MINISTRY OF CORPORATE AFFAIRS

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One of the primary objectives of the Insolvency and Bankruptcy Code, 2016 (Code) is maximisation of the value of the corporate debtor (CD). For some stakeholders, the exercise of value maximization stops at realization through the approved resolution plan. However, there are several other options including retrieval of value siphoned off through avoidance transactions.

The UNCITRAL Legislative Guide on Insolvency Law states that "provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors". These transactions can fall into several categories. The 'preferential transaction' is about 'who', i.e., the debtor is being biased and is making payment to a creditor, to the exclusion of others, such that the creditor is wrongly benefitted, it amounts to a preference. While 'undervalued transactions' are about 'how much', where the value received by the debtor is less than the value compromised by the debtor. The scope of 'transactions to defraud creditors' is different from that of a preferential or undervalued transaction, in the sense that there is an element of deliberate intent, viz., the intent to defraud. For either preferential or undervalued transactions, intent does not matter. Further, an 'extortionate transaction' is one in which the debtor had to make exorbitant payments w.r.t the credit, or the terms were unconscionable under the principles of law relating to contracts. Like almost all jurisdictions namely UK, USA, China, Singapore, Australia, in India, the Code recognizes several 'avoidable transactions' such as the preferential transactions (Section 43), undervalued transactions (Section 45), transactions defrauding creditors (Section 49) extortionate transactions (Section 50) and wrongful and fraudulent trading (Section 66).

As regards the recovery from the vulnerable transactions, the Bankruptcy Law Reforms Committee observed that "If such transactions are established, then they will be reversed. Assets that were fraudulently transferred will be included as part of the assets in liquidation. The Committee recommends that all transactions up to a certain period of time prior to the application of the IRP (referred to as the "look-back period") should be scrutinised for any evidence of such transactions by the relevant Insolvency Professional. The relevant period will be specified in regulations." The Code enables reversal of avoidance transactions and thereby claw back the value lost through such transactions. If transactions are undone and the lost value is retrieved, the creditors stand to realise value from vulnerable transactions as well as from the existing assets. Higher the value creditors can realise from the corporate in stress, the higher is the likelihood of resolution of stress by a resolution plan, which is the primary objective of insolvency law in India. Further, the Code requires the beneficiaries of such transactions to disgorge the value, and thereby takes away the incentive to indulge in vulnerable transactions. Since such transactions are considered criminal in certain circumstances, particularly when it is fraudulent, it disincentivises a potential miscreant. Such incentives and disincentives are formulated to ensure that there is no vulnerable transaction. In such a case, value resides within the company and consequently, the possibility of a company getting into stress is less. In this sense, these provisions prevent stress, and stand to guard corporate governance.

The Insolvency Professional acting as Resolution Professional (RP) is entrusted with the responsibility to make sure that value of any asset of the CD lost on account of such vulnerable transactions is clawed back. The look back period or the twilight period prescribed under the Code is preceding two years for a transaction entered with related parties and preceding one year in case of transactions with others. There is no time period for reporting of a fraudulent transaction. While discussing the duties of an IP, the BLRC observed that "The IP makes sure that assets are not stolen from the company, and initiates a careful check of the transactions of the company for the last two years, to look for illegal diversion of assets. Such diversion of assets would induce criminal charges."

In the landmark judgment of Anuj Jain Interim Resolution Professional for Jaypee Infratech Limited versus Axis Bank Limited [Civil Appeal Nos. 8512-8527/2019], Hon'ble Supreme Court clarified upon the duties and responsibilities of the RP in respect of avoidance transactions. It further observed the parameters of each case is unique and different types of avoidance transactions are required to be examined differently.

On establishment of avoidance transaction, the Code has provided for both civil remedies and criminal charges. The power to grant civil remedies is entrusted upon the Adjudicating Authority (AA) that can pass such orders as mentioned under the Code while dealing with applications pertaining to avoidance transactions. Further, provision of criminal proceedings under section 66(1) of the Code is to set off alarm bells among the conspirators and set the tone for future behaviour of the perpetrators of crime.

In normal circumstances, when a company is in good financial health, a director's primary duty is to act in the best interests of the company by promoting shareholder's value in the company. However, when a company is insolvent, or is in the "twilight zone", the director is obliged to instead have primary regard to the interests of the creditors. This is because in an insolvency context, it is the creditors who have priority of economic interest in the company, rather than the shareholders. It is possible that the directors of the company in distress do not maintain due care or siphon off the funds of the company for their gain, once they know that onset of insolvency cannot be avoided. On 'Twilight zone' like situation, Chapter F of Section II of Part two of the UNCITRAL Legislative Guide mentions that "Insolvency proceedings (both liquidation and reorganization) may commence long after a debtor first becomes aware that such an outcome cannot be avoided. In that intervening period, there may be significant opportunities for the debtor to attempt to hide assets from creditors, incur artificial liabilities, make donations or gifts to relatives and friends or pay certain creditors to the exclusion of others. There may also be opportunities for creditors to initiate strategic action to place themselves in an advantageous position."

Section 66(2) of the Code makes the directors liable for the loss to the creditors that arise during twilight zone. The twilight zone begins from the time when a director knew or ought to have known that there was no reasonable prospect of avoiding the commencement of resolution till the company enters the resolution process. During this period, a director has an additional responsibility to exercise due diligence to minimise the potential loss to the creditors and he is liable to make good such loss. This incentivises the corporate as well as its promoters and managers to seek resolution in early days of stress when the possibility of resolution is higher.

Generally, when an avoidance transaction is undone, the underlying property returns from the beneficiary to the CD. Section 66(2) however, provides recourse against the director who made transaction, and not the beneficiary. This provision has been rarely used. If used, this would take away incentive of promoters to resist admission making the admission much faster and enable commencement of resolution process when chances of resolution are high.

The grave concern regarding possibility of substantial erosion of value of the Corporate Debtor through avoidance transactions is seemingly real. To ward off such threats, the Code provides robust framework for identifying avoidance transactions during lookback period of two years with a view to protect the interests of stakeholders of a CD. Retrieving the value not only augurs well with the value maximization principle but more importantly potentially serves as effective deterrent to corporate persons to refrain from unscrupulous practices.

The robust framework for identifying avoidance transactions to protect the interests of stakeholders of a CD is at the very heart of achieving one of the most important objectives of the Code - the resolution of insolvency while also ensuring maximisation of the value, preservation of the assets of the CD and safeguarding the interests of all stakeholders of the CD. The Code provides a comprehensive insolvency resolution framework and is armed with necessary provisions to deal with avoidance transactions and protecting the interests of the stakeholders of a CD who are aggrieved by such transactions.

REVIEW OF CORPORATE SECTOR

(i) As on 30.06.2021, the number of companies registered under the Companies Act was 21,87,026. Of these, 7,62,654 companies were closed, 6,918 companies were under liquidation, 38,800 companies are in the process of being struck-off from the register and 2,288 companies have so far obtained the 'dormant' status according to Section 455 of the Companies Act, 2013. There are 13,76,366 active companies, including 2,20,532 companies, which were incorporated within the preceding eighteen months (not due for Annual Statutory Filings).

(ii) A total of 12,722 companies, including 826 One Person Companies (OPCs), were registered under the Companies Act, 2013 during June, 2021 with authorized capital of Rs. 3,296.67 crore. The breakup of the newly incorporated companies by type is as follows:

Type of Company	No. of Companies registered in June, 2021	Total Authorized Capital (Rs. in Crore)
1)	2)	3)
Company limited by shares	**12,630**	**3,296.27**
Of which,		
(a) Private	12,423	1,463.66
Of which,		
One Person Companies	826	29.77
(b) Public	207	1,832.61
Company limited by Guarantee	**91**	**0.30**
Of which,		
(a) Private	86	0.30
(b) Public	5	-
Unlimited Company	1	0.10
Grand Total	**12,722**	**3,296.67**

(iii) During the Month of June, 2021, Maharashtra had maximum number of company registrations (2,521) followed by Uttar Pradesh (1,325) and Delhi (1,293). 'Business Services' topped the economic activity-wise classification (3,684) of newly registered companies.

(iv) During June, 2021, 12,630 (out of 12,722) companies were registered as companies limited by shares with authorized capital of Rs. 3,296.27 crores. For more statistical details about the growth of the corporate sector, the reader is invited to the 'Monthly Information Bulletin on Corporate Sector', at URL: mca.gov.in/ MinistryV2/Information Bulletin.html

MONTHLY MIS REPORT FROM COMPETITION COMMISSION OF INDIA

(as of June, 2021)

S. No.	Sections		Cases pending as on last day of previous month (A)	Cases received during the month (B)	Total Cases (A+B)	Net Cases pending with CCI for final disposal
1.	19	19(1)	31	-	31	30
2.		19(1)(a)	92	03	95	88
3.		19(1)(b)	11	-	11	11
	Sub Total		**134**	**03**	**137**	**129***
4.	6(2)& 6(5)		14	06	20	06
4(a)	20(1)		-	-	-	-
Total			**148**	**09**	**157**	**135**

Note: *Out of **129** pending anti-trust cases, **70** cases are pending with DG and **59** cases (**16** cases are at prima facie stage and **43** cases for hearing) are pending with CCI.

Cases remanded by Appellate Authority

5.	Remanded	10	-	10	10

Cases regarding contravention of orders of Commission

6.	Causing fresh inquiry	01	-	01	01

MAJOR EVENTS

(i) Union Minister of State for Finance and Corporate Affairs, Shri Anurag Singh Thakur launched Investor Education and Protection Fund Authority's (IEPFA) six modules of short films titled “Hisaab ki Kitaab” on 3rd June, 2021. The modules highlight the importance of budget and savings, insurance schemes and other social security schemes of the Government. The aim of the modules is to increase financial literacy and investor awareness among population.

(ii) Forum of Indian Regulators (FOIR) Centre at Indian Institute of Corporate Affairs (IICA) successfully organized the 22nd Annual General Body Meeting of FOIR on 18th June, 2021. The meeting was chaired by Dr. M.S. Sahoo, Hon. Chairperson, FOIR and Chairperson, Insolvency and Bankruptcy Board of India. Dr. Krishnamurty Subramanian, Chief Economic Advisor to the Government of India graced the gathering with his presence and address on the theme, “Role of Regulation in Fostering Markets” where he stressed on the need of competition and innovation along with ways to foster pro-market behavior. The members discussed several agendas including budget, governing body members, activities undertaken by FOIR Centre at IICA and proposals for the FY 2021-2022.

(iii) School of Corporate Governance and Public Policy, IICA successfully organized two days online familiarization program for Independent Directors (Batch IV) on 24th and 25th June, 2021. 50 Independent Directors and aspiring Directors from 34 companies (PSUs and Private Companies) participated in the program.

(iv) Sh. Ashok Kumar Gupta, Chairperson, CCI and Mr. Alexandre Barreto de Souza, President, the Administrative Council for Economic Defense (CADE), Brazil signed a Memorandum of Understanding between CCI and CADE on 18th June, 2021.

(v) Under the State Resource Person Program, training on, “Competition Law and Public Procurement” was conducted in Kerala, Assam, Odisha, Telangana, Uttarakhand and Himachal Pradesh.

NOTIFICATIONS

(i) Vide Notification No. G.S.R 392(E) dated 07.06.2021, the Companies (Incorporation) Rules, 2014 have been amended to introduce a new linked form named AGILE-PRO-S (earlier known as AGILE-PRO) to be filed with incorporation application form (SPICE+) to ease the new company incorporation along with other registrations including Shops and Establishment Registration from June, 2021 onwards.

(ii) Vide Notification No. G.S.R 409(E) dated 15.06.2021, Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 has been omitted to provide that all matters can be deliberated & resolutions passed by Board of Directors through video conferencing or other audio visual means. The measure will provide increased flexibility to Boards of companies for conducting Business and further the Ease of Doing Business objective of the Government.

(iii) Vide Notification No. G.S.R 418(E) dated 18.06.2021, the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019 have been amended to provide that in case an individual has delayed in applying to the Institute for inclusion of his name in the data bank of Independent Directors or in case of delay in renewal thereof, the Institute shall allow such inclusion or renewal, as the case may be, after charging a further fees of one thousand rupees on account of such delay. Through this amendment, requests made by a large number of stakeholders to grant additional time for delayed applications in view of Covid-19 pandemic have been addressed.

(iv) Vide Notification No. G.S.R.419(E) dated 18.06.2021, the Companies (Indian Accounting Standards) Rules, 2015 have been amended to keep the Ind ASs aligned with the amendments made in IFRS and to extend the benefits of COVID-19 related rent concession, that were introduced last year, from 30th June, 2021 to 30th June, 2022. The said amendment also provides for practical expedient as provided under the IFRS Standards with respect to Phase-II Interbank Offered Rate (IBOR) replacement issues.

(v) Vide Notification No. G.S.R. 432(E) dated 23.06.2021, the Companies (Accounting Standards) Rules, 2021 has been notified to mirror the Companies (Accounting Standards) Rules, 2006 (notified under the Companies Act, 1956) to bring the same under the Companies Act, 2013. The said rule also amended the definition of Small and Medium Size companies for applicability of Accounting Standards under which the turnover limit has been increased from rupees fifty crores to not exceeding rupees two hundred and fifty crores and borrowings limit enhanced from rupees ten crores to rupees fifty crores.

CIRCULARS

(i) The Ministry has issued a General Circular No. 10/2021 dated 23.06.2021 to allow companies to conduct their EGMs through Video Conferencing or other Audio Video means or transact items through postal ballot upto 31st December, 2021 in accordance with the framework provided in the earlier circulars dated 08.04.2020, 13.04.2020, 15.06.2020, 28.09.2020 and 31.12.2020.

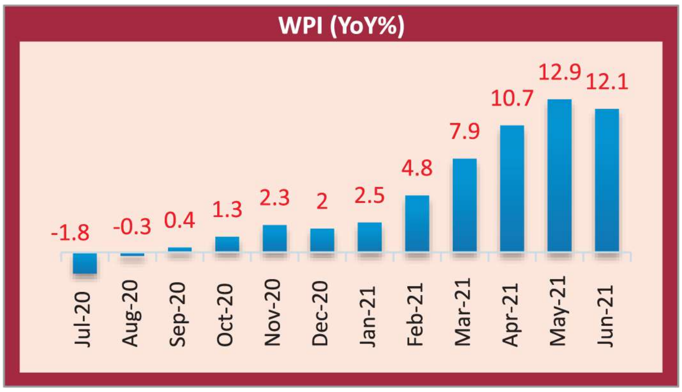
(ii) The Ministry vide General Circular No. 11/2021 dated 30.06.2021 in continuation of earlier General Circular No.06/2021 dated 03.05.2021, has granted additional time upto 31.08.2021 to companies/LLPs to file forms under the Companies Act, 2013/LLP Act, 2008 (other than a CHG-1 form, CHG-4 form and CHG-9 form) which were/are due for filing during 1st April, 2021 to 31st July, 2021 without any additional fees.

(iii) The Ministry vide General Circular No. 12/2021 dated 30.06.2021 has relaxed the time for filing forms related to creation or modification of charges under the Companies Act, 2013 by substituting the figures “31.05.2021” and “01.06.2021” wherever they appear in the General Circular No. 07/2021 dated 03.05.2021 with the figures “31.07.2021” and “01.08.2021” respectively.

SOME MACRO INDICATORS

Wholesale Price Index (WPI)

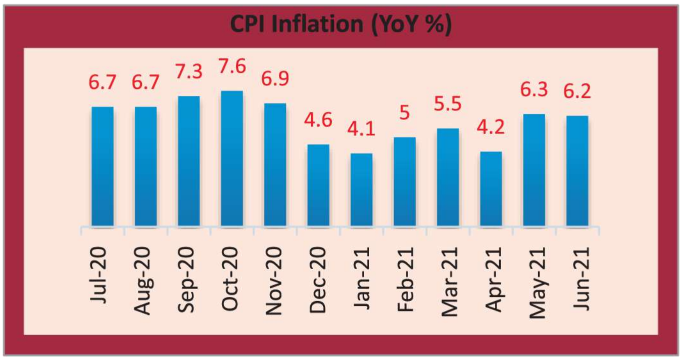
The annual rate of inflation, based on monthly WPI, stood at 12.07% (provisional) for the month of June, 2021 (over June, 2020). Month-on-Month inflation rate (June, 2021 over May, 2021 stood at 0.75%)



Source: DPIIT

Consumer Price Index (CPI)

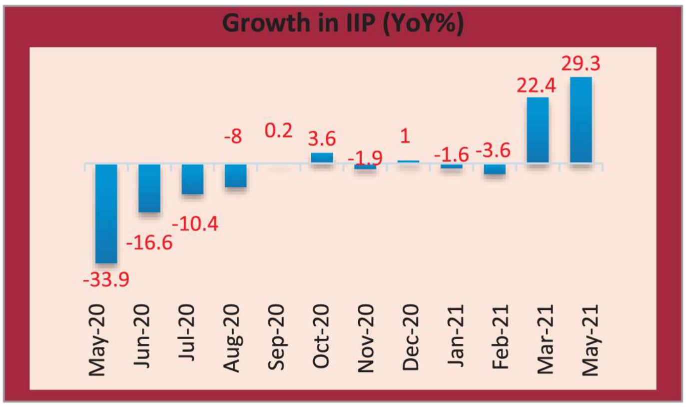
The CPI (Combined) on Base 2012, all India Inflation rates (on point to point basis i.e., June, 2021 over June, 2020) stood at 6.26%.



Source: MOSPI

Index of Industrial Production

The quick estimates of Index of Industrial Production (IIP) with base 2011-12 for the month of May, 2021 stands at 116.6 which is 29.3% higher as compared to May, 2020.

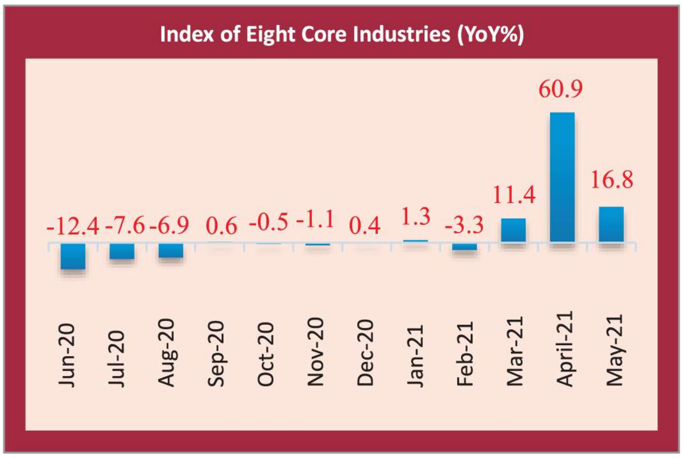


Source: MOSPI

Note: Data not released for April, 2021 due to lockdown during same period last year.

Index of Eight Core Industries

The combined Index of Eight Core Industries stood at 125.8 in May, 2021, which increased by 16.8% as compared to the Index of May, 2020.



Source: DPIIT

Select Ratios of Listed Non-Government Non-Financial Companies (Sector-wise)

Trends in the selected corporate performance indicators published by RBI of a sample of non-government non-financial listed companies for third quarter of FY 2020-21 is as below:

Select Ratios of Listed Non-Government Non-Financial Companies

Indicator	Q3:2019-20	Q2:2020-21	Q3:2020-21
No. of Companies	2,702	2,637	2,692
Cost of Raw Materials to Sales	49.2	46.9	49.2
Staff Cost to Sales	11.2	12.2	11.2
Interest Burden	29.1	27.4	22
Tax Provisions to EBT	20.4	18.6	20.1
Other Income to Net Profit	48	49	38.4
Cash Coverage Ratio (times)	4.8	4.9	5.8
Interest Coverage (times)	3.4	3.7	4.5
Interest to Sales	3.8	4.5	3.9
Operating Profits to Sale	15.5	18	19
EBITDA to sales	18.3	22.2	22.6
Net Profit to Sales	5.9	8.5	9.3

Source:RBI

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