

# CCI approval mandatory for Resolution Plan approval by CoC

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## Introduction

In *Independent Sugar Corporation Limited v. Girish Sriram Juneja and Ors* 2025 SCc OnLine Sc 181, a three-judge bench of the Hon'ble Supreme Court examined whether it is mandatory to obtain the "prior approval" of the Competition Commission of India (CCI) before the approval of a resolution plan by the Committee of Creditors of a corporate debtor (CoC) in Corporate Insolvency Resolution Proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC) in terms of the proviso to Section 31(4) (Proviso) of IBC.. The Hon'ble Supreme Court also opined on whether the Competition Act, 2002 (Competition Act) allowed the CCI flexibility (in terms of procedural safeguards) whilst approving combinations which could potentially impact relevant markets.

Hon'ble Just. Hrishikesh Roy and Hon'ble Just. Sudhanshu Dhulia issued a concurring opinion and held that that the requirement to obtain the approval from the CCI (CCI Approval) prior to approval of the resolution plan by the CoC (CoC Approval) is mandatory in nature. Accordingly, the CoC cannot approve a resolution plan under Section 30(4) of the IBC unless the prior approval of CCI is procured before the resolution plans are placed for CoC Approval. Issuing a dissenting opinion, Hon'ble Just. S.V.N Bhatti held that the Proviso is directory in nature. Thus, a resolution plan could be approved by the CoC pre-CCI Approval, so long as CCI Approval was obtained before approval from the National Company Law Tribunal (NCLT) in terms of Section 31(1) of the IBC. Additionally, Just. Bhatti observed that the CCI was not required to mandatorily undertake investigation (in line with Section 29 of the Competition Act) in all combinations involving concerns of appreciable adverse effect in the relevant market (AAEC).

In this Update, the authors analyse the key observations of the Supreme Court on the aforementioned issues, i.e., the timelines for obtaining CCI Approval under the Proviso and the procedural safeguards in the Competition Act.

## Factual Background

Hindustan National Glass and Industries Ltd (Corporate Debtor) was referred to corporate insolvency resolution process (CIRP) pursuant to an order dated 21 October 2021 passed by Hon'ble National Company Law Tribunal, Kolkata (NCLT). During the CIRP, the resolution professional (RP) received 2 (two) resolution plans from: (i) Independent Sugar Corporation Limited (ISC); and (ii) AGI (AGI Resolution Plan). Notably, each of ISC and AGI were required to obtain approval from the CCI for the CIRP. AGI sought a relaxation from the resolution professional (RP) on the requirement to obtain prior CCI approval for the AGI Resolution Plan. Allowing AGI's request, the RP required AGI to procure CCI approval after CoC Approval, but prior to filing the application with the NCLT for its approval (Approval Application).

Further to the relaxation by the RP, AGI filed the notice with the CCI (through a Form-I) for approval for its acquisition of the Corporate Debtor on 27 September 2022. Whilst ISC was eligible for deemed approval under the Green Channel Route (GCR) i.e., without any waiting period, AGI (since it was engaged in the same business as the Corporate Debtor) had to approach the CCI under the normal route, i.e., with a waiting period. Given the potential high market shares ((i) 80-85% in the food and beverages segment, and (ii) 45-50% in the alco-beverage segment) of the post-combined entity, the CCI termed the notice filed by AGI as invalid and directed AGI to re-file notice in Form-II.

The resolution plans were placed before the CoC for their consideration on 22 October 2022, i.e., before AGI could re-file notice and obtain CCI Approval. The CoC approved the AGI Resolution Plan on 28 October 2022 (AGI CoC Approval). Critically, AGI did not have CCI Approval nor did it have an application pending with the CCI, as on date of the AGI CoC Approval, whilst ISC had procured CCI Approval. On the AGI CoC Approval, the RP filed the Approval Application praying for approval of the AGI Resolution Plan. In the interim, while the Approval Application was *sub-judice*, as directed by CCI, AGI submitted the Form-II with the CCI. Observing that the proposed combination would result in AAEC in the relevant market (on account of *inter alia* the high market shares), the CCI issued a show-cause notice to AGI (under Section 29(1) of the Competition Act) (SCN). Responding to the SCN, AGI submitted voluntary modifications (i.e., voluntarily hiving off / divestment of a key plant of the Corporate Debtor) (Modification) on receipt of approval from the NCLT. Observing that the Modification proposed assuaged AAEC concerns, the CCI issued a conditional approval for the proposed combination (on 15 March 2023). Pertinently, the conditional approval was based on the successful implementation of the Modification and required appointment of independent agencies (monitoring and divestment) to this end.

At this stage, ISC filed an application before NCLT challenging the approval of AGI Resolution Plan on the ground that prior approval of CCI had not been obtained by AGI at the time of AGI CoC Approval. Rejecting the application, the NCLT held that AGI had obtained CCI Approval whilst the Approval Application was *sub-judice*, in line with the scheme of the IBC (28 April Order). Challenging the 28 April Order, ISC filed an appeal with the National Company Law Appellate Tribunal (NCLAT). ISC also filed a separate appeal before the NCLAT challenging the CCI approval granted to AGI, on grounds that the conditional approval granted was not in compliance with the requirements of the IBC. Dismissing the appeals filed by ISC, the NCLAT observed: (i) the requirement to obtain CCI Approval prior to CoC Approval was only directory in nature and in light of the present facts, the AGI Resolution Plan could be implemented, and (ii) the scheme of the Competition Act allowed CCI to deviate from prescribed procedure (public consultation, publication of details in the public domain), if transacting parties mitigated / assuaged AAEC concerns arising from a combination. Further, the NCLAT held that the CCI failed to comply with Section 29(1) of the Competition Act, since it issued the SCN only to AGI and not the Corporate Debtor.

ISC preferred an appeal before the Supreme Court against the decisions of the NCLAT (collectively, the "Appeals"). Both the Appeals were tagged and heard together by the Hon'ble Supreme Court in the captioned matter.

## Observations of the Hon'ble Supreme Court

### Observations of Just. Hrishikesh Roy (concurring with by Hon'ble Just. Sudhanshu Dhulia)

Just. Roy and Just. Dhulia rendered concurring opinions on this issue and held that the *Proviso* is mandatory in nature. Key observations and findings from the opinions are set out below:

- **Rules of Interpretation:** Relying on established precedents, the Hon'ble Justices observed that when the language of the section is clear, unambiguous and reasonably susceptible to only one meaning, a literal interpretation is the best way to understand the legislative intention behind enacting the particular provision. Further, when a statute prescribes a certain thing and the manner in which it must be done, it must be done in that same manner. Analysing the *Proviso*, the Justices observed: (i) the language of the *Proviso* was clear and without any ambiguity, and (ii) it contained specific directions and timelines for resolution applicant to obtain the CCI Approval.
- **Legislative Intention:** The Hon'ble Justices observed that the legislative intent behind insertion of the *Proviso* appeared to indicate that CCI Approval is procured before CoC Approval. Relying on: (i) the unambiguous language of the *Proviso*, (ii) extrinsic sources of interpretation (memorandum explaining modifications to the IBC (Amendment) Ordinance, 2018 and notes on clauses to the amendment act, introducing the *Proviso*), and (iii) the amendments to the IBC, which prescribed a timeline of one year to obtain statutory appeals, but specifically culled out the CCI Approval requirement, indicated deliberate legislative intent that resolution applicants procure CCI Approval prior to CoC Approval.
- **Mandatory Nature of the Proviso:** The Hon'ble Justices observed that a legislative provision may be considered mandatory in nature, if the scheme of the legislation prescribes consequences for non-compliance with such provision. Section 30(2)(e) of the IBC required that only resolutions plans (compliant with applicable laws) are placed by the RP before the CoC. Given this requirement, if

resolution plans (involving combinations with AAEC concerns) are placed for CoC Approval before CCI Approval, such resolutions plans contravene provisions of the Competition Act. To this end, there are specific consequences prescribed under the IBC and the Competition Act for such invalid resolution plans, ensuring that the Proviso is a mandatory provision and not directory.

- **Anomalous Situations:** The Competition Act (and attendant regulations) empower the CCI to direct modifications to a combination (involving a resolution plan). Accordingly, if CCI Approval is not obtained before CoC Approval, it is plausible that the CCI subsequently directs modifications to a resolution plan (already considered and approved by the CoC). Resultantly, interpreting the Proviso to be directory in nature would lead to a situation where the CoC is required to consider a resolution plan (and exercise commercial wisdom) without being accorded an opportunity to consider any modifications directed by the CCI.
- **CCI Approval Timelines:** Rejecting AGI's contentions, the Hon'ble Justices clarified that an application for procuring CCI Approval can be submitted at any time including, (a) submission of expression of interest; (b) issuance of RFRP; or (c) when the list of prospective resolution applicants is published. Lauding the CCI's quick approval timelines, the Hon'ble Justices observed that resolution applicants acting expeditiously can potentially obtain CCI Approval before CoC Approval.
- **Procedural Safeguards:** The Hon'ble Justices observed that Sections 29 and 30 of the Competition Act delineate a procedural roadmap that the CCI is required to adhere to when it reviews combinations which have the potential to cause an AAEC. Considering that Section 29(1) of the Competition Act prescribes that a show-cause notice thereunder must be issued to the parties to the combination, the CCI violated this requirement when it issued the SCN only to AGI. Considering that the Modification envisaged divestment of a key plant, it was imperative that the Corporate Debtor consented to the Modification. Lastly, the Supreme Court also observed that the CCI did not have the flexibility to deviate from the established procedural safeguards (Sections 29(2) to Section 29(6) read with Section 30 of the Competition Act) whilst assessing modifications / proposals submitted by transacting parties, pursuant to a show-cause notice under Section 29(1) of the Competition Act.
- **Conditional Approvals:** Notably, the Hon'ble Justices also observed that conditional approvals (such the one granted to AGI by the CCI) were in dissonance with the objectives of the IBC, given that these were predicated on the presumption of future compliance. As such, conditional approvals could foster uncertainty, necessitate further modifications thereby diminishing the sanctity of the resolution framework.

In view of the above, the Hon'ble Supreme Court speaking through Justices Mr. Roy and Mr. Dhulia passed the following directions: (a) the AGI Resolution Plan is set aside and quashed (since CoC Approval was provided before CCI Approval in contravention of the IBC); (b) any action taken pursuant to the Resolution Plan shall stand nullified; (c) the rights of all stakeholders shall be restored as per status quo ante, prior to the approval of the Resolution Plan by the CoC on 28 October 2022; and (d) consequently, the CoC shall reconsider the resolution plan submitted by ISC and any other resolution plan which possessed the requisite CCI approval as on 28 October 2022 i.e., the date on which the CoC voted upon the submitted Resolution Plans.

While the aforementioned judgment of the Hon'ble Supreme Court lays down the legal position on the issue at hand, it is also worthwhile to understand the dissenting opinion provided by Just. S.V.N Bhatti on the aforementioned issues.

### Observations of Just. Bhatti

Key observations and findings from the dissenting opinion of Just. Bhatti are set out below:

- **Proviso is directory and not mandatory:** A literal interpretation of the Proviso ensures that the Proviso is inconsistent with the other provisions forming part of Section 31 of the IBC. Further, in terms of Section 30(4) of the IBC, the CoC while exercising its commercial wisdom is required to assess whether the submitted resolution plan is feasible, viable and whether interests are appropriately prioritized. As a corollary, the CoC is not conferred with the power to adjudicate on whether a resolution plan is legally enforceable. Such authority vests only with the NCLT. Thus, if a resolution applicant procures CCI Approval after CoC Approval but before approval of the resolution plan by NCLT, the resolution plan is legally tenable and in compliance with the IBC.



- *Procedural Safeguards:* Relying on language set out under Section 29(1) of the Competition Act, Just. Bhatti observed that the approval granted by the CCI to GI was legal, given that CCI was satisfied that the Modification assuaged AAEC concerns – thereby observing that the Competition Act accorded CCI sufficient jurisdiction to determine when a detailed investigation was required in a proposed combination. On the issue of issuing notice, Just. Bhatti observed that the CCI was required to issue notice to the parties to the combination, i.e., the acquirer / target. Accordingly, in the present case, failure to issue SCN to the Corporate Debtor violated the provisions of the Competition Act.

In view of the aforementioned reasons, Just. Bhatti opined that the Proviso should be read as directory in nature. On the procedural lapses, Just. Bhatti concurred with the findings of the NCLAT.

## Comments

The requirement to obtain CCI Approval prior to CoC Approval is now settled law, and failure to adhere to this requirement would result in rejection of the resolution plan by CoC or NCLT. Pertinently, the majority opinion also sheds light on the timelines associated with obtaining CCI Approval – now, a resolution applicant can apply for CCI Approval as early as submission of expression of interest, ensuring CCI Approval is procured before resolution plans are placed for approval of the CoC.

Given CCI's proclivity to require parties to submit documents demonstrating binding intention of the parties to enter into and consummate the transaction (in line with the Competition Act), it remains to be seen how the CCI assesses these requirements in light of the observations of the Hon'ble Supreme Court. Further, the judgement results in an increased burden on the CCI, since it takes away the discretion accorded to the CCI to approve combinations with *prima facie* AAEC concerns on receipt of satisfactory proposals / modifications by the transacting parties, without undertaking a detailed investigation / undertaking public consultation. Lastly, with the recent insertion of Section 29(7) in the Competition Act, transacting parties and/or the CCI may be inclined to propose modifications to a proposed combination, even before the CCI forms a *prima-facie* opinion on potential AAEC arising from a combination.

Summing up, considering that a resolution applicant may want to wait till submission of resolution plan and outcome of negotiations with CoC to apply for CCI approval, requirement of such approval as a pre-condition for approval of resolution plan by CoC may put a resolution applicant at a disadvantage over a bidder who has already received CCI approval as CoC would now be required to only go with a bidder who has received such approval. This would do away with any uncertainty around successful completion of CIRP on account of uncertainty of CCI approval at the stage of CoC approval even though it may limit possibilities of negotiating better value with a bidder who has not yet received such approval but is willing to offer a higher value.

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