

Decoding the Supreme Court's decision: Implications for India's merger control regime



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[Aparna Mehra](#) , [Kshitij Sharma](#) , [Karan Arora](#) 5 min read



A balance must be maintained between the CCI's review of competition dynamics and the time-sensitive insolvency process. **(Hindustan Times)**

Summary

Ever since India's implementation of the Insolvency and Bankruptcy Code (IBC), it has been clear that all transactions emanating from resolution plans under the corporate insolvency resolution process (CIRP), where the entities meet the jurisdictional thresholds under the Competition Act, 2002, will require approval of the Competition Commission of India (CCI).

When this approval is sought is important, as a balance must be maintained between the CCI's review of competition dynamics and the time-sensitive insolvency process.

Recently, the Supreme Court in the case of *Independent Sugar Corporation Ltd vs Girish Sriram Juneja and Others* held that the requirement of obtaining the CCI's prior approval under the IBC is mandatory for resolution plans that qualify as a 'combination' under the Competition Act.

In other words, a resolution plan cannot be approved if it does not have CCI approval (if required) prior to the committee of creditors' (CoC) consideration of all resolution plans placed before.

An analysis of CIRPs in the last five years reveals that the approval of resolution plans by CoCs has mostly been received before CCI approval. Given the judgement, the process followed by successful resolution applicants could be viewed as violative of the law.

To meet this newly interpreted timeline, the Supreme Court opined that a resolution applicant can file a CCI application in relation to a resolution plan as early as at the stage of submitting the 'Expression of Interest'. This would, in effect, lead to more CCI applications for the same insolvency process as all potential resolution applicants would need to approach the Commission at an early stage of the process.

While this aspect of the judgement has received significant attention, what seems to have fallen between the cracks is the apex court's observations on various procedural aspects of the merger control process under the Competition Act. These could drastically alter established practices.

Communications with parties to the combination: Most provisions of the Indian merger control regime, particularly those relating to filing and communication obligations, are addressed to parties to the combination.

However, as per CCI protocols, based on the contractual agreement between the transacting parties and internationally followed practices, all communication from the CCI to the parties have been typically sent to the notifying party—which in the case of an acquisition is the acquirer and in case of mergers and amalgamations are the merging parties.

The target enterprise in a merger filing, depending on the contractual agreement between the parties, receives either the entirety or parts of such communication (at the discretion of the acquirer). The Supreme Court's ruling potentially unsettles this protocol.

In its judgement, the Supreme Court observed that the CCI's failure to issue a show-cause notice to all relevant parties (notably, the target company) constituted a major procedural lapse.

The court interpreted the term 'parties to the combination' to not be restricted to only the acquirer, giving due weight to the plurality attached to the word 'parties'. It observed that bypassing this statutory requirement undermined the fairness and completeness of the investigative process.

Considering these observations, there is a likelihood of increased involvement of target enterprises in the CCI's merger review process, which will be another aspect that transacting parties will need to deal with.

However, for all regular communication except a show-cause notice, the CCI is likely to continue to respect the contractual arrangement of the transacting parties and send communications based on such contracted terms.

Potential alterations to the CCI's modification framework: Under the Indian merger control regime, transactions notified to the CCI that could potentially pose an adverse impact on competition in any relevant market can be modified either *suo moto* by the CCI or voluntarily by the transacting parties.

The modification framework allows transacting parties to allay the CCI's concerns and undertake the transaction subject to the implementation of agreed modifications. The parties can submit the relevant modifications to the CCI both before a show-cause notice and in response to it.

In the judgement, a potential adverse impact on competition was taken to transcend the interests of the immediate parties, thereby necessitating a broader consultation with the public on the transaction and data collection process.

Reading this observation of the Supreme Court in consonance with the rest of the judgement suggests that transactions that *prima facie* pose an adverse impact on competition in the CCI's view would necessarily have to go through the procedural requirement of a public consultation on various facets of the deal and any modifications proposed by transacting parties.

This observation is not in consonance with a reading of the modification framework under the Competition Act, something that has been correctly noted by Justice S.V.N. Bhatti in his dissenting judgement.

The observation also creates disharmony between the Competition Act and the associated regulations relating to combinations, given that the regulations clearly contain an enabling provision allowing transacting parties to propose modifications along with their response to the show-cause notice and allowing CCI to approve a transaction at this stage.

If this interpretation were to be adopted, transactions that *prima facie* pose an adverse impact on competition could experience a prolonged and complex merger review process. Further, this will likely also entail increased legal costs and stretched timelines on account of a comprehensive review, which could impact the ease of doing business in India, putting a dampener on mergers and acquisition activity and foreign investments.

It is undeniable that the Supreme Court's ruling in relation to the timing of CCI approval for a resolution plan *vis-à-vis* the CoC's approval will have a significant impact on CIRPs. The court's observations on various procedural facets of India's merger control regime also hold the potential to significantly alter settled protocols for merger related filings.

The authors are, respectively, partner, senior associate and associate with the competition law practice at Trilegal.