good will and clients for all times to come.
7. **Consumer is the purpose of the business:** The basic function of a business is to create customers and retain them. Without providing goods of the right quality, quantity, and price, how can a consumer be satisfied. And without satisfied customers, not business can survive.
8. **Ethical Obligations:** Behind many successful businesses, ethical values of the founders are the cornerstones. They run, sustain values during crises and attain glories in the business world. Business without ethical values is nothing but a criminal activity. No civil society will tolerate such businesses any longer in times to come.
9. **Public support:** Business does not exist in a vacuum. Financial institutions and banks are financing their activities. Government is providing various types of support and incentives. Employees are doing their best to achieve organisational facilities.
10. **Principle of trusteeship:** According to Gandhi, anything that is provided by the society to anyone including business persons must be used for the benefit of the poor and downtrodden. Business persons are not the owners of everything in the business. They are merely trustees of the resources provided by the society to them. The society expects business persons to use such resources effectively for the benefit of all stakeholders including consumers.

2.3.3 Consumer Rights

In order to ensure that all the consumer rights are protected properly, it is necessary to develop a general awareness amongst all concerned about the rights of consumers. It is necessary for everybody to recognise that every consumer has the following rights:

1. **Safety:** The right to safety is important for safe and secure living. Without any effective regulatory mechanisms consumers suffer most in terms of safety. The right safety means the right to be protected against products, production processes and services, which are hazardous to health or life. It includes concern for consumer's long term interests as well as for their immediate requirements.
2. **Information:** Consumers should have the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, so as to make the right decision and protect themselves against abusive practices. Besides this, consumers should have the right to access information related to public affairs, which are dealt with by the government and its agencies.
3. **Choice:** The right to choice deals with the issue of choosing between different alternatives. The right to choice can be defined as an assurance, whenever possible, of availability, ability and access to a variety of products and services at competitive price, does it always mean 'just' (right) price? It is here that the role of institutions comes in, i.e. to pursue the objective of right to choice under the framework of a 'welfare state'.
4. **Representation:** The right to representation (to be heard) means the right to advocate consumers' interests with a view to receiving full and sympathetic consideration in the formation and execution of economic and other policies, which affect consumers. This right includes the right to representation in the government and in other policy making bodies as well as the right to be heard in the development of product and services before they are produced or set up. In other words, the right to representation is a right as well as a responsibility on the part of civil society to ensure that consumer interest prevails.
5. **Redressal:** The socio political dimension of the issue stems from the fact that in a stratified society (polity) like in India, vulnerable sections may not have real access to justice. This includes the right to receive compensation for supply of shoddy goods or unsatisfactory services and availability of acceptable forms of legal aid or redress for small claims wherever necessary. The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers is justified for dignified living.

6. **Consumer Education:** The right to consumer education means the right to acquire the knowledge and skills to be an informed consumer. It is easier for the literate to know their rights and to take actions to influence factors which affect consumers' decisions. This is not to say that illiterates are ignorant but they are certainly at a disadvantage, as they cannot read on their own. At present there is no clear-cut policy in India with respect to consumer education, the union and state governments have accepted the introduction of consumer education in school curriculum. The Indira Gandhi National Open University (IGNOU) has devised a syllabus for distant education on consumer protection.
7. **Basic Needs:** The basic needs of the consumers of a country emanate from the question of survival and dignified living. It includes adequate food, clothing, health care, drinking water and sanitation, shelter, education, energy and transportation. Thus, there are two goods and six services which come under the ambit of basic needs. Without the fulfilment of these eight needs it would be impossible for any human being to live in a dignified manner.
8. **Healthy environment:** Healthy environment means the right to be protected against environmental pollution so as to enhance the quality of life. It includes protection against environmental degradation. It acknowledges the need to protect and improve the environment for future generations as well.

Therefore, in order to protect the interest of consumers. The government of India has adopted several measures and is not lacking in providing the consumers with the mechanism or the enabling environment for protecting the various rights we have mentioned above. The challenge is in the strengthening of the administrative mechanism in implementing such measures, with incentives for the enforcement officials so that they perform their duties without being influenced.

2.3.4 Consumer Responsibilities

Although efforts have been made to protect the interest of consumers by both government and non-government organisations but exploitation of consumers will not be stopped till consumers come forwards to safeguard their own interests first. Along with government

and voluntary organisations, consumers have also to bear some responsibilities. Some responsibilities are:

1. **Consumer must exercise his rights:** These rights are : right to safety, right to be informed, right to choose, right to be heard, right to seek redressal and right to consumer education. Consumers must be aware of their own rights with regard to the products and services they buy from the markets.
2. **Cautious consumer:** Before purchasing, consumer must insist on getting full information on the quality, quantity, utility, price, etc. of the goods or services. This will ensure a better purchase. He should not depend entirely on the seller.
3. **Filing complaint for the redressal of genuine grievances:** Sometimes consumers ignore the deception of traders believing that the loss is small but this attitude encourages corrupt business practices to continue. On the other hand, some consumers also make exercise claims for compensation for small defects in goods which are not justified.
4. **Consumer must be quality conscious:** This is the only way to eradicate the problems of adulteration and spurious goods. While making purchases, consumers must look for standard quality certification marks like ISI, Agmark, FPO, Woolmark, etc.
5. **Advertisements often exaggerate:** Do not be carried away by these. Consumers should compare the uses of the product given in the advertisement copy and the actual product. Any discrepancy should be brought to the notice of the sponsor of the advertisement.
6. **Insist on cash memo:** If there is any defect in the goods purchased and consumer has to make a complaint, the cash memo must be there as proof of purchase. A seller is bound to give a cash memo.

Consumers can be protected from exploitation if the consumer movement gets involved seriously. The educated consumers in society should also raise their voices and fight for the desired changes. Unless the consumers raise these issues, either through active participation

in consumer organisations or through other groups, the question of the rights of consumers will only remain textbook material.

2.3.5 Ways and Means of Consumer Protection

Consumers in India need a fair deal. Exploitation of consumers must be stopped forthwith. Consumers of the country must unite themselves to overcome the threats posed by business forms. However, consumer movement in India is still in its infancy. More than 16 percent of the people live below poverty line and the rural public are not integrated into the mainstream of consumerism. Also they do not have access to the information concerning consumer protection provided by the government. Hence, the consumer movement in India is to be developed in a perspective different from the elitist approach of the developed countries. It is to be a social movement, wherein people of all walks of life have to play their role. Following points offer some ways and means of consumer protection followed in India.

- i. **Lok Adalats:** The concept of Lok Adalats, in India, is catching up fast. Here, aggrieved parties can directly approach these Adalats with their grievances. Issues are discussed on the spot and decisions are taken thereafter. The procedure followed in these Adalats saves time and money of the general public. The union government established a Committee for implementing legal aid schemes in the country, in consonance with provisions of article 39A of the constitution which Guarantees justice to all citizens notwithstanding their economic or their disabilities. Lok Adalat has become part of a speedy, effective and economical redressal system. Delhi transport corporation, Indian Railways, Delhi Development Authority, Mahanagar Telephone Nigam Limited, Delhi Vidyut Board hold Lok Adalat from time to time to sort out the problems faced by users.
- ii. **Public Interest Litigation:** Public interest litigation involves efforts to provide legal representation to unrepresented groups and interests. Such efforts have been undertaken in recognition of the fact that the legal system normally does not provide legal services to large segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, minorities and others. Thus, any individual or organisation can approach the court for remedial

action for effective implementation of laws, environmental protection or any other social evils like bonded labour.

The judiciary has made several innovations in connection with PIL. Firstly, the Anglo-Saxon concept of locus standi has been given up. In accordance with this concept, it is the aggrieved party only which can approach the court for compensation. But under the PIL concept, any person can move the court in the interest of weaker section, who or which may not be able in a position to seek remedy on their own. Secondly, a complaint sent to the Supreme Court even on a post card may be treated as a writ petition, that is, a petition seeking the court's intervention to stop any activity or practice in the public interest.

- iii. **Environmentally Friendly Products:** The ministry of environment and forests has introduced the "Eco- Mark" scheme. The Scheme authorises producers to use the eco-mark label with the symbol of an earthen pitcher if the products satisfy the conditions laid down regarding the production processes and use of environmental friendly materials. To begin with, it has included consumer items like toilet soap, detergents, paints, packaging material, food items, edible oil, etc. The scheme is consumer oriented so that people buy products which are not harmful or are least harmful to the environment in their manufacture, use and disposal.

The objective of the scheme is to provide an incentive for manufacturers and importers to reduce adverse environmental impact of products. Also, the scheme assists the consumers to be environmentally conscious in their daily lives by providing information to take account of environmental factors in their purchase decisions, encourage citizens to purchase products which have less harmful environmental impact and ultimately to improve the quality of environment.

- iv. **Redressal Forums and Consumer Protection Councils:** Under the consumer protection act, 1986, a judicial machinery has been set up to deal with consumer grievances and disputes. The district Forums, state commissions are constituted to provide for a simple, speedy and inexpensive redressal of consumer grievances.

Under the provisions of the act, consumer protection councils have been set up by the central and state governments for the promotion and protection of the rights of consumers. These councils are also to be constituted at the district level by the state governments according to the amendment of the Consumer Protection Act in 2002.

- v. **National Youth Award on Consumer Protection:** to encourage the participation of consumer and youth in the field of consumer protection, the union Ministry has instituted two national awards, namely, National Award on consumer Protection and National Youth Award on Consumer Protection which are given every year. The ministry has also instituted a National Women Award to involve women who have done outstanding work in the field of consumer protection.
- vi. **Publicity Measures:** There must be regular telecasting of a fortnightly programme on consumer protection by Doordarshan. The Ministry is broadcasting a weekly programme Apne Adhikar. From 20 commercial broadcasting stations of AIR. Also, the ministry is bringing out a quarterly journal entitled Upabhokta Jagran.
- vii. **Consumer Welfare Fund:** The union ministry of Finance, department of revenue has passed the central Excise and customs laws act, 1991, which provides for creation of consumer Welfare Fund wherein the amount of excess excise/custom duties which are not refundable to manufacturers or importers, shall be credited and the money from this fund will be used for promoting the welfare of consumers. The working group constituted to suggest guidelines for utilisations of the CWF has identified the following priority areas of funding:
 - Centralised production and distribution of literature.
 - Setting up facilities for training and research in consumer education and related matters on national and regional basis.
 - Community based rural awareness projects.
 - Setting up complaints handling counselling and guidance mechanisms like consumer guidance bureau.
 - Setting up of consumer product testing laboratories.

- Building up of infrastructure facilities for organising consumer education activities on a permanent basis at district and taluka levels.

2.4 TRADE PRACTICES

Trade practice is a method of competition, operating policy (as the use of standards of size, shape, and quality of materials), or business procedure common to members of a line of business or industry that may be formally adopted sometimes as a rule under government auspices.

2.4.1 Restrictive Trade Practices

The Act defines ‘restrictive trade practice’ as a trade practice which tends to bring about manipulation of price or conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely lead to rise in the price; any trade practice which requires a consumer to buy, hire or avail of any goods or services as condition to buying, hiring or availing of other goods or services.

2.4.2 Unfair Trade Practices

‘Unfair trade practice’ means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely;-

(1) The practice of making any statement, whether orally or in writing or by visible representation which:-

- falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
- falsely represents that the services are of a particular standard, quality or grade;
- falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;

- represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
- represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
- makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
- gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof; Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;
- makes to the public a representation in a form that purports to be-
 1. a warranty or guarantee of a product or of any goods or services; or
 2. a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;
- materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;
- gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation. - For the purposes of clause (1), a statement that is-

- a) expressed on an article offered or displayed for sale, or on its wrapper or container; or
 - b) expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or
 - c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;
- (2) Permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation :- For the purpose of clause (2), ‘bargaining price’ means:-

- a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or
 - b) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;
- (3) Permits:-
- a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;

- b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;

(3A) Withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure the information about final results of the scheme.

Explanation:- For the purposes of this sub-clause, the participants of a scheme shall be deemed to have been informed of the final results of the scheme where such results are within a reasonable time, published, prominently in the same newspapers in which the scheme was originally advertised;

(4) Permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;

(5) Permits the hoarding or destruction of goods, or refuses to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.

(6) Manufacture of spurious goods or offering such goods for sale or adopts deceptive practices in the provision of services.

2.5 CONSUMER PROTECTION COUNCILS

2.5.1 Central Consumer Protection Council

1. The Central Government shall, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Central Consumer Protection Council (hereinafter referred to as the Central Council).
2. The Central Council shall consist of the following members, namely:-

- a. The Minister in charge of the consumer affairs in the Central Government, who shall be its Chairman, and
- b. Such number of other official or non-official members representing such interests as may be prescribed.

2.5.1.1 Procedure for meetings of the Central Council

1. The Central Council shall meet as and when necessary, but at least one meeting of the Council shall be held every year.
2. The Central Council shall meet at such time and place as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed.

2.5.1.2 Objectives of the Central Council

The objects of the Central Council shall be to promote and protect the rights of the consumers such as:-

- a) The right to be protected against the marketing of goods and services which are hazardous to life and property.
- b) The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be so as to protect the consumer against unfair trade practices.
- c) The right to be assured, wherever possible, access to a variety of goods and services at competitive prices.
- d) The right to be heard and to be assured that consumer's interests will receive due consideration at appropriate forums.
- e) The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
- f) The right to consumer education

2.5.2 State Consumer Protection Council

1. The State Government shall, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Consumer Protection Council for the state. (here in after referred to as the State Council).
2. The State Council shall consist of the following members, namely:-
 - i. The Minister incharge of consumer affairs in the State Government who shall be its Chairman;
 - ii. Such number of other official or non-official members representing such interests as may be prescribed by the State Government.
 - iii. Such number of other official or non-official members, not exceeding ten, as may be nominated by the Central Government.
3. The State Council shall meet as and when necessary but not less than two meetings shall be held every year.
4. The State Council shall meet at such time and place as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed by the State Government.

2.5.2.1 Objects of the State Council

The objects of every State Council shall be to promote and protect within the State the rights of the consumers laid down in clauses (a) to (f) of section 6.

2.5.3 District Consumer Protection Council

The State Government shall establish for every district, by notification, a council to be known as the District Consumer Protection Council with effect from such date as it may specify in such notification. The District Consumer Protection Council (hereinafter referred to as the District Council) shall consist of the following members, namely:-

- I. The Collector of the district (by whatever name called), who shall be its Chairman;
and

- II. Such number of other official and non-official members representing such interests as may be prescribed by the State Government.

The District Council shall meet as and when necessary but not less than two meetings shall be held every year. Further, the District Council shall meet at such time and place within the district as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed by the State Government.

2.5.3.1 The objects of District Council

The objects of every District Council shall be to promote and protect within the district the rights of the consumers laid down in clauses (a) to (f) of section 6.

2.6 POWER OF AND PROCEDURE APPLICATION TO THE NATIONAL COMMISSION

The National Commission shall consist of:

(a) a person who is or has been a Judge of the Supreme Court, to be appointed by the Central

Government, who shall be its President [Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of India;]

(b) four other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman [Provided that every appointment under this clause shall be made by the Central Government on the recommendation of a selection committee consisting of the following, namely:-

1. a person who is a Judge of the Supreme Court, to be nominated by the Chief Justice of India-Chairman.
2. the Secretary in the Department of Legal Affairs in the Government of India-Member.

3. Secretary of the Department dealing with consumer affairs in the Government of India-Member.

The salary or honorarium and other allowances payable to and the other terms and conditions of service of the members of the National Commission shall be such as may be prescribed by the Central Government.

Every member of the National Commission shall hold office for a term of five years or up to the age of seventy years, whichever is earlier and shall not be eligible for reappointment. Notwithstanding anything contained in sub-section (3), a person appointed as a president or as a member before the commencement of the Consumer Protection (Amendment) Act, 1993, shall continue to hold such office as President or member, as the case may be, till the completion of his term.

2.6.1 Jurisdiction of the National Commission

The National Commission shall have jurisdiction to :-

- a) appeal against the orders of any State Commission; and
- b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or
- c) has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

2.6.2 Power of and procedure applicable to the National Commission

The National Commission shall, in the disposal of any complaints or any proceedings before it, have-

- i. the powers of a civil court as specified in sub-sections (4), (5) and (6) of section 13;
- ii. the power to issue an order to the opposite party directing him to do any one or more of the things referred to in clauses (a) to (i) of sub-section (1) of section 14, and follow such procedure as may be prescribed by the Central Government.]

Any person, aggrieved by an order made by the National Commission in exercise of its power conferred by sub-clause (i) of clause (a) of section 21, may prefer an appeal against such order to the Supreme Court within a period of thirty days from the date of the order:-

- a. Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

Every order of a District Forum, the State Commission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final.

- (1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.
- (2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay.

The National Commission shall have administrative control over all the State Commission in the following matters, namely:-

- a. calling for periodical returns regarding the institution, disposal, pendency of cases;
- b. issuance of instructions regarding adoption of uniform procedure in the hearing of matters, prior service of copies of documents produced by one party to the opposite parties, furnishing of English translation of judgments written in any language, speedy grant of copies of documents;

- c. Generally overseeing the functioning of the State Commissions or the District Forum to ensure that the objects and purposes of the Act are best served without in any way interfering with their quasi-judicial

The State Commission shall have administrative control over all the District Forums within its jurisdiction in all matters referred to in sub-section (1)

Enforcement of orders by the Forum, the State Commission or the National Commission

Every order made by the District Forum, the State Commission or the National Commission may be enforced by the District Forum, the State Commission or the National Commission, as the case may be, in the same Forum, the State Commission or the National Commission to send, in the event of its inability to execute it, 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, the place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated, and thereupon, the court to which the order is so sent, shall execute the orders as if it were a decree or order sent to it for execution.

Dismissal of frivolous or vexatious complaints

Where a complaint instituted before the District Forum, the State Commission or, as the case may be, the National Commission is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees, as may be specified in the order.

Penalties

Where a trade or a person against whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the

National Commission, as the case may be, such trader or person [or complainant] shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees, or with both:

Provided that the District Forum, the State Commission or the National Commission, as the case may be, may, if it is satisfied that the circumstances of any case so require, impose a sentence of imprisonment or fine, or both, for a term lesser than the minimum term and the amount lesser than the minimum amount, specified in this section.

2.7 ROLE OF CONSUMER ORGANISATIONS

There are about 500 consumer associations, which are working in the field of consumer protection. They are taking up various aspects of consumer exploitation. However, only a handful of them has achieved any prominence. Some of them are: consumer guidance society of India, Mumbai; citizens action group; Mumbai; consumer education and research centre, Ahmedabad; common cause, New Delhi; consumer utility and trust society, Jaipur; and voice, new Delhi. These consumer organisations are performing, among others, a number of functions concerning consumer affairs.

- Bringing out brouchers, journals, monographs;
- Accelerating consumer awareness;
- Collecting data on different products and testing them;
- Arranging talks, seminars, workshops, and conferences for the purpose of focusing on the problems of consumers and finding solutions thereof;
- Encouraging consumers for boycotting goods, which are defective and bad quality, by putting up confrontation and resistance;
- Filling suits, complaints and writ petitions on behalf of the consumers before the courts;
- Investigating into problems of consumers;

- Organising protests against price rigging, adulteration, misuse of drugs and cosmetics, laws for consumers protection.
- Educating the consumers to help themselves;
- Educating women regarding consumerism;
- Organising exhibitions concerning spurious, adulterated products, etc. to create awareness;
- Extending support to governmental agencies in cases of adulteration, sale of hazardous products and other malpractices;
- Keeping schools start consumer education to develop in children a critical sense at an early age;
- Promoting network of consumer associations region-wise and state wise along with federation at the apex level;
- Running voluntary complaint counters for consumer guidance and counselling;
- Motivating people to adopt socially desirable consumption standards.

2.8 CONSUMER COORDINATING COUNCIL

The consumer coordinating council (an apex body of consumer organisations India) has been conducting several programmes on consumer education for activists and others. It has published training manual covering: (i) the consumer protection act; (ii) water, food and public distribution system; (iii) health, drugs and cosmetics; and (iv) road transports and railways.

2.9 ROLE OF THE PRESS

Since, the enactment of the consumer protection act and even before that, newspapers and magazines have been responding to the needs of consumers in more than one way. Apart from publishing articles, columns, etc. newspapers have also tried to come to the rescue of harassed consumers. For instance, the Indian express was one of the first newspapers to start a consumer complaint column. It carried the problems and grievances of consumers and took up the responsibility of forwarding these to the concerned authorities for redress. In many cases the results were published and consumers were able to get their

grievances settled. The success and popularity of column in the Indian express motivated other newspapers to follow suit. Today, almost all newspapers carry a consumer complaint column every week. The regional language newspapers are also not lagging far behind.

2.10 ROLE OF UNIVERSITIES AND SCHOOLS

Indira Gandhi national Open University (IGNOU) has made a beginning by developing a comprehensive syllabus which provides the basic framework for other universities to develop a curriculum for consumer education. The Kakitaya University in Warangal, Andhra Pradesh, is already running a one year post graduate course in consumer law. The central board of secondary education (CBSE) has published a teachers' manual on consumer education which provides guidelines and examples by which co-curricular activities can be organised and acted upon for creating awareness among school students.

There has been a mushroom growth of voluntary consumer organisations. Most of them are without any resources and as such their contribution to consumer movement has been insignificant. Some of the large organisations lack popular base and decentralised decision making. There is an urgent need of an apex consumer organisation, which would help in coordinating the activities of voluntary consumer organisations in India.

2.11 SUMMARY

According to the provisions of the Consumer Protection Act, 1986 'unfair trade practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including the practice of making any statement, whether orally or in writing or by visible representation which falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model; falsely represents that the services are of a particular standard, quality or grade; falsely represents any re-built, second-hand, reno-vated, reconditioned or old goods as new goods; makes a false or misleading representation concern-ing the need for, or the usefulness of, any goods or services etc. permits the publication of any advertisement whether in any news-paper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price. 'Bargaining price' has been defined as a price that is stated in any advertisement to be a bargain price, by reference to an ordinary

price or otherwise, or a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold.

It is necessary for everybody to recognise that every consumer has certain rights which are: safety, information, choice, representation, redressal, consumer education, basic needs, and healthy environment.

The consumer movement in India is to be developed in a perspective different from the elitist approach of the developed countries. It is to be a social movement, wherein people of all walks of life have to play their role. Enactment of consumer protection act 1986 was one of the most important steps taken to protect the interest of consumers. The provisions of the act came into force with effect from 1 July, 1987. The act recognises consumers' right to safety, right to be informed, right to choose, right to be heard, right to seek redressal and right to consumer education. The central and state level consumer protection councils are functioning in all States/Union Territories.

2.12 SELF ASSESSMENT QUESTIONS

Q 1. Why is consumer protection required in India?

Ans: _____

Q 2. Who is consumer according to the consumer protection Act?

Ans: _____

Q3. Under which circumstances the public interest Litigation is filed?

Ans: _____

- 3.1 Introduction
- 3.2 Objectives
- 3.3 Historical Background of Competition Act, 2002
- 3.4 Statement of objectives
- 3.5 Scope of Competition Act ,2002
- 3.6 Important Definition of Competition Act, 2002
- 3.7 Features of Competition Act,2002
- 3.8 Distinguish between MRTP Act and Competition Act
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- 3.12 Factors to be considered while deciding Vertical Agreements
- 3.13 IPR's not Anti- Competitive
- 3.14 Dominant position
- 3.15 Factors determine Dominant position
- 3.16 Practices Constitute abuse of Dominant Position
- 3.17 Consequences of abuse of Dominant Position
- 3.18 Combination and Regulation of Combination
- 3.19 Exemption from the Provisions of section 5
- 3.20 Regulation of Combinations
- 3.21 Transaction donot have adverse effect on competition
- 3.22 Establishment of Commission
- 3.23 Competiton of Commission
- 3.24 Appointment of chairperson and members

- 3.25 Terms of office of Chairperson and other members
- 3.26 Resignation of Chairperson or members of commission
- 3.27 Removal of Chairperson or member of commission
- 3.28 Duties of Commission
- 3.29 Power and Functions of commission
- 3.30 Summary
- 3.31 Important Practice questions
- 3.32 Practice questions
- 3.33 Glossary
- 3.34 References

3.1 Introduction

The Competition Act, 2002 was enacted by the parliament of India and governs Indian competition law. It replaces the MRTP Act (Monopolies and Restrictive Trade Practice Act). Under this legislation, the competition commission of India was established to present the activities that have an adverse effect on competition in India. This act extends to whole of India except the state of Jammu and Kashmir. It is a tool to implement and enforce Competition policy and to prevent and furnish anti-Competitive business practices by firms and unnecessary government interference in the market.

The Competition Act, 2002 was amended by the Competition (amendment) Act, 2007 and again by the Competition (Amendment) Act, 2009.

The Government of India in April 1964 appointed the Monopolies inquiry Commission under the chairmanship of Justice K.C Das Gupta, a judge of the Supreme Court, to inquire into the extent and effect of Concentration of economic power in private hands and prevalence of monopolistic and restrictive trade practices in important sections of economic activity. The MRTP act was intended to cause the rise of Concentration of wealth in a few hands and of monopolistic practices. It was repealed on September, 2009. The Act has been successfully replaced by the competition act, 2002. The Competition Bill, 2001 was introduced in Lok Sabha by Finance Minister Arun Jaitley on 6 August, 2001.

3.2 Objectives

After reading this unit, you would be able to

- To understand the concept of Competition Act, 2002.
- To understand the prohibition of Competition Act, 2002.
- To understand the concepts deals with Competition Act, 2002.

3.3 Historical background of competition act, 2002

India being a democratic nation promoted “social justice” and existence of an Economic System that does not result into concentration of economic power in few hands. With this objective, the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 was established to prohibit monopolistic and restrictive trade practices detrimental to the public interest. The MRTP Act was amended several times, but could not could not attain the desired results.

Besides, the Government thought that the Monopolies and Restrictive Trade Practices Act, 1969 has become obsolete in view of international economic development for removing controls and resorting to liberalization by opening up the economy of the country to face competition from within the country and out side. In pursuit of the policy of globalisation the Government of India constituted a High Level Committee on Competition Policy and Law. The Committee submitted its report on May 22, 2000 to the Central Government. Thereafter, the Central Government consulted various trade and industry associations and also the general public on this subject. All these efforts finally culminated into the drafting of the Competition Bill, 2001.

The Competition Bill was passed by both the Houses of Parliament and received the assent of the President on 13th January, 2003. The Bill came on the Statute Books as THE COMPETITION ACT, 2002 (12 OF 2003).

3.4 Statement of Objectives

The prime objective of the establishment of the Competition Act was do away with the rigid structure of the MRTP Act, 1969. The aim was to shift the focus from curbing monopolies (by the MRTP Act) to promoting competition (through the Competition Act)

1. In the pursuit of the globalisation, India aimed at removing controls and opening its economy to the world economy. Hence, the MRTP Act was repealed and focus was shifted from curbing monopolies to promoting competition.

2. The Act seeks to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India.

3. To establish a quasi-judicial body [Competition commission of India (CCI)] which shall also undertake competition advocacy for creating awareness and imparting training on competition issues.

4. To curb negative aspects of competition through the medium of CCI.

5. To create a fund called as competition Fund. The grants given by the Central Government, costs realized by the Commission and application fees charged will be credited into this Fund. The pay and allowances and the other expenses of the Commission will also be borne out of this Fund. The Act provides for empowering the Comptroller and Auditor-General of India to audit the accounts of the Commission. The Central Government will be required to lay the annual accounts of the Commission, as audited by the Comptroller and Auditor-General and also the annual report of the Commission before both the Houses of Parliament.

6. The Act aims at repealing the Monopolies and Restrictive Trade Practices Act, 1969 and the dissolution of the Monopolies and Restrictive Trade Practices Commission. The Act provides that the cases pending before the Monopolies and Restrictive Trade Practices Commission will be transferred to the CCI except those relating to unfair trade practices which are proposed to be transferred to the relevant for a established under the Consumer Protection Act, 1986.

7. To promote and sustain Competition in markets in India.

8. To protect the interests of consumers.

3.5 Scope of the Act

(1) This Act may be called the Competition Act, 2002.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It came into force on different dates as the Central Government by notification in the Official Gazette, appointed.

Provide that different dates were appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be constructed as a reference to the coming into force of that provision

3.6 Important definitions (section 2)

- Section 2 (a) “acquisition” means, directly or indirectly, acquiring or agreeing to acquire: -
 - (a) shares, voting right or assets of any enterprise; or
 - (b) control over management or control over assets of any enterprise;
- Section 2 (b) “agreement” includes any arrangement or understanding or action in concert,-
 - (i) whether or not, such arrangement, understanding or action is formal or in writing ; or
 - (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings ;
- Section 2 (ba) “Appellate Tribunal” means the Competition Appellate Tribunal established under sub-section (1) of section 53A;]
- Section 2 (c) “cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distributor; sale or price of, or, trade in goods or provision of services;

- Section 2 (d) “Chairperson” means the Chairperson of the Commission appointed under sub-section (1) of section 7;
- Section 2 (e) “Commission” means the Competition Commission of India established under sub-section (1) of section 8;
- Section 2 (f) “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 ;
- Section 2 (g) “Director-General” means the Director-General appointed under subsection (1) of section 16 and includes any Additional, Joint, Deputy or Assistant Directors General appointed under that section;
- Section 2 (h) “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 relatable 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;
- Section 2 (i) “goods” means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes -
 - (i) products manufactured, processed or mined;
 - (ii) debentures, stocks and shares after allotment;
 - (iii) in relation to goods supplied, distributed or controlled in India, goods imported into India;
- Section 2 (j) “Member” means a Member of the Commission appointed under subsection (1) of section 8 and includes the Chairperson;
- Section 2 (k) “notification” means a notification published in the Official Gazette;
- Section 2 (l) “person” includes -
 - (i) an individual;
 - (ii) a Hindu undivided family;
 - (iii) a company;
 - (iv) a firm;
 - (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;

- (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 (1 of 1956);
 - (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;
- Section (m) “practice: includes any practice relating to the carrying on of any trade by a person or an enterprise;
 - Section (n) “Prescribed” means prescribed by rules made under this Act,
 - Section(o) “ 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;
 - Section (p) “public financial institution” means a public financial institution specified under section 4A of the Companies Act, 1956, (1 of 1956) and includes a State Financial, Industrial or Investment Corporation;
 - Section (q) “regulations” means the regulations made by the Commission under section 64;
 - Section (r) “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;

- Section (s) “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 homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas;
- Section (t) “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;
- Section (u) “service” means service of any description which is made available to r? potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment’ amusement, construction, repair, conveying of news or information and advertising;
- Section (v) “shares” means shares in the share capital of a company carrying voting rights and includes -
 - (1) any security which entitles the holder to receive shares with voting rights;
 - (2) stock except where a distinction between stock and share is expressed or implied;
- Section 2 (w) “statutory authority” means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefore or any matter connected therewith or incidental thereto;
- Section 2 (x) “trade” means any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services;

- Section 2 (y) “turnover” includes value of sale of goods or services;
- Section 2 (z) Words and expressions used but not defined in this Act and defined in the Companies Act, 1956 (1 of 1956) shall have the same meanings respectively assigned to them in that Act.

3.7 Features of competition act, 2002

- (1) The Competition Act, 2002 has been enacted to prevent practices having an appreciable adverse effect on competition, to promote and sustain competition in the market and to protect the interests of consumers and to ensure freedom of trade.
- (2) With the enforcement of the competition Act, 2002 the MRTP Act, 1969 shall stand repealed and the MRTP Commission shall be dissolved.
- (3) The Competition Act, 2002 seeks to achieve its objectives by prohibiting anticompetitive trade agreements, preventing abuse of dominance, regulating combination and formulating a policy on competition, creating awareness by imparting training on competition issues.
- (4) The Competition Act, 2002 provides for the establishment of Competition Commission of India and prescribes its duties, functions, and powers.
- (5) The open and fair competition also protects the interests of the consumers which is one of the objectives as provided in the Preamble of The Competition Act.
- (6) The Act is a very important socio-economic legislation with its thrust on -
 - (i) prohibition of anti-competitive agreements;
 - (ii) prohibition of abuse of dominant position; and
 - (iii) regulation of certain combinations’

- (7) The Competition Act applies to all goods including the goods imported into India and services as defined in the Act'
- (8) The Act is applicable to all the enterprises which, inter alia, include private sector undertakings, public sector undertakings, Government Departments performing non-sovereign functions for consideration.
- (9) Amendments to the Act The Competition Act was first amended by the Competition (Amendment) Act, 2007 which was assented by the President of India on September 24, 2007. the Amendment Act, 2007, inter alia provides for the following :-
- (i) the Commission shall be an expert body which would function as a market regulator for preventing and regulating anti-competitive practices in the country in accordance with the Act and it would also have advisory and advocacy functions in its role as a regulator;
 - (ii) for establishment of the Competition Appellate Tribunal, which shall be a three-member quasi-judicial body headed by a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court' to hear and dispose of appeals against any direction issued or decision made or order Passed by the Commission;
 - (iii) for adjudication by the Competition Appellate Tribunal of claims on compensation and passing of orders for the recovery of compensation from any enterprise for any loss or damage suffered as a result of any contravention of the provision of the Act;
 - (iv) for implementation of the orders of the Competition Appellate Tribunal as a decree of a civil court;
 - (v) four filing of appeal against the orders of the competition Appellate Tribunal to Supreme Court.

The Act was further amended by the competition.(Amendment) ordinance,2009 which brought an end to the MRTP Commission, with effect from October 14, 2009' The Competition (Amendment) Ordinance, 2009 has been repealed and replaced by the Competition (Amendment) Act, 2009.

3.8 Distinguish between MRTP Act and Competition act

Following are the important differences between the MRTP Act, 1969 and Competition Act, 2002 :

- (1) MRTP Act is based on the pre-liberalization scenario whereas Competition Act is based on the post liberalization scenario.
- (2) MRTP Act emphasizes on curbing monopolies whereas Competition Act emphasizes on promoting competition.
- (3) MRTP Act provides for compulsory registration of agreements relating to restrictive trade practices whereas in Competition Act, there is no such requirement of registration of agreements.
- (4) Under Competition Act, dominance per se is not bad but only the abuse of dominance is considered bad whereas under the MRTP Act, dominance itself is bad.
- (5) Combinations are not regulated by MRTP Act whereas they are regulated by Competition Act.
- (6) MRTP Act does not vest MRTP Commission power to inquire into cartels of foreign origin in a direct manner whereas the Competition Act seeks to regulate them.

3.9 Anti competitive agreements

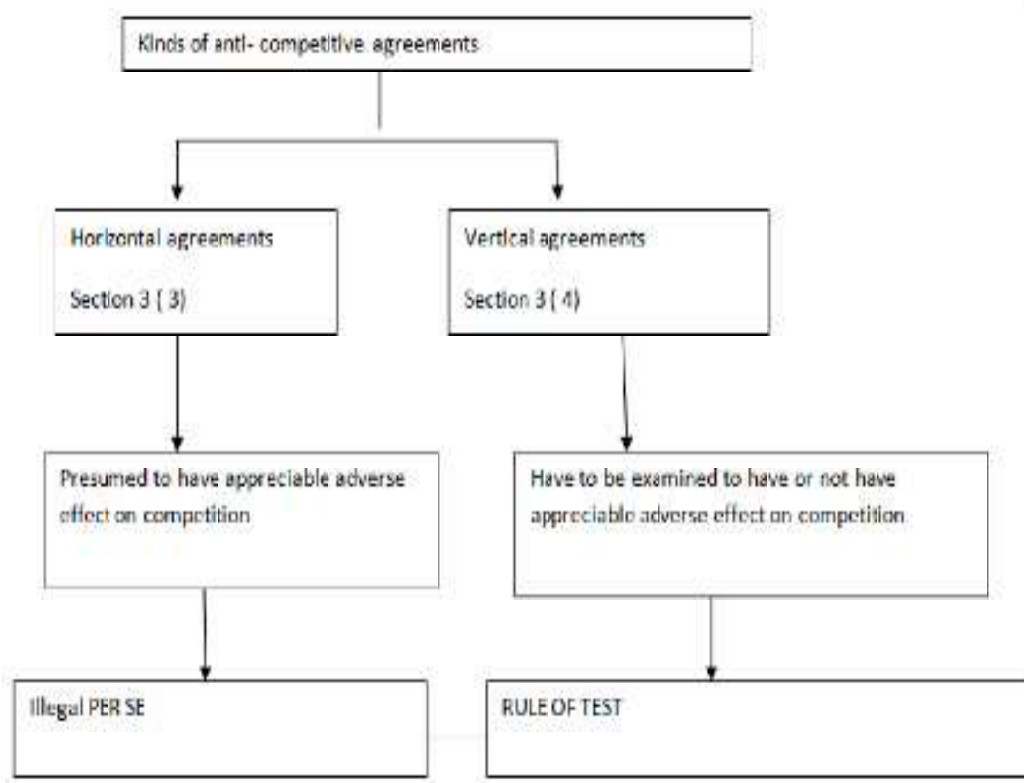
Section 3 of the competition act provides for the prohibition of entering into certain agreements which are termed as anti competitive agreements . There is no specific definition of the term “ anti- competitive agreements”.

Definition of the competition has been given by the Raghavan committee in High level committee on competition policy and law. It means 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, profits, sales or market share” (world bank , 1999) . The word “Agreement” is defined in section 2 (b) of the competition act, 2002 which includes amongst others any agreement or undertaking or action in concert whether formal or in writing or whether intended to be enforceable by legal proceedings. The agreement which is contrary to or inconsistent with competition agreement will be called as anti- competition agreement.

3.10 Prohibition on anti- competitive agreements (section 3) : Void

Under section 3 of the competition act, 2002 , prohibition has been imposed on anti- competitive agreements. Section 3 (1) of the competition act provides that (i) no enterprise or association of enterprises of person or association of persons (ii) shall enter into any agreement in respect of production , supply, distribution, storage, acquisition or control of goods or provision of services (iii) which causes or is likely to cause an appreciable adverse effect on competition within india. This provision prohibits any enterprise or person or their association from entering into any anti- competitive agreement which causes or is likely to cause an appreciable adverse effect on competition. Any such agreement, if made, shall be void under section 3 (2) of the act.

3.11 Kinds of anti- competitive agreements



3.11.1 Horizontal agreements

The first category of anti- competitive of agreements covers the agreements emanating from the collective action of a group of persons engaged in the same line of business activity. These may be referred to as horizontal arrangements. These are in the nature of cartels or concerned actions which envisages uniformity or harmonization of the market behaviour of a group of competing producers or suppliers. Such practices are pursued either under a bi- partite agreement or arrangement directly entered into by the participating

enterprises or by an arrangement or agreement arrived at through the instrumentality of association of enterprises of persons of which the participating parties are members.

3.11.2 Consequences of entering horizontal agreements:

The agreements which are termed as horizontal agreements [under clauses (a) to (d) of section 3 (3) of the act] are assumed to have an appreciable adverse effect on competition. Therefore, these are considered to be illegal per se and do not require any test of ‘ Rule of reason’. The rule of reason requires to determine whether an agreement or arrangement or practice has an adverse effect on competition or not, it must be examined by considering all the facts and features of the case. But in case of per se rule, no such examination is required, it is presumed to be harmful to the competition and therefore, it is illegal , per se. Horizontal agreements are arrangements between enterprises at the same stage of the production chain and that is generally between two rivals for either fixing prices or for limiting production or for sharing markets. In all such agreements, there is a presumption in the Act that such agreements cause AAEC. Cartel is also a horizontal agreement. This is generally between producers of goods or providers of services for price-fixing or sharing of market, and is generally regarded as the most pernicious form of anti-competitive agreement.

The agreements as specified under clauses (a) or (d) of section 3 (3) of the competitive act, 2002 are presumed to be void being anti – competitive agreements. Section 3(3) provides that an agreement would have AAEC if there is a practice that is carried on, or a decision that has been taken, between any of the parties mentioned above, including cartels, engaged in identical or similar trade of goods or provision of services, that can either –

- a. Directly or indirectly determine the 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 (*effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding*).

The section provides an exception to the joint ventures entered into by the parties if they increase the efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services. Section 3(1) of the Act cannot be invoked independently and is necessarily to be used along with section 3(3) related to horizontal agreements or section 3(4) related to vertical agreements. However, it should be clarified that section 3(1) is not merely a suggestive provision but is essentially the “genus” of the Act. It should also be invoked independently to serve the interest of consumers and also cover various other types of agreements which may not fall under the aegis of section 3(3) or 3(4).

Under section 19, to determine whether an agreement has an appreciable adverse effect on competition under section 3, the competition commission of India (expert body established to function as a market regulator for preventing and regulating anti-competitive practices) shall consider the following factors:-

- 1. Creation of barriers to new entrants in the market.**
- 2. Driving existing competitors out to the market.**
- 3. Foreclosures of competition by hindering entry in to the market.**
- 4. Accrual of benefits to consumers.**
- 5. Improvements in production or distribution of goods or provision of services.**
- 6. Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services**

(1) Price fixing agreements [clause (a) of section 3 (3)] :

It is the common form of anti- competitive agreement which directly or indirectly determines purchase or sale price. This is also referred to as a price cartel. It is to substitute prices determined by fiat of combination or concert here without taking into an account the interest of the consumers. The aim and objective of the price fixing agreement is the elimination

of competition. Such agreements are made by way of informal understanding as to prices for prevailing completion and keeping the price up.

A concert means that certain traders combine together to fix the price of commodity or raise the price at the same or about the same time. The intention is to limit competition among themselves. A feature of concert is that the price of the commodity is fixed not on the basis of the supply and demand in the market but by the understanding .

Thus, agreement of price fixing involves the power to control the market and to raise the prices arbitrarily above the competitive level. Such an agreement to fix the prices is presumed to have an appreciable adverse the effect on competition and therefore, is void PER SE.

(2) Anti – competitive agreements which limits production, supply etc. [clause (b) of section 3 (3)]

Clause (b) of section 3 (3) of the competitive act, 2002 deals with the anti- competitive agreement which limits or controls production, supply, markets, technical development, investment, or provision of services . such agreements, shall be presumed to have an appreciable adverse effect on competition and therefore, are void per se. The object of these agreements or arrangements is to eliminate competition by limiting quantity.

Case study: Involving section 3(3) (a) and section 3 (3) (b)

FICCI – multiplex association of india vs United producers and distributors forum

The producers and distributors of films formed united producers and distributors forum taking a collective decision of not to release any new films to the multiplexs. The main aim was to presuurize the multiplexs to accept new terms of revenue sharing ratio,so that the producers and distributors could extract better revenue from multiplexs. Thus, this led to the formation of cartelisation trying to fix sales price by fixing revenue sharing ratio in violation of section 3 (3) (a). Besides, UPDF were also limiting / controlling supplu by refusing to release Hindi motion pictures for exhibition in multiplexes in violation of section 3 (3) (b) of the competition act. Thus, the agreement was declared to be void per se.

(3) Allocation of market share [clause (c) of section 3 (3)]

Clause (c) of section 3 (3) of the competition act, 2002 deals with the anti- competitive agreements which 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. An allocation of market share involved an agreement among enterprises that each will have exclusive or preferential rights in a designated area for sales, production , provision of services or otherwise. Such agreements shall be presumed to have an appreciable adverse effect on competition and therefore, void per se.

(4) Bid rigging or collusive rigging [clause (d) of section 3(3)]

Bid rigging means any agreement, between the enterprise or persons engaged in identical or similar production or trading or 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 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 to the bidding group.

According section 3 (3) (d) of the competition act, 2002 , an agreement which directly or indirectly results in bid rigging or collusive bidding shall be presumed to have an appreciable adverse effect on competition and therefore, void per se.

(5) Collusive bidding or bid rigging:

It is an agreement or arrangement between two or more bidders – (i) to tender supply or purchase of goods or services at price or on terms agreed or arranged between them or (ii) as to the prices which any of them bids, at an auction for sale of goods. Such arrangements or practices eliminate competition between the parties inter se, or to exclude other competitors. These are also referred to as knock out agreements.

Almost all forms of bid rigging schemes have one thing in common ; an agreement among some or all of bidders, which pre- determines the winning bidder and limits, or eliminates competition among the conspiring vendors.

3.11.3 Remedies to Anti-competitive Agreements

After an inquiry if the commission finds that the agreement in question falls within the category of Section 3, it can pass any of the following orders as the case may be:

1. Direct the person, enterprise or association involved in the agreement to discontinue or re-enter such agreement;
2. Impose such penalties on person enterprise or association, as it deems fit. Such penalties shall not exceed ten percent of the average turnover for the preceding three financial years
3. In cases of cartels the penalties mentioned above shall extend to each producer, seller, distributor, trader or service provider included in that cartel and the amount of penalty could extend upto either three times of its profit for each year of the agreement's continuance or ten percent, whichever is higher.
4. Direct for modification of the agreement to the extent and in the manner as may be specified in the order of the commission.
5. Payment of cost and issuing of directions to the enterprise to comply with the orders.
6. Pass any such order or direction as it may deem fit.

3.11.4 Vertical agreements

Vertical agreements are between enterprises at different stages of the production chain, like an arrangement between the manufacturer and a distributor. The presumptive rule does not apply to vertical agreements. The question whether the vertical agreement is causing AAEC is determined by rule of reason. When rule of reason is employed, both positive as well as negative impact of competition is analyzed. In order to determine whether any agreement is in contravention of section 3(4) read with section 3(1) of the Act, the following five essential ingredients of section 3(4) have to be satisfied:

- a. There must be an agreement amongst enterprises or persons;
- b. The parties to such agreement must be at different stages or levels of production chain, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services;
- c. The agreeing parties must be in different markets;

- d. The agreement should cause or should be likely to cause AAEC;
- e. The agreement should be of one of the following nature as illustrated in section 3(4) of the Act:
 - i. Tie-in arrangement (*includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods*). It is also referred to as tying agreement, tying arrangement, tie in sale or clubbed sale. It refers to an arrangement by a manufacturer or a dealer of goods to compel a buyer to purchase some goods which he does not want, along with the goods he wants to purchase. Such a situation occurs where the tying product is the subject of scarcity either due to product shortage or deliberately manipulated.
 - ii. Exclusive supply agreement (*includes any agreement restricting in any matter 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*). Such an agreement or arrangement may clog competition in the channel of distribution.
 - iii. 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*);
 - iv. 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*);
 - v. 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 changed*).

3.11.5 Consequences of entering into vertical agreements:

The agreements which are termed as vertical agreement under clause (a) to (e) of section 3 (4) of the act] shall be void if such an agreement causes or is likely to cause an appreciable adverse affect on competition in india. These agreements are not treated as void per se

but have to be judged under the rule of reason test to decide whether they cause appreciable adverse effect on competition or not.

3.11.6 Types of vertical agreements

- a) Tie-in-arrangements includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. This is an arrangement by which a seller agrees to sell a product known as the tying item only on the condition that buyer agrees to buy a second product known as the tied product from the seller. Such arrangements not only reduce or eliminate the competition completely but also remove buyer's resistance to the tied product. Following tie-in arrangements were held to be in restraint of trade: In Hindustan Motors Ltd. case, requiring the buyers of cars to pay towards the servicing of cars with the sale price. In re Anand Gas case, requiring customer to buy gas stove while giving gas connection
- b) Exclusive supply agreements includes any agreement restricting in any manner the purchase in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. In Jindal Steel v SAIL, an exclusive supply agreement through a memorandum of understanding (MOU), was entered into between Indian Railways and Steel Authority of India (SAIL) to supply rails on a continuous basis. Jindal Steel and Power Limited alleged that the said MOU resulted in foreclosure of the relevant market for it. It was held that the MOU was not hit by Sec. 3(4) and hence, not anti-competitive. Consumer Guidance Society v Hindustan Coca Cola Beverages Ltd is another case dealing with exclusive supply agreements..
- c) Exclusive distribution agreements 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. The main feature of such agreements is that the manufacturer or supplier agrees to supply certain goods for resale to only one party, the exclusive distributor within a defined territory and no other party will be supplied with the goods within that area by the supplier. Exclusive dealing is a way of restraining interbrand competition.
- 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. It is a sort of boycott. It means refusal to buy or sell by a mutual agreement with an

intention to restrict competition is illegal. Refusal to buy or sell by a mutual agreement with an intention to restrict competition is illegal. The Act, however, does not empower the authority to decide on behalf of any of the parties whether they should enter into any particular agreement or not. To deal or not to deal is the freedom of the enterprise and they can choose not to deal with any specific firm or person. But where such refusal to deal falls within the definition of the Act, the behavior of the enterprises is said to be anti-competitive. In *Kapoor Glass Pvt. Ltd. v Schott Glass Pvt. Ltd.*, the CCI held the joint venture to be anti-competitive since it was created to finish off competition in the downstream market and that various agreements were in contravention of clauses (a), (b), (d) and (e) of section 3(4). e) Resale price maintenance (RPM) 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. RPM is a form of price fixing. Illustrations: A manufacturer Y and its distributor Z may agree that the distributor will sell Y's products at certain prices, at or above a price floor (Minimum RPM) or at or below a price ceiling (Maximum RPM). If Z refuses to maintain prices due to whatever reason, Y may stop doing business with it. Every case of RPM is to be judged on the basis of its effects to establish its nature. Usually, branded goods are subjected to RPM as opposed to non-branded goods. RPM, however, may prove beneficial in following ways: , Ensuring efficient retail services , Addressing free rider problem (Free rider is one who enjoys the benefits of someone else's investment) , Limiting inter-brand competition among retailers. Also, in following situations RPM may not be a restraint of trade: , if manufacturer was in a position to use its dominant power then it would much rather use it through wholesale prices instead of going into resale price maintenance agreement or , a product or service might require brand specific promotion by the retailer. Such a promotional activity involves cost on retailer.

3.12 Factors to be considered while deciding vertical agreements:

The Competition Commission of India (CCI) should while conducting any enquiry into the alleged anti-competitive behavior of the enterprises should examine various factors and circumstances. Sec. 19(3) provides for various situations that may result if

any of the above types of vertical agreements is present in the market which are as follows: (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) Any Improvement with regard to production or distribution of goods or provision of services; (f) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services. The situations in clauses (a)-(d) are negative while that in (e)-(f) are positive. It can be said that the grounds or standards mentioned in the above provision are quite open-ended, vague and difficult to determine. Moreover, every type of vertical agreement is to be judged on the basis of the above parameters.

3.13 IPR's – Not anti- competitive [section 3(5) (i)]

In the Competition Act, 2002, section 3(5) thereof in the Chapter relating to Prohibition of Agreements (Anti – Competitive Agreements) states that:- “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 have been or may be conferred upon him under:-

- (a) the Copyright Act, 1957 (14 of 1957)
- (b) the Patents Act, 1970 (39 of 1970)
- (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999)
- (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999) (e) the Designs Act, 2000 (16 of 2000)
- (f) the Semi-conductor Integrated Circuits Layout- Design Act, 2000 (37 of 2000).

Export rights [section 3 (5) (ii)]

Many countries exempt anti-competitive agreements relating to exports from the operation of law; this is presumably on the ground that such anti-competitive agreements harm only overseas consumers and are therefore of no concern to the national authorities. Section 3(5) (ii) exempts the right of any person to export goods from India up 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. It means export agreement relating only to the production, supply, distribution or control of goods or provision of services is exempted. According to Meyerman , in the course of reaching agreement

on export prices or terms of sale, for example, the participant may exchange information about domestic prices or output, that would permit them to reach an explicit or tacit agreement affecting domestic market’.

Section 27 of the act empowers the competition commission to pass orders after the inquiry into anti – competitive agreements or abuse of dominant position. Where after the inquiry, the commission finds that there is contravention of section 3 [anti competitive agreements] or section 4 [abuse of dominant position] , it may pass all or any of the following orders, namely-

- i) Direct to discontinue and not to re –enter such agreement or discontinue such abuse of dominant position , as the case may be
- ii) Impose such penalty ,as it deem fit which shall be not more than 10 % of the average of the turnover for the last three preceding financial years, upon each of the parties concerned.
- iii) In case of a cartel, to impose upon each member of the cartel, a penalty of up to three times of its profit for each year of continuance of such agreement or 10 % of its turnover for each year of continuance of such agreement, which ever is higher
- iv) Direct to modify the agreement to the extent and in the manner as may be specified by the commission.
- v) 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 and
- vi) Pass such other order or issue such directions as it may deem fit. Any order passed by the commission is appealable before the competition appellate tribunal under section 53 A of the competition act.

Summary:

The term ‘vertical agreement’ does not find a place in the Competition Act 2002. Sec. 3(4) of the Act, however, provides for agreements amongst persons or enterprises at different stages or levels of the production chain in various markets, with respect to production, supply, distribution, storage, sale or trade in goods or provision of services. Such agreements are referred to as vertical agreements and are prohibited under Section 3(1). The Rule of Reason is used to determine the nature of vertical agreements since the definition uses the term ‘which causes or is likely to cause appreciable adverse effects on competition’. Exclusive supply and distribution, Tie-in-Sales, Resale Price Maintenance

and Refusal to Deal are few types of vertical restraints expressly mentioned in the Act though there could be other types that may fall under the description. The definition of each of the vertical restraints is also inclusive i.e. there could be other vertical restraints as well even if not prescribed under sub-sections. Section 19(3) further provides for the factors that may be considered while evaluating the effects of such agreements. End Notes: 1. The Competition Act, 2002 2. Raghavan Committee's Report on Competition 3. Jindal Steel Power Ltd. v SAIL [2012] 111 SCL 382 (CCI) 4. [www.cci.gov.in](http://www.cci.gov.in/May2011/OrderOfCommission/Case22of2010OrderMemberR.pdf) 5. Kapoor Glass Pvt. Ltd. v Schott Glass Pvt. Ltd. <http://www.cci.gov.in/May2011/OrderOfCommission/Case22of2010OrderMemberR.pdf> 6. Pawan Hans Ltd. v UOI (2003) 114 Comp Cas 676 (SC) 7. D.P.Mittal, Taxmann's Competition Law and Practice

3.14 Dominant position

Once the relevant product and geographic market is defined, one can analyse whether the allegation of dominance of an under-taking in the relevant product market is verified. In *N.V. Netherlands Banden Industrie Michelin vs Commission of the European Communities* it is observed that dominant position under Article 86 of the EC Treaty is as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."

Dominant Position has been appropriately defined in the Act in terms of the 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

The dominant position test can be conducted by using different criteria. The main criterion is the market share. Market share cannot by itself give a definite indication of dominance but can give a presumption of dominance. A company may have a large market share for a limited time without being dominant. The market share must be considered together with the length of time for which the company held the critical market share.

Even when the market share gives a pre-sumption of dominance, other factors that could constitute barriers to entry in the market must also be considered. Barriers to entry into the market can be statutory regulations and national legal systems, the requirement of superior technology to be able to compete in a market, the vertical integration and well-developed distribution systems of the firms already present in the market, the product differentiation with brand names attracting the customer, and the conduct of the company in the relevant market.

The listing above is not exhaustive and it is widely recognised that there can be diverse indications of dominance. One final element that should nevertheless be mentioned is the internal correspondence of the company that is alleged to be dominant. Indeed, if the internal correspondence of the company confirms the allegation of dominance then this may be material evidence for the alleged dominance.

Scope of section 4

Section 4 focuses on two important elements

- 1. There must be a dominant person and**
- 2. Such dominant position must have been abused**

Section 4 mandates the existence of dominant position of an enterprise that has been abused, only then this section 4 shall be applied.

Abuse of dominant position by an enterprise or group is prohibited under section 4 of the companies act.

3.15 Factors that determine dominant position

Under section 19 (4) the competition commission, while determining whether an enterprise enjoys a dominant position or not under section 4 should have due regard to all or any of the following factors, namely

- a) Market share of the enterprise**
- b) Size and resources of the enterprise**
- c) Size and importance of the competitors**
- d) Economic power of the enterprise including commercial advantages over competitors**

- e) **Vertical integration of the enterprise or sale or service network of such enterprises**
- f) **Dependence of consumers on the enterprise**
- g) **Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a government company or a public sector undertaking or otherwise**
- h) **Entry barriers including barriers such as regulatory barriers, financial risk , high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale , high cost of substitutable goods or services for consumers.**
- i) **Countervailing buying power**
- j) **Market structure and size of market**
- k) **Social obligations and social costs**
- l) **Relative advantage by way of the contribution to the economic development , by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition.**

The competition commission is also authorised to take into account any other factor which it may consider relevant for the determination of dominant position

3.16 Practices which constitute abuse of dominant position

It is not the dominant position but its abuse which is prohibited. Sub section (2) of section 4 of the competition act provides a list of practices that shall constitute abuse of dominant position and thus prohibited. According to this provision, there shall be an abuse of dominant position if an enterprise or a group:

Types of abuse of dominant position' situation analyzed as under-

1. **Predatory Pricing-** As per section 4(b) of the Act it explains it as the practice by which the sale of goods or the provision of services, is at a rate of price which is lower than the cost price with the view to reduce the competition or eliminate the competitors.

Clause (a) of section 4 (2) , states that following given acts, shall constitute abuse of dominant position:-

- a) price discrimination: Price discrimination may be made by charging different prices from different buyers or by granting discriminatory discount, allowance, or rebate to different buyers. It involves a differentiation in which some enterprise or consumers are given preferences over others, particularly in the treatment of purchasers by a seller. The practice of price discrimination impedes competition.
- b) price leadership: Price leadership is allied to price fixing. In the case of price leadership the price for a product is fixed by one firm holding a dominant position in the trade and is then followed with little or no departure by other firms. This feature is commonly found in trade or industry where one firm, more powerful than the rest, announces its price and trading policy with surety and confidence that other dealer will follow its lead.
- c) Predatory pricing: The practice of predatory pricing involves price cutting with the intention of eliminating competition by driving out the competitors of the market. Explanation (b) to section 4 of the competition act defines the expression 'predatory pricing' to mean 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 close down the business altogether or compromise with predator according to his wishes.

2. Refusal to supply- This practice involves purposefully withholding the supply of the product or service thus increasing the demand for the same and then forcing the customers to buy the product or service at a higher price thus manipulating the needs of the customer. This act of refusal has a major negative impact on the state of fair competition in the relevant market.

3. Limiting Supply- The practice of limited supply of products of luxurious and precious nature thus having the advantage of raising the price because of its scarcity. The appropriate example for this is the diamond market, though large quantities of them are kept in storage, only a small quantity is only polished and made available to the customers, thus resulting in its high price.

4. Barriers to entry or denial of the market assess - Barriers to entry includes patent as well as strategic first mover advantages.

5. A group of colluding multiple suppliers appreciably affecting the relevant market.

COMPETITION ACT The Competition Act provides in section 4 for the prohibition of abuse of dominant position: Section 4: Abuse of Dominant Position: (1) No enterprise shall abuse its dominant position. (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,— (a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or services; or (ii) price in purchase or sale (including predatory price) of goods or service; or Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or (b) limits or restricts— (i) production of goods or provision of service.

Limiting or restricting production, market, etc.

Clause (b) of section 4 (2) of the competition act, provides that it shall be an abuse of dominant position, if an enterprise or a group limits or restrict-

I) Production of goods or provision of services or market therefore, or

II) Technical or scientific development relating to services is to the prejudice of consumers.

3. DENIAL OF MARKET ACCESS

Under clause (c) of section 4 (2) of the competition act, it shall be an abuse of dominant position, if an enterprise or a group indulges in practice resulting in denial of market access in any manner. Any practice by the dominant enterprise which forecloses the market access to other market players or deter entry to new players shall be considered as abuse of dominant position.

4. Conditional contracts: Where an enterprise or group forms a conditional contract where by the other parties have to forcefully accept some supplementary conditions of the enterprises or group, then it shall amount to be the abuse of its dominant position.

5. Entry into other relevant market: According to clause (e) of section 4 (2) of the competition act, an enterprise using its dominant position in one relevant market to enter into or to protect, other relevant market shall be treated as abuse of dominant position.

3.17 Consequences of abuse of dominant position

Section 7 of the act empowers the competition commission to pass orders after the inquiry into anti- competitive agreements or abuse of dominant position . Where the inquiry, the commission finds that there is a contravention of section 3 [anti – competitive agreements] or section 4 [abuse of dominant position] , it may pass all or any of the following orders, namely, -

- i) Direct to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position , as the case may be:
- ii) Impose such penalty , as it deem fit which shall be not more than 10 % of the average of the turnover for the last three preceding financial years, upon each of the parties concerned.
- iii) In case of a cartel, to impose upon each member of the cartel, a penalty of up to three times of its profit for each year of continuance of such agreement or 10 % of its turnover for each year of continuance of such agreement, which ever is higher.
- iv) Direct to modify the agreement to the extent and in the manner as may be specified by the commission.
- v) 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 ; and
- vi) Pass such other order or issue such directions as it may deem fit. Any order passed by the commission as above, is applicable before the competition appellate tribunal under section 53 A of the competition act.

3.18 Combination and regulation of combinations

Section 5 and section 6 deal with identifying any kind of combination (an acquisition, merger or amalgamation) that causes or is likely to cause an adverse effect on competition in India. Any such kind of the combination is considered to be void u/s 6 (1). The purpose of section 5 is to identify such combination i.e. section 5 defines such combination. Whereas , section 6 lays down the provisions regarding regulating such combinations.

Meaning and definition of combination u/s 5

Combination under section 5 of the competition act, 2002 includes.

- i) **Acquisition under clause (a) of section 5 ; or**
- ii) **Acquiring of control under clause (b) of section 5 ; or**

iii) The merger or amalgamation under clause (c) of section 5.

Three clauses i.e; clause a , b and c of section 5 which together define a combination.

- i) Acquisition under clause (a) of section 5 : Clause (a) of section 5 states that an acquisition where the individual parties to the acquisition or the group whose control , shares, voting rights or assets acquired jointly have:**

Table no. – 1

Applicable to	Within / outside india	Combined assets or combined turnover
Individual parties	In india	More than Rs 1000 crores or more than Rs 3,000 crores
Individual parties	Outside india	More than dollar 500 million combined assets including assets of Rs 500 crores in india or more than Dollar 1500 million combined turnovers including Rs 1500 crores turnover in india
group	In india	More than Rs 4000 crores or more than Rs 12,000 crores
group	Outside india	More than US dollar combined assets 2 billion or 2000 million including assets of Rs 500 crores in india OR More than Dollar 6 billion or 6,000 million US combined turnover including Rs 1500 crores turnover in india.

Here the following terms need to be made clear

Control includes controlling the affairs or management by –

- a) One or more enterprises , either jointly or singly, over another enterprises or group;**
- b) One or more groups, either jointly or singly , over another group or enterprises.**

Group means two or more enterprises which, directly or indirectly , are in a position to –

- a) Exercises 26 % or more of the voting rights in the other enterprises or**
- b) Appoint more than 50 % of the members of the board of directors in the other enterprise, or**
- c) Control the management or affairs of the other enterprises.**

the value of assets is to be determined is shown in audited books of account of the enterprise, in the financial year in which the date of the proposed merger falls. The adjustment which can be made is on account of the provisions for depreciation . Thus, the assets are to be taken at their book value , rather than their realizable or other values. However, the value of assets shall include the brand value, value of goodwill, or the value of intellectual property rights, etc. referred to in sub section (5) of section 3.

Acquiring of control under clause (b) of section 5

Clause (b) of section 5 states that where a person (who already has direct or indirect control over another enterprise or group) acquires the control of another enterprise or group and after acquiring such control:-

Table no. 2

Applicable to	In/ outside India	Combined assets or Turnover
Both enterprises	In India	More than Rs 1,000 crores Or More than Rs 3,000 crores
Both enterprises	Outside india	More than
The group acquired and the enterprise which acquired the group	In India	
The group acquired and the enterprise which acquired the group	Outside india	

Such a combination shall said to have adverse effect on combination in india.

The merger or amalgamation under clause (c) of section 5

Clause (c) of section 5 states that any merger or amalgamation in which the enterprise formed after the merger or amalgamation or the group formed after the merger or amalgamation has: -

3.19 Exemption from the provisions of section 5

In exercise of the powers conferred by clause (a) of section 54 of the competition act, the central government , in public interest, has exempted an enterprise. Whose control , shares, voting rights or assets are being acquired has assets of the value of not more than Rs 250 crore or turnover not more than Rs 750 crores from the provisions of section 5 of the said act for a period of five years . A similar exemption has been allowed to the ‘ group’ exercising less than 50 % of voting rights in other enterprise. This exemption is allowed for a period of five years.

3.20 Regulation of combinations

Section 6 lays down the provisions dealing with the regulations of combinations.

(1) Section 6 (1) . combination causing appreciable adverse effect on competition void. Sub section (1) of section 6 of the competition act provides

that no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in india and such a combination shall be void. Theus, any combination, which causes or is likely to cause appreciable adverse effect on competition is void.

Power with CCI to evaluate effect of combination of competition

The combinations are regulated under the competition act in view of their potential appreciable adverse effect on competition in the relevant market in india. The act empowers the competititon commision of india CCI to evaluate the effect of combinations on competitions in the relevant market having the due regard to all or any of the factors enumerated in sub section (4) of section 20 of the act.

Factors under section 20 (4)

Under section 20 (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 competition commission of india shall have the 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 to the market.**
- c) Level of combinations in the market.**
- d) Degree of countervailing powere in the market.**
- e) Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins.**
- f) Extent of effective competition likely to sustain in a market.**
- g) Extent to which substitutes are available or are likely to be available in the market.**
- 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 market.**
- j) Nature and extent of vertical integration in the market.**
- k) Possibility of a filing business**

- l) Nature and extent of innovation**
- m) Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable effect on competition**
- n) Whether the benefits of the combination outweigh the adverse impact of the combination , if any.**

3.21 Transactions which donot have adverse effect on competition

According to regulation 4 of the combination regulations, 2011 read the schedule I, the combinations resulting from the categories of transactions mentioned below, do not cause adverse effect on competition in india.

1. An acquisition of shares or voting rights, referred to in sub clause (i) or sub clause (ii) of clause (a) of section 5 of the act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly , do not exceed fifteen percent of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a shareholders agreement or articles of association , not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.
2. An acquisition of shares or voting rights, referred to in sub clause (i) or sub clause (ii) of clause (a) of section 5 of the act, where the acquirer , prior to acquisition , has 50 % or more shares or voting rights in the enterprise whose shares or voting rights are being acquired , except in the case where the transaction results in transfer from joint control to sold control.
3. An acquisition of shares or voting rights, referred to in sub clause (i) or sub clause (ii) of clause (a) of section 5 of the act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular or service of the enterprise of which assets are being acquired, irrespective of whether such assets are organised as a separate legal entity or not.

4. An amended or renewed tender offer where a notice to the commission has been filed by the party making the offer, prior to such amendment or renewal of the offer
5. An acquisition of stock in trade, raw materials, stores and spares in the ordinary course of business.
6. An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or subscription to rights issue to the extent or their entitled proportion, not leading to a acquisition of control.
7. Any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be.
8. An acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group.
EXPLANATION: The group referred to in this category shall have the same meaning as given in the explanation (b) to section 5 of the act.
9. An acquisition of current assets in the ordinary course of business;
EXPLANATION: current assets shall have the same meaning as attributed to them in schedule VI of the companies act, 1956
10. A combination referred to in section 5 of the act taking place entirely outside India with insignificant local nexus and effect on markets in India.

3.22 Establishment of commission

Section 7 of the Competition Act, 2002 provides for the establishment of the Competition Commission of India (CCI). The main purpose of establishment of Competition Commission of India was to form an expert body corporate that acts as the market regulator that functions to prevent and regulate anti-competitive practices in India.

Under-section 7 (1) of the Act, the Central Government by notification shall establish the Competition Commission of India. Accordingly, the Central Government established the Competition Commission of India having its head office at New Delhi, with effect from

However, the Commission could not be made functional due to filing of a writ petition before the Supreme Court. While disposing of the writ petition on January 20, 2005, the Court held that if an expert body is to be created by the Union Government, it might be appropriate for the Government to consider the creation of two separate bodies, one's with expertise for advisory and regulatory functions and the other for adjudicatory function's based on the doctrine of separation of powers recognized by the Constitution of India. Consequently, the Central Government, in exercise of the powers conferred by section 53A in Chapter VIIIA [inserted by the Competition (Amendment) Act, 2007] established the Competition Appellate Tribunal having its headquarters at Delhi, with effect from May, 15, 2009. Perpetual Succession and Common Seal Section 7(2) of the Competition Act provides that the Competition Commission of India shall be a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, and to contract. It shall sue or be sued by the said name'

Head Office of the Commission [Section 7(3)]

The head office of the Competition Commission shall be at such place as the Central Government may decide from time to time. The central Government has notified the establishment of the Commission having its head office at New Delhi, with effect from October 14,2003.

Offices at other places [Section 7(4)]

The Competition Commission may establish offices at other places in India' However, no such offices has yet been established by the commission.

3.23 Composition of commission

section 8(1) of the Act provides that the Competition commission of India shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the central Government. The central Government has accordingly constituted the Commission'

Qualifications of Chairperson and Members [Section 8(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 fifteen 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'

It may be noted that there is a difference between the Chairperson and Members of the Competition Commission in so far as their status and remuneration are concerned whereas there is no difference between them in relation to their qualifications. Whole-time Members [Section 8(3)] The Chairperson and other Members 'shall be whole-time IV {embers of the Competition Commission. Thus, part-time Members cannot be appointed in the Competition Commission.

3.24 Appointment of chairpersons and members Section 9(1) of the Competition Act provides that the appointment of the Chairperson and other Members of the Competition Commission shall be made by the Central Government from a panel of names recommended by a Selection Committee consisting of the following, namely :

- (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) Two experts of repute who have special knowledge - Members ; of, and professional experience in international trade, economics, business, commerce , law, finance, accountancy, management, industry, public affairs of competition matters including competition law and policy. The term of the Selection Committee and the manner of the selection of panel of names shall be such as may be prescribed. Accordingly, the Central Government has made the Competition Commission of India (Term of the Selection Committee and the manner of Selection of Panel of Names) Rules, 2008. It has been provided that the term of the Selection Committee constituted under sec 9(1) of the Competition Act shall be for a period of one year from the date of its constitution. [Under Rule 3]

3.25 Term of office of chairperson and other members

The Chairperson and every other member of the Competition Commission shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. However, the Chairperson or other Members shall not hold offices as such after he has attained the age of sixty-five years.

Filling up of Vacancies of the Chairperson or Member

Section 10(2) of the Competition Act provides that a vacancy caused by the resignation or removal of the Chairperson or any other Member under section 11 or by death or otherwise shall be filled by fresh appointment in accordance with the provisions of sections 8 and 9. Thus, any vacancy of the Chairperson or Member shall be filled by fresh appointment.

Oath of office and of Secrecy

Section 10(3) of the Competition Act provides that 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 form, manner and before such authority, as may be prescribed.

Vacancy in the office of the Chairperson [Section 10(4)]

In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson, until the date on which a new Chairperson, appointed in accordance with the provisions of the Act to fill such vacancy, enters upon his office. Thus, where any vacancy occurs in the office of the Chairperson of the Commission by reason of his death, resignation or otherwise, the senior-most Member of the Commission shall act as the Chairperson until a person appointed to fill such vacancy assumes the office of the Chairperson.

Chairperson unable to discharge his functions

Section 10(5) of the Act provides that when the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the function of the Chairperson until the date on which the Chairperson resumes the charge of his functions. Thus, in the absence of the Chairperson owing to illness or any other cause, the senior most

Member of the Commission, shall discharge the functions of the Chairperson” He shall Continue to do so until the date on which the Chairperson resumes the charge of the functions.

3.26 Resignation, removal and suspension

Resignation of the Chairperson or Member Under section 11(1) of the Competition Act, the Chairperson or any other member may resign his office, by giving a notice in writing under his hand addressed to the Central Government. However, the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office.

- ü Until the expiry of three months from the date of receipt of such notice.**
- ü Or until a person duly appointed as his successor enters upon his office.**
- ü Or until the expiry of his term of office, whichever is the earliest.**

3.27 Removal of the Chairpersons or Member of the Commission

Section 11(2) of the Competition Act, provides that the Central Government may remove the Chairperson or any other Member from his office if he - (a) is, or at any time has been adjudged as an insolvent ; or (b) has engaged at any time, during his term of office, in any paid employment ; or (c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude ; or (d) has acquired such financial or other interest as is likely to affect prejudicially his functions as Member ; or (e) has so abused his position as to render his continuance in office prejudicial to the public interest ; (f) has become physically or mentally incapable of acting as a Member.

- ü However under section 11(3) the Government’s power of removal on the ground of**

abuse of position [clause (e) above]; or having acquired financial or other interest [clause (d) above] is subject to inquiry and report made by the Supreme Court on a reference being made in this behalf. This procedure has been provided with a view to secure independence of the Competition Commission.

Restriction on Employment of the chairperson and Members

According to Section 12, the Chairperson and other Members shall not accept any employment in, or connected with the management or administration of, any enterprise which has been a party before the Competition Commission under the Act, for a period of two years from the date on which they cease to hold office. However, this prohibition shall not apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government Company as defined in the Companies Act, 2013.

3.28 Duties of commission

Under section 18 of the Act, the Competition Commission shall have the following duties.

- (i) To eliminate practices having adverse effect on competition ;
 - (ii) To promote and sustain competition ;
 - (iii) To protect the interests of consumers; and
 - (iv) To ensure freedom of trade carried on by other participants in markets in India.
- However, the Commission may, for the purpose of discharging its duties of performing its functions under the Act, enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country.

3.30 Powers and Functions of the commission

Following are the powers and functions of CCI -

- (1) Power to inquire into anti-competitive agreements and abuse of dominant position [Section 19(1) and 19(2)]
- (2) Power to determine whether an agreement has an appreciable adverse effect on competition [Section 19(3)]
- (3) Power to inquire whether an enterprise enjoys a dominant position [Section 19(4)]
- (4) Power to determine what is a relevant market [Section 19(5), 19(6) and 19(7)]
- (5) Power to inquire whether a combination has appreciable adverse effect on competition [Section 20(1), 20(2), 20(3) and 20(4)]
- (6) Power to Pass Cease and Desist orders [clause (a) and clause (d) of Section 27]
- (7) Power to impose penalty [Clause (b) of Section 27]
- (8) Power to pass orders [Clause (e) and (g) Section 27]

- (9) Power to pass orders of division of enterprise enjoying dominant position [Section 31]
- (10) Power to pass orders on combinations that have an adverse effect on competition [Section 31]
- (11) Power to inquire agreement, abuse of dominant position or combination outside India [Section 32]
- (12) Power to issue Interim orders [Section 33]
- (13) Power to regulate its own procedures [Section 36]

1. Power to inquire into anti-competitive agreements & absence of Dominant position

Section 19(1) of the Act empowers the Competition Commission to inquire into any alleged contravention of the provisions of Section 3(1) [anti-competitive agreements] or section 4(1) [abuse of dominant position]. The inquiry can be initiated on -

- (a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association ; or
- (b) a reference made by the Central Government or a State Government or a statutory authority; or
- (c) its own motion. Section 19(2): Section 19(2) provides that the powers and functions of the competition commission shall include the powers and functions as specified in section 19(3) to section 19(7) of the Competition Act, 2002. So let us study the sections 19(3) to section 19(7) in detail.

2. Power to determine whether an agreement has an appreciable adverse effect on competition

Section 19(3) empowers the commission to have due regard to all or any of the factors listed, while determining whether an agreement has an appreciable adverse effect on competition u/s 3 of the Act i.e. an Anti competitive Agreement. [Refer, Chapter - Prohibition of Agreements : Anti Competitive Agreements for detailed information on Anti competitive Agreements.]

The Competition Commission shall while determining whether an agreement has an appreciable adverse effect on competition under section 3 have due regard to all or any of the following factors :-

- (a) creation of barrier 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 consumer\$. ;**
- (e) improvements in production or distribution or goods or provision of services ;**
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.**

3. Power to inquire whether an enterprise enjoys a dominant position

Section 19(4) empowers the Commission that while inquiring whether an enterprise enjoys a dominant position or not u/s, shall have due regard to all or any of the factors mentioned u/s 19(4). [Refer, chapter - Abuse of Dominant position & Regulation of combinations, for detailed information on Dominant Position] The Competition Commission shall, while inquiring whether enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely :-

- (a) market share of the enterprise ;
- (b) size and resources of the enterprise ;
- (c) size and importance of the competitors ;
- (d) economic power of the enterprise including commercial advantages over competitors ;
- (e) vertical integration of the enterprises or sale or service network of such enterprises ; .
- (f) dependence of consumers on the enterprises ;
- (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government Company or a public sector undertaking or otherwise;
- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers ;
- (i) countervailing buying power ;

- (j) **market structure and size of market ;**
- (k) social obligations and social costs ;
- (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition ;
- (m) any other factor which the Commission may consider relevant for the enquiry.

4. Power to determine what is a relevant market

ü Before assessing whether an undertaking is dominant, it is important, as in the case of

horizontal agreement, to determine what the relevant market is. For determining - whether a market constitutes a ‘relevant market’ the Competition Commission shall have due regard to the ‘relevant geographic market’ and ‘relevant product market’ under section 19(5).

ü Geographic dimension involves identification of the geographical area within which

competition takes place. Relevant geographic market may be local, national, international or occasionally even global, depending upon the facts in each case- The relevant geographic market u/s 2(5) comprises the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas.

Section 19(6) empowers the Commission to have due regard to all or any of the following listed factors, while determining the “relevant geographic market”.

- (a) regulatory trade barriers ;
- (b) local specification requirements ;
- (c) national procurement policies ;
- (d) adequate distribution facilities ;
- (e) transport costs ;
- (f) language;
- (g) consumer preferences ;
- (h) need for secure, regular suppliers or rapid after-sales services.

ü On the demand side, the relevant product market includes all such substitutes

that the consumer would switch to, if the price of the product relevant to the investigation were to increase. For the supply side, this would include all products who could, with their existing facilities, switch to the production of such substitute goods.

ü U/s 2(t) the relevant product market is a market comprising all those products or services. which are regarded as inter-changeable or substitutable by the consumer. It may for the reason of characteristics of the products or services, their prices or intended use'

ü Section 19(7) empowers the Commission to have due regard to all or any of the following listed factors, while determining "relevant product market".

- (a) physical characteristics or end-use of goods ;
- (b) price of goods or service
- (c) consumer preferences ;
- (d) exclusion of in-house production ;
- (e) existence of specialized producers ;
- (f) classification of industrial products.

Procedure of inquiry done u/s 19

(i) Section 26(1) of the Competition Act provides that on receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Competition 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. However, if the subject-matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(ii) Where the Commission is of the opinion that there exists no prima facie case, it shall -

- (a) close the matter forthwith ; and
- (b) pass such orders as it deems fit ;
- (c) send a copy of the order to the Central Government or the State Government or

the statutory authority or the parties concerned, as the case may be. Any such orders passed by the Commission is appealable before the Competition Appellate Tribunal under section 53A of the Act.

(iii) The Director General on receipt of the direction from the Competition Commission, shall submit a report of his findings within such period as may be specified by the Commission. However, the Commission may, on an application made by the Director General giving sufficient reasons, extend the time for submission of the report by such period as it may consider reasonable. [Sec 26(3)]

(iv) The Competition Commission may forward a copy of the report submitted by the Director General to the parties concerned. However, in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the said report to the Central Government or the State Government or the statutory authority, as the case may be. [Sec 26(4)]

(v) if the report of the Director recommends that there is no contravention of the provisions of the Act, 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. [Sec (k) 26(s)1.

(vi) The Competition Commission may consider the objections and suggestions on the report of the Director General, received by it under sub-section (5) of section 26. If the Commission, after such consideration, agrees with the recommendations of the ' Director General that there is no contravention of the provisions of the Act, it shall.

(a) close the matter forthwith; and

(b) pass such orders as it deems fit ; and

(c) communicate its orders to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be. [Section 26(6)1.

(vii) If, after consideration of the objections or suggestions, the Commission is of the opinion that further investigation is 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 the Act. [Section 26(7)\1.

(viii) If the report of the Director General referred to in Section 26(3) commends that there is contravention of any of the provisions of the Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of the Act. [Sec 26 (8)]

5. Power to inquire whether a combination has an appreciable adverse effect on Competition

Section 20(1) of the Competition Act, empowers the CCI to inquire into as to whether a combination has caused or is likely to cause an appreciable adverse effect an competition in India.

The CCI, may upon its knowledge or information relating to :

- (i) acquisition referred under clause (a) of section 5; or
- (ii) acquisition of control referred under clause (b) of section 5 ; or
- (iii) the merger or amalgamation referred under clause (c) of section 5.

- shall inquire as to whether a combination has caused or is likely to cause an appreciable adverse effect on competition in India.

However, the Commission shall not initiate any inquiry under this sub-section after the expiry of one year from the date on which such combination has taken effect. Thus, a suo moto inquiry into any of the combinations refered to above shall be initia-ted within one year from the date on which such combination has taken effect. [Refer Chapter -Abuse of Dominant Position and Regulation of combinations, Topic- What is a combination under section 5, for detailed information on clause.(a) clause (b) and clause (c) of section 51 Section 20(2) of the Act, provides that the Commission shall, on receipt of notice under section 6(2) inquire whether a combination referred to in that notice has caused or is likely to cause an appreciable adverse effect on competition. [Refer Chapter - Abuse of Dominant

Position and Regulation of Combination, 'Topic - Regulation of Combinations, for details information on section 61 Under Section 20(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 Competition Commission of India 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 to 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 significantly and sustainably increase prices or profit margins ;
- (f) extent of effective competition likely to sustain in a market ;
- (g) extent to which substitutes are available or are likely to be available in the market ;
- (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 market ;
- (j) nature and extent of vertical integration in the market ;
- (k) possibility of a failing business ;
- (l) nature and extent of innovation ;
- (m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition ;
- (n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

6. Power to pass Cease and Desist order

Under clause (a) of section 27 of the Act, the Commission, after the inquiry, may direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in anti-competitive agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be. Thus, clause (a) of section 27 empowers the Commission to pass 'cease and desist' orders against any anti-competitive agreement. It means that such an agreement

shall not only be discontinued forthwith but shall also not be repeated or re-entered. Further under clause (d) of section 27 the Commission may order that the agreement be modified in such manner as may be specified.

7. Power to impose penalty

According to clause (b) of section 27 of the Act, the Commissions may impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such anti-competitive agreements or abuse of dominant position. 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 three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher.

8. Power to pass orders

Clause (e) section 27 of the Act, provides that the Commission, after the inquiry, may direct the enterprises concerned to abide by such orders as the Commission may pass and comply with the directions, including payment of costs, if any. This provision extends the power of the Commission to pass any other order or issue any direction, including the payment costs. The enterprises concerned must abide by the said orders and the directions. Under clause (g) of section 27 of the Act, the Commission, after the inquiry, may pass such other order or issue such directions, as it may deem fit. This provision has conferred very wide powers to the Commissions that it may pass any other order or issue any directions, as it may deem fit.

9. Power to pass order of division of enterprise enjoying dominant position

Under sub-section (1) of section 28 of the Act, the Competition Commission may direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position. This seems to be the drastic step which the Commission will adopt as a last resort to prevent an enterprise from abusing its dominant position. Guidelines for passing order of division Under sub-section (2) of section 28 of the Act, the order of

the Commission to direct division of an enterprise enjoying dominant position, 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 either by discharge or reduction of any liability or obligation or otherwise ;
- (c) the creation, allotment, surrender or cancellation of any shares, stocks or securities ;
- (d) [Omitted by Competition (Amendment) Act, 2007]
- (e) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise ;
- (f) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof ;
- (g) any other matter which may be necessary to give effect to the division of the enterprise.

10 Power to pass orders on combinations that have adverse effect on competition

ü Section 31(1) empowers the commission to approve the combination, if the combination does not or is not likely to have, an appreciable adverse effect on competition.

ü Section 31(2) states, that if the combination has or is likely to have an appreciable

adverse effect on competition, then the Commission shall direct that the combination shall not take effect. Where the adverse effect on competition can be eliminated by suitable modification to such combination, the Commission may propose such modification to the parties of the combination.

Where the Commission approves the combination with modification, the order of the Commission approving the combination shall specify the terms, conditions and the time for all constituent activities giving effect to the proposed combination and shall call for a compliance report. [Section 31(3)]

The parties, who accept the modification proposed by the commission, shall carry out such modification within the period specified by the commission. The parties to the Combination may give effect to such combination, only if they carry out the modification

proposed by the commission within the specified period. If they fail to carry out such modification, the combination shall be deemed to have an appreciable adverse effect on competition and the commission shall deal with such combination, in accordance with the provisions of the Act. Where the Commission has directed under Section 31(2) that the combination shall not

(b) 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

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- (a) the acquisition referred to in clause (a) of section 5 ; or
- (b) the acquisition or control referred to in clause (b) of section 5 ; or
- (c) the merger or amalgamation referred to in clause (c) of section 5, shall not be given effect to.

Section 31 (ii) provides for deemed approval for the combination if the Commission does not pass orders during the period of the two hundred and ten days from the date of the notice given to the Commission under section 6 (2) of the Act or till the Commission passes an order or issues directions under section 31(1) or 31(2) or 31(7) of the Act.

Any combination ordered to be void by the Commission, shall be death with by the authorities under any other law for the time being in force as if such combination had not taken place.

[Section 31(13)]

11. Power to inquire agreement, abuse of dominant position or combination outside India

Section 32 of the Act deals with the acts taking place outside India but having an effect on competition in India. This provision empowers the Competition Commission of Indian to inquire into an agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India, even if such agreement, or abuse of dominant position or combination takes place outside India, as specified in clauses (a) to (d), namely

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- (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. The Commission has the power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act and pass such orders as it may deem fit in accordance with the provisions of the Act.

12. Power to issue Interim Orders

Section 33 of the Act empowers the Competition Commission to issue interim orders, where it deems it necessary. It provides that where during an inquiry, the Commission is satisfied that an act in contravention of section 3(1) or section 4(1) or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, be order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party. Any such order shall be signed and dated by &Members, including d dissenting note, if any.

13. Power of commission to regulate its own procedure

(i) Section 36(1).of the Act provides that in discharge of its functions, the Competition Commission shall be guided by the principles’ of natural justice and the Commission shall have the power to regulate its own procedure. Thus, the Commission may make necessary regulations to regulate its own procedure, consistent with the provisions of the Competition Act and any rules ma {e by the Central Government.

(ii) Powers of the Commission same as are vested in Civil Courts. Section 36(2) of the Act provides that the Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in the matter of -(a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents ; (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses or documents ; and (e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1972, any public record or document or copy of such of record or document from any office.

(iii) Assistance from experts. Section 36(3) of the Act empowers the Competition Commission to call upon such experts, from the field of economics, commerce, accountancy, International trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it.

(iv) Production of documents, etc. Section 36(4) of the Act provides that the Commission may direct any person to produce before the Director General or Secretary or an officer authorized by it, the books or other documents, being documents relating to any trade, in the custody or under the control of such person for the purpose of examination under the Act. The commission may also direct any person to furnish to the Director General or the secretary or any other officer authorized by it, such other information as may be in his possession in relation to the trade carried on by such person as required for the purposes of the Act.

14. Power to amend/rectify orders

Section 38 of the Act, empowers the Competition Commission to amend any order passed by it, by rectifying any mistake apparent from the record. Thus, when there is a mistake apparent on the face of the record, the commission may rectify it by amending any order passed by it under the provisions of the Act. The Commission shall not amend substantive part of such order, while rectifying any such mistake. The scope of this provision is limited to correcting a mistake apparent from the record.

3.30 Summary

The Competition Bill was passed by both the houses of parliament and received the assent of the president on 13th January, 2003. The bill came on the statue books as the competition act, 2002 (12 OF 2003). The Government thought that the monopolies and restrictive trade practices act, 1969 has become obsolete in view of international economic developments for removing controls and resorting to liberisation by opening up the economy of the country to face competition from within the country and outside.

Under section 3 of the competition act, 2002 , prohibition has been imposed on anti-Competitive agreements. Section 3 (1) of the Competiton Act provides that (i) no enterprise or association of enterprises of person or association of persons and (ii) shall enter into

any agreement of enterprises of production, supply, distribution, storage, acquisition or control of goods or provision of services.

Under section 7 (1) of the act, the Central Government by notification shall establish the competition commission of India . Accordingly, the Central Government established the competition commission of india having its head office at New Delhi , with effect from October 14, 2003.

3.31 Important questions

1. Discuss the meaning of combination, as explained under three clauses to section 5 .
2. Discuss the procedure for investigation of combinations under the Competition Act.
3. Discuss the horizontal anti- competitive agreements under section 3 (3) of the competition act.
4. Briefly define horizontal and vertical anti- competitive agreements.

3.32 Practice questions

1. Define the dominant position. What are the factors that determine whether an enterprise enjoys a dominant position or not.
2. Explain the features of the competition act, 2002
3. Discuss the objectives and scope of the competition act, 2002
4. Give the composition of commission & Appointment of chairperson or members.

3.33 Glossary

Anti- competitive agreement, combination, vertical agreements, Rule of reason, collective rigging, MRTP act, Cartel.

3.34 References

- * www.cci.gov.in
- * “The Monopolies and Restrictive Trade practices Act, 1969”. Geory Theme Verlog.
- * Competition bill Introduced, the Hindu, August 2001.
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- 4.1 Introduction
- 4.2 Objectives
- 4.3 Introduction and Meaning of FEMA, 2000
- 4.4 Applications and Commencement of FEMA
- 4.5 Objectives of FEMA
- 4.6 Scope of FEMA
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- 4.17 Possession and retention of foreign currency [Foreign exchange management (Possession and retention of foreign currencies) regulations,2000]
- 4.18 Realisation, repatriation and surrender of foreign exchange
 - 4.18.1 Exemption from provisions relating to Holding/ Repatriation
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- 4.21 Restrictions on current account transactions
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- 4.25 Summary
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4.1 Introduction

The Foreign Exchange Management Act, 1999 (FEMA), is an act of the parliament of India to Consolidate and amend the law relating to Foreign Exchange with the objectives of facilitating external trade and payments and for promoting the orderly development and maintenance of Foreign Exchange market in India. It was passed in the winter session of parliament in 1999 replacing the FERA (Foreign Exchange Regulation Act). It extends to the whole of india replacing FERA. It enabled a new foreign exchange management regime Consistent with the emerging framework of the world trade organisation. It is the central legislation that deals with in bound investment into India and act bound Investments from India and trade and business between India and the other countries.

In the backdrop of acute shortage of Foreign Exchange in the country the Foreign Exchange Regulation Act of 1973 (FERA) was enacted. This legislation was passed by the Indian Parliament by the government of Indira Gandhi but it came into force with effect from January 1, 1974. It was repealed in 1999 by the Government of Atal Bihari Vajpayee are replaced by the Foreign Exchange Management Act, which Liberalised Foreign Exchange controls and restrictions on foreign Investment.

FEMA had became the need of the hour since FERA had become incompatible with the pro-liberalisation policies of the government of India. It brought a new management regime

of foreign exchange consistent with the emerging framework of the world trade organisation (WTO). It is another matter that the enactment of FEMA also brought with the prevention of Money Laundering Act, 2002, which came into effect from 1st July, 2005. FEMA contains 7 chapters divided into 49 sections of which 12 sections cover operational part and the rest contravention, penalties, adjudication, appeals, enforcement directorate etc.

4.2 Objectives

After reading this unit, you would be able to

To understand the concept of FEMA, 2002.

To understand the legal framework of FEMA, 2000

To understand the Possession and Retention to FEMA & FERA

To understand the concept of amendments to FEMA by Finance Act, 2015.

4.3 Introduction and Meaning of FEMA, 2000

Foreign Exchange Regulation Act was introduced in the year 1947. This was later replaced with the Foreign Exchange Regulation Act, 1973 (FERA), which came into effect on 1st Jan., 1974. The Foreign Exchange Regulation Act, 1973 was reviewed in 1993 and several amendments were enacted as part of the on-going process of economic liberalisation relating to foreign investments and foreign trade. At that stage, the central Government decided that a further review of FERA would be undertaken in the light of subsequent developments. It was subsequently felt that a better course would be to repeal the existing Foreign Exchange Regulation Act and enact a new legislation. The Reserve Bank of India was accordingly asked to undertake fresh exercise and suggest a new legislation. A Task Force constituted for this purpose, submitted its report in 1994 recommending substantial changes in the existing Act.

Keeping in view the changed environment, the central Government decided to introduce the Foreign Exchange Management Bill and repeal the FERA, 1973. The Foreign Exchange Management Bill having been passed by both the Houses of Parliament received the assent of the President on 29th December, 1999. It came on the statute Book as the Foreign Exchange Management Act, 1999 (42 of 1999)

4.4 Application and Commencement of FEMA

1. This Act may be called the Foreign Exchange Management Act, 1999.
2. It extends to the whole of India.
3. It applies to all branches, offices and agencies outside India owned or controlled by a person resident in India and also to any contravention thereunder committed outside India by any person to whom this Act applies.
4. It came into force on 1st June, 2000 by notification in the Official Gazette.

4.5 Objectives of FEMA

The FEMA was enacted :

- ✓ to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments.
- ✓ for promoting the orderly development and maintenance of foreign exchange markets in India.
- ✓ to conserve foreign exchange resources.
- ✓ to control transactions directly/indirectly affecting foreign exchange.
- ✓ For prevention of leakage of foreign exchange'
- ✓ Thus, approach of FEMA is radically different from FERA-from conservation to facilitation and from control to regulation.

4.6 Scope of FEMA

- ✓ FEMA is applicable to all parts of India.
- ✓ The Act is also applicable to all branches, offices and agencies outside India owned or controlled by a person resident in India.
- ✓ The Act is also applicable to any contraventions that are committed outside India by any person to whom this Act applies.

- ✓ Residential status is the most important factor for determining the applicability of the Act.
- ✓ The persons that are covered under the Act are Persons resident in India, Non-resident Indians (NRI), Persons resident outside India, Overseas Corporate Body (OCB) and Persons of Indian Origin (PIO).

4.7 AMENDMENTS TO FEMA BY FINANCE ACT, 2015

FEMA has been amended by the Finance Act, 2015. The important changes are as follows:

1. Amendment of Section 2 : The following clauses have been inserted in section 2.

- ✓ Sec 2 (cc). “Authorised officer” means an officer of -the-Directorate of Enforcement authorised by the Central Government U/s 37A.
- ✓ Sec 2 (g) : “Competent Authority” means the authority appointed by the Central Government U/s 37A(2).

2. Insertion of New Section 37A : Seizure and subsequent confiscation of assets in India of value equal to assets held outside India in contravention of FEMA-Often, a person holds assets like foreign exchange, foreign securities and immovable property outside India in contravention of provisions of section 4 of FEMA. It is very difficult to confiscate those assets which are outside India. Hence, as per section 37A of FEMA (inserted w.e.f. g-9- 2015), if such asset is held outside India in contravention of provisions of FEMA, other assets in India of same person of equivalent value can be seized and the person shall be liable to a penalty up to 3 times the sum involved in such contravention. The order of seizure shall be placed before ‘Competent Authority’ appointed by Central Government, within 30 days from date of seizure. The Competent Authority (not below rank of Joint Secretary) will decide within 180 days whether to continue seizure or set aside seizure. Before taking any decision, the Competent Authority shall hear the representatives of Directorate of Enforcement and the aggrieved person.

3. Regulation making powers to Central Government in respect of capital account transactions (other than debt instruments) : At present, under section 6 of FEMA, RBI has

powers to make regulations in respect of any classes or classes of permissible capital account transactions. As per proposed amendments to section 6 of FEMA, RBI will have powers to make regulations only in respect of debt instruments. In respect of other capital account transactions, regulations will be made by Central Government.

4.8 DEFINITIONS UNEER THE ACT

- ✓ Section 2 (a) “Adjudicating Authority” means an officer authorised under subsection (1) of section 16;
- ✓ Section 2 (b) “Appellate Tribunal” means the Appellate Tribunal for Foreign Exchange established under section 1g;
- ✓ Section 2 (c) z 6’ “Authorised person” means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under subsection (1) of section 10 to deal in foreign exchange or foreign securities;
- ✓ Section 2 [(cc)] : “Authorised Officer” means an officer of the Directorate of Enforcement authorised by the central Government under section 37A];
- ✓ section 2 (d) : “Bench” means a Bench of the Appellate Tribunal;
- ✓ Section 2 (e) : “Capital Account Transaction” means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6;
- ✓ Section 2 (f) : “Chairperson” means the Chairperson of the Appellate Tribunal;
- ✓ Section 2 (g) “Chartered accountant” shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (28 of 1949);
- ✓ Section 2 (gg): “Competent Authority means the Authority appointed by the Central Government under sub-section (2) of section 37A1;

- ✓ Section 2 (h) : ‘Currency’ includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank;
- ✓ section 2 (i) : “currency notes” means and includes cash in the form of coins and bank notes.
- ✓ section 2 (j) : “Current account transaction” means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes :
 - (i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business,
 - (ii) payments due as interest on loans and as net income from investments,
 - (iii) remittances for living expenses of parents, spouse and children residing abroad, and
 - (iv) expenses in connection with foreign travel, education parents, spouse and children;
- ✓ Section 2 (k) : “Director of Enforcement” means the Director of Enforcement appointed under sub-section (1) of section 36;
- ✓ Section 2 (l) : “export”, with its grammatical variations and cognate expressions, means :
 - (i) the taking out of India to a place outside India any goods,
 - (ii) provision of services from India to any person outside India;
- ✓ Section 2 (m) : foreign currency” means any currency other than Indian currency;
- ✓ section 2 (n) : foreign exchange,, means foreign currency and includes :
 - (i) deposits, credits and balances payable in any foreign currency

(ii) draft, travellers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency’

(iii) draft, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;

✓ section 2 (o) : “Foreign security”, means any security, in the form of shares, stocks, bonds’ debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency;

✓ section 2 (p) : “Import”, with its grammatical variations and cognate expressions, means bringing into India any goods or services;

✓ section 2 (q) : “Indian currency”, means currency which is expressed or drawn Indian in rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of india Act, 1934 (2 of 1934);

✓ Section 2 (r’) : Legal practitioner” shall have the meaning assigned to it in clause (i) of sub-section (1) of section 2 of the Advocates Act, 1961 (25 of 1961),

✓ Section 2 (s) : “Notify” means to notify in the official Gazette and the expression “notification’ shall be construed accordingly; ,

✓ Section 2 (u) : „person,, includes :

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company.

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not, (vi) every artificial juridical person, not falling within any of the preceding sub _ clauses; and

(vii) any agency' office or branch owned or controlled by such person;

✓ Section 2 (v) : „person resident in India, means :

(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include : (A) a person who has gone out of India or who stays outside India, in either case:

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India. or

(c) 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, otherwise than :

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India' or

(c) for any other purpose, in such circumstances as would indicate his 'intention to stay in India for an uncertain period;

(i) any person or body corporate registered or incorporated in India,

(ii) an office, branch or agency in India owned or controlled by a person resident outside India,

(iii) an office, branch or agency 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;

✓ section 2 (x) : “prescribed” means prescribed by rules made under this Act;

✓ Section 2 (y) : .repatriate to India” means bringing into India the realised foreign exchange and:

(i) the selling of such foreign exchange to an authorised person in India in exchange for rupees; or

(ii) the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank, and includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange and the expression “repatriation” shall be construed accordingly;

✓ Section 2 (z) : „Reserve Bank” means the Reserve Bank of India constituted under sub-section (1) of section 3 of the Reserve Bank of India Act, 1934 (2 of 1934);

✓ Section 2 (za): “security” means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944 (18 of 1944), savings certificates to which the Government Savings Certificates Act, 1959 (46 of 1959) applies, deposit receipts in respect of deposits of securities and units of the Unit Trust of India established under sub-section (1) of section 3 of the Unit Trust of India Act, 1963 (52 of 1963) or of any mutual fund and includes certificates of title to securities, but does not include bills of exchange or promissory notes other than Government promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act;

✓ Section 2 (zb): “service” means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

- ✓ section 2 (zc) : “special Director (Appeals)”, means an officer appointed under section 18;
- ✓ section 2 (zd): “specify” means to specify by regulations made under this Act and the expression “specified”, shall be construed accordingly;
- ✓ Section (ze) : “transfer” includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right title, possession or lien.

4.9 IMPORTANT CONCEPTS

1. WHO IS AN AUTHORISED PERSON ?

Section 2 (c) of FEMA defines Authorised Person as, “Authorised person means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under section 10(1) to deal in foreign exchange or foreign securities,.. As per section 10(1) of the Foreign Exchange Management Act, 1999, the Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.

Section 10(2) of the Foreign Exchange Management Act, 1999 states that an authorization under this section shall be in writing and shall be subject to the conditions laid down therein. section 10 states that the Reserve Bank may authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities as an authorised dealer, money changer or off-shore banking unit. The Reserve Bank may specify the conditions in the authorisation and may also revoke the same in the public interest in the case of any contravention of the provisions of this Act or failure to comply with the conditions in the authorisation’ The authorised person before understanding any transaction in foreign exchange shall make a declaration that the transaction does not contravene any provisions of the FEMA’ If any person (other than the authorised person) who has acquired or purchased foreign exchange (for any purpose mentioned in the declaration) does not use it for that purpose or does not surrender it to the authorised person or uses it for some other purpose not permissible under the Act, shall be claimed to have committed contravention under the Act.

category	entities	Permitted activities
Authorised Dealer Category I	Commercial Banks, Foreign Banks, State Coop Banks, Urban Coop Banks Dealer	All current and capital account transactions as per RBI directions issued from time to time.
Authorised dealer category II	Upgraded FFMC'S , coop banks, regional rural banks, other as licences by RBI	Specified non- related current account transaction and all activities permitted to FFMS
Authorised dealer category III	Select financial and other institution	Transaction incidental to the foreign exchange
Authorised dealer category IV	Department of post, urban coop banks, other FFMC's	Purchase of foreign exchange and sale for private and business visits abroad.

Activities by Authorised Dealers

Generally, all nationalised Banks, leading non-nationalised banks and foreign banks are appointed as Authorised Dealers Category I' to deal in foreign exchange. They can deal in all other transactions in foreign exchange like bill of exchange, cheques, Letter of Credit, deposits etc. They can freely purchase from public in India TTs (Telegraphic Transfers), MTs (Mail Transfers), drafts, bills etc'' drawn in any foreign currency against rupees. r Authorised Dealers-category try can issue foreign exchange for : (a) Private visits and business visits (b) Remittances of tour operators (c) Participation in international events, - global conferences and specialised training (d) Medical treatment abroad (e) Overseas education (Remittance of, examination fees for GRE, TOEFL etc. (g) Employment and

overseas job applications (h) Emigration and Emigration Consultancy fees (i) Visa fees o
Fees for registration of documents (k) Fees for International organisations.

2. AUTHORTSED MONEY CHANGERS (AMC)

Money Changers' are authorised by RBI only to :

- (a) purchase foreign currency in form of traveller's cheques, notes or coins or
- (b) sale foreign currency in form of coins and notes. They can sell /purchase foreign exchange as per guidelines issued by RBI. 'money Changers' can only deal in coins, notes and traveller's cheques.

Authorised & money Changers may be FPMC (Full Fledged Money Changer) or a RMC (Restricted Money Changer). FPMCs are authorised to purchase foreign exchange from residents and non-residents visiting India and to sell foreign exchange for certain approved purposes. Authorised Dealers and FPMCs can appoint franchisees. Some large hotels and shops, leading travel agencies etc. are appointed as 'Restricted Money Changers' (RMCs). The 'Restricted Money Changers' can only purchase foreign currency and accept traveller's cheque. Such acceptance may be for accepting value of goods/services sold by them or even for converting into rupees. however, RMCs cannot sell foreign exchange.

All AMCs require licenses from RBI to deal in foreign exchange.

3. OFFSHORE BANKING UNITS

'Offshore Banking unit' (OBU) is a new concept under FEMA. An offshore banking unit can be appointed as 'Authorised Agent'. Offshore banking units can be set up in Special Economic Zones (SEZ), as per Foreign Exchange Management (Offshore Banking Unit) Regulations, 2002. The OBU would be virtually foreign branches of Indian Banks but located in India. The OBU will be exempt from restrictions in respect of CRR, SLR or priority sector lending provisions. They will give access to SEZ and SEZ developers to international finance at international rates. OBU can source foreign currency funds from abroad. OBU will not be treated as 'authorised dealer'. They will deal only in foreign

exchange. They will deal only with SEZ units and developers of SEZ. Foreign Exchange Management (Offshore Banking Unit) Regulations, 2002 have been issued by RBI.

4. FOREIGN EXCHANGE RATE

Exchange rate means rate of exchange from one currency to another. With effect from I-3-L993, exchange rate of Indian Rupee is fixed by market, depending on demand and supply. This is called “LERMS” i.e. Liberalised Exchange Rate Management System. Under this system, the FEDAI (Foreign Exchange Dealers Association of India) decides the exchange rate on the basis of demand and supply, without any intervention from RBI. The market rate applies uniformly to all foreign exchange payments-Government or private. The receipts on current or capital account are also at market rate of exchange.

Types of foreign exchange rates

FEDAI announces rates on daily basis. The rates may be cash (transaction on same day), Tom (delivery on immediately succeeding working day), spot (delivery on second successive working day) or forward (delivery beyond second successive working day). The rates are

- TT selling : Transmission by bank drafts, mail transfer, telegraphic transfer.
- Bill Selling : Foreign remittances outside India as proceeds of import bills payable in **India. This rate is little worse than TT selling rate.**
- TT buying : Purchase of foreign currency where cover is already obtained by Bank.
- Bill buying : Purchase/discounting/negotiation of export bill. This rate is worse than **TT buying rate, and in addition, bank also recovers interest for the period for which bank is out of funds.**
- Travellers cheques/Currency notes selling rates/encashment : As per RBI **formula.**

Spread between rates ,

There is difference between buying rate and selling rate. The difference is called ,spread,.The maxim is ‘buy low-sell high or give less-take more’. The ‘spread’ permitted by FEDAI is

maximum 1% for US \$ and 2 % for other hard currencies like UK Pound, Yen, Euro. In case of other currencies, there is no limit, but normally, the spread does not Exceed 5%.

5. NON RESIDENT INDIAN (NRI)

The term 'Non Resident Indian' is not used or defined in FEMA Act, but is used and defined in various regulations issued by RBI. 'Non Resident Indian (NRI) means a person resident outside India who is a citizen of India or is a person of Indian origin as per Consolidated FDI Policy dated 17-4-2014 issued by DIPP of MC & I. Thus, a person resident outside India will be 'NRI' if (a) He is citizen of India or (b) He is PIO (Person of Indian Origin). For the purpose of Foreign Exchange Management (Remittance of Assets) Regulations, 2000, NRI means a person resident outside India who is a citizen of India.

6. PERSON OF INDIAN ORIGIN

'Person of Indian Origin' (PIO) means a citizen of any country other than Bangladesh or Pakistan, if (a) he at any time held Indian passport; or (b) he either of his parents or any of his grand-parents was a citizen of India or (c) the person is a spouse of an Indian citizen or of a person referred to in (a) or (b) above. [The definition is as per regulation 2(xii) of Foreign Exchange Management (Deposit) Regulations, 2000, regulation 2(iv) of Foreign Exchange Management (Remittance of Assets) Regulations, 2000 and regulation 2(iv) of Foreign Exchange Management (Investment in Firm or Proprietary Concern in India) Regulations, 2000]. Para 2-1-30 of Consolidated FDI Policy Circular No. 1 of 2013 dated 5-4-2013 issued by DIPP of MC & I. o For the purpose of Foreign Exchange Management (Investment in Firm or Proprietary Concern in India), Regulations, 2000, citizen of 'Sri Lanka' is also excluded in addition to citizen of Bangladesh and Pakistan. o For the purpose of Foreign Exchange Management (Acquisition and Transfer of immovable Property in India) Regulations, 2000, the definition is further restrictive. Only individuals (not being citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan) who at any time held Indian passport or who or either of whose father or grandfather was a citizen of India will be 'PIO'. Thus, this definition is restrictive compared to other definitions. (Regulation 2(c) as amended w.e.f. 5-10-2009).

4.10 FEATURES OF FEMA

1. Enforcement of FEMA : Though RBI exercises overall control over foreign exchange transactions' enforcement of FEMA has been entrusted to a separate 'Directorate of Enforcement' formed for this purpose. [Section 36].

2. Controlling role of RBI : FEMA envisages that RBI will have a controlling role in management of foreign exchange. Since RBI cannot directly handle foreign exchange transactions, it authorises 'Authorised Persons' to deal in foreign exchange as per directions issued by RBI. [section 10 of FEMA]. RBI is empowered to issue directions to such 'Authorised Persons' u/s 11. These directions are issued through AP(DIR) circulars. RBI exercises control through its Foreign Exchange Department (FED) at Central Office, New Delhi.

3. Free transactions on current account are allowed under FEMA. However, some restrictions on current account transactions may be imposed. [Current account transactions have been explained in detail in chapter Current Account Transactions].

4. FEMA maintains control over realisation of export proceeds : Export of goods and services is regulated by the provisions of Sections 7 and 8 of FEMA, 1999 and Foreign Exchange Management (Export of Goods and Services) Regulations, 2000. Generally, exports are free but in the case of following exports, prior approval of RBI is required:

1. Export of goods on lease, hire or any other manner other than sale or disposal of goods;
2. Exports on elongated credit terms;
3. Counter trade i.e., any arrangement involving adjustment of value of goods imported in India against value of goods exported from India.

5. Regulation of capital account transactions : RBI may, in consultation with the Central Government, specify the permissible capital account transactions and the limits up to which foreign exchange will be allowed for such transactions by making the appropriate regulations. Accordingly, the RBI has made Foreign Exchange Management (permissible Capital Account Transactions) Regulations, 2000. Thus capital account transactions are permitted

to the extent specifically permitted by RBI [Capital account transactions have been explained in detail, in chapter-Capital Account Transactions].

6. Adjudicating Authorities : Section 16 of Foreign Exchange Management Act, 1999 empowers the Central Government to appoint as many Adjudicating Authorities as it thinks fit for the purposes of enquiry. The Adjudicating Authorities can hold enquiry only on receiving a complaint from an authorized officer. Adjudicating Authority shall endeavour to dispose off the complaint in one year. If it is not possible, he shall record the reasons for not disposing off the complaint within 1 year. There are 3 levels of Adjudicating Authorities i.e., Deputy Director, Additional Director and Director of Directorate of Enforcement in the ascending order of hierarchy.

7. Appellate Tribunal for foreign Exchange : Section 18 of Foreign Exchange Management Act, 1999 empowers the Central Government to establish an Appellate Tribunal for Foreign Exchange to hear appeals against the orders of Adjudicating authorities (i.e., Additional Director and Director of Directorate of Enforcement) and Special Director (Appeals). The appeal against the orders of appellate Tribunal shall lie before the High Court. The Appellate Tribunal consists of a Chairperson and other members.

8. Penalties [Section 13] : If any person contravenes any of the provisions of Foreign Exchange Management Act, 1999 or any Rules, Regulations, Notifications, Directions, or Orders issued in exercise of the powers under Foreign Exchange Management Act, he shall be liable to penalty up to 3 times the sum involved in such contravention where such amount is quantifiable or up to Rs 2 lakhs where the amount is not quantifiable. In case, the contravention is a continuing one, then a further penalty of up to (5000 per day shall also be imposed until the contravention continues.

9. Compounding of Offences [Section 15] : Section 15 empowers the Directorate of Enforcement and Reserve Bank to compound tire offences. This section provides that contravention under Section 13 may be compounded within 180 days from the date of receipt of application. No contravention shall be compoundable unless the amount involved in such contravention is quantifiable.

4.11 LEGAL FRAMEWORK OF FEMA

Provisions of FEMA cannot be found at one place but are spread over at different places. The Foreign Exchange Management Act, 1999 contains only basic legal framework. The practical aspects are covered in rules made by Central Government and regulations made by RBI.

1. Role of RBI

Section 11(1) of FEMA authorises RBI to give directions to ‘authorised person’ to ensure compliance with provisions of FEMA. RBI issues direction to Authorised Persons through AP(DIR) circulars. [AP stands for ‘Authorised Person’ and DIR stands for ‘Directions’]. Many circulars have been issued by RBI under this series. The main functions of RBI under FEMA are as follows :

- (a) Control over dealings in foreign exchange by giving general or special permission for dealing in foreign exchange, excluding those cases where specific provisions have been made in Act, rules or regulations section 3
- (b) RBI cannot impose any restrictions on current account transactions. These can be imposed only by Central Government in consultation with RBI-section 5. In certain cases, prior approval of RBI is required for current account transactions as provided in Foreign Exchange Management (Current Account Transactions) Rules, 2000
- (c) Specifying conditions for payment in respect of capital account transaction-section 6(2)
- (d) Regulate/prohibit/restrict the following, by issuing regulations (i) Transfer or issue of foreign security to resident and Indian security to non-resident (ii) Borrowing and lending in foreign exchange or to a foreign person (iii) Export/import of currency or currency notes (iv) Transfer of immovable property outside India (v) Giving guarantee or surety where foreign exchange transaction is involved section 6(3)
- (e) Specify (by regulation) period and manner in which foreign exchange due from export of goods and services should be received-section 7 (0 To grant exemption from realisation and repatriation in cases specified u/s 9 [These cover provisions in respect of possession

of foreign currency or foreign coins, foreign currency accounts, foreign exchange acquired from employment, business, trade, services etc.]

(g) Granting authorisation to ‘Authorised Person’ to deal in foreign exchange, to give directions to them and to inspect the authorised person-sections 10, 11 and 12.

(h) To make regulations-section 47 2. Role of Ministry of Finance Industrial Policy announced by Ministry of Industry, Government of India contains provisions in respect of FDI (Foreign Direct Investment), foreign technical collaborations, royalty payments, joint ventures abroad etc. which are directly relevant to understand provisions of FEMA. Policy in respect of External Commercial Borrowings (ECB) and FCCD/GDR/ ADR is announced and controlled by Ministry of Finance, Government of India.

3. Rules under FEMA

Following rules have been issued under FEMA.

Appellate Tribunal for Foreign Exchange (Recruitment, salary and Allowances and other Conditions of Service of Chairperson and Members) Rules, 2000

- ✓ Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000
- ✓ Foreign Exchange (Authentication of Documents) Rules, 2000
- ✓ Foreign Exchange (Compounding Proceedings) Rules, 2000
- ✓ Foreign Exchange Management (Current Account Transactions) Rules, 2000
- ✓ Foreign Exchange Management (Encashment of Draft, Cheque, Instrument and Payment of Interest

4. Regulations under FEMA

REGULATION

- ✓ Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000
- ✓ Foreign Exchange Management (Acquisition and Transfer of Immovable Property outside India) Regulations, 2000
- ✓ Foreign Exchange Management (Borrowing and Lending in Rupees) Regulations, 2000
- ✓ Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000
- ✓ Foreign Exchange Management (Deposit) Regulations, 2000
- ✓ Foreign Exchange Management @encashment of Draft, Cheque, Instrument and Payment of Interest) Rules.2000
- ✓ Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000
- ✓ Foreign Exchange Management (Export and Import of Currency) Regulations, 2000
- ✓ Foreign Exchange Management (Export of Goods and Services) Regulations, 2000
- ✓ Foreign Exchange Management (Foreign Currency Account by a Person Resident in India) Regulations, 2000
- ✓ Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations. 2000
- ✓ Foreign Exchange Management (Guarantees) Regulations, 2000
- ✓ Foreign Exchange Management (Insurance) Regulations, 2000

- ✓ Foreign Exchange Management (Investment in Firm or Proprietary Concern in India) Regulations, 2000
- ✓ Foreign Exchange Management (Issue of Security in India by a Branch, Office or Agency of a Person Resident outside India) Regulations, 2000
- ✓ Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000
- ✓ Foreign Exchange Management (Offshore Banking Unit) Regulations, 2002
- ✓ Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2002
- ✓ Foreign Exchange management (Possession and Retention of Foreign Currency) Regulations, 2000
- ✓ Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000
- ✓ Foreign Exchange Management (Remittance of Assets) Regulations, 2000
- ✓ Foreign Exchange Management (Transferor Issue of any Foreign Security) Regulations, 2004
- ✓ Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000

5. Circulars and Master Circulars

Section 11(1) of FEMA authorises RBI to give directions to ‘authorised person’ to ensure compliance with provisions of FEMA. RBI issues directions to Authorised Persons through AP(DIR) circulars. Often, circulars give instructions which really amount to amendment to regulations issued by RBI. In such cases, the regulations are issued later with retrospective effect. Practically, RBI circulars are taken as amendment to regulations and are given effect immediately, without waiting for formal amendment to regulations. Most of these circulars are consolidated in master circulars issued by RBI on 1st July every year.

6. Other legal Provisions

Provisions of SEBI become relevant when capital market is involved. Income Tax provisions are contained in Income Tax and provisions in respect of EOU/SEZ/STP/ EHTP/BTP are contained under Customs Law. Some other provisions like FCRA, SAFEMA, COFEPOSA are also relevant for FEMA.

4.12 DIFFERENCE BETWEEN FERA AND FEMA

Main differences between FERA and FEMA are as follows :

- (a) Object of FERA was to conserve foreign exchange and to prevent its misuse Object of FEMA is to facilitate external trade and payments and maintenance of foreign exchange market in India.
- (b) Violation of FERA was a criminal offence while violation of FEMA is a civil offence.
- (c) Offences under FERA were not compoundable while offences under FEMA are compoundable.
- (d) Citizenship was a criteria to determine residential status of a person under FERA, while stay of more than 182 days in India is the criteria to decide residential status.
- (e) Provisions in respect of Basic Travel Quota (BTQ), business travel, export commission, gifts, donation etc. have been considerably liberalised in FEMA
- (f) Almost all current account transactions are free, except a few.
- (g) FEMA is a civil law, while FERA was draconian police law.

4.13 DEALING IN FOREIGN EXCHANGE

Section 3 of the FEMA, 1999 has imposed restrictions on dealing in foreign exchange. As per provisions of section 3, except as provided in Act, rules or regulations or with general or specific permission of RBI. a person shall not :

- Deal in on transfer any foreign exchange or foreign security to) any person other than authorised person’.
- Make any payment to or for the credit of any person resident outside India in any manner.
- Receive any payment by or on behalf of any person resident outside India except through authorised person. Any payment by or on behalf of person outside India should be with corresponding inward remittance from a place outside India” If such payment is received (even from authorised person) without corresponding inward remittance, it will be treated as payment not received through authorised person.
- Enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire any asset outside India by any person.
- Financial Transaction’ means # making any payment to, or for credit of any person # receiving any payment for, by order or on behalf of any person or drawing, issuing or negotiating any bill of exchange or promissory note or # transferring any security or acknowledging any debt.

Most of the powers in respect of routine matters for REMITTANCE OF FOREIGN EXCHANGE have been delegated by the Reserve Bank of India (RBI) to the Authorised Dealers. Authorised Dealers have the general permission to purchase the Foreign Currency Notes, Coins and travellers cheque from Residents and Non-Residents. Certain restrictions have been imposed by the Reserve Bank on bringing in and taking out of foreign currency, possession and retention of foreign currency.

- Purchase of TT : Authorised Dealers may freely purchase Telegraphic Transfers (TTs), Mail Transfers (MTs), drafts, bills, etc. drawn in any foreign currency against rupees from the public in India.

- Purchase of Foreign currency from Public : Authorised Dealers/Authorised Money Changers, franchisees may freely purchase Foreign Currency Notes, coins and travellers cheque from residents as well as non-residents. Production of passport need be insisted upon only while encashing travellers cheque tendered by non residents.
 - Receipt of Foreign Exchange in India : There are no restrictions on receipt of foreign exchange in India from any foreign country through Authorised Dealers in India. The Reserve Bank vide Notification No. FEMA 61 2000-RB dated 3rd May, 2000 has also permitted any person to : ‘ (a) Send into India limit foreign exchange in *y form other than currency notes, bank notes and travellers cheques;
- (b) Bring into India from any place outside India without limit Foreign Exchange (Other than unissued notes). Provided that bringing of Foreign Exchange into India under clause (b) shall be subject to the condition that such person makes, on arrival in India, a declaration to the custom authorities in Currency Declaration Form (CDF). However, it shall not be necessary to make such declaration where the aggregate value of the Foreign Exchange in the form of currency notes, bank notes or traveller’s cheque brought in by such person at any one time does not exceed USD 10,000 (US Dollars ten thousand) or its equivalent and/or the aggregate value of foreign currency notes brought in by such person at anyone time does not exceed USD 5,000 (US Dollars Five Thousand) or its equivalent.
- (c) Taking out foreign exchange in any form, other than foreign exchange obtained from an authorised dealer or a money changer is prohibited unless it is covered by a general or special permission of Reserve Bank. Non-residents, however, have general permission to take out an amount not exceeding the amount originally brought in by them. The Reserve Bank (vide its Notification No. FEMA 16/2000-RB dard 3rd May, 2000) has permitted any person, to receive any payment: (a) made in rupees by order or on behalf of a person resident outside India during his stay in India out of rupee funds provided by him by sale of Foreign Exchange to an authorised dealer or a money change in India.
- (b) made by means of a cheque drawn on a bank situated outside India or a bank draft or travellers cheque issued outside India.

(c) made in foreign currency notes directly from out of India : subject to the conditions that the foreign exchange received pursuant to clauses (b) and (c) shall be offered for sale or caused to be offered for sale to an authorised dealer or a money changer within seven days of receipt thereof.

(d) by means of postal order issued by a post office outside India or by a postal money order issued by such post office.

- Export and Import of Foreign Currency : According to Rule 5 of the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000 no person shall without general permission of the Reserve Bank, export or send out of India, or import or bring into India, any foreign currency.

4.14 IMPORT OF FOREIGN EXCHANGE

According to Rule 6 of the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000 the Reserve Bank has granted general permission to any person :

(a) send into India without limit foreign exchange in any form other than currency notes, bank notes and travellers cheques;

(b) bring into India from any place outside India without limit foreign exchange (other than unissued notes). Provided that bringing of foreign exchange into India under clause (b) shall be subject to the condition that such person makes., on arrival in India, a declaration to the Custom authorities in Currency Declaration Form (CDF); Provided further that it shall not be necessary to make such declaration where the aggregate value of the foreign exchange in the form of currency notes, bank notes or traveller's cheques brought in by such person at any one time does not exceed USD 10,000 (US dollars ten thousand) or its equivalent and/or the aggregate value of foreign currency Notes brought in by such person at any one time does not exceed USD 5,000 (Us dollars five thousand) or its equivalent.

4.15 EXPORT OF FOREIGN EXCHANGE

According to Rule 7 of the Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations 2000 the Reserve Bank has granted a general permission to the following categories of person to export foreign exchange and currency notes :

1. An authorised person may send out of India foreign currency acquired in normal course of business; any person may take or send out of India :

(i) cheques drawn on foreign currency account maintained in accordance with Foreign Exchange Management (Foreign currency Accounts by a person resident in India) Regulations, 2000;

(ii) foreign exchange obtained by him by drawal from an authorised person in accordance with the provisions of the Act or the des or regulations or directions;

(iii) currency in the safes of vessels or aircraft which has been brought into India or which has been taken on board a vessel or aircraft with the permission of the Reserve Bank; any person may take out of India :

(i) foreign exchange possessed by him in accordance with the Foreign Exchange Management (Possession and Retention of Foreign currency) Regulations, 2000;

(ii) unspent foreign exchange brought back by him to India while returning from travel abroad and retained in accordance with the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000;

4. any person resident outside India may take out of India unspent foreign exchange not exceeding the amount brought in by him and declared in accordance.

4.1 Receipt and Payment in FOREIGN EXCHANGE

provisions in respect of manner of receipt and payment in foreign exchange: are contained in Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000' Manner of Receipt in Foreign Exchange : Receipt in foreign exchange by an authorised

dealer shall be either by debit to Asian Clearing Union dollar account in India or payment in permitted currency. 'Permitted currency' means a foreign currency which is freely convertible. Debit Asian Clearing Union is permitted only in respect of member countries of Asian Clearing Union. The Asian Clearing Union (ACU) was established with its head quarters at Tehran, Iran, on December 9, 1974 at the initiative of the United Nations Economic and Social Commission for Asia and Pacific (ESCAP), for promoting regional cooperation. The main objective of the clearing union is to facilitate payments among member countries for eligible transactions on a multilateral basis, thereby economizing on the use of Foreign Exchange reserves and transfer costs, as well as promoting trade among the participating countries. The Central Banks and the Monetary Authorities of Bangladesh, Bhutan, India, Iran, Maldives, Myanmar, Nepal, Pakistan and Sri Lanka are currently the members of the ACU.

All transactions which are required to be settled through the ACU will be handled by AD Category-I banks in the same manner as other normal Foreign Exchange transactions, through correspondent arrangements. Payment for export can be received :

- (i) in the form of a bank draft, cheque, pay order, foreign currency notes/travellers cheque from a buyer during his visit to India, provided the foreign currency so received is surrendered within the specified period to the authorised dealer of which the exporter is a customer.
- (ii) by debit to FCNR (Foreign Currency Non Resident Account)4. {RE (Non Resident External Rupee Account) account maintained by the buyer with an authorised dealer or an authorised bank in India.
- (iii) in rupees from the credit card servicing bank in India against the charge slip signed by the buyer where such payment is made by the buyer through a credit card.
- (iv) from a rupee account held in the name of an Exchange House with an authorised dealer if the amount does not exceed fifteen lakh rupees per export transaction. [The limit was (five lakh up to 21-5-2014)].
- (v) in accordance with the directions issued by the Reserve Bank to authorised dealers,

where the export is covered by the arrangement between the Central Government and the Government of a foreign country or by the credit arrangement entered into by the Exim Bank with a financial institution in a foreign state.

(vi) in the form of precious metals i.e. gold/silver/platinum equivalent to value of jewellery exported by Gem and Jewellery units in SEZ and EOU, if sale contract provides for the same and value is declared in the relevant GR/SDFIPP form.

(vii) the importer client can make payment through his credit card. He need not be on visit to India. The payment can be made in Rupees, but reimbursement from card issuing bank/organisation should be received in foreign exchange. Manner of payment in foreign exchange Payment in foreign exchange by an authorised dealer shall be either by debit to Asian Clearing Union dollar account in India or payment in permitted currency. The payment shall be in a currency appropriate to the country of shipment of goods. Payment of export related receipts through Online Payment Gateway Service Providers (OPGSPs) is also permissible. Offsetting (set off) against payment due Often export Or has to make payment in foreign exchange to person from whom export realisation is due. Similarly, importer has to make payment to foreign supplier, who has to receive some payment from him. So far, RBI permission was required for such set off in all cases. Now, such set off is allowable by Authorised Dealer Category I Banks, to set off export receivables against import payables. The import should be as per Foreign Trade Policy and proper documents are submitted to Bank. Both transactions should be reported separately. Set off should be against same overseas buyer and supplier and his consent should be obtained.

Payment through international Card

A person resident in India may make payment in foreign exchange through an international card held by him if the transaction for which the payment is made is in conformity with provisions of FEMA and Export-Import Policy.

Money Transfer Service Scheme

Money Transfer Service Scheme (MTSS) is a quick and easy way of transferring personal remittances from abroad to beneficiaries in India. Only inward personal remittances into India such as remittances towards family maintenance and remittances favouring foreign

tourists in India are permissible. Outward remittance is not permitted.

Online payment Gateways

Online Payment Gateways have emerged as a popular mode of facilitating e-commerce transactions. Some of the Online Payment Gateway Service Providers (OPGSPs) facilitate cross border transactions also. These facilitate small value export transactions. In order to ensure that these OPGSPs do not violate FEMA provisions, RBI has decided to allow Authorised Dealer Category I Banks to offer facility of repatriation of export related remittances by entering into standing arrangements with such OPGSPs. The facility will be available for export of goods and services of value not exceeding USD 10,000. The facility of online payment has been extended for payment of imports also.

4.16 Holding of Foreign Exchange, Foreign Security and Immovable property

Restrictions on holding or transfer of foreign exchange/security/ immovable property Section 4 of FEMA provides that no person resident of India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India, except as provided in the Act.

Exceptions to restrictions

1. Foreign currency/security/property by resident [section 6(4)] A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India, if such currency, security of property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

2. Indian currency/security/property by non-resident [Section 6(5)] A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India, if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

3. Restrictions on branches/offices of non-resident [Section 6(6)] RBI can prohibit, restrict or regulate establishment of a branch, office or other place of business by a person resident outside India; for carrying on any activity relating to such branch, office or other place of business.

4.17 POSSESSION AND RETENTION OF FOREIGN CURRENCY [FOREIGN EXCHANGE MANAGEMENT (POSSESSION AND RETENTION OF FOREIGN CURRENCIES) REGULATIONS, 2000]

Foreign currency or foreign coins can be possessed and retained subject to the limits [Regulation 3 of Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000].

1. Possession by authorised persons : Authorised person can retain and possess foreign currency and coins within the scope of his authority without any limit. I

2. Foreign coins : Any person can possess foreign coins without limit.

3. Currency up to USD 2000 by any person : A person resident in India can retain foreign currency notes, bank notes and foreign currency travellers' cheques not exceeding US \$ 2000 or its equivalent in aggregate. Such foreign exchange in the form of currency notes, bank notes and travellers cheques should have been acquired by him :

(a) while on a visit to any place outside India by way of payment for services not arising from any business in or anything done in India or

(b) acquired by him, from any person not resident in India and who is on a visit to India, as honorarium or gift or for services rendered or in settlement of any lawful obligation or

(c) was acquired by him by way of honorarium or gift while on a visit to any place outside India or

(d) represents un-spent amount of foreign exchange acquired by him from an authorised person for travel abroad.

4. Balance in RFC (Domestic) Account : A resident can keep the amount in RFC

(Domestic Account) also without any limit. This facility is in addition to USD 2000 which he is permitted to keep in form of currency notes/travellers', cheques.

5. Possession of foreign exchange by a person resident in India but not permanently resident therein : As per regulation 4 of Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000, a person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and travellers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the regulations made under the Act, i.e. after making declaration when required.

Not permanently resident' means a person resident in India for employment of a specified duration (irrespective of length thereof) or for a specific job or assignment, the duration of which does not exceed three years.

Holding of foreign exchange by Authorised Banks

Besides authorised dealers and money changers, various other banks can also hold and deal with foreign exchange. There are exchange houses also that deal in foreign exchange. RBI has issued instructions in respect of all such intermediaries.

4.18 REALISATION, REPATRIATION AND SURRENDER OF... FOREIGN EXCHANGE

Under section I of FEMA, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India the foreign exchange within such period and such manner as may be specified by RBI.

4.18.1 Exemption from provisions relating to holding/repatriation

Section 4 prohibits holding of foreign exchange by resident in India (Section 4 has already been explained) Section 8 requires that foreign exchange earned is realised and repatriated to India. However, in following cases, the foreign exchange can be held or need not be repatriated to India :

- Possession of foreign currency [Sec. 9(a)] : Possession of foreign currency or foreign coins up to limit prescribed by RBI is permitted.
 - Foreign Currency Account [Sec.9(b)] : Foreign Currency Account can be held and operated by such persons and within such limits as specified by RBI
 - Foreign exchange acquired before July 1947 [Sec. 9(c)] : Foreign exchange acquired or received before 8th July 1947 or income arising or accruing thereon can be held outside India. If such foreign exchange is acquired as a gift or inheritance, that exchange and income arising there from can be held as foreign exchange in India or held abroad and need not be repatriated.
 - Foreign Exchange acquired abroad [Sec.9(e)] : Foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means can be held as foreign exchange in India or it need not be repatriated from abroad; subject to limits specified by RBI.
 - Any other receipt specified by RBI [Sec. 9(f)] : Any other receipt, as may be specified by RBI, can be held as foreign exchange in India or it may not be repatriated.
- 14.6.2 Duty of persons to realise foreign exchange due As per regulation 3 of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000, a person resident in India to whom any amount of foreign exchange is due or has accrued shall take all reasonable steps to realise and repatriate to India such foreign exchange. He shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing : (a) that the receipt by him of the whole or part of that foreign exchange is delayed; or (b) that the foreign exchange ceases in whole or in part to be receivable by him. Note that 'foreign exchange due' means the amount which a person has a right to receive or claim in foreign exchange and 'surrender' means the selling of foreign exchange to an authorised person in India in exchange of, rupees. Meaning of repatriate to India : As per section 2(y) of FEMA, 'repatriate to India' means bringing into India the realised foreign exchange and (i) selling of such foreign exchange to an authorised person in India in exchange for rupees or (ii) the holding of realised amount in an account with an authorised

person in India to the extent notified by IGI. It also includes use of realised amount for discharge of a debt or liability denominated in foreign exchange.

4.18.2 Manner of Repatriation (According to Regulation 4)

On realisation of foreign exchange due, a person shall repatriate the same to India, (i.e. bring into, or receive in, India) and (a) sell it to an authorised person in India in exchange for rupees; or (b) retain or hold it in account with an authorised dealer in India (termed as EEFC account) to the extent specified by the RBI or (c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank. A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer. Thus, he can collect the amount in his bank account abroad and remit the same to India [regulation 4(2) of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000]. Surrender of foreign exchange by person other than an individual resident of India Foreign exchange acquired or purchased by person (other than individual resident in India) but not used for permissible purposes, should be surrendered to authorised person within 60 days from date of acquisition or purchase (except when the foreign exchange was purchased for foreign travel) [Regulation 6(1) of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000]. In case of unspent foreign exchange purchased by person (other than individual resident in India), which was taken for foreign travel, the foreign exchange should be surrendered within 90 days if the exchange was in form of currency notes and coins and within 180 days if the foreign exchange was in form of travellers cheques [Regulation 6(2) of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000]. 14.6.4 Surrender of foreign exchange by an individual resident of India to be made within 180 days Foreign exchange received/realised/unspent/unused should be surrendered within 180 days, in case of individual resident in India : Regulation 64 of Foreign Exchange Management (Realisation, Repatriation and Surrender of Foreign Exchange) Regulations, 2000. Provisions not applicable to foreign currency of Nepal and Bhutan : provisions of these regulations do not apply to foreign exchange in the form of currency of Nepal or Bhutan [regulation 7 of

4.19 WHAT IS A Current Account Transaction

Section 2(j) of FEMA states that ‘*Current Account Transaction’ means a transaction other than a capital account transaction. It includes following :

- Payment due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business
- Payments due as interest on loans and as net income from investments (dividends after deduction of tax)
- Remittances for living expenses of parents, spouse and children residing abroad
- Expenses in connection with foreign travel, education and medical care of parents, spouse and children The definition stated above is an “inclusive definition” i.e. apart:- from the above mentioned expenses, current account transaction also includes any expenditure which is not a “capital account transaction”. Such as :
 - expenses of branch office abroad.
 - educational expenses abroad.
 - medical expenses abroad.
 - expenses on foreign travel.

These all expenses although are not mentioned in the definition under section 2(j), but are covered as “current account transaction”. Dealing in current account transactions : No Restrictions. Under section 5 of the FEMA, any person may sell or draw any foreign exchange to or from an authorized person if such sale or draw is a current account transaction. However, the Central Govt. may impose reasonable restrictions on current account transactions in the public interest in consultation with the RBI by making the appropriate rules. Accordingly, the Central Govt. has made Foreign Exchange Management (Current Account Transactions) Rules, 2000. Thus, generally all current account transactions are

free subject to reasonable restrictions, which may be imposed by the Central Government in consultation with the RBI

4.20 Facilities for taking Foreign Exchange

As per the revised schedule III to Foreign Exchange Management (Current Account Transactions) Rules 2000 (w.e.f.26-5-15) :

1. An individual can avail the facility of taking foreign exchange for the specified purposes within an overall limit of US \$2,50,000. This limit is within the overall limit of LRS (Liberalised Remittance Scheme) of 2,50,000 US \$ per financial year. The overall limit can be used for any of the following purposes :

- (i) Private visits to any country (except to Nepal and Bhutan)
- (ii) Gift or donation
- (iii) Going abroad for employment
- (iv) Emigration
- (v) Maintenance of close relative abroad
- (vi) Travel for business, or attending a conference or specialized training or for meeting medical expenses or check up abroad or for accompanying as attendant to a patient going abroad for medical treatment
- (vii) Expenses in connection with medical treatment abroad
- (viii) Studies abroad
- (ix) Any other current account transaction. Foreign Exchange in excess of US \$ 2,50,000 in some cases

For the following expenses, foreign exchange over and above the limit of US \$ 2,50,000 can be availed :

- Emigration
- Expenses in connection with medical treatment abroad
- Studies abroad

2. An Individual, who is a PRI (Person Resident in India) 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 the office or branch of a foreign company or subsidiary or joint venture in india of such foreign company, may also make remittance for the aforesaid purposes up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

3. Facilities for Persons other than Individuals In general, a person other than an individual may also avail of foreign exchange facility, mutatis mutandis, within the limit prescribed under the said Liberalised Remittance Scheme for the purposes mentioned herein above. However, the following remittances by persons other than individuals shall required prior approval of the Reserve Bank of India :

(i) Donations exceeding one per cent of their foreign exchange earnings during the previous three financial years or US \$ 50,00,000, whichever is less, for :

(a) creation of Chairs in reputed educational institutes,

(b) contribution to funds (not being an investment fund) promoted by educational institutes; and

(c) contribution to a technical institution or body or association in the field of activity of the donor Company.

(ii) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding US \$25,000 or five percent of the inward remittance whichever is more.

(iii) Remittances exceeding US \$ 1,00,00,000 per project for any consultancy services in respect of infrastructure projects and us \$ 10,00,000 per project, for other consultancy services procured from outside India.

(iv) Remittances exceeding five per cent of investment brought into India or US \$ 1,00,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses. What is Liberalised Remittance Scheme (LRS) Liberalised Remittance Scheme allows remittances by a resident individual up to US \$ 2,50,000 per financial year for any permitted current or capital account transaction or a combination of both. The permissible capital account transactions by an individual under LRS are :

- (i) opening of foreign currency account abroad with a bank;
- (ii) purchase of property abroad;
- (iii) making investments abroad;
- (iv) setting up Wholly owned subsidiaries and Joint Ventures abroad;
- (v) extending loans including loans in Indian Rupees to Non-resident Indians (NRIs) who are relatives as defined in Companies Act, 2013.

It may be noted that the Scheme cannot be made use for making remittances for any prohibited or illegal activities such as margin trading, lottery, etc.

4.21 Restrictions on current account transactions

Under Section 5 of FEMA any person can sell or draw foreign exchange to or from authorised person if such sale or drawal is a current account transaction. Reasonable restriction on current account transactions can be imposed by Central Government in public interest, in consultation with RBI. No restrictions on current account transaction, unless specified Basically, all current account transactions are free, unless specifically

restricted by Central Government. Thus, there are no restrictions on following current account transactions :

- Payment for imports of goods which are permitted under Open General Licence (OGL) or under Import Licence.
- Remittance of interest on investment made from abroad. Remittance of principal amount i.e. capital is permitted subject to restrictions imposed in the scheme. Tax will be deducted at source as per Income Tax provisions.
- Remittance of interest on funds borrowed from abroad as per approved schemes. Even penal interest can be remitted. Tax will be deducted at source as per Income Tax provisions.
- Remittance of dividend is permitted if the foreign investment was as per approved scheme. Remittance of dividend requires permission only when investment was allowed subject to dividend balancing condition.
- Booking of passage for foreign travel with airline/shipping companies or booking of cargo in ships/aircrafts. Indian office/agent can accept payment in Indian rupees and make remittance abroad to Principal.
- Salary/remuneration to foreign nationals/foreign directors.
- Remittance from EEFC/RFC account for permitted current account transactions.
- Export Commission (except in few cases as explained later).
- There is no restriction on remittance for advertisement on internet or TV abroad. Even Advance up to US \$ 2,00,000 can be remitted. Although, principally all current account transactions are free, but there are some restrictions or limitations which have been imposed on current account transactions.

I. PRIOR APPROVAL OF THE RBI

Remittance of foreign exchange above the prescribed limits will be permitted by the RBI if it is satisfied that those are genuine current account transactions. However, if remittance is

from RFC (Resident foreign currency account) account, no permission of RBI is required even if the expenditure is above the specified limits [Rules 4 and 5 and Schedules II and III of Foreign Exchange Management (Current Account Transactions) Rules, 2000]. In case of remittance from EEFC (Exchange Earners Foreign Currency Account) account, permission of RBI is required in a few cases, as stated below. In other cases, no permission of RBI is required even if the expenditure is above the specified limits. [Rule 6] In respect of the following expenses, if the foreign exchange is more than the specified limits and payment is not to be made through EEFC (Exchange Earner's Foreign Currency) account or RFC (Resident Foreign Currency) account, prior approval of RBI will be required.

1. Remittance of gifts and donations : Gifts up to US \$ 5,000 and donations up to US \$ 5,000 or equivalent per remitter/donor per annum are permissible [Item 3 of Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000]. These are also permissible under Liberalised Remittance Scheme (LRS). If gifts and donations exceed this limit, then prior approval of RBI is required.

2 Donations to educational institutes by corporates : Corporates can create chairs in reputed educational institutes or make donations to educational institutions up to 1% of foreign exchange earnings during three previous years or US \$ 5 million, whichever is less_ [Item 2(i) of Schedule III of Foreign Exchange Management (Current Account Transactions), Rules, 2000 as amended w.e.f. 26-5-2015]. Donations above this limit requires RBI approval.

3. Commission to agents abroad for sale of flats/plots in India : Commission to agents abroad for sale of residential flats/commercial plots in India up to 5% of the inward remittance or US \$ 25,000 per transaction (whichever is higher) is permitted without RBI approval. [Restriction applies to EEFC account also] [Schedule III Item 11 of Foreign Exchange Management (Current Account Transactions) Rules, 2000]. Remittance above this limit requires RBI approval.

4. Consultancy charges : Any consultancy services procured from abroad upto US \$ 1,00,00,000 per project for consultancy services in respect of infrastructure project and US \$ 10,00,000 per project in case of other consultancy services can be paid without RBI permission [Schedule III Item 15 of Foreign Exchange Management (Current Account

Transactions) Rules, 2000. [para 2(iii) Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000 amended w.e.f. 26-5-2015]. The restriction does not apply to EEFI account. Remittance above this limit will require RBI approval.

5. Reimbursement of pre-incorporation expenses : Remittance up to 5% of investment Brought in India or US \$ 1,00,000, whichever is higher, is permissible by an entity in India by way of reimbursement of pre-incorporation expenses. Remittance can be on basis of certificate from statutory auditors [para 2(iv) Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000 amended w.e.f. 26-5-2015). Remittance above this limit requires RBI approval.

6. Development of website : Remittance for developing website is permissible. However, in some schemes, earnings are offered on incremental basis depending on number of new clients/customers added to the chain” Operation of such scheme is akin to money circulation. Hence payment to such schemes is not permitted.

7. Lease rental for aircraft/aircraft engine/helicopter : Remittance of lease rental and/or opening of LC towards security deposit etc. for import of aircraft/engine/helicopter on operating lease basis is permitted, if approval of appropriate authorities like Ministry of Civil Aviation/DGCA has been obtained. However, approval of RBI will be required for financial lease transaction i.e. which contains an option to purchase the asset at the end of lease period.

8. Advertisement on TV abroad : There are no restrictions and foreign exchange can be remitted without any permission of RBI. However, there are restrictions on Advertisements by PSU, State/Central Government.

II. PRIOR APPROVAL OF THE GOVERNMENT OF INDIA

In following cases, prior approval of concerned ministry of Government of India will be required for remittance, even if these are current account transactions. If payment is through RFC account, approval of Government of India is not required. The relaxation is applicable to payment through EEFC account also [see rules 4 and 6 of Foreign Exchange Management (Current Account Transactions) Rules, 2000]. 1 Cultural Tours: For Cultural Tours, permission of Ministry of HRD (Department of Education and Culture) is necessary [Item

1 of Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 20001.

2. Advertisements by PSU/Government : Advertisements abroad by any PSU/State and Central Government department for any purpose other than for promotion of tourism, foreign investment and for international bidding (exceeding US \$ 10,000) will require approval from Ministry of Finance (Department of Economic Affairs) [item 2 of Schedule II of Foreign Exchange Management (current Account Transactions) Rules, 20001.

3. Chartered vessel by PSU/Government : Payment for freight of vessel chartered by PSU or import by a Govt. department or a PSU on c.i.f. basis (i.e. other than f.o.b. and f.a.s. basis) can be made with approval of Ministry of Shipping (Chartering Wing) [This restriction does not apply to normal imports of raw materials and capital goods]. The restriction applies only for imports through ocean transport. [item 3 of Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000]

4. Payment of import on CIF basis by PSU/Government through ocean transport : Payment of import through ocean transport by Government or a PSU on CIF basis (i.e. other than f.o.b and f.a.s. basis) requires approval of Ministry of Transport [Director General of Shipping] [Item 4 of Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000].

5. Agents of multi modal transporters : Multi-modal transport operators making

payments to their agents abroad have to obtain Registration Certificate from Director General of Shipping [Item 5 of Schedule II of Foreign Exchange Management (current Account Transactions) Rules, 20001.

6. Hire charges of transponders : Remittance of hiring, charges of transponders by TV channels should be approved by Ministry of Information and Broadcasting and remittance of hiring charges of transponders by internet service providers is required to be approve4 by Ministry of Communication and Information Technology. [item 6 of Schedule II of Foreign Exchange Management (current Account Transactions) Rules, 2000].

7. container detention charges beyond prescribed limits : container detention charges at or below the rates prescribed by Director General of Shipping can be freely remitted. However, remittance of container detention charges exceeding rates prescribed by Director General of Shipping require approval from Ministry of Surface Transport (Director General of Shipping) [Item 7 of Schedule II of Foreign Exchange Management, [current account Transactions) Rules, 20001.

8. Prize money for sports : Remittance of prize money/sponsorship of sports activity abroad,” if the amount involved exceeds US \$ 1,00,000 can be made only with approval from Ministry of Human Resource Development (Department of Youth Affairs and Sports)- Permission is not required irrespective of amount, if remittance is by International/National /State Level sports bodies [tem 9 of Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 20001.

9. Membership of P&I club : Payment for membership of P and I club can be only with approval of Ministry of Finance (Insurance Division) [Restriction applicable even if payment is made from EEFC account] [item 11 of Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 20001.

III. PROHIBITED CURRENT ACCOUNT TRANSACTIONS

There is prohibition on certain remittances, even if they are ‘current account transactions’. These cannot be done even with permission of RBI or Government. Payment from RFC/ EEFC account will also not be permitted. [Rule 3 and Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 20001.

1. Transaction with Nepal-Bhutan : (a) Drawal of foreign exchange for travel to Nepal or Bhutan is not permitted. (b) Transaction with a person resident in Nepal or Bhutan (unless permitted by RBI by a special or general order) cannot be made in foreign exchange. It should be made only in Indian Rupees.

2. Commission on exports to JVAMOS abroad : Commission on Exports made towards equity investment in Joint Ventures/wholly Owned Subsidiaries abroad of Indian Companies is not permitted [Item 4 of Schedule I of Foreign Exchange Management (Current Account

Transactions) Rules, 2000].

3. Commission on rupee trade : Commission on export under Rupee State credit Route is not permitted. However, commission up to 10 % of invoice value of exports of tea and tobacco is permitted [Item 6 of Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000].

4. Call back charges : Payment related to 'call back services' of telephones. [Call back charges means the party which is receiving the telephone call makes payment of telephone charges] [Item 7 of Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000].

5. Lottery/races : Following remittances are prohibited : (a) Remittance out of lottery winnings (b) Remittance of income from racing/riding etc. or any other hobby (c) Remittance for purchase of lottery tickets, banned magazines, football pools, sweepstakes etc. [Items 1, 2 and 3 of Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000]. Even foreign direct investment (FDI) in lottery schemes is prohibited.

6. Bogus prizes/fictitious schemes/money circulation schemes/cheap money offers : Some (usually bogus) organisations advise individuals by e-mails or letters that they have won prizes in lotteries etc. and they should arrange to remit some amount in US \$ as processing fees or transaction fee, tar clearance charges etc. Some time cheap money is offered and processing charges for application fee are demanded. Gullible people fall to such mails. It has been clarified that remittance for lottery like schemes functioning under different names like money circulation scheme or remittance for purpose of securing prize money/awards is prohibited.

4.22 Capital Account Transactions

What is a capital account transaction ?

Section 2(e) of the Foreign Exchange Management Act, 1999 defines capital account transaction as : -

“Capital account transaction means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in subsection (3) of section 6.” However, the Finance Act, 2015 has omitted subsection (3) of section 5. In simple words, a capital account transaction is a transaction that is associated with the movement of capital such as transaction in property, investments, lending and borrowing transactions. But the most important trait of a capital account transaction is that results into :-

- (i) Alteration of assets or liabilities outside India of a person resident in India ; or
- (ii) Alteration of assets or liabilities in India of a person resident outside India. How are capital account transactions regulated ?

Section 6 of the FEMA, 1999 provides for regulating the capital account transactions.

- Under Section 6(1), any person may sell or draw foreign exchange to or from an **authorised person for a capital account transaction, but subject to the provisions of section 6(2).**
- Under Section 6(2) as amended by the Finance Act, 2015, the Reserve Bank **may, in consultation with the Central Government, specify-(a) any class or classes of capital account transactions, involving debt instruments, which are permissible;**

(b) the limit up to which foreign exchange shall be admissible for such transactions;

(c) any conditions which may be placed on such transactions; Section 6(2) also states that the Reserve Bank or the Central Government shall not impose any restrictions on the drawal of foreign exchange for payment due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business.

- Under Section 6(2A) as amended by the Finance Act 2015 the Central **Government may, in consultation with the Reserve Bank, prescribe -**

(a) any class or classes of capital account transactions, not involving debt instruments, which are permissible;

(b) the limit up to which foreign exchange shall be admissible for such transactions; and

(c) any conditions which may be placed on such transactions

- Section 6(3) has been omitted by the Finance Actr 2015
- Under Section 6(4), a person resident in India is allowed to hold, own, transfer or invest in a foreign currency, foreign security or any immovable property, which is situated outside India;

(i) if such security, currency or property was acquired, held or owned by such person when he was resident outside India ; or

(ii) if such security, currency or property was inherited by such person from a person who was resident outside India.

- Under Section 6(5), a person resident outside India is allowed to hold, own, transfer or invest in Indian currency, security or any immovable property situated in India;

(i) if such currency, security or property was acquired, held or owned by such person when he was resident in India ; or

(ii) if such currency, security or property was inherited from a person who was resident in India.

- Under Section 6(6), the Reserve Bank may, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

4.23 Permissible Capital Account Transactions

As per Schedule I to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000; a person resident of India can sell foreign exchange to authorized person' or draw foreign exchange from authorize person for following capital account transactions. This should be within the limits specified in regulations relevant to that transaction:

- Investment in foreign securities by a person resident in India
- Foreign currency loans raised in India and abroad by a person resident in India
- Transfer of immovable property outside India by a person resident in India
- Issue of guarantees by a person resident in India in favour of a person outside India
- Export, import and holding of currency/currency notes
- Loans and overdrafts (borrowings) by person resident in india from a person resident outside India.
- Maintenance of foreign currency accounts India and outside India by a per son resident in India
- Taking out insurance policy by a person resident in India from an insurance company outside India
- Loans and overdrafts by a person resident in India to a person resident outside India
- Remittance outside India of capital assets of a person resident in India.
- Sale and purchase of foreign exchange derivatives abroad by a person resident in India.

Permissible Capital Account Transactions by Persons Resident Outside India

As per Schedule II to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000; a person resident outside India can sell foreign exchange to 'authorised person' or draw foreign exchange from authorised persons for following capital account transactions. This should be within the limits specified in regulations relevant to that transaction :

- Investment in India in (i) Security issued by a body corporate or an entity in India and investment made therein by a person resident outside India and (ii) Investment by way of contribution by a person resident outside India to the capital of firm or proprietorship concern or association of persons in India
- Acquisition and transfer of immovable property in India by a person resident outside India
- Guarantee by a person resident outside India in favour of, or on behalf of a person resident in India
- Import and export of currency/currency notes into/from India by a person resident outside India.
- Deposits between a person resident in India and a person resident outside India
- Foreign currency accounts in India of a person resident outside India
- Remittance outside India of capital assets in India of a person resident outside India.

Acquisition and transfer of immovable property in india

Categories of persons resident outside india The persons resident outside India are categorized as : -

- Non-Resident Indian (NRI) ; or

- Foreign national of Indian origin (PIO) ; or
- Foreign national of non-Indian origin

Who can purchase an immovable property in India Under the general permission available, the following categories can purchase an immovable property in India:

(i) Non-Resident Indian (NRI)

(ii) Person of Indian Origin (PIO)

The general permission, however, covers only purchase of residential and commercial property and is not available for purchase of agricultural land plantation property/farm house in India.

- Non-Resident Indian (NRI) is a citizen of India resident outside India.
- A 'Person of Indian Origin' means an individual (not being a citizen of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Nepal or Bhutan) who

(i) At any time, held an Indian passport or

(ii) Who or either of whose father or mother or whose grandfather or grandmother was a Citizen of India by virtue of the Constitution of India or the Citizenship Act, 1955 Regulations regarding acquisition and transfer of immovable property in India The regulations regarding acquisition and transfer of immovable property in India by NRI's/PIO's/Foreign Nationals of Non-Indian origin are contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulation 2000.

1. Acquisition and Transfer of immovable property in India by a person resident outside India (Regulation 3) (NRI)

- A person resident outside India who is a citizen of India may acquire any immovable property in India other than agricultural/plantation/farm house. payment of purchase price shall be made out of funds received from banking channels from outside India or from non-resident account maintained as per provisions of FEMA Act. Payment by traveller's cheques or by foreign currency notes is not permissible.

- An NRI may acquire immovable property in India by taking loan from authorised dealer or housing finance institution in India. It may happen that after the loan is repaid, the NRI may sale the property. In such case, if he had repaid the amount out of remittances abroad or from their NRE/FCNR account, sale proceeds to the extent of foreign exchange inward remittances can be remitted abroad.
- NRI can transfer any immovable property other than agricultural or plantation property or farm house by sale to person resident in India. He may transfer agricultural land, farm house or plantation property in India by way of gift or sale to a person resident in India, who is citizen of India, by way of gift or sale. If asset is sold, amount equivalent to foreign exchange brought in can be repatriated.

2. Acquisition and transfer of property in India by pro (Regulation 4)

- person of Indian origin (PIO) resident outside India may acquire immovable property other than agricultural land/farm house/plantation property in India by purchase, from out of funds received in India by way of inward remittance from any place outside India or funds held in any non-resident account in India. payment by traveller's cheques or by foreign currency notes is not permissible.
- PIO can transfer any immovable property other than agricultural or plantation property or farm house by sale to person resident in India. He may transfer agricultural land, farm house or plantation property in India by way of gift or sale to a person resident in India, who is citizen of India, by way of gift or sale. If asset is sold, amount equivalent to foreign exchange brought in can be repatriated. Where an immovable property acquired by PIO is sold, amount equivalent to foreign exchange brought in, can be repatriated.
- Restrictions in case of citizens of some countries (regulation 7) - Citizen of Bangladesh, Pakistan, Sri Lanka, Afghanistan, China, Nepal, Iran, Bhutan, Macau and Hong Kong cannot acquire immovable property without prior permission of Reserve Bank of India. However, he can acquire by lease for a period up to five years.

3. Acquisition by other only through inheritance

Foreign nationals of non-Indian origin resident outside India can acquire immovable property only by way of inheritance from a person who was resident in India. Others can acquire immovable property only with specific permission of RBI. Sale of such property will also require approval of RBI.

4. Sale of immovable property by NRI/PIO

An NRI/PIO is permitted to sale his immovable property in India and repatriate the sale proceeds abroad up to US \$ one million per financial year. There is no lock-in period RBI Master Circular No. 4/2015-16 dated 1-7-2015 on 'Acquisition and Transfer of Immovable Property in India by NRIs/PIOs/Foreign Nationals of Non-Indian Origin' Remittance will be permitted on submission of certificate of CA in form prescribed by

CBDT (in respect of TDS)

A person resident outside India (other than above) referred to in section 6(5) of FEMA or his successor, will require prior permission of RBI to repatriate sale proceeds of immovable property [regulation 6(a) of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000].

5. Immovable Property for carrying on business (Regulation 5)

A person resident outside India who has established in India a branch or place of business (but not a mere liaison office) in accordance with RBI regulations, can acquire any immovable property in India, which is necessary for or incidental to carrying on such activity. The person acquiring property should file with the Reserve Bank a declaration in the form IPI within 90 days. The form IPI has to be filed only when the immovable property is acquired in India by a person resident outside India who has established in India a branch, office or other place of business, excluding a liaison office. Transaction made by person resident outside India who is citizen of India or PIO are not required to be reported. The property can be transferred by way of mortgage to an authorised dealer as a security for any borrowing. If the asset is sold, sale proceeds can be repatriated only with prior permission of RBI.

6. Sale/purchase by foreign embassies/diplomats (Regulation 5A)

A foreign embassy/diplomat/consulate general may purchase or sell immovable property in India other than agricultural land/plantation property/farm house. They should obtain clearance from Ministry of External Affairs. Purchase should be firm inward remittance of foreign exchange. RBI permission is not necessary, but clearance from Ministry of External Affairs is required to be obtained.

4.24 Remittance of assets outside india

Meaning of 'Remittance of Asset- 'Remittance of asset' means remittance outside India of funds representing

- a deposit with a bank or a firm or a company
- provident fund balance or superannuation benefits
- amount of claim or maturity proceeds of Insurance policy
- sale proceeds of shares, securities, immovable property or any other asset held in India in accordance with the provisions of the Act or rules or regulations made there under [Regulation 2(v) of Foreign Exchange Management (Remittance of Assets) Regulations, 2000]. Provisions in respect of remittance outside India by a person whether resident in India or not, of assets in India, are contained in Foreign Exchange Management (Remittance of Assets) Regulations, 2000. NRI means a person resident outside India who is a citizen of India. 'Person of Indian Origin (PIO)' means a citizen of any country other than Bangladesh or Pakistan, if (a) he at any time held Indian passport; or (b) he or either of his parents or any of his grand-parents was a citizen of India or (c) the person is a spouse of an India citizen or a person referred to above.

Remitting assets without permission of RBI

1. Remittance of Assets by NRI/PIO/Foreign national [Regulation 4(2)]

NRI/PIO/Foreign Nationals (including retired employees or non-resident widows of Indian citizens) can remit, through authorised dealers upto US \$ 1.00 Million (10,00,000 US \$) out of balances in NRO account/sale proceeds of assets, for all bona fide purposes, on

production of an undertaking and certificate by the person making remittance in format prescribed under Income Tax Law.

2. Remittance up to USD one million from sale of assets [Regulation 4(3)]

NRVPIO can remit amount upto one million USD per financial year out of balance held in his NRO account or sale proceeds of assets, including immovable property acquired by non-resident out of his/her resources in India, or sale proceeds of property received by way of inheritance or gift. There is no lock-in period in case of remittance out of sale of immovable property. An undertaking by remitter and certificate from CA in format prescribed under Income Tax Law should be submitted. Permission of RBI is not required. Remittance facility in respect of sale proceeds of immovable property is not available to citizens of Pakistan, Bangladesh, Sri Lanka, China, Afghanistan, Iran, Nepal and Bhutan

3. Remittance of inheritance [Regulation 4(2)]

A citizen of foreign state : -

- who has retired from an employment in India
- or has inherited the assets from a person
- or is a widow resident outside India and has inherited assets of her deceased husband who was an Indian citizen resident in India, may remit an amount, not exceeding US \$ 1,000,000 (one million) per financial year. Remittance is permitted on production of documentary evidence in support of acquisition, inheritance or legacy of assets by the remitter, an undertaking by remitter and certificate from CA in format prescribed under Income Tax Law. Permission of RBI is not required.

4. Remittance after deed of settlement with parents

NRVPIO can also remit an amount upto US \$ 1,000,000 if the amount is received under a settlement made with parents or close relatives, if settlement is to take affect after death of settler. Settlement is also mode of inheritance from parent and hence remittance is permissible. A NRI or PIO can remit an amount up to US \$ 1,000,000 [one million] per financial year, out of assets in India acquired through inheritance/legacy or settlement where

property is passed on to legatees on production of documentary evidence, an undertaking by remitter and certificate from CA in format prescribed under Income Tax Law. Permission of RBI is not required. Remittance can be made in more than one instalment through same authorised dealer.

5. Remittance after completion of study/training [Regulation 4(iv)]

If a person had come to India for studies/training and has completed his studies/training, may remit the balance available in his account, provided such balance represents funds derived out of remittances received from abroad through normal banking channels or rupee proceeds of foreign exchange brought by such person and sold to an authorised dealer or out of stipend/scholarship received from the Government or any Organisation in India. Permission of RBI is not required.

6. PF/pension/superannuation contribution (Regulation 5)

An entity in India may remit the amount being its contribution towards the provident fund/superannuation/pension fund in respect of the expatriate staff in its employment who are resident in India but not permanently resident therein. 'Expatriate staff means a person whose provident/superannuation/pension fund is maintained outside India by his principal employer outside India.

7. Remittance in foreign exchange on winding up of company [(Regulation 4(4))]

Remittance on winding up is permitted by authorised dealer after receipt of Court order or after voluntary winding up. Tax clearance certificate and auditor's certificate should be obtained.

Remitting assets with permission of RBI

In following cases, remittance can be made only with permission of RBI [Regulation 6 of Foreign Exchange Management (Remittance of Assets) Regulations, 2000 (I) Remittance of legacy to citizen out of India - Remittance on account of legacy bequest or inheritance exceeding US \$ 1,000,000 (one million) per financial year to a citizen of foreign state permanently resident outside India. Application should be made to RBI in form LEG.

(2) Remittance by NRI/PIO above US one million - Remittance by NRI/PIO out of balance held in NRO accounts/sale proceeds of assets/assets in India acquired by way or inheritance/legacy, if amount of remittance exceeds US \$ 1,000,000 (one million).

(3) Remittance on account of hardship - Remittance to a person resident outside India on the ground that hardship will be caused to such a person if remittance from India is not made.

(4) Remittance after closing of branch/office in India - Remittance of winding up proceeds of a branch/office (other than project office) in India of a person resident outside India can be made by Authorised Dealer as per prescribed guidelines and provisions - Rule 6(1)(iii) of FEM (Remittance of Assets) Regulations as amended w.e.f. 19-1-2011. Application should be supported by following documents -

(a) Copy of RBI permission for establishing branch in India

(b) NOC or tax clearance certificate from ITO

(c) Auditor's certificate certifying required details

(d) Confirmation that no legal proceedings are pending and there is no legal impediment to remittance

(e) Report from ROC regarding compliance of provisions of Companies Act in respect of winding up and

(f) Report from ROC regarding compliance with provisions of Companies Act. On submitting these documents, Authorised Dealer will permit remittance - regulation 7

of Foreign Exchange Management (Remittance of Assets) Regulations, 2000 inserted w.e.f. 19-1-2011.

4.25 Summary

The Foreign Exchange Regulation act, 1973 was reviewed in 1993 and several amendments were enacted as part of the on-going process of economic liberalisation relating to foreign investments and foreign trade. The Foreign Exchange Management Bill having been passed

by both of the houses of parliament received the assent of the president on 29th December, 1999 . It came on the statue book as the foreign exchange management act, 1999. FEMA was enacted to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments.

4.26 Important questions

1. Give a detailed note on realisation, repatriation and surrender of foreign exchange under FEMA
2. What is Asian Clearing Union
3. Give provisions of regulations, and management of foreign exchange under FEMA
4. What are the restrictions imposed on current account transactions

4.27 Practice questions

1. Explain the provisions of holding foreign exchange under FEMA
2. Explain in detail the prohibited current account transactions
3. Explain the provisions of remittance of assets outside india
4. What is remittance of assets.

4.28 Glossary

FERA, FEMA, Competent Authority, Authrised Officer, Appellate Tribunal, legal Practitioner

4.29 References

- * www.fema.rbi.org.in
- * <http://directoratEOFenforcement.gov.in>
- * <http://finmin.nic.in>
- * Economic Regulation of Domestice and Foreign Exchange Markects”, Kalyani Publisher.