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Further, in the Elective Papers which are Case Study based, the solutions have been worked out on the basis of certain assumptions/views derived from the facts given in the question or language used in the question. It may be possible to work out the solution to the case studies in a different manner based on the assumption made or view taken.

PAPER 6D: ECONOMIC LAWS

NOTE: There are three case study questions in the question paper. Candidates are required to answer all the questions of any two case study questions.

Citation of case laws, sections, subsections, rules may not form part of the answer.

Case Study No. 1

Question

(A) *A complaint was made by a complainant (Informant) to the Competition Commission of India (CCI) against the practices adopted by certain Insurance Companies in implementation of the Insurance scheme, Country Peoples Plan (CPP) by an imaginary State Government 'Z' in India.*

The CCI after going through the complaint, on merit, ordered a detailed investigation by the Director General of Investigation under the Competition Act, 2002 (as amended in 2007, briefly referred to hereinafter as the "Act"). The facts of the case are mentioned as under:

- (i) *CPP is the health insurance scheme introduced by the Central Government for below poverty line (BPL) families. The task of implementation of this scheme was entrusted to the respective State Governments of the country with the Central Government bearing 75% of the expenses incurred in relation to the annual premiums.*
- (ii) *A tender was floated by a State Government 'Z' through its agency ULTRA (on 1.11.2009) for selecting and insurance service provider for the implementation of the CPP for the year beginning 2010-11 for a period of three years. The State Government 'Z' issued a tender for the implementation of CPP scheme for the selection of the insurance provider. In this regard, bids were invited from: (a) insurance companies licensed and registered with the Insurance Regulatory and Development Authority; and (b) agencies enabled by any central legislation to undertake health insurance related activities. The last date for submission of the tender was 31.1.2010.*
- (iii) *Four Public Sector Insurance Companies A, B, C & D Insurance Company, each submitted their offer in response to the above tender before its last date of submission. All these companies formed an Insurance Facilitation Group (IFG) with the objective of a common cause of furtherance and Development of insurance business in India and all these companies were members of the IFG. Before submitting their bids against the above tender, officials of these companies attended a meeting of IPG as per their practice, held on 27.12.2009 at XYZ place in the State 'Z' with the sole agenda to discuss the Tender Notice on CPP dated 1.11.2009 of the State Government 'Z'. They agreed on a business sharing model of sharing the business in the ratio of 55% by the winning company and 15% each by the*

remaining companies of the total business generated. They also agreed on the premiums to be quoted by each of them in response to the tender. The minutes of the meeting signed by officials of aforementioned companies stated to share the business among the four Insurance Companies with insurance Company with 55% and other Companies with 15% each. D Insurance Company will be L1 and other three insurance companies will be L-2 to L-4 in the quotation being submitted on 28th December, 2009 as per the decision taken in the above meeting.

- (iv) Seven insurance companies including the A, B, C, & D Insurance Company submitted the tender documents. The Technical Evaluation Committee (TEC) formed by the State Government 'Z' evaluated the bids on the basis of a scoring system. The TEC decided that the companies which scored 50 marks and above (a benchmark set by the TEC through ratings) would be declared successful in the technical rounds. As such, only C and D insurance Company were declared successful and their financial bids were opened in the presence of the representatives of the respective insurance companies. TEC recommended acceptance of D Insurance Company's bid for implementation of CPP scheme being the lowest in the State 'Z' for a period of three years subject to yearly basis renewals. D Insurance Company was awarded the tender on the basis of comparative bids mentioned as under:

Details of Price Bids relating to the Tender dated 1.11.2009 for 2010-11.

S. No.	Participating Insurance company	Whether Technically Qualified	Marks Awarded in Technical Evaluation	Premium Amt. as stated in Bid (₹)	
				Without S.T	With ST @ 10.3%
1	D	Yes	76	521	575
2	C	Yes	63	597	658
3	E	No	49	509	561
4	F	No	45	599	652
5	B	No	49	590	651
6	A	No	47	580	640
7	G	No	48	775	854

- (v) Accordingly, D Insurance Company won the tender for 2010-11 and later on shared its business with A, B & C Insurance Company in their agreed mutual model sharing ratio. The tender was issued for a period of three years. However, towards the end of the first year of the contract, D Insurance Company sought for an upward revision of premium to ₹ 1,000/- per family. When this request of D Insurance Company was turned down by the State Government 'Z'; D Insurance Company invoked the exit clause of the contract. As a result of this action, the State Government retendered.

- (vi) **Post Retendering Scenario:** It was found that the price rise effected by the Insurance companies - A, B, C & D Insurance Company could not have been based on any rational business justification as the retender for the year 2011- 12 and 2012-13 was won by E Insurance Company at a much lower premium of ₹ 840/- per family. The awarded contract was even extended with the same premium for the year 2012-13, 2013-14 and 2014-15 i.e. for a period of three years and this contract was renewed for the year 2014-15 at the same price. E Insurance Company confirmed that the company was not incurring any losses for providing health insurance services under CPP scheme. The details of rates of these Insurance companies in relation to the tenders of 2010-11 to 2012-13 are mentioned as under:

Details of Insurance companies rates bids in relation to tenders of 2010-11 to 2013-14

S. No.	Name of Insurance company	Price Bids (₹)							
		2010-11		2011-12		2012-13		2013-14	
		Without S.T	With ST	Without S.T	With ST	Without S.T	With ST	Without S.T	With ST
1	2	3	4	5	6	7	8	9	10
1	A	580	640	850	938	1700	1875	900	994
2	B	590	651	850	938	1250	1392	1100	1214
3	C	597	658	910	1004	1400	1546	920	1016
4	D	521	575	1000	1104	1000	1104	1000	1104
5	E	**509	561	840	927	840	927	840	927

** Not technically qualified

- (vii) It was observed that the State Government entrusted its agency named ULTRA to implement CPP scheme in letter and spirit in the State and this agency had actually facilitated continuance of D Insurance Company as the insurer under these schemes by employing an arbitrary practices. A, B, C & D Insurance Companies have claimed that until 2002, all of them were owned by General Insurance Company.

It was also submitted that pursuant to the enactment of the General Insurance Business (Nationalization) Amendment Act, 2002, Government of India holds 100% shares of each of them and controls the management and affairs of the companies through Department of Financial Services (Insurance Division), Ministry of Finance. In this regard, a reference may be had to the policy reforms introduced by the Government of India in 1991 which led to the de-regulation of the Indian economy.

With the commencement of private participation, a need was felt to modify the existing market structure of certain select sectors, including, the insurance sector so as to promote orderly growth of these sectors.

In this regard, the Government of India established a committee in the year 1993 under the chairmanship of Shri R. N. Malhotra (former Governor of the Reserve Bank of India) to propose reforms for the insurance sector. Pursuant to the recommendations of the Malhotra Committee, two major regulatory changes were introduced, including, ending the monopoly of General Insurance Company in the general insurance business and ending the control exercised by General Insurance Company over its wholly owned subsidiaries.

These regulatory changes were ushered in to allow the public sector insurance companies to act independently and to compete with the private players to offer better services to consumers.

- (viii) Further, A, B, C & D Insurance Companies submitted that all decisions relating to submission of bids, determination of bid amounts, business sharing arrangements, etc. were taken internally at company level without any ex ante approval/ directions from Ministry of Finance. Even the decisions taken by the companies were not notified ex post to the Ministry. These companies participated in the above said tenders, independent of Ministry of Finance.
- (ix) Details of Business Sharing Arrangement among A, B, C & D Insurance Companies relating to the Tender dated 1.11.2009 are tabulated as under:

Details of Business Sharing Arrangement relating to the Tender dated 1.11.2009

Total Business Generated for D Insurance Company: ₹ 92,94,65,400/-

S. No.	Name of Insurance Company	Business Sharing (in term of %)	Business sharing (in term of revenue (₹))
1	A	15	13,94,19,810.00
2	B	15	13,94,19,810.00
3	C	15	13,94,19,810.00
4	D	55	51,12,05,970.00

- (x) Turnover of the A, B, C & D Insurance Companies in the last three financial years based on the financial statements were as under :

S. No.	Name of the Insurance Company	Annual Turnover (₹ In crore)		
		2010-11	2011-12	2012-13
1	A	6000	7660	9575

2	B	5400	6745	7853
3	C	7600	7500	8765
4	D	6745	7352	7872

You are required to analyse, with reference to the Competition Act Provisions.

- Q.1 Whether the public sector insurance companies i.e., A, B, C & D Insurance Company constitute a single economic entity? Explain. **(5 Marks)**
- Q.2 Examine whether the A, B, C & D Insurance Companies by their conduct have entered into an agreement and have contravened any of the provisions of the Competition Act. Explain. **(10 Marks)**
- Q.3 The State Government 'Z' has now desired to include a specific clause in the bid document to prevent abuse of the Competition Act. What key clauses would you recommend? Please draft your reply within a total of 100-200 words. **(5 Marks)**
- Q.4 Assume a situation where the agreement and the meeting of IFG took place outside India. Explain whether the provisions of the Act still be applicable. **(4 Marks)**
- Q.5 Chairman of the Competition Commission of India, based upon the facts of the above case, has requested you as an officer of the Commission to draft a brief show cause notice that should be issued to the insurance companies alleged to be in default. Your notice should cover the following aspects namely Authority issuing the notice, Defendant details, Alleged contraventions, Facts as available and Time line for the response by the defendant. Also include the relevant provisions which empower such notices to be issued. **(6 Marks)**
- (B) You are the Chairman of Competition Commission of India (CCI) under the Competition Act, 2002 (hereafter, the Act) as amended in 2007 and subsequently you are chairing the Bench to deal with information filed under section 19(1) (a) of the Act relating to the radio taxi market, alleging abuse of dominance and predatory pricing. You do not own a car. For official journeys, you are provided with an office vehicle. For private use, you generally avail of the facility available in the market of radio taxis, fitted with GPS instruments. Therefore, you are fully aware of the radio taxis available in the market and exposed to the methodology of requisitioning a taxi for personal use and of paying for the service.
- Informants A and B are engaged in the business of providing radio taxi services in a certain city XXX in South India under the brand names "Press and Hail a Taxi" and "Taxi before you blink", A large Radio Taxi provider C is also in the market competing with Radio Taxi providers A and B and some others too. Informants A and B filed before the CCI separate information under Section 19 (1) (a) of the Act alleging that Radio Taxi provider C had abused its dominant position by engaging in predatory pricing in the relevant market by offering heavy discounts to passengers and incentives to cab drivers, in contravention of Section 4 (2) (a)(ii) of the Act. Radio Taxi provider C was in the habit

of having oral agreements with customers thus practising an opaque behaviour prejudicing the interests of A and B.

Informants alleged that C controlled over 50% of a highly concentrated market, demonstrating C's dominance. The Informants also alleged that there were considerable entry barriers present which had made it difficult for a new player to effectively compete. Consistent payment of high incentives and discounts along with exclusivity clauses in agreements with drivers allowed C to thwart effective competition, lock-in drivers and create a wide base of customers.

Additionally, the Informants alleged that the presence of an extensive network of C across the city XXX had acted as a sufficient detriment to any countervailing buying power available with consumers. They alleged that the presence of a large network of C had restricted the power of consumers to negotiate and had substantially restricted competition in the market for other Radio Taxis in the city XXX.

Based on the high market share of C, the Commission arrived at the prima facie view that C held a dominant position in the relevant market of "Radio Taxi services" in city XXX and directed the Director General ("DG") to conduct a detailed investigation into the matter.

Findings of the DG

The DG recognized the different business models prevailing in the radio taxi service industry i.e. asset-owned model, aggregator model and hybrid model. He noted that while C functioned under the aggregator model, its services were functionally substitutable with those provided by other taxis operating under the different business models.

Accordingly, the DG concluded that the relevant product market would be the "market for radio taxi services" and the relevant geographic market would be the city of XXX.

The DG compared the number of trips/rides undertaken by different players in the relevant market between 2012 and 2016 to observe that while C did grow at a meager rate of 63% between January and September of 2015, Informant A's trip size registered a phenomenal growth of 1200% in the same period. He noted that A was an aggressive player in the market and that the rise of A as a healthy competitor defeated the argument of the presence of entry barriers. The DG concluded that C was not in a dominant position, given these facts.

Informants had alleged that C had access to funds and had availed of the same in big measure, thwarting the other operators to avail of funds. This, according to them, was an entry barrier. DG found that no evidence had been supplied by the Informants to substantiate this entry barrier allegation. DG dismissed the allegation as not proved.

Answer the following 10 Multiple Choice Questions by selecting the most appropriate answer from the options given for each question. Write a few lines justifying your stance.

(10 x 2= 20 Marks)

- (i) *The oral agreements between Radio Taxi provider C and some customers, falling within Section 2(b) of the Act _____.*
- (a) *are not legally enforceable*
 - (b) *are legally enforceable*
 - (c) *are not anti-competitive*
 - (d) *are not actions in concert*
- (ii) *Dominance under the Act should be determined on the basis of _____.*
- (a) *market share*
 - (b) *price leadership.*
 - (c) *profitability*
 - (d) *ability to operate independently of competitive forces in the relevant market*
- (iii) *Relevant market is made up of _____.*
- (a) *relevant geographic market*
 - (b) *relevant product market*
 - (c) *relevant geographic market and relevant product market*
 - (d) *market structure and size alone*
- (iv) *Abuse of dominance by a dominant enterprise arises _____.*
- (a) *if the enterprise imposes unfair or discriminatory condition in purchase or sale of goods or service*
 - (b) *if the enterprise imposes discriminatory condition or price to meet competition*
 - (c) *if the enterprise makes a sizeable profit in its activities*
 - (d) *if the enterprise is a price leader*
- (v) *Predatory pricing arises when an enterprises _____.*
- (a) *prices its product very high*
 - (b) *prices its product just below the prevalent market price*
 - (c) *prices its product to clear inventory*
 - (d) *prices its product below its cost of production with a view to reducing competition or eliminating competitors*
- (vi) *Two Enterprises _____.*
- (a) *can be in a dominant position at the same time*
 - (b) *cannot be in a dominant position at the same time*

- (c) *can be dominant only if they merge*
- (d) *can be dominant only if one acquires the other*
- (vii) *Abuse of dominance does not arise if_____.*
- (a) *the enterprise limits or restricts production of goods or provision of services.*
- (b) *the enterprise limits or restricts technical and scientific development relating to goods or services to the prejudice of consumers.*
- (c) *the enterprise does not indulge in practices resulting in denial of market access.*
- (d) *the enterprise uses its dominance in one relevant market to enter into other relevant market.*
- (viii) *CCI cannot make enquiry into alleged contravention of the provisions in Section 3 and 4 _____.*
- (a) *on unfounded rumours*
- (b) *on its own motion*
- (c) *on receipt of information from consumers or trade associations*
- (d) *on receipt of a reference from the Central Government or State Government*
- (ix) *The parties requesting for confidentiality of information or documents submitted during the investigation shall have to satisfy the conditions laid down in regulation _____ of the Competition Commission of India (General) Regulations, 2009.*
- (a) 42
- (b) 39
- (c) 35
- (d) *None of the above*
- (x) *Relevant product market will have to reckon*
- (a) *regulatory trade barriers*
- (b) *physical characteristics or end-use of goods*
- (c) *national procurement policies*
- (d) *transport costs*

Answers to Part (A) of Case study 1
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Answer 1

Yes, the Public insurance companies, A, B, C & D Insurance company constitute a single economic entity, which means that companies associated with each other through the virtue of

common control operate. These Companies formed an Insurance Facilitation Group (IFG) with the objective of a common cause of furtherance and development of insurance business in India and all these companies were members of IFG.

This common control operate can be considered as cartel defined in section 2(c) of the competition Act, 2002.

"Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Alternative answer

It is observed that although the public sector insurance companies namely A, B, C and D Insurance company are presently under the supervision of the Central Government, each of them placed a separate bid in response to the tenders issued by the State Government for implementation of the CPP scheme.

Further, the Insurance companies themselves have submitted that all decisions relating to submission of bids, determination of bid amounts, business sharing arrangements, etc. were taken internally at company level without any *ex ante* approval/ directions from the Ministry of Finance. Thus, it is apparent that these companies participated in the impugned tenders independent of Ministry of Finance.

In view of the above, it is concluded that bid offers submitted by the A, B, C and D Insurance companies in response to the Tender issued by the State Government 'Z' in relation to the CPP were based on their own volition and the Ministry of Finance had no role to play. The Ministry of Finance did not exercise any *de facto* or *de jure* control over business decisions of these companies in submitting bids for impugned tenders. As such, these insurance companies do not constitute a single economic unit.

Answer 2

Yes, A, B, C, & D insurance companies have entered into an agreement for sharing the business on a basis of business sharing model in the ratio of 55% by the winning company and 15% each by the remaining companies of the total business generated.

Insurance companies through an agreement between them quoted the bids rate, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

These are anti-competitive agreements defined under section 3 of the Competition Act, 2002. According to the section, it shall not be lawful for any enterprise or association of enterprises or person or association of persons to 'enter' into an agreement in respect of production, supply, storage, distribution, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. All such agreements entered into in contravention of the aforesaid prohibition shall be void.

Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, shall be presumed to have an appreciable adverse effect on competition, in the following manner, where it—

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

Accordingly, in the given case, the agreement between them A, B,C,& D insurance companies results in the anti-competitive agreements, and thus contravened the provisions of the Competition Act.

Alternative Answer

“In the given case, these insurance companies had held a meeting under the auspices of IFG on 27.12.2009 at XYZ place in the State 'Z' with the sole agenda to discuss the 'Tender Notice on CPP dated 1.11.2009 of the State Government 'Z', The meeting was held to discuss about sharing of business and submission of quotation for the above business”, The minutes of the meeting of IFG signed by officials of aforementioned companies indicated that a decision was taken 'to share the business among the four PSUs with D Insurance Ltd. with 55% and other Companies with 15% each ...D Insurance Company will be L1 and other three insurance companies will be L-2 to L-4 in the quotation being submitted on 28th December, 2009'.

It is a fact that the decision taken by these companies in the above mentioned IFG meeting was implemented by them. It is clear that the price quoted by these companies in their price bids was in accordance with the decision taken in the IFG meeting held on 27.12.2009. In line with the decision taken in the IFG meeting, D Insurance Company was the L-1 bidder.

In terms of the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control or goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

By virtue of the presumption contained in subsection (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of

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

It may also be pointed out that explanation appended to section 3(3) of the Act defines 'bid rigging' as any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services; which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

In view of the above, it is concluded that conduct of A, B, C & D Insurance Companies have resulted in manipulation of the bidding process initiated by the State Government in contravention of the provisions of section 3(1) read with section 3(3)(d) of the Act. In case of agreements as listed in section 3(3) of the Act, once it is established that such an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition; the onus to rebut the presumption would lie upon the opposite parties".

Further, the insurance companies A, B, C & D have entered into an agreement (in writing as per the minutes of IFG meeting) to manipulate the tendering process initiated by Z State Government/ULTRA for implementation of the scheme for the years 2010-11, 2011-12, 2012-13 in accordance with the provisions of section 2(b) of the Act. It is clearly and unequivocally established. Section 2(b) of the Act defines the term 'Agreement'. Accordingly, the term Agreement includes arrangement or understanding or action in concert (i) whether or not, such arrangement, understanding or action is formal or in writing (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings."

Answer 3

To prevent abuse of Competition Act. It is advised that the following clauses be included by the State Government "Z" to prohibits abuse of dominant position by any enterprise or group.

An enterprise or a group, does not-

- (a) directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or services; or price in purchase or sale (including predatory price) of goods or service, or
- (b) limits or restricts the production of goods or provision of services or market therefor; or technical or scientific development relating to goods or services to the prejudice of consumers; or
- (c) indulges in practice or practices resulting in denial of market access in any manner; or
- (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

- (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Answer 4

As per section 32 of the Competition Act, 2002, where-

- (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 shall, have power to inquire under the various provisions of the Act into such 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 and pass such orders as it may deem fit in accordance with the provisions of this Act.

Though the agreement and the meeting of IFG took place outside India, but have an appreciable adverse effect on competition in the relevant market in India, so the provisions of the Competition Act are applicable.

Answer 5**Drafting of show cause notice**

To,

A, B, C, & D Insurance Companies

New Delhi-110014

12th May, 2018

Subject: Show cause notice for entering into anti-competitive agreement or combination of an enterprise for abusing of dominant position

The Chairman, CCI, has noticed that an agreement / combination of the A, B, C, & D Insurance Companies in response to the tender issued by the State government (Z), for selection of the insurance service provider for implementation of the CPP, insurance, is likely to cause, or has caused an appreciable adverse effect on competition and abuse of dominant provision under section 3 and 4, within the relevant market in India.

All the service providers as aforesaid, are required to respond within thirty days of the receipt of the notice, as to why investigation in respect of such an agreement/combination should not be conducted under section 29 of the Competition Act, 2002.

Chairman

CCI

Answers to Part B of Case study 1
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(i) Answer (a): Are not legally enforceable

Reasoning: The oral agreements between radio taxi provider C and customers are presumed to have an appreciable adverse effect on competition. These agreements are void, so they are not legally enforceable.

(ii) Answer (d): Ability to operate independently of competitive forces in the relevant market

Reasoning: Dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

- (a) operate independently of competitive forces prevailing in the relevant market; or
- (b) affect its competitors or consumers or the relevant market in its favour.

[Explanation to section 4]

(iii) Answer (c): Relevant geographic market and relevant product market

Reasoning: "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 2(r)]

(iv) Answer (a): If the enterprise imposes unfair or discriminatory condition in purchase or sale of goods or service

Reasoning: According to section 4 of the Competition Act, 2002, there shall be abuse of dominant position if an enterprise or a group, directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or services; or price in purchase or sale (including predatory price) of goods or service.

(v) Answer (d): prices its product below its cost of production with a view to reducing competition or eliminating competitors

Reasoning: "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(vi) Answer (b): cannot be in a dominant position at the same time

Reasoning: Dominant position can be enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market. Therefore two enterprises cannot be in a dominant position at the same time.

(vii) Answer (c): the enterprise does not indulge in practices resulting in denial of market access

Reasoning: According to Section 4(2)(c) of the Competition Act, 2002, there shall be abuse of dominant position if an enterprise or a group indulges in practice or practices resulting in denial of market access in any manner. Therefore non indulgences in practices resulting in denial of market access by the enterprise is not a abuse of dominance.

(viii) Answer (a): on unfounded rumours

Reasoning: Section 19 of the Competition Act, 2002, lays down the procedure for any inquiry which can be initiated *suo motu* by the Commission, on receipt of a reference from the Central Government or a State Government and on the on receipt of an information from consumers or trade associations.

(ix) Answer (c): 35

According to section 30(3), the parties requesting for confidentiality shall file an affidavit as specified in regulation 42 of the Competition Commission of India (General) Regulations, 2009 stating that the conditions prescribed in regulation 35 of the Competition Commission of India (General) Regulations, 2009 are satisfied.

(x) Answer (b): Physical characteristics or end use of goods

Reasoning: "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 2(t)]

Case study No. 2

(A) *A Corporate Insolvency Resolution process, under the Insolvency and Bankruptcy Code 2016 was initiated by M/s A Limited as a Corporate Debtor. The company was in default to its creditors and the assets were insufficient to meet the liabilities of the company.*

Attempts to resolve the insolvency of the corporate debtors failed and in the last, it was decided to go for liquidation of the company. The balance sheet and additional information of A Ltd. are given below:

Key Financial Information:

Data	Amount (₹ In crore)	Data	Amount (₹ In crore)
<i>Equity Share Capital</i>	11,000	<i>Land & Building</i>	16,500
<i>Preference Share Capital</i>	3,800	<i>Fixtures & Fittings</i>	1,000
<i>Term Loan</i>	1,500	<i>Stocks</i>	640
<i>Working Capital Loan</i>	1,200	<i>Debtors</i>	550
<i>Unsecured Financial Creditors</i>	1,000	<i>Other current Assets</i>	625
<i>Government dues</i>	400	<i>Cash</i>	175
<i>Workman dues</i>	240	<i>Accumulated Losses</i>	2,350
<i>Employee Liability</i>	300		
<i>Operational Creditors</i>	<u>2,400</u>		
	21,840		21,840

Additional Information:**Creditors**

- (1) Term loan is secured against fixed charge on land & building and fixtures & fittings. Bank A with an ₹ 800 crore term loan outstanding has first charge on the assets and Bank B with ₹ 700 crore outstanding has second charge on the assets.
- (2) Working capital loan is provided by Bank C and secured against a floating charge on debtors stock of the company.
- (3) Unsecured financial creditors include a Director X who owns 3% of the share capital of M/s A Limited with an outstanding loan due to him of ₹ 50 crores.

Other Liabilities:

- (1) Workman dues represents amount payable for the period of 24 months preceding the liquidation commencement date.
- (2) Employee liability includes ₹ 25 crore is outstanding for employees for a period of 12 months.
- (3) Last three years of tax assessment pending total demand raised by the department is ₹ 1200 crore. This has not been included in the balance sheet, but reflected as a contingent liability only. However the liquidator has managed to get an assessment completion certificate and agreed to a final liability of ₹ 300 crore.

Fixed Assets & Other Assets :

- (1) Land & Building realized 70% of book value and there would be a cost of ₹ 175 crore in realizing the assets.
- (2) Fixtures & fittings would realize 30% of book value, net of any realization cost. Stock, debtors & other current assets would realize 65% of book value.

Other information:

- (1) There was a pending insurance claim filed by the company for a quality breach by a supplier, which was not recorded in the books. The liquidator has managed to recover ₹ 150 crore from the insurance company.
- (2) Lease for the office premises had a lock in period of 10 years, out of which three years have expired. The landlord has submitted a claim of ₹ 120 crore for the remaining seven years of the lease period.
- (3) Based on the amount realized & distributed, the cost of liquidation is computed to be ₹ 140 crores.
- (4) The pending insolvency period cost was ₹ 80 crore, mainly including interim funding, remuneration of the IP and other such costs as permitted under the Code.
- (5) The secured creditors have decided to relinquish their security interest to the liquidation estate and receive proceeds from the sale of the liquidation assets by the liquidator as per provisions laid under the Insolvency and Bankruptcy Code, 2016.

You are required to find out following with reference to the relevant provisions laid under the Insolvency and Bankruptcy Code, 2016:

Q.1 What would have been the constitution of the Committee of Creditors and what would have been the voting share of each of the members of the committee?

(2+3 = 5 Marks)

Q.2 Total value realized by liquidator.

(4 Marks)

Q.3 Order of Priority with Notes indicating the relevant section of the Code.

(8 Marks)

Q.4 You have been appointed as the Interim Resolution professional of A Ltd. Draft a public notice as required under the Act and Regulations.

(5 Marks)

Q.5 The application before NCLT was filed on 5th January, 2018. The case was admitted on 20th January, 2018. The IRP who was appointed on 20th January, 2018, received the order on the same day and issued public notice on 23rd January, 2018 seeks your guidance on the various time lines to be compiled with. Prepare a checklist for his ready reference.

(5 Marks)

Q.6 In the said case, assume that A Ltd. has transferred an amount of ₹ 500 crore to its subsidiary abroad. The subsidiary has acquired assets for its business purposes.

How will you, as the liquidator treat the assets of the subsidiary and the shares held in the subsidiary? **(3 Marks)**

- (B) You are a Chartered Accountant specialising in FEMA related matters. You are back in office after a short trip and your assistant has compiled all clients' queries on which your opinion is requested. Choose the most appropriate reply and write a few lines justifying your stance.
- (i) Mr. Patel's mother requires to travel to USA for a complicated brain surgery. The estimate given by the hospital in USA is USD 3,00,000 over and above Mr. Patel would need USD 50,000 towards lodging boarding and other incidental expenses. Mr. Patel had already spent USD 2,00,000 during the concerned Financial Year. Mr. Patel can remit from India _____.
- (a) USD 2,50,000
 (b) USD 3,00,000
 (c) USD 3,50,000
 (d) USD 1,00,000
- (ii) Mr. Smith is deputed to India by his company to develop a strategic software for a period of five years from 1st January, 2015. He is paid salary to his Indian bank account. On 1st May, 2017 he wants to remit his entire salaries ended till 30th April, 2017 to his home country USA. Mr. Smith can _____.
- (a) remit the salary after payment of applicable taxes and contribution to applicable social security schemes
 (b) cannot remit any amount as salary is credited to his bank account in India
 (c) remit gross salary before taxes and can make payment of taxes at the year end
 (d) remit salary only upon completion of assignment after payment of taxes and filing of Income tax return
- (iii) Mr. John, an Australian citizen of non-Indian origin is engaged in construction of farm houses in Australia. He intends to take 50% stake in an Indian company which is engaged in construction of residential premises in Jammu. Mr. John _____.
- (a) cannot make any investment in the Real Estate Sector
 (b) can invest through his company in Australia
 (c) can make direct investment for construction of residential premises
 (d) Both (a) and (b) above
- (iv) Mr. Mehra intends to return to India for good after 30 years of stay in USA. Mr. Mehra needs to _____.

- (a) close all his bank accounts in USA and remit funds to India
- (b) liquidate all his investments before returning to India
- (c) bring minimum of USD 2,50,000 to India for his survival
- (d) can retain his money, bank accounts, investments etc. abroad without any restrictions
- (v) Mr. Kale migrated to UK 20 year ago. He later on acquired UK citizenship. He inherited 50 acres of agricultural land in Maharashtra which has an inbuilt Farm House. Mr. Kale intends to gift or sell this property to his only son who has UK citizenship, but settled in India. Mr. Kale _____.
- (a) can gift this property to his son but cannot sale it
- (b) can neither gift nor sale this property to his son
- (c) can sale this property to his son but cannot gift it
- (d) can do both, gift as well as sale this property to his son
- (vi) Mr. Iyer an Indian resident acquired a residential flat in Malaysia in contravention of FEMA regulations. Fearing actions, he intends to gift the same to his nephew Mr. Kartik, who is a resident of India at present but will soon be migrating to Malaysia for higher studies. Mr. Kartik _____.
- (a) can acquire the flat from his uncle by way of gift
- (b) cannot acquire the flat from his uncle by way of gift
- (c) can acquire the flat by way of inheritance but not as a gift
- (d) can acquire the flat by way of sale, gift or inheritance
- (vii) M/s Charming Garments has a warehouse in Amsterdam to which goods worth ₹ 10 crore are exported. The firm needs to realise the proceeds of exports _____.
- (a) as soon as exports are made
- (b) within nine months from the date of export
- (c) as soon as goods are sold or within fifteen months from the date of shipment of goods whichever is earlier.
- (d) within twelve months from the date of shipment of goods
- (viii) Mr. Gotad travelled to Germany for attending a conference. He acquired USD 5,000 from his travel agent in India, out of which he saved currency notes worth USD 2,500. Upon his return to India, Mr. Gotad _____.
- (a) needs to surrender USD 2,500 to his Authorised Dealer (AD) within six months of date of return

- (b) needs to surrender USD 2,500 to his AD within ninety days of date of return
- (c) can retain USD 2,000 and surrender USD 500 within 90 days of his return to India
- (d) can retain USD 2,500 for his next trip
- (ix) For any contravention of FEMA Regulations under section 13 of the Act, where the sum involved is quantifiable, the quantum of penalty would be _____.
- (a) three times of sum involved
- (b) rupees two lacs only
- (c) upto Rupees five thousand per day of the offence in continue
- (d) Both (a) and (c) above
- (x) The time limit for compounding of offences under section 13 of FEMA by the Directorate of Enforcement is
- (a) Nine months from the date of application
- (b) Six months from the date of committing such contravention
- (c) 180 days from the date of receipt of application by the Directorate of Enforcement
- (d) 180 days from the date of application to the Directorate of Enforcement

Answers to Part (A) of Case study 2

Answer 1

In the given case, the committee of creditors will be constituted as per section 21 of the Insolvency and Bankruptcy Code, 2016.

The members of the committee will comprise all financial creditors excluding related party who will not have right of representation, participation or voting in the meeting of the committee of creditors.

Accordingly, the committee of creditors and their voting share will be as under:

S.No.	Members	Loan Amount (Rs. Crores)	Voting Share %
1	Bank A	800	21.92
2	Bank B	700	19.18
3	Bank C	1200	32.88
4	Unsecured unrelated financial creditors	950	26.02
		3650	100

The director X who is an unsecured financial creditor with ₹ 50 crores, since related party of the corporate debtor, shall not have any right of representation, participation or voting in the committee of creditors.

Answer 2

Total Assets that can be realized by the Liquidator of M/S A Limited will be as follows:

Land & Building realized 70% of book value = ₹ 11,550 Crore

Less: Cost of realization = ₹ 175 Crore

Net value = ₹ 11375 Crore

Fixtures & Fittings realize 30 % of book value = ₹ 300 Crore

Stock, debtor & other current assets would realize 65% of book value = ₹ 1179.75 Crore

Insurance claim recovered by the liquidator from insurance company = ₹ 150 Crore

Total value realized by liquidator = ₹ 13,004.75 Crore.

[Note: Answer may also be given on the assumption of inclusion of amount of cash available in the amount of total value released by liquidator. In such case total value released will be 13,179.75 Crore].

Answer 3

Section 53 of the Code lays the provisions related to distribution of assets or the proceeds from the sale of the liquidation assets.

Distribution of proceeds from the sale of the liquidation assets: The proceeds from the sale of the liquidation assets shall be distributed in the following order of priority —

- (a) the insolvency resolution process costs and the liquidation costs paid in full;
- (b) the following debts which shall rank equally between and among the following :—
 - (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
 - (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
- (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
- (d) financial debts owed to unsecured creditors;
- (e) the following dues shall rank equally between and among the following:—
 - (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

- (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- (f) any remaining debts and dues;
- (g) preference shareholders, if any; and
- (h) equity shareholders or partners, as the case may be.

Fees to liquidator: The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients, and the proceeds to the relevant recipient shall be distributed after such deduction.

Particulars	Amount (₹ in Crores)	
Value Realized by Liquidator		13,004.75
Add: Cash		<u>175.00</u>
Total Amount of Funds Available		13,179.75
Less: Section 53(1)(a) insolvency resolution process costs and the liquidation costs.		
(i) Cost of Liquidation	140.00	
(ii) Insolvency Professional related costs*	80.00	<u>220.00</u>
Balance Available		12,959.75
Less: Section (53)(1)(b)		
(i) Workmen's dues for the period of 24 months preceding the liquidation commencement date	240.00	
(ii) Debt owed to a secured creditors		
(a) Term loans	1500.00	
(b) Working capital loan	<u>1200.00</u>	<u>2940.00</u>
Balance Available		10,019.75
Less: Section(53)(1)(c)		
Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date		<u>25.00</u>
Balance available		9994.75
Less: Section(53)(1)(d)		
Financial debts owed to unsecured financial creditors		<u>1000.00</u>
Balance Available		8994.75
Less: Section(53)(1)(e)		
Amount due to the Central Government and the State Government		

(i) Government dues	400.00	
(ii) Income Tax Liability	<u>300.00</u>	<u>700.00</u>
Balance Available		8294.75
Less: Section(53)(1)(f)		
(i) Employee liability (300-25)	275.00	<u>2675.00</u>
(ii) Operational Creditors	<u>2400.00</u>	5619.75
Balance Available		
Less: Section(53)(1)(g)		
Amount to be given to Preference Shareholders		<u>3800.00</u>
Balance Available		1819.75
Less: Section(53)(1)(h)		
Amount to be given to Equity Shareholders		<u>1819.75</u>
Balance Available		NIL

[Note 1: Rent claim for unexpired lease period has been considered at nil value as based on the relevant provisions, payment of periodic nature can only be claimed till the time order for liquidation is passed

*Note 2: It is assumed that 'pending insolvency cost of ₹ 80 crores has not been paid in full before and now being paid in full].

Answer 4

Draft Public notice to the Creditors of A Ltd., the corporate debtor is as under:

Form A

PUBLIC ANNOUNCEMENT

(Under Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.)

FOR THE ATTENTION OF THE CREDITORS OF A LIMITED

RELEVANT PARTICULARS		
1.	NAME OF CORPORATE DEBTOR	A LIMITED
2.	DATE OF INCORPORATION OF CORPORATE DEBTOR	
3.	AUTHORITY UNDER WHICH CORPORATE DEBTOR IS INCORPORATED / REGISTERED	
4.	CORPORATE IDENTITY NUMBER / LIMITED LIABILITY IDENTIFICATION NUMBER OF CORPORATE DEBTOR	
5.	ADDRESS OF THE REGISTERED OFFICE AND PRINCIPAL OFFICE (IF ANY) OF CORPORATE DEBTOR	
6.	INSOLVENCY COMMENCEMENT DATE IN RESPECT OF CORPORATE DEBTOR	

7.	ESTIMATED DATE OF CLOSURE OF INSOLVENCY RESOLUTION PROCESS	
8.	NAME AND REGISTRATION NUMBER OF THE INSOLVENCY PROFESSIONAL ACTING AS INTERIM RESOLUTION PROFESSIONAL	
9.	ADDRESS AND E-MAIL OF THE INTERIM RESOLUTION PROFESSIONAL, AS REGISTERED WITH THE BOARD	
10.	ADDRESS AND E-MAIL TO BE USED FOR CORRESPONDENCE WITH THE INTERIM RESOLUTION PROFESSIONAL, IF DIFFERENT FROM THOSE GIVEN AT SL. NO.9.	
11.	LAST DATE FOR SUBMISSION OF CLAIMS	

Notice is hereby given that the National Company Law Tribunal has ordered the commencement of a corporate insolvency resolution process against the M/S A Ltd. on ----- [insolvency commencement date].

The creditors of M/S A Ltd., are hereby called upon to submit a proof of their claims on or before----- [within fourteen days from the appointment of the interim resolution professional] to the interim resolution professional at the address mentioned against item 8.

The financial creditors shall submit their proof of claims by electronic means only. The operational creditors including workmen and employees may submit the proof of claims by in person, by post or by electronic means.

Submission of false or misleading proofs of claim shall attract penalties.

Name and Signature of Interim Resolution Professional:

Date and Place:

Answer 5

Checklist for ready reference of various time lines to be complied by IRP within the Insolvency and Bankruptcy Code are:

Sl.No	Process of Insolvency process	Timelines
1.	Filing of application before NCLT	5 th January 2018
2.	Admission of application	20 th January, 2018
3.	Appointment of Interim Resolution Professional(IRP)- Actual date	20 th January 2018 (within 14 days from the commencement date)
4.	Public announcement -Actual date	Uptil 23 rd January, 2018(within 3 days from the date of appointment of the Interim Resolution Professional)
5.	Collation of claims	Within 14 days of the date of appointment of Interim Resolution Professional

6.	Verification of claims	Within 7 date from last date of submission of claims
7.	Constitution of Committee of Creditors	Immediate after verification of claims
8.	Holding first meeting of Committee of Creditors	Within 7 days of constitution of Committee of Creditors
9.	Filing of report to Adjudicating Authority	Before 30 th day of appointment of IRP
10.	Moratorium	180 days from the date of admission of application i.e. 18 th July, 2018.

Answer 6

According to section 36 of the code, for the purposes of liquidation, the liquidator shall form an estate of the assets, which will be called the liquidation estate in relation to the corporate debtor. The liquidation estate shall comprise all liquidation estate assets which shall include any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor.

However, as per the Insolvency and Bankruptcy Code, 2016, assets of any Indian or foreign subsidiary of the corporate debtor shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation.

So, according to the above provision, the assets of the foreign subsidiary of A Ltd., is excluded for recovery in the liquidation.

Answers to Part (B) of Case study 2**(i) Answer (c): USD 3,50,000**

Reasoning: As per Schedule III of the FEM (Current Account Transactions) Rules, 2000, Individuals can avail of foreign exchange facility within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit shall require prior approval of the Reserve Bank of India. However, for the purposes of expenses in connection with medical treatment abroad, the individual may avail of exchange facility for an amount in excess of the limit prescribed if it is so required by a medical institute offering treatment. Mr. Patel can remit from India $3,00,000 + 50,000 = \text{USD } 3,50,000$.

(ii) Answer (a): remit the salary after payment of applicable taxes and contribution to applicable social security schemes

Reasoning: As per Schedule III of the FEM (Current Account Transactions) Rules, 2000, a person who is resident but not permanently resident in 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 make remittance up to his net salary, after deduction of taxes, contribution to

provident fund and other deductions. Accordingly, Mr. Smith can remit the salary after payment of taxes and contributions related to social security schemes.

(iii) Answer (c): can make direct investment for construction of residential premises

Reasoning: As per the FEM (Permissible Capital Account Transactions) Regulations, 2000, the person resident outside India is prohibited from making investments in India in any form, in any company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage in real estate business, or construction of farm houses. In "real estate business" the term shall not include shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.

(iv) Answer (d): can retain his money, bank accounts, investments etc. abroad without any restrictions

Reasoning: As per the Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2015, a citizen of a foreign state resident in India may open, hold and maintain a foreign currency account with a bank outside India.

[Note: This regulation does not form part of the study material. Correct answer given in common parlance, may be taken into consideration]

(v) Answer (a): can gift this property to his son but cannot sale it

Reasoning: As per the FEM (Acquisition and transfer of immovable property in India) Regulation, a person of Indian origin resident outside India may transfer any immovable property in India other than agricultural land/farm house/plantation property, by way of sale to a person resident in India. Since in the question it an agricultural land, so it will fall in exception for transfer of property by the way of sale to a person resident in India.

(vi) Answer (b): cannot acquire the flat from his uncle by way of gift

Reasoning: A person resident in India may acquire immovable property outside India, a person resident in India may acquire immovable property outside India, by way of inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition. Since in the given case there was contravention of FEMA regulations, so Mr. Kartik cannot acquire the flat.

(vii) Answer (c): as soon as goods are sold or within fifteen months from the date of shipment of goods whichever is earlier.

Reasoning: As per FEM (Export of goods and services) Regulation, the amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months from the date of export, provided that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within

fifteen months from the date of shipment of goods.

- (viii) Answer (c): can retain USD 2,000 and surrender USD 500 within 90 days of his return to India**

Reasoning: According to *Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015*, a person resident in India can retain foreign currency notes, bank notes and foreign currency traveller's cheques not exceeding USD 2,000 or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques represents unspent amount of foreign exchange acquired by him from an authorised person for travel abroad.

- (ix) Answer (d): Both (a) and (c) above i.e., three times of sum involved and up to rupees five thousand per day of the offence in continue**

Reasoning: According to section 13 of the Foreign Exchange Management Act, 1999, if any person contravenes any provisions of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day which the contravention continues.

- (x) Answer (c): 180 days from the date of receipt of application by the Directorate of Enforcement**

Reasoning: According to section 15 of the Foreign Exchange Management Act, 1999, any contravention under section 13 may, on an application made by the person committing such contravention, be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and Officers of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed.

Case Study No. 3

Everbullish Inc. USA has a subsidiary in Singapore, namely Everbullish Steel Asia Pvt. Ltd. (ESA) looking after the entire south east Asia, including India.

ESA has following entities operating under it.

- (i) A branch in China for manufacturing of steel*
- (ii) A liaison office in India for marketing of steel exported by ESA directly to Indian customers.*

- (iii) A project office in Afghanistan
- (iv) A commission agent in Bangladesh
- (v) A warehouse in Srilanka

ESA upgraded its Liaison Office (LO) in India to a full fledged subsidiary as 1st April, 2016 and transferred all its balances to the newly formed subsidiary, name Everbullish Indian Steel Pvt. Ltd. (EISPL)

Note In each of the above situations, you are required to give relevant 'FEMA' and 'Prohibition of Benami Property Transaction Act, 1988 and references options or steps to regularize the contraventions, if any.

- (A) ESA was advised that since it has a permission to operate as a LO till 31.3.2018, there is no need to obtain separate approval from RBI for converting or upgrading the same into a subsidiary. Hence No permission was taken by ESA or EISPL. Incorporation expenses were spent by the Indian LO out of funds remitted by ESA. EISPL started local trading in India. The LO was not closed by the ESA and no intimation was filed with RBI till *31-10-2018. **(5 Marks)**

Question

Are there any FEMA violations in the above transactions, and if so, then what is the way out? **(5 Marks)**

- (B) Sensing something wrong, EISPL decided to undergo voluntary FEMA compliance audit. EISPL has appointed you as a FEMA auditor. In the process of audit, you discover several transactions where FEMA regulations were not adhered to, or compliances pending. You are required to give your expert opinion on following matters as to what are the contraventions under FEMA and how they can be regularized?

Question 1

Receipt of Share application money from ESA amounting to ₹ One crore on 1st April 2017. No compliances are made in this respect as the company was advised that activities of the EISPL falls under the automatic route of RBI. **(5 Marks)**

Question 2

ESA had bought a large commercial property on 1st January, 2016 which was then leased to EISPL w.e.f, 1st April 2016 and part of the premises was leased to an unrelated Indian company w.e.f. 1st April, 2017. **(5 Marks)**

Question 3

ESA had sent an adhoc amount of ₹ two crore to EISPL for its day to day requirements. The funds have been received by the EISPL on 1st January, 2018. Again no FEMA compliances are made in this respect. **(4 Marks)**

* date 31-10-2018 will be taken as 31.03.2018

Question 4

EISPL has exported steel worth ₹ 10 crore to solid steel GmbH an unrelated German Company on 1st January 2017. Solid steel has run into financial trouble and therefore refused to pay. Despite best efforts, EISPL is unable to recover the sum. The directors of EISPL used to follow up for recovery over phone only and therefore no documentary evidence is available.

- (i) Assuming that the total exports of EISPL for the year ended 31st March 2017 is likely to cross ₹ 50 crore, can it write off this sum? **(3 Marks)**
- (ii) Assuming that EISPL has imported steel ingots from solid steel amounting to ₹ 11 crore, in Dec. 2016, which is still outstanding. Can it net off and make the payment for the balance of ₹1 crore only? **(3 Marks)**
- (iii) Will your answer change if the import and export transactions would have happened in December, 2017 and January, 2018 respectively? **(2 Marks)**

Question 5

EISPL remitted ₹ one crore to the project office of the ESA in Afghanistan in February, 2018. Is it permissible? Will your answer be different if instead of money, steel worth of ₹ one crore is exported to the Afghanistan P.O.? **(3 Marks)**

Question 6

EISPL exported goods to Srilanka. For that purpose it hired the warehouse of ESA and paid warehousing charges. Is it permissible? What is the time limit for realising goods exported by EISPL to its Srilankan Warehouse? **(5 Marks)**

Question 7

EISPL wants to remit commission to the agent of ESA for exports made by Bangalore. However the Agent has requested to pay ₹ one crore extra, as advance to be adjusted against future commission. Looking at the present business scenario, it may take 5 years to adjust the advance commission paid to the Bangladesh Agent. Is it okay from FEMA perspective? **(5 Marks)**

Question 8

One of the directors, of the EISPL is a person of India origin with US citizenship. He wants to acquire a commercial premises in India and then lease it to the company. Is this permissible under FEMA? Will your answer be different if that director is a US citizen of non-Indian origin? **(5 Marks)**

Question 9

In the process of audit it is observed that one of the directors Mr. Valia of EISPL who, recently joined company has acquired a large bungalow in Bangalore in the name of his son who has settled in USA. He purchased the same by paying ₹ 10 crore. However, his son is still studying and has not disclosed this property in his US tax returns. Upon

enquiry Mr. Valia's son denies of holding any such property. What are the consequences in this case under the provisions of the "Prohibition of Benami Property Transaction Act, 1988". **(5 Marks)**

Answer (A)

According to the Foreign Exchange Management (Establishment of a Branch Office or a Liaison office or a project office or any other place of business) Regulations, 2016:

1. Liaison Office (LO) means a place of business to act as a channel of communication between the principal place of business or Head office or by whatever name called and entities in India but which does not undertake any commercial/ trading / industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel.
2. The validity period of an LO is generally for three years, except in the case of Non-Banking Finance Companies (NBFCs) and those entities engaged in construction and development sectors, for whom the validity period is two years only. No further extension would be considered for liaison offices of entities which are Non-Banking Finance Companies and those engaged in construction and development sectors (excluding infrastructure development companies). Upon expiry of the validity period, the offices shall have to either close down or be converted into a Joint Venture / Wholly Owned Subsidiary in conformity with the extant Foreign Direct Investment policy.

The question states that ESA has the permission to operate as a LO till 31.3.2018. Hence, we can deduce that ESA must have got the permission to operate as a LO on 1.4.2016. The facts of the case study also states that ESA upgraded its LO in India to full fledged subsidiary on 1.4.2016.

From the definition of LO, it can be inferred that trading is not included in the permissible operation of a LO. As per the question ESA has got the permission to operate as a LO and not as a subsidiary, hence, the decision to operate in the nature of subsidiary without informing the concerned authority is incorrect.

In every financial year, liaison office have to submit the annual activity certificate confirming the activities undertaken along with the Audited financial statements, including the receipt and payment of account on or before 30th September of the Year.

Failure to comply the above, will attract penalty as provided in the Foreign Exchange Management Act, 1999.

[Note: The question has provided that LO is liaisoning for steel business, hence it has been taken to be in the categories of those engaged in construction and development sectors.]

Alternative answer

ESA was wrongly advised that it can form a subsidiary without any compliances under FEMA. RBI grants permission for the Liaison office (LO) office for a Special duration and for specified

activities only. A LO is supposed to adhere to all names under FEMA and comply with conditions mentioned in the permission from RBI.

So, ESA needs to set right things as follows:

- (i) Intimate RBI about closure of LO and transfer of all its assets and liabilities in the new formed subsidiary EISPL.
- (ii) File all pending returns of LO with the Income tax authority and audited accounts with ROC as well as activity certificate under FEMA with its authorized dealer for the onward submission to RBI.
- (iii) Spending funds on incorporation of a company by a LO is in violation of conditions attached to the activities of the LO and utilization of funds.
- (iv) It is given that EISPL started local trading in India. EISPL can do local trading only in respect of Cash & Carry wholesale Trading under automatic route of RBI. For any other category it requires prior approval of RBI.
- (v) For various offences/contravention mentioned above ESA needs to approach RBI for compounding of offences. EISPL shall ensure that its activities remain within the purview of FEMA reputations. For allotment of share to ESA against the balances transferred from the LO as well as incorporation expenses. If EISPL intends to remit fund to ESA instead of allotments of shares, they still it needs to obtain RBI approval.

Answer B.

Answer 1

According to Schedule II to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, investment in India by a person resident outside India, through issue of securities by a body corporate or an entity in India and investment therein by a person resident outside India, is a permissible transaction.

Further, according to the Master Directions on Foreign Investment in India-

An Indian company issuing shares /convertible debentures under FDI Scheme to a person resident outside India shall receive the amount of consideration required to be paid for such shares /convertible debentures by:

- (i) inward remittance through normal banking channels.
- (ii) debit to NRE / FCNR account of a person concerned maintained with an AD category I bank.
- (iii) conversion of royalty / lump sum / technical know how fee due for payment /import of capital goods by units in SEZ or conversion of ECB, shall be treated as consideration for issue of shares.

- (iv) conversion of import payables / pre incorporation expenses / share swap can be treated as consideration for issue of shares with the approval of FIPB. (Now Line Ministry as FIPB is abolished on 17th April, 2017.)
- (v) debit to non-interest bearing Escrow account in Indian Rupees in India which is opened with the approval from AD Category – I bank and is maintained with the AD Category I bank on behalf of residents and non-residents towards payment of share purchase consideration.

If the shares or convertible debentures are not issued within 180 days from the date of receipt of the inward remittance or date of debit to NRE / FCNR(B) / Escrow account, the amount of consideration shall be refunded.

It can be regularized on an application filed to RBI where amount outstanding towards issue of security is beyond the period of 180 days from the date of receipt.

Alternative answer

Compliances on Shares allotment

Two stages compliance is required in respect of receipt of funds and allotment of shares under FEMA:

- (i) Form ARF needs to be submitted to the authorized dealer AD bank of the company within 30 days of receipt of remittance towards equity shares KYC and Foreign Inward remittance certificate (FIRC) need to be submitted alongwith form ARF.
- (ii) Form ECGPR needs to be filed with AD bank within 30 days of allotment of shares. This form should be certified by a company Secretary certifying all compliances under the Companies Act, 2013 and a valuation certificate from a Chartered Accountant certifying the valuation of shares as per the pricing guidelines under FEMA.
- (iii) The FEMA regulation provides that the allotment of shares needs to be completed within six months of the receipt of funds. Under the companies Act, the shares needs to be allotted in 3 months. Since share are not allotted within the time frame nor intimation filed, therefore EISPL need to obtain RBI permission for allotment of shares and apply for compounding of offence.
- (iv) It may be noted that automatic route of RBI is available only in respect of compliances made within the prescribed time frame.

Answer 2

According to the Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Regulations, 2000, provides that a person resident outside India cannot lease/ rent any part of the property acquired by him.

Hence, ESA cannot lease the said commercial property to EISPL & to an unrelated Indian Company.

Alternative answer

Foreign companies are allowed buy immovable property in India for the purpose of carrying on its own business. Form IP is to be filed with RBI for intimating the purchase of property. However, remittance of sale proceed needs prior approval of RBI. If ESA has ceased its activities as LO, it cannot continue to hold and lease property to others. Recently RBI has permitted to lease additional place to related enterprises.

Under the circumstances, ESA needs to regularize the leasing of premises to EISPL. As LO cannot earn any income in India, a question would arise for the leasing income.

Step to be taken by ESA

- (i) Approach RBI with facts of the case
- (ii) Obtain specific approval for lease of premises or sale its subsidiary EISPL.
- (iii) Apply for compounding of offence as per advice from RBI.

Answer 3

Schedule I to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, allows loans and overdrafts (borrowing) by a person resident in India from a person outside India subject to the compliance of guidelines issued by RBI in this regard. Hence, ESA is advised to comply with the Newspaper guidelines.

Alternative answer

EISPL has received on adhoc amount of ₹ 2 crore for its day to day requirements for ESA on 1st January, 2018.

EISPL can take external commercial borrowing (ECB) from its parent company subject to conditions prescribe in the ECB regulations.

However, any loan under ECB regulations can be drawn only after obtaining loan Registrations Number (i.e. LRN). In the instance case EISPL has already received the funds from ESA on 1st January, 2018. It would be better to treat these funds towards subscription of compulsory convertible debentures (CCDs). Authorized Dealer Bank may be approached for necessary changes in the FIRC. ESA & EISPL can pass necessary resolution in this behalf. CCDs are treated at par with equity shares. Hence, EISPL needs to comply with necessary formalities under the Foreign Direct Investment (FDI) regulations.

RBI may levy nominal compounding fees for delay in intimation of receipt of funds.

Answer 4

- (i) Section 7 of FEMA deals with provisions of Export of Goods and Services.

It is the duty of the exporter to see that foreign exchange is realized within the prescribed time limit. The normal time limit for realization of exports is nine months from the date of export. If for any reason export proceeds are not realized in time, the AD/RBI bank may be informed and requested to extend the time limit.

As per Master Direction – Export of Goods and Services;

An exporter who has not been able to realize the outstanding export dues despite best efforts, may either self-write off or approach the AD Category – I banks, who had handled the relevant shipping documents, with appropriate supporting documentary evidence. The limits prescribed for write-offs of unrealized export bills are as under:

Self "write off" by an exporter (Other than status holder exporter)	5%*
Self "write off" by status holder exporter	10%*
"Write off" by AD Bank	10%*
* of the total export proceeds realized during the previous calendar year	

The above limits will be related to total export proceeds realized during the previous calendar year and will be cumulatively available in a year.

Thus, EISPL can write off the amount to the extent as prescribed in the above provisions.

Alternative answer

Section 7 of FEMA deals with provisions of Export of Goods and Services.

It is the duty of the exporter to see that foreign exchange is realized within the prescribed time limit. The normal time limit for realization of exports is nine months from the date of export. If for any reason export proceeds are not realized in time, the AD/RBI bank may be informed and requested to extend the time limit.

Exporter needs to maintain robust documentations of steps taken to realize the outstanding dues. In the instant case the directions followed up for payment only over phone and therefore would land up in trouble as they will not be able to prove that all reasonable efforts were put in to realize the export proceeds. Under the circumstances, the company may face stringent actions from the Enforcement Directorate.

Self-write off of exports is permitted upto 10% of the average annual realization of exports in past 3 years subject to fulfilment of certain other conditions. As EISPL does not fall into this category specific approval from RBI is advisable.

(ii) As per Master Direction – Export of Goods and Services;

EISPL can set off the amount and make payment for 1 crore only by following the conditions:

AD category –I banks may deal with the cases of set-off of export receivables against import payables, subject to following terms and conditions:

- (1) The import is as per the Foreign Trade Policy in force.
- (2) Invoices/Bills of Lading/Airway Bills and Exchange Control copies of Bills of Entry for home consumption have been submitted by the importer to the Authorized Dealer bank.
- (3) Payment for the import is still outstanding in the books of the importer.
- (4) Both the transactions of sale and purchase may be reported separately in R-Returns and FETERS (Foreign Exchange Transactions- Electronic Reporting System).
- (5) The relative EDF (Export Declaration Form) will be released by the AD bank only after the entire export proceeds are adjusted / received.
- (6) The set-off of export receivables against import payments should be in respect of the same overseas buyer and supplier and that consent for set-off has been obtained from him.
- (7) The export / import transactions with ACU countries should be kept outside the arrangement.
- (8) All the relevant documents are submitted to the concerned AD bank who should comply with all the regulatory requirements relating to the transactions.

Alternative answer

Netting off export of goods receivable and import payable from same party is permitted under the automatic route, provided the outstanding amounts are within the time frame prescribed in FEMA. In this case both are overdue and hence specific approval from RBI would be required.

- (iii) The position as stated above in part (ii) will not change even if the import and export transactions would have happened in December 2017 and January 2018 respectively.

Answer 5

According to Foreign Exchange Management (Export and import of currency) Regulations, 2015, any person resident in India may take outside India (other than to Nepal and Bhutan) currency notes of Government of India and Reserve Bank of India up to an amount not exceeding ₹25,000 (Rupees twenty five thousand only).

Hence, EISPL cannot remit amount of ₹ 1 crore to the project office of ESA in Afghanistan. However, EISPL can export steel worth ₹ 1 crore to project office of ESA in Afghanistan (by following the guidelines as issued by RBI).

Answer 6

Remittance of funds for the warehouse rent falls within the current account transactions and therefore EISPL can freely remit warehouse charges to Sri Lanka.

According to Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, where goods are exported to a warehouse established outside India with the permission of the Reserve Bank of India, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods;

The Reserve Bank of India, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of fifteen months.

Hence, EISPL can send goods to the warehouse in Sri Lanka. Also, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods. However, this period can be extended as mentioned above.

Answer 7

Payment of export commission to an overseas agent is a current account transaction and hence freely permitted. However, payment of advance commission, lasting for five years would be regarded as capital account transaction and therefore would require prior approval of RBI.

EISPL is well advised to approach RBI for remitting advance commission which is in the nature of loan.

Alternative answer

The Foreign Exchange Management Act, 1999 does not provide for a prohibition for payment of commission to an agent provided it does not exceed 12.50% of the invoice value. Hence, EISPL can remit commission to agent of ESA for exports made by Bangladesh within the above limit.

In view of above, the request to pay ₹ One crore extra, as advance to be adjusted against future commission cannot be accepted and is not okay from FEMA perspective as the relative shipment has not been made.

Answer 8

According to Acquisition and transfer of immovable property in India, Regulations,

A person of Indian origin and resident outside India may acquire immovable property in India other than an agricultural property, plantation, or a farm house:

Provided that in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of (i) funds received in India through normal banking channels by way of

inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank of India:

Provided further that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by currency notes of any foreign country or any mode other than those specifically permitted by this clause.

Thus, in the given situation, the said director who is a person of Indian origin with US citizenship can acquire the commercial premises in India.

According to section 6(3) of the Foreign Exchange Management Act, 1999, a person resident outside India can acquire or transfer the immovable property in India, other than a lease not exceeding five years. Thus, the director can lease the said commercial premises but not for a period exceeding 5 years.

If the director would have been a US citizen of non Indian origin then he will not be allowed to acquire the property in India.

Answer 9

In the given instant, a director Mr. Valia of EISPL has acquired bungalow in Bangalore in the name of his son who has settled in USA. Upon enquiry Mr. Valia's son denies of holding any such property and has also not disclosed in his US tax returns.

The given situation falls within the purview of section 2(9) of the Prohibition of benami Property Transaction Act, 1988. According to the section benami transaction "means a transaction or an arrangement (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

As per the exception to the above clause, Mr. Valia can hold the property in the name of his son provided the consideration is paid out of the known sources of the Mr. Valia. This source is also not disclosed so it is assumed that it is an unauthorized source.

Further, on enquiry, denial of Mr. Valia's Son of holding of any such property, is known in respect of such property, as a benami transaction.

As of consequential holding of benami transactions, section 3 states that no person shall enter into any benami transaction. Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

So, Mr. Valia shall be liable under the Prohibition of Benami Property Transaction Act, 1988.