NOTICE OF COMBINATIONS IN INSOLVENCY RESOLUTION

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The Competition Act, 2002, regulates combinations that have an appreciable adverse effect on competition in the relevant market. During a Corporate Insolvency Resolution Process, a combination may form part of a resolution plan. This article explores the interplay of the Competition Act, 2002, with the Insolvency and Bankruptcy Code, 2016, for the purpose of sending the notice of such a combination to the Competition Commission of India as well as for receiving its approval. It examines the theory and practice relating to the 2018 Amendment to the Insolvency and Bankruptcy Code, 2016, which fixes the stage for securing the approval of the Competition Commission of India. It also analyses committee reports, recent judicial decisions on the interpretation of the Amendment, as well as industry practices before and after the Amendment. The article further assesses the viability of the newly introduced 'Green Channel' for combination approvals in the context of insolvency resolution. It also investigates the overlap of the Insolvency and Bankruptcy Code, 2016, with the Companies Act, 2013, and its implications thereto. The article aims to ascertain the optimum mechanism for obtaining approvals from the Competition Commission of India, for such combinations arising out of a Corporate Insolvency Resolution Process.

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I. INTRODUCTION

When a corporate entity is unable to service its debts, a recovery mechanism in the form of a Corporate Insolvency Resolution Process ('CIRP') can be initiated, which is governed by the Insolvency and Bankruptcy Code, 2016, ('IBC') in India. CIRP is a process for resolving the corporate insolvency of a corporate debtor. It may be initiated by a financial creditor,[1] an operational creditor,[2] or a corporate applicant of the corporate debtor.[3] The purpose of the CIRP is for the Committee of Creditors ('CoC') to resolve the situation of insolvency of a going concern by considering and approving 'resolution plans' in a specified period. In case of a failure to submit or reject the resolution plan, a liquidation process ensues.[4]

Since its introduction in 2016, CIRPs have resulted in over 270 successful resolutions.[5] However, the Indian insolvency regime is at a nascent stage, which inevitably involves teething troubles. One such issue comes in the form of the Competition Commission of India's ('CCI') approval of 'combinations' that arise in the course of a CIRP. A combination under the Competition Act, 2002, ('Competition Act') is defined as the acquisition of control, shares, voting rights or assets by a person, over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises, when the combining parties exceed the thresholds set in the Competition Act.[6] To be considered as a combination under the Competition Act, an acquisition, merger or amalgamation needs to meet certain thresholds.[7] In case a combination meets these thresholds, a notice of the same must be sent to the CCI.[8]

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1 The Insolvency and Bankruptcy Code, 2016, §7.

2 *Id*., §9.

3 *Id*., §10.

4 *Id*., §33.

5 Gaurav Noronha, *Insolvency Resolution in India sees Second Consecutive Quarter of Under-Performance*, The Economic Times, December 2, 2020, available at https://economictimes.indiatimes.com/industry/banking/finance/banking/insolvency-resolution-in-india-sees- second-consecutive-quarter-of-under-performance/articleshow/79525163.cms?from=mdr (Last visited on March 23, 2021).

6 Competition Commission of India, *Provisions Relating to Combinations*: *Advocacy Series Booklet 5*, May, 2014, available at https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/combination.pdf (Last visited on March 23, 2021).

7 The Competition Act, 2002, §5.

8 *Id*., §6.

A major issue that has plagued resolution applicants since 2016 is that of notice to and approval of the CCI in cases of combinations arising out of CIRP, forming a part of a resolution plan. It stems from the ambiguity regarding the exact stage of the CIRP by which a notice of such a combination must be sent to the CCI and its approval secured. There are arguments on both sides – one side avers that given the multiple resolution plans involved in a CIRP, it would be prudent to send only the plan approved by CoC for the CCI's investigation. The other side contends that the CoC should have the benefit of the CCI's opinion while evaluating resolution plans, and early approvals would make it possible to consider alternate resolution plans. While this issue appears simply procedural, it has major substantive implications on a CIRP and ought to be considered as such.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, ('2018 IBC Amendment') provided a stipulation in this regard by adding a proviso, laying down that the said notice must be sent to the CCI at a stage prior to the CoC approving the resolution plan.[9] This legislative mandate carved out a specific exception for CCI's approval of resolution plans, and for the first time, laid down the exact stage at which CCI approval must be secured when combinations form a part of a resolution plan.

In this article, I study this statutory stipulation and its operation in the Indian insolvency regime. In Part II, I survey the statutory framework governing the IBC and Competition Act, which forms the basis of my analysis. It explores the law governing the stages of a resolution plan in a CIRP, the mechanism for notifying the CCI of combinations and the respective construction of binding documents under the two enactments. Part III of the article examines the pre-2018 IBC Amendment situation and discusses the need for the Amendment. In Part IV, I study the operation of the Amendment through industry practice that has largely abided by this mandate, which stands in stark contrast to the interpretation of the amended section by courts that have opted to read down the mandatory nature of the Amendment. In Part V, I examine the recently introduced expedited approval mechanism for combinations in the form of 'Green Channel', and its relevance to a CIRP. Part VI of the article explores the absence of an overlap of the IBC with the Companies Act, 2013, ('the Companies Act') in the context of combinations. In Part VII, I conclude with my observations and recommendations in the context of arriving at the optimum mechanism for sending a notice to and securing the approval of the CCI for combinations arising in CIRPs.

[9] The Insolvency and Bankruptcy Code, 2016, Proviso to §31(4), *inserted vide* The Insolvency and Bankruptcy (Amendment) Act, 2018 (w.e.f. June 6, 2018).

II. STATUTORY FRAMEWORK: IBC AND COMPETITION ACT

Before delving into the 2018 IBC Amendment, a discussion on the theoretical background to the governing legislations is necessary. Multiple resolution plans are submitted for the resolution of a corporate debtor's insolvency. As the CIRP progresses, the most viable plan progresses to finalisation. The stages that a resolution plan progresses through in CIRP will be discussed in Part II (A). Combinations may form a part of such resolution plans, and the Competition Act requires that combination meeting certain thresholds,[10] need to be notified to the CCI in order to analyse whether the same would have an appreciable adverse effect on competition in the relevant market.[11] Part II (B) discusses the concept of notices of combinations in the Competition Act. A 'binding document' is considered to be a 'trigger event' for sending such notices to the CCI. The Competition Act and IBC differ in their conception of a binding document. In Part II (C), the concept of a binding document in IBC in contradistinction to the Competition Act and its implications thereof are analysed.

A. STAGES OF A RESOLUTION PLAN IN CIRP

When a corporate debtor enters into a CIRP, the CoC appoints a resolution professional,[12] who invites prospective resolution applicants for submission of 'resolution plans'[13] meant for insolvency resolution of the corporate debtor as a going concern.[14] §30 of the IBC provides a mechanism for the submission of a resolution plan.[15] Various resolution applicants submit their resolution plans to the resolution professional,[16] who examines[17] whether the said plan is in conformity with the statutory scheme.[18] After such a filtering process, the vetted resolution plan is sent by the resolution professional to the CoC for its approval.[19] The CoC then votes to approve the resolution plan,[20] and the same is submitted by the resolution professional to the Adjudicating Authority.[21] The Adjudicating Authority finally decides on the approval of the resolution plan as per the relevant statutory provisions.[22]

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10 The Competition Act, 2002, §5.
11 *Id*., §6.
12 The Insolvency and Bankruptcy Code, 2016, §22.
13 *Id*., §25(2)(h).
14 *Id*., §5(26).
15 *Id*., §30.
16 *Id*., §30(1).
17 *Id*., §30(2).
18 *Id*., §§30(2)(a)–30(2)(f).
19 *Id*., §30(3).
20 *Id*., §30(4).
21 *Id*., §30(6).
22 *Id*., §31(1).

If the resolution plan involves a combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India, a notice of the same must be sent to the CCI by the resolution applicant itself.[23] The exact stage at which the said notice is to be sent was unclear before the 2018 IBC Amendment. Therefore, the 2018 IBC Amendment laid down an explicit stipulation in this regard in order to establish a mandatory regime for statutory approvals in general and CCI approvals in particular. However, recent judgments of the National Company Law Appellate Tribunal ('NCLAT') have read down this mandate by treating the relevant provision as simply 'directory', which in effect negates the purpose of the 2018 IBC Amendment and takes away from the certainty that the said amendment sought to establish.[24] The Parts ahead survey the statutory framework that governs the correct stage at which this notice should be sent to the CCI, which will be built on to analyse recent NCLAT judgments and committee reports addressing this aspect.

B. NOTICE OF A COMBINATION IN COMPETITION LAW

§6 of the Competition Act provides for the regulation of combinations. Under §6(1), it is prohibited to enter into a combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India, and such a combination is considered void. Due to this, §6(2) of the Competition Act provides that a person or enterprise proposing to enter into a combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India may give notice to the CCI within thirty days of:

(a) approval of the proposal relating to merger or amalgamation by the board of directors of the enterprises concerned with such merger or amalgamation;

(b) execution of any agreement or other document for acquisition or acquiring of control.

India follows a 'suspensory regime', where no combination can come into effect till the lapse of 210 days of such notice or CCI orders on the combination, whichever is earlier.[25] Only on the lapse of such a period is the combination deemed to be approved by the CCI.

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[23] The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, Reg. 37(l), read with the Competition Act, 2002, §6(2).

[24] National Company Law Appellate Tribunal (New Delhi), Arcelormittal India (P) Ltd. v. Abhijit Guhathakurta , 2019 SCC OnLine NCLAT 920; National Company Law Appellate Tribunal (New Delhi), Vishal Vijay Kalantri v. Shailen Shah (3), 2020 SCC OnLine NCLAT 1013; National Company Law Appellate Tribunal (New Delhi), Makalu Trading Ltd. v. Rajiv Chakraborty, 2020 SCCOnLine NCLAT 643.

[25] The Competition Act, 2002, §5(2A).

C. CONCEPT OF A 'BINDING DOCUMENT': COMPETITION LAW V. IBC

As a CIRP progresses, the most viable resolution plan emerges and obtains the status of a binding document on approval by the Adjudicating Authority.[26] This is in contradistinction to the Competition Act's conception of a binding document, which considers the mere 'proposal' for a combination to be a binding document, and governs the event in which a notice must be sent to the CCI for evaluating its possible adverse effects on competition in the relevant market.[27] It is my contention that what constitutes a binding document starkly differs in the regimes of the Competition Act and the IBC, founded in the purpose that the binding character of a document serves in these two regimes.

1. Binding Document in IBC

As per the IBC, only the plan approved by the Adjudicating Authority is considered binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders.[28] This position is no longer *res integra* – courts have held that the resolution plan so approved is final and binding and that the scope of interference by courts is very limited. In *K. Sashidhar* v. *Indian Overseas Bank*,[29] the Supreme Court, in the context of a rejected resolution plan held as under:

> "As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC, much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. […] The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable".[30]

In *Rahul Jain* v. *Rave Scans (P) Ltd.*, the Supreme Court set aside the modifications made by the NCLAT to the order of the National Company Law Tribunal ('NCLT'), stating that the resolution plan after due approval by the

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[26] The Insolvency and Bankruptcy Code, 2016, §31(1).
[27] The Competition Act, 2002, §6(2)(a).
[28] *Id*., §6(2)(a).
[29] (2019) 12 SCC 150.
[30] *Id*., ¶52.

Adjudicating Authority, which is the NCLT, had attained finality.[31] Thus, in the IBC regime, only the resolution plan duly approved by the Adjudicating Authority is considered to be a binding document.

2. Binding Document in Competition Act

In the context of the Competition Act, the concept of a binding document is different. As mentioned above, a notice of a combination under §6(2) of the Competition Act is to be sent under either when a proposal for merger/amalgamation is approved by the board of directors[32] or on the execution of any agreement or 'other document' for acquisition or acquiring of control.[33] These two stipulations are considered to be the 'trigger events' for notification of a proposed combination to the CCI, and the documents enumerated in the provision are considered binding documents for the purposes of the Competition Act.

The Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011, ('Combination Regulations, 2011') further elaborate on the phrase 'other document' used in §6(2)(b). Regulation 8 defines the phrase as "any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets".[34] Two provisos to Regulation 8 provide further stipulations with regard to acquisition without the consent of the enterprise being acquired and public announcements in the context of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. In fact, Clause 7 of the Draft Competition (Amendment) Bill, 2020, inserts an explanation to §6 of the Competition Act that is exactly worded as Regulation 8 of the Combination Regulations, 2011.[35] Thus, the proposal is to elevate the status of 'other document' from subordinate legislation to the main statute itself.

A binding document for the purpose of the Competition Act, in the specific context of a proposal for a combination in a resolution plan, has not been explicitly defined. To arrive at what constitutes a binding document in this context, it must be seen that in a CIRP, the resolution plan is the document that may contain a proposal for a combination. It is an executed document that conveys a decision to acquire control, shares, voting rights or assets. When read in this context, it is quite clear that a binding document for the purposes of the Competition Act should mean the resolution plan as submitted by the resolution applicant to the resolution professional. While the resolution plan is not binding for the purposes of the CIRP unless it is approved by the Adjudicating Authority, it is considered binding on the

[31] Rahul Jain v. Rave Scans (P) Ltd., (2019) 10 SCC 548.
[32] The Competition Act, 2002, §6(2)(a).
[33] *Id*., §6(2)(b).
[34] The Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011, Reg. 8.
[35] The Draft Competition (Amendment) Bill, 2020, Cl. 7.

proposer of the resolution plan as well as the resolution applicant for the purposes of notifying the CCI. CCI's decisional practice is the strongest endorsement of this position of law, having provided approvals in cases where notices of combinations were sent at the stage of submission of a resolution plan.[36] Not holding such notices to be premature is implicit approval to the construction that a resolution plan itself constitutes a binding document for notifying the CCI.[37]

Thus in a CIRP, the notice of a combination should be sent to the CCI as soon as the resolution plan is submitted to the resolution professional. In case such notice is not sentto the CCI before the implementation of the combination as contained in a resolution plan, it would amount to a contravention of provisions of the Competition Act and attract penalty under it.[38]

III. THE 2018 IBC AMENDMENT

The 2018 IBC Amendment provides a mandatory stipulation relating to the stage at which the approval of the CCI must be secured for combinations arising out of a resolution plan. It is important to understand the situation prior to this Amendment, the need for introducing it and the implications of the new regime.

A. SITUATION PRIOR TO THE 2018 IBC AMENDMENT

The requirement of CCI approval was initially provided for under the broadly worded Regulation 37(l) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which required the resolution plan to provide for obtaining necessary approvals from the Central and State Governments and other authorities.[39] Approval of the CCI was clubbed under the general category of statutory approvals required for a resolution plan. Significantly, no time limit was prescribed for securing such approvals.

In relation to this, the recommendations in the Report of the Insolvency Law Committee of March, 2018, ('First Insolvency Law Committee Report') are important. On the aforementioned regulation, it observed:

> "The Committee deliberated that as the onus to obtain the final approval would be on the successful resolution applicant as per

[36] For an illustrative list of these cases, *see* the tables in Parts III(B) (pre-2018 IBC Amendment) and IV(A) (post- 2018 IBC Amendment). In most cases, notice of the combination was sent to the CCI at the stage of filing of the resolution plan before the resolution professional.

[37] M. M. Sharma, *Ignore CCI at Your Own Peril*, Business Standard, April 25, 2018, available at https://www.business-standard.com/article/opinion/ignore-cci-at-your-own-peril-118042500004_1.html (Last visited on March 23, 2021).

[38] The Competition Act, 2002, §§43-A, §42.

[39] The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Reg. 37(l).

> the resolution plan itself, the Code should specify that the timeline will be as specified in the relevant law, and if the timeline for approval under the relevant law is less than one year from the approval of the resolution plan, then a maximum of one year will be provided for obtaining the relevant approvals, and section 31 shall be amended to reflect this.
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> […] However, the Committee was of the opinion that approval from CCI may be dealt through specific regulations for fast tracking the approval process in consultation with the CCI. The Committee was informed that pursuant to discussions with CCI, it has been agreed that CCI will have a period of 30 working days for approval of combinations arising out of the Code, from the date of filing of the combination notice to the CCI. Further, this timeline of 30 days may be extended by another 30 days, only in exceptional cases. In the event that no approval or rejection is provided by the CCI within the aforementioned timelines, the said combination would be deemed to have been approved. Detailed forms and relevant regulations in this regard may be provided by CCI in due course of time".[40]

While no reasoning is provided for making a 'specific' exception for CCI approvals in this Report, the Committee clearly treated CCI approval as a 'distinct class' ofapprovals. This recommendation underscores the importance of CCI approvals in a CIRP on two counts. *First*, specific regulations were recommended for CCI approvals as distinct from other statutory approvals under §31 of the IBC. *Second*, a 'fast-track' mechanism for thirty- day approval was agreed upon by the CCI for combinations forming a part of a resolution plan. Crucially, the Committee made no observation on the stage at which the notice of a combination should be sent to the CCI or by what stage it needs to be secured.

B. NEED FOR THE 2018 IBC AMENDMENT

The reasons behind treating CCI approval as a distinct class are not too difficult to infer. *First*, as elaborated in the preceding Part, a binding document for the purposes of notifying a combination to the CCI is considered to be the resolution plan as submitted to the resolution professional. The CCI investigates the structure of a proposed combination and the possibility of adverse effects of the proposed combination on competition in the relevant market. Such investigations go to the heart of the proposed combination and the resolution plan itself. A combination, if found to have an appreciable adverse effect on the relevant market, is void.[41] In case the CCI on investigation finds that a proposed combination cannot be allowed, or can be allowed but only with mandatory changes, the entire CIRP

[40] Shri Injeti Srinivas, *Report of the Insolvency Law Committee*, 55 (March 2018).

[41] The Competition Act, 2002, §6(1).

process will be derailed if such a finding comes at a belated stage. This would not leave enough time for the CoC to consider alternative, less anticompetitive plans. Thus, it is important that such notice be given at an early stage so that the CoC can have the benefit of any objections or conditions from the CCI while it considers and votes on the various resolution plans before it.

Before the Insolvency and Bankruptcy Code (Amendment) Act, 2019, ('2019 IBC Amendment') if a successful resolution plan was not approved by the Adjudicating Authority within 270 days of initiation of CIRP,[42] the corporate debtor would have to be liquidated.[43] In case of CCI rejecting or requiring modifications of a combination arising out of a resolution plan, the resolution applicant would have to go back to the drawing board and submit a fresh resolution plan to the CoC for approval.[44] This would frustrate the very object of the strict IBC timelines, leading to value destruction and reduction in recovery rate.[45] In such a scenario, it was entirely possible that the sensitive CIRP timelines would be derailed,[46] andthe corporate debtor face liquidation, with the delay further compounding issues by leading to lower realisation during liquidation.[47]

It is thus clear as to why CCI approval was treated on a separate plane by the Committee. Not just the approval, but even the stage at which such approval is sought and granted or denied is extremely important. As seen in the previous Part, in CIRP, a resolution plan is considered to be the binding document for the purposes of the CCI. However, given that no law governed the stage at which such notice of and approval for a combination arising out of a resolution plan was to be completed, the CCI was being notified both prior to and post the approval of the

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42 The Insolvency and Bankruptcy Code, 2016, §12.

43 *Id*., § 33; The 2019 IBC Amendment added a stipulation for 'mandatory' adherence to the 330-day CIRP timeline (including extensions), providing a further grace period of ninety days in case the CIRP could not be completed till then (§ 4 of the 2019 IBC Amendment). This statutory mandate was eventually struck down by the Supreme Court which allowed the Adjudicating Authority to extend the time limit of the CIRP not only beyond the statutory 330 days but even beyond the ninety days grace period, in exceptional circumstances as demarcated in the judgment. *See* Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531, ¶127.

44 There is no provision in the IBC for 'modification' of a resolution plan approved by the CoC. The role of the Adjudicating Authority is limited merely to overseeing the compliance of procedural requirements by the resolution professional and the CoC in approving the resolution plan. *See* K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150, ¶¶52, ¶58. The Supreme Court has recognised only a limited power of the Adjudicating Authority to modify a resolution plan in order to safeguard the rights of operational creditors, *see* Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17, ¶77.

45 Dr T. K. Viswanathan Committee, The Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, 15 (November 4, 2015); *See* also Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17, ¶¶15, ¶27 (quoting this report).

46 *See* The Insolvency and Bankruptcy Code, 2016, Proviso to §12 stating "… any extension of the period of corporate insolvency resolution process … shall not be granted more than once".

47 The Insolvency and Bankruptcy Code, 2016, Proviso to §12.

CoC.[48] An illustrative list of combinations arising in CIRP notified to CCI prior to the 2018 IBC Amendment, is provided below:

Name of Party filing notice under §6(2) of the Competition Act	**Combination Registration Number**	**Date of the notice to the CCI**	**Date of the Order**	**Stage of Filing Notice to the CCI**
Rajputana Properties	C-2018/02/557	February 16, 2018	March 7, 2018	CoC
UltraTech Cement Limited	C-2018/02/558	February 22, 2018	March 27, 2018	Resolution Professional ('RP')
Tata Steel	C-2018/03/562	March 26, 2018	April 25, 2018	RP
AION Investments Private II Limited and JSW Steel Limited	C-2018/03/561	March 12, 2018	May 11, 2018	RP
Vedanta Limited	C-2018/04/563	April 6, 2018	May 11, 2018	RP
Tata Steel	C-2018/07/581	June 2, 2018	August 6, 2018	RP
Adani Wilmar	C-2018/06/580	June 27, 2018	August 10, 2018	RP
Arcelor Mittal Societe Anonyme and Nippon Steel & Sumitomo	C-2018/08/593	August 13, 2018	September 18, 2018	RP

[48] Anshuman Sakle et al., *Second Amendment to Insolvency and Bankruptcy Code, 2016 — Addressing the Conundrum Around CCI Clearance*, THE SCC ONLINE BLOG, June 4, 2019, available at https://www.scconline.com/blog/post/2019/06/04/second-amendment-to-insolvency-and-bankruptcy-code-2016-addressing-the-conundrum-around-cci-clearance/ (Last visited on March 23, 2021).

Metal Corporation				
JSW Steel	C-2018/08/594	August 23, 2018	September 8, 2018	RP
Liberty House	C-2018/09/599	September 11, 2018	November 6, 2018	Post NLCT approval
Arcelor Mittal India Pvt. Ltd.	C-2018/12/624	December 17, 2018	January 10, 2019	RP
Royale Partners Investment Fund	C-2019/01/632	January 15, 2019	January 31, 2019	CoC
Patanjali Ayurved	C-2019/01/631	January 14, 2019	March 6, 2019	Post CoC approval

From this survey of industry practice, it can be seen that notices for, and CCI approval of most plans were facilitated at the stage of submission of the resolution plan to the resolution professional, but there were significant cases of deviation from this practice. Further, the CCI's turnaround time in deciding these cases is noteworthy – most decisions were delivered within a month of receipt of the notice.

The ambiguity related to the stage of notifying the CCI has consequences and is best actualised in the acquisition of Electrosteel Steels Limited by Vedanta Limited. In April, 2018, Vedanta's resolution plan was approved by the NCLT at Kolkata during the CCI's review process.[49] Since the CCI's decision was not yet known at such a belated stage, such a situation could lead to two issues.[50] *First*, the disqualification of Vedanta and ultimately the liquidation of Electrosteel, and *second*, potential concerns over the partial or complete implementation of a merger or acquisition earlier than permitted under law, known as 'gun- jumping'.[51]

[49] National Company Law Tribunal (Kolkata Bench, Kolkata), SBI v. Electrosteels Limited, 2018 SCC OnLine NCLT 27756.

[50] Sakle, *supra* note 48.

[51] 'Gun jumping' is a term used to describe the bypassing of statutory requirements of competition law in the relevant jurisdiction. In India, if combination thresholds are being met, implementing a transaction without CCI approval before the statutory 210-day period, under §6(2A) of the Competition Act, 2002, or implementation of the transaction without disclosing the same to the CCI, under §5 of the Competition Act, 2002, amounts to gun jumping. *See* Jame R. Modrall & Stefano Ciullo, *Gun- Jumping and EU Merger Control*, Vol. 24, E.C.L.R., 424 (2003).

The Competition Act takes a serious view on gun-jumping, with strict penal consequences under §43A of the Competition Act,[52] if a notice of a combination under §6(2)[53] is not provided to the CCI. The CCI has the power to impose a penalty on a combination which may extend to one percent of the total turnover or the assets, whichever is higher. The act of noncompliance with such penalty order in the absence of a reasonable cause is "punishable with fine which may extend to rupees one lakh for each day during which such noncompliance occurs, subject to a maximum of rupees ten crore".[54] Non-compliance with such punishment is further punishable with "imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore".[55] In the context of the IBC, such punishment of imprisonment of two years or more would make the resolution applicant ineligible to submit a resolution plan in the future.[56]

Thus, given that neither the stage of notice to or approval of CCI nor any timelines for the same were enumerated in the law, Vedanta's resolution plan, if implemented without the requisite approval, could attract major penalties from the CCI. Such penalties could have serious repercussions on the financial health of the going concern.

C. COMING OF THE 2018 IBC AMENDMENT

This uncertain regime relating to statutory authority approval of resolution plans was addressed by the insertion of §31(4) by the 2018 IBC Amendment with effect from June 6, 2018.[57] The requirement of statutory approvals was shifted from the Regulations to the IBC itself, now with a specific mandate regarding the stage at which the resolution applicant is to obtain statutory approvals. It states that the resolution applicant shall, pursuant to the resolution plan approved under §31(1), obtain the necessary approval required under any law for the time being in force within one year from approval by the Adjudicating Authority or within such period as provided for in such law, whichever is later.

However, the proviso to §31(4), which specifically deals with CCI approval of combinations, provides a completely different regime for this approval. It mandates that where a resolution plan contains a provision for a combination, as referred to in §5 of the Competition Act, the resolution applicant shall obtain the approval of the CCI prior to the approval of such a resolution plan by the CoC.

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[52] The Competition Act, 2002, §43-A.

[53] *Id*., §6(2).

[54] *Id*., §42(2).

[55] *Id*., §42(3).

[56] *See* The Insolvency and Bankruptcy Code, 2016, §29-A(d)(i). The Competition Act, 2002 is Entry 18 of the Twelfth Schedule to the IBC.

[57] *Id*., §31(4), *inserted vide* The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (w.e.f. June 6, 2018).

This amendment was made pursuant[58] to the observations of the First Insolvency Law Committee Report,[59] which treated CCI approval as a separate class unto itself. As discussed previously, the recommendation did not address the aspect of the stage at which CCI approval must be secured, but instead suggested a fast-track procedure for CCI approval. The 2018 IBC Amendment thus went beyond the immediate recommendation of the Committee yet did not address the issues flagged by the Committee at all since no timelines for the CCI's approval have been laid down in the amended statute.

A salient aspect of the amended statute is that it makes a specific exception only in the context of combinations arising out of a resolution plan. This exception clearly defines that the stage of such notice must be 'prior' to the CoC's approval. As seen earlier, unlike other statutory approvals, CCI approval goes to the core of the resolution plan. At the time of voting on resolution plans before it, the CoC would be equipped with the benefit of CCI's opinion for 'all' resolution plans before it, and any alterations, if necessary, can be carried out at this early stage itself. Given that the IBC has a *non obstante* clause, this specific exception shows due deference to the wisdom of the CCI in case of combination approvals at an early stage of the CIRP, in harmony with provisions of the Competition Act that require notice at the stage a binding document is executed.[60]

IV. OPERATION OF 2018 IBC AMENDMENT

While the 2018 IBC Amendment introduces a procedural mandate for securing CCI approval before the CoC votes on a resolution plan, there have been deviations from the letter of the law. The said deviations, judicial interpretations and committee recommendations require a careful analysis to chart the path ahead in this regard.

A. INDUSTRY PRACTICE

The 2018 IBC Amendment introduced a statutory mandate for the resolution applicant to obtain CCI's approval of the resolution plan before the CoC's approval. In this context, the stage at which the notice for such combinations was sent to CCI is relevant. An illustrative list of combinations arising in CIRP notified to CCI post the 2018 IBC Amendment is provided below:

[58] Shri Injeti Srinivas, *Report of the Insolvency Law Committee*, 52 (February, 2020).
[59] Srinivas, *supra* note 40.
[60] The Insolvency and Bankruptcy Code, 2016, §238.

Name of Party filing notice under §6(2) of the Competition Act	Combination Registration Number	Date of notice to the CCI	Date of the Order	Stage of Filing Notice to the CCI
UV Asset Reconstruction Co. Ltd.	C-2019/02/642	February 7, 2019	March 7, 2019	RP
JSW Steel Coated Products	C-2019/03/650	March 11, 2019	April 9, 2019	RP
Reliance Industries Limited and JMFARC	C-2019/03/648	March 11, 2019	April 15, 2019	RP
CVI CVF IV Master Fund II LP & Ors.	C-2019/04/659	April 22, 2019	June 3, 2019	Post CoC approval
Haldiram Snacks Private Limited	C-2019/10/693	October 15, 2019	October 24, 2019	CoC
NBCC (India) Limited	C-2019/12/711	December 16, 2019	December 27, 2019	Post CoC approval

Comparing the pre and post-2018 IBC Amendment industry practice, it is clear that CCI analyses resolutions plans arising in CIRP with the utmost priority and usually delivers orders within one month from when the notice is sent to it. This bears out the discussions between the First Insolvency Law Committee Report and the CCI to the extent of quick approvals.[61] In most instances, the pre-2018 IBC Amendment industry practice of sending a notice to the CCI at the stage of filing the plan with the resolution professional is still being followed. However, there are multiple instances of CCI approval being sought even after CoC approval. To understand this trend, the development of the law requires analysis.

B. PROVISO TO §31(4): WHETHER DIRECTORY OR MANDATORY?

The underlying reason for deviations from the letter of the law is the paramountcy of the substantive right of a corporate debtor to insolvency resolution. The most important development in this regard arose on November 15, 2019, in the judgment of the Supreme Court of India in *Essar Steel India Ltd.*

[61] SRINIVAS, *supra* note 40, at ¶16.4.

Committee of Creditors v. *Satish Kumar Gupta* ('Essar Steel').[62] Under the 2019 IBC Amendment, the mandatory deadline for completion of CIRP under §12 was extended to 330 days, but in default of this deadline, automatic liquidation of the corporate debtor mandatorily ensued.[63] In light of issues over delays not attributable to the corporate debtor, the court in Essar Steel,[64] struck down the word 'mandatorily' as being manifestly arbitrary under Article 14 of the Constitution of India,[65] and also as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution of India.[66] Before this decision, if the CCI was notified at a belated stage of the CIRP and/or if it took too long to reach its decision, the corporate debtor stood to lose its right to insolvency resolution and face liquidation for no fault of its own. However, the dictum in *Essar Steel Ltd. Committee of Creditors* v. *Satish Kumar Gupta*,[67] obviates such a situation, thereby preserving the substantive right of the corporate debtor and giving discretion to the Adjudicating Authority to extend the CIRP timeline as required, but only if 'exceptional circumstances' as delineated in the judgment arise.[68]

The judicial trend has been to water down the mandate of the proviso to §31(4) of IBC and treat the provision to be directory in nature. The leading decision in this context was that of the NCLAT on December 16, 2019, in *Arcelormittal India (P) Ltd* v. *Abhijit Guhathakurta* ('Arcelormittal').[69] In this case, a notice of the combination to the CCI was sent after the resolution plan was approved by the CoC. The court observed as under:

> "We have noticed and hold that proviso to sub-section (4) of section 31 of the 'I&B Code' which relates to obtaining the approval from the 'Competition Commission of India' under the Competition Act, 2002 prior to the approval of such 'Resolution Plan' by the 'Committee of Creditors', is directory and not mandatory. It is always open to the 'Committee of Creditors', which looks into viability, feasibility and commercial aspect of a 'Resolution Plan' to approve the 'Resolution Plan' subject to such approval by Commission, which may be obtained prior to approval of the plan by the Adjudicating Authority under §31 of the 'I&B Code'. In present matter already approval

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62 Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531, ¶108 ('Essar Steel').

63 The Insolvency and Bankruptcy Code (Amendment) Act, 2019, Cl. 4.

64 Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531.

65 The Constitution of India, 1950, Art. 14.

66 *Id*., Art. 19(1)(g).

67 Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531.

68 *Id*.

69 National Company Law Appellate Tribunal (New Delhi), Arcelormittal India (P) Ltd v. Abhijit Guhathakurta, 2019 SCC OnLine NCLAT 920 ('Arcelormittal').

> of the Competition Commission of India has been taken to the 'Resolution Plan'".

No appeal against this judgment was preferred. This decision was relied on in a subsequent judgment of the NCLAT on March 5, 2020, in *Vishal Vijay Kalantri* v. *Shailen Shah* ('Vishal Vijay Kalantri').[70] In this case, no approval of the CCI was sought at any stage since the proposed combination was below the threshold limit requiring approval of the CCI.[71] However, to address the argument that the approved resolution plan violated the mandate of the proviso to §31(4) of the IBC, the court observed that:

> "It is manifestly clear that a Resolution Plan containing provision for combination has been treated as a class apart requiring approval of the Competition Commission of India even prior to such Resolution Plan being approved by the Committee of Creditors. However, treating such requirement as mandatory is fraught with serious consequences (emphasis added)".[72]

The decision in Arcelormittal was based on the supremacy and wisdom of the CoC in a CIRP, but the reasoning for treating the proviso to §31(4) of the IBC as directory is not robust. The decision in Vishal Vijay Kalantri, on the other hand, acknowledges the fact that resolution plans involving combinations have been legislatively intended to be a 'class apart', yet the mandate cannot be given effect to due to 'serious consequences' ensuing from a strict reading. The judgment is conspicuous with its lack of elucidation on the nature of these serious consequences.

The decision in Vishal Vijay Kalantri is peculiar for two reasons. *First*, the combination was observed to be below the threshold limit required for notifying the CCI, and therefore the question of CCI approval did not arise at all. *Second*, if the appellant's argument relating to the mandate of the proviso to §31(4) of the IBC was to be accepted, the corporate debtor would be facing liquidation. This prospect was absolutely unsustainable in the eyes of the NCLAT.[73] It is relevant to note that a civil appeal was filed against this judgment[74] but was categorised as a defective matter that was not refiled within ninety days.

This trend of NCLAT treating the proviso to §31(4) of the IBC as merely directory and not mandatory was continued by NCLAT most recently on September 9, 2020, in *Makalu Trading Ltd.* v. *Rajiv Chakraborty* ('Makalu

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[70] National Company Law Appellate Tribunal (New Delhi), Vishal Vijay Kalantri v. Shailen Shah, 2020 SCC OnLine NCLAT 1013 ('Vishal Vijay Kalantri').

[71] *Id.*, ¶16.

[72] *Id.*, ¶15.

[73] *Id.*, ¶16.

[74] Diary No. 18799/2020.

Trading').[75] In this case, the notice of the combination was sent to CCI before the CoC's approval, but the resolution plan was approved by the CoC before CCI clearance.[76] When the matter reached the Adjudicating Authority, approval for the plan was made subject to the clearance of the CCI, which ultimatelyapproved the plan. In the impugned judgment, the NCLT made some pertinent observations regarding the nature of the mandate of §31(4):

> "If an action is part of cluster of actions, and such action is only accompanying action to main action, it cannot be blindly said that failing to comply with that mandate will tantamount to nullity of all other actions without looking into the consequences of non-compliance of such accompanying action".[77]

It further held that the "procedural infraction could be harmonised by saying that the plans were validated by the CCI approval",[78] and that "such post facto approval is not in deprivation of justice".[79] Crucially, the NCLT located the provision in §31 of the IBC (Approval of resolution plan) and not in §30 of the IBC (Submission of resolution plan), thus placing the examination of procedural compliance with the Adjudicating Authority and not the CoC since the latter "cannot remain waiting until approval is obtained from CCI".[80]

In the appeal against this order, the appellant made arguments before NCLAT supporting the mandate of the statute, arguing that a particular manner laid down by a statute must be followed,[81] as well as that prior permission cannot be replaced by subsequent permission.[82] Interestingly, relying on *Arun Kumar* v. *Union of India*,[83] it was argued that prior permission of the CCI is a statutory precondition of the nature of a 'jurisdictional fact',[84] the absence of which denudes the CoC from any power, authority or jurisdiction to vote on the proposed Resolution Plan.[85] The import of this novel argument would be that the Adjudicating Authority lacks 'jurisdiction' to decide on a resolution plan that has not been approved by the CCI 'prior' to the CoC voting on it, in strict compliance with the proviso to §31(4) of the IBC.

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75 National Company Law Appellate Tribunal (New Delhi), Makalu Trading Ltd. v. Rajiv Chakraborty , 2020 SCC OnLine NCLAT 643 ('Makalu Trading').

76 *Id*., ¶5.

77 National Company Law Tribunal (Principal Bench, New Delhi), Rajiv Chakraborty v. SBI, 2019 SCC OnLine NCLT 711, ¶40 (May 6, 2020).

78 *Id*., ¶42.

79 *Id*., ¶43.

80 *Id*., ¶44.

81 Mackinnon Mackenzie & Co. Ltd. v. Mackinnon Employees Union, (2015) 4 SCC 544, ¶¶42 – ¶43.

82 Bangalore City Coop. Housing Society Ltd. v. State of Karnataka, (2012) 3 SCC 727, ¶¶34, ¶68.

83 Arun Kumar v. Union of India, (2007) 1 SCC 732, ¶¶74 – ¶76.

84 The Court defined a 'jurisdictional fact' as "one on existence or non-existence of which depends assumption or refusal to assume jurisdiction by a court, tribunal or an authority. […] If the jurisdictional fact does not exist, the court, authority or officer cannot act". *See Id*.

85 Makalu Trading, *supra* note 75, at ¶3a.

Per contra, respondents in the case argued that in view of Arcelormittal treating the proviso to §31(4) of the IBC as directory, since CCI approval in the present case was obtained before approval by the Adjudicating Authority, no contravention of IBC provisions was made out. Similar to the argument taken in Vishal Vijay Kalantri, it was argued that any further delay in the approval of the plan would have resulted in the liquidation of the corporate debtor. Another novel argument was made relating to the incompatibility of timelines under the Competition Act and the IBC, and that a strict interpretation would defeat the purpose of resolution under the IBC.[86]

While dismissing the appeal and treating the proviso to §31(4) of the IBC as 'directory', the decision of the NCLAT turned on a simple fact in the case before it – that the Adjudicating Authority was conscious of CCI approval. The fact that CCI approval was taken after CoC approval, in contravention of proviso to §31(4) of the IBC, was acceptable due tothis fact and in light of the earlier decision of NCLAT in Arcelormittal.[87] In fact, the NCLAT provided more insight into its reasoning in Makalu Trading than in Arcelormittal by its reliance on the judgment of the Supreme Court in *Sharif-ud-din* v. *Abdul Gani Lone* ('Sharif-ud-din').[88] The Supreme Court in Sharif-ud-din provided a test for evaluating whether a statute is to be read as mandatory or directory. It held that:

> "A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened".[89]

The Supreme Court had also considered relevant the lack of a 'specific consequence' for failure to comply with the statutory prescription in reading a statute as directory.[90]

Thus, what seemed to weigh with the court was the fact that invalidation of an approved resolution plan merely on the fact that CCI approval was taken at a later stage cannot be the reason for setting aside that resolution plan. It is true that the letter of the law was violated inasmuch as the fact that the resolution plan the CoC voted on was not approved by the CCI. However, such approval came 'before' the Adjudicating Authority approved the plan. In case the law was strictly construed, a plan that was cleared through the CIRP, as well as by the Adjudicating Authority, would have to be rejected – this, in the view of NCLAT, could not be the intent of the 2018 IBC Amendment. Further, by treating the provision as merely

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86 *Id*., ¶5a.
87 *Id*., ¶11.
88 Sharif-ud-din v. Abdul Gani Lone, (1980) 1 SCC 403.
89 *Id*., ¶9.
90 *Id*.

directory, it did not need to address the argument regarding the absence of the jurisdictional fact.

The NCLAT held that the defect of the absence of CCI approval could be cured by seeking approval at a later stage. What is important to note here is that unlike in Vishal Vijay Kalantri, the Adjudicating Authority did not give approval to the resolution plan before CCI approval was received, and thus the resolution plan could not be implemented pending such approval. Hence, no provision of the Competition Act would be violated by this decision.

However, similar to the decision in Vishal Vijay Kalantri, the proviso to §31(4) of the IBC has effectively been rendered nugatory by this decision. CCI approvals are now being treated in the same class as other regulatory approvals under §31(4). A civil appeal against the NCLAT judgment in Makalu Trading was dismissed *in limine* by a Bench comprising Justices D. Y. Chandrachud, Indu Malhotra, and Indira Banerjee on October 12, 2020, observing that no substantial question of law was involved in the appeal. It thus seems that presently, the position of law declared by NCLAT holds the field.

Despite explicitly recognising the legislature's intent to treat CCI approvals a class apart, the NCLAT's treatment of the proviso as directory has the effect of placing CCI approvals in the same class as other approvals under §31(4) of the IBC, i.e., they can be obtained by the resolution applicant within one year of approval of the resolution plan by the Adjudicating Authority. As seen in the recommendations of the First Insolvency Law Committee Report,[91] CCI approvals were treated as a class apart in conjunction with the fast track mechanisms agreed upon. The 2018 IBC Amendment gave statutory recognition to this distinct treatment. The legislature, in its wisdom, instead of laying down a timeline for CCI approvals, provided the stage at which this approval had to be secured, i.e., prior to the CoC voting upon the resolution plan. By interpreting this mandate as directory, the NCLAT has rendered ineffective the mechanism put in place by the legislature to secure CCI approvals. Given the Supreme Court's decision in *Essar Steel Ltd. Committee of Creditors* v. *Satish Kumar Gupta*,[92] the NCLAT's decision in Makalu Trading, and the lack of a mechanism in place to streamline CCI approvals, the CIRP timeline is effectively in the hands of the Adjudicating Authority.

As the law presently stands, CCI approvals can be taken even after CoC has voted on a resolution plan. In case the CCI raises objections or grants conditional approval, the CoC would not have the benefit of considering alternate resolution plans. If the CCI were to deny approval entirely, fresh resolution plans would have to be submitted to the CoC. All of this greatly detracts from the CoC's

[91] Srinivas, *supra* note 40.

[92] Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531.

statutory mandate to ensure value maximisation,[93] and additionally defeats the object of strict CIRP timelines.

C. SECOND INSOLVENCY COMMITTEE REPORT

As discussed in Part III (A), the 2018 IBC Amendment was made pursuant to the First Insolvency Law Committee Report. In March, 2018, the Committee had recommended a fast-track approval of combinations in CIRP. In February, 2020, the Insolvency Law Committee came out with another report ('Second Insolvency Law Committee Report') in which it dealt with statutory approvals for resolution plans.[94]

The Committee took inspiration from §230(5) of the Companies Act for making a key recommendation in the context of timelines for obtaining statutory approvals in a CIRP.[95] It suggested that post-approval of a resolution plan by the CoC, the resolution plans should be "sent to all concerned government and regulatory authorities whose approvals are core to the continued running of the business of the corporate debtor". It further recommended a 'deemed approval' by statutory authorities if they do not raise their respective objections to the resolution plan within forty-five days. In case of objections or conditional approvals to such a plan, the resolution applicant could attempt to clear them before placing the plan before the Adjudicating Authority within the time limits of §12 of the IBC, but if that is not possible, then the resolution applicant may still clear the objections or comply with the conditions within a year from the approval of the resolution plan by the Adjudicating Authority.[96]

The Committee further observed that "the window of forty-five days given to government and regulatory agencies should be excluded from the computation of the time limit under §12 of the Code".[97] It made a pertinent observation that the "current mechanism of availing such approvals after the approval of the resolution plan, has created uncertainty regarding the successful implementation of the resolution plan. This uncertainty may deter resolution applicants from coming forward, and may stall or frustrate the very resolution of the corporate debtor".[98] Thus, it has recommended that statutory approvals should be taken at a stage *posterior* to the approval of the resolution plan by the CoC, which is exactly opposite of the proviso to §31(4) of the IBC as it stands today. It has been seen that the judicial trend of interpreting the statute has moved in the same direction.

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[93] Tata Steel Ltd. v. Liberty House Group Pte. Ltd., 2019 SCC OnLine NCLAT 13, ¶35.

[94] Srinivas, *supra* note 58.

[95] *Id*., ¶14.7.

[96] *Id*., ¶14.8.

[97] This recommendation is similar to that of the First Insolvency Law Committee Report (at ¶16.4), which provided a specific recommendation for 'deemed approval' of the CCI if it did not grant approval within thirty days, with a possible extension of another thirty days. The Second Insolvency Law Committee Report provides only forty-five days for 'all' statutory authorities. *See Id*., ¶14.9.

[98] *Id*., ¶14.14.

In contrast to the First Insolvency Law Committee Report recommendation, this Report treats all statutory approvals on the same plane and does not consider CCI approvals as a separate class. Furthermore, the Committee placed the onus of determining what government approvals are to be taken on the resolution applicant itself.[99] A single-window for sending plans to relevant agencies was also recommended in this context.[100]

These recommendations are significant, marking a shift from treating CCI approvals distinctly. CCI approvals go to the core of a resolution plan's success, and as argued earlier, their objections are best addressed at the earliest stage. NCLAT decisions, in reading down the proviso to §31(4), took a contrary position to the mandate of law, thus adding uncertainty to the CIRP timeline. The Second Insolvency Law Committee Report recommends statutory authority approvals only for the resolution plan cleared by the CoC, i.e., at a later stage than what the proviso to §31(4) of the IBC mandated. Yet, it attempts to reinstate certainty in the CIRP timeline by introducing deemed approvals and single-window clearances. While the recommendations leave a window for objections or conditions to be cleared or complied within a further period of a year from approval by the Adjudicating Authority, the said authority would have the benefit of being aware of such objections while deciding on approval of a resolution plan and may consider them as a relevant factor while making its decision.

That said, if these recommendations are accepted, the CoC would not have any reference to the CCI's position on the resolution plans placed for consideration before it. Thus the objections or conditions, if any, will come at a later point in the CIRP timeline, which would render it more difficult to address than at the stage of CoC approval. I believe that it would have been optimal to continue treating CCI approvals as a distinct class so that its approval could be taken before the CoC voted on the resolution plan. With this, deemed approval could have been introduced in case of failure of CCI to raise its objections or conditions within forty-five days of submission of the resolution plan to them, with the said period excluded from computation of the time limit under §12 of the IBC.

V. GREEN CHANNEL ROUTE

As seen in Part II (B), India follows a suspensory regime with regard to approval of combinations. The July, 2019, Report of the Competition Law Review Committee ('CLRC Report')[101] noted the trend of CCI decisional practice that CCI rejected no combination reviewed by it and ordered modifications in less than 2.6 percent of the notified combinations.[102] In light of this trend, as well as the

[99] *Id*., ¶14.5.
[100] *Id*., ¶14.10.
[101] Shri Injeti Srinivas, *Report of the Competition Law Review Committee* (July, 2019).
[102] *Id*., ¶4.4.

high transaction costs coupled with delayed transactions in the existing regime,[103] the CLRC Report recommended a kind of voluntary merger mechanism known as 'Green Channel' for combinations that are *unlikely* to result in any appreciable adverse effect on competition in the relevant market.[104] Under this mechanism, parties to a combination may self-assess and undertake pre-filing consultation with the CCI on whether they qualify for the mechanism. The upside of this mechanism is a deemed approval– as opposed to the existing suspensory regime, parties do not require to wait for 210 days to implement the transaction.

Pursuant to the CLRC Report, Regulation 5A was added to the Combination Regulations, 2011, by the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Amendment Regulations, 2019, with effect from August 15, 2019.[105] As per Regulation 5A(1), parties belonging to certain categories of combinations may give a self-declaration that their combination does not cause an appreciable adverse effect on competition in the relevant market.[106] On making such a declaration, the combination is 'deemed' to have been approved by the CCI under Regulation 5A(2), subject to verification of the declaration and the details provided therein as well as whether the combination falls under the specified categories. In case these conditions are not satisfied, subject to the parties being heard by the CCI, the combination would be void *ab initio.* It should be noted that notwithstanding a deemed approval, there is no provision that prevents complaints on abuse of dominant position from being filed against the parties to a combination.[107]

The CLRC Report had recommended that combinations arising out of resolution plans in a CIRP may be permitted to use the Green Channel Route.[108] Despite this recommendation, Regulation 5A of the Competition Act neither permits vertical or horizontal overlap between the parties, nor does it permit overlaps in the production of complementary products. Combinations arising out of resolution plans usually involve such overlaps, and thus this route is not open to a large number of proposed combinations. Furthermore, there is always a risk that the CCI may take issue with the declaration or details therein, which would render the

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[103] *Id.*, ¶4.5.

[104] *Id.*, ¶4.6.

[105] The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019, Reg. 2.

[106] *See* as mentioned in Schedule III of the Combination Regulations Amendment 2019, as below: "Considering all plausible alternative market definitions, the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control–do not produce/provide similar or identical or substitutable product(s) or service(s); are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are at different stage or level of production chain; and (c) are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are complementary to each other."

[107] The Competition Act, 2002, §4.

[108] Srinivas, *supra* note 101, ¶4.16.

deemed approval void *ab initio* without an option of amending the proposal. As opposed to a combination declared void, the effect of a combination being declared void *ab initio* under Regulation 5A is that the combination is treated as never having occurred.[109] This possibility would derail the entire CIRP, involve great legal uncertainty in de-tangling of assets and run the risk of pushing an enterprise into liquidation. On this aspect, the CLRC Report merely referred to the CCI's decisional trend as well as the importance of the pre-filing consultation.[110]

The viability of the Green Channel Route for combinations arising in CIRPs has been discussed in detail in a May, 2020, IBBI Research Initiative paper.[111] It argues that the "theoretical basis for green-channeling IRPs is the failing firm defence".[112] The failing firm defence forms an exception to approvals of combinations in competition law, wherein even a combination having an appreciable adverse effect on competition in the relevant market may be granted approval if it is found that the denial of approval and consequential liquidation may outweigh the grant of approval of the proposed combination. In the context of CIRP, such a defence would be an important consideration when the CoC is evaluating multiple resolution plans – a plan which may have lesser anticompetitive effects may, in fact, be preferred.

The Competition Act stipulates that the 'possibility of a failing business' shall be a factor in evaluating whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market.[113] There are three tests in evaluating the failing firm defence. *First*, whether the failure of the firm is imminent in the absence of the merger, *second*, whether there is an alternative entity which can merge with or acquire the failing firm resulting in a less anticompetitive transaction, and *third*, whether the assets of the firm would exit the market in the absence of the merger.[114]

It is reported,[115] that such a consideration has been made only once by the CCI in the case of the acquisition of Asian Colour Coated Ispat Limited ('ACCIL') by JSW Coated Steel Products.[116] It was observed that liquidation of ACCIL "*would result in the retardation of capacity utilisation and production*

[109] The Competition Act, 2002, §6(1).

[110] Srinivas, *supra* note 101, ¶4.11.

[111] M. P. Ram Mohan & Vishakha Raj, *Merger Control for IRPs: Do Acquisitions of Distressed Firms Warrant Competition Scrutiny?*, Insolvency And Bankruptcy Board Of India Research Initiative, May, 2020, available at https://ibbi.gov.in/uploads/publication/dc195510e9141a689e41ad181ab66cea.pdf (Last visited on March 23, 2021).

[112] *Id*., 2.

[113] The Competition Act, 2002, §20(4)(k).

[114] Mohan & Raj, *supra* note 111, at 3.

[115] *Id*., 21.

[116] The Competition Commission of India, *Proposal for acquisition of Asian Colour Coated Ispat Limited by JSW Steel Coated Products Limited*, Combination No. C-2019/03/650.

from the market, thereby impacting end-consumers".[117] In this case, CCI used only one of the three tests of the failing firm defence.[118]

Importantly, the paper also identified the cross-purposes that insolvency and competition regimes may find themselves at.[119] In the acquisition of Bhushan Power by JSW Steel,[120] NCLAT has identified the CoC's "statutory mandate to ensure value maximisation for which it may call for and consider the 'improved financial offer(s)". However, CCI's paramount consideration is to ensure a level playing field in the market. When the European Commission was faced with such a conflict in the Blokker and Toys R Us merger, it rejected the failing firm defence on two major grounds.[121] *First*, Blokker's acquisition of Toys R Us would strengthen its dominant position, and the latter's liquidation would not lead to the same consequences as a merger. *Second*, and most crucially, other more pro-competitive options were available for merger and could have been opted for. Thus, the European Commission prioritised the maintenance of a competitive market as well as the interest of consumers. Given NCLAT's identification of the CoC's role, the CCI's mandate assumes a very significant and independent role within the CIRP, especially when confronted with a *fait accompli*.

In light of all the above considerations, given the nascent stage of the Indian insolvency regime, it is preferable that combinations arising out of resolution plans be considered in the suspensory regime. Crucially, the CoC should have the benefit of the CCI's decision so that it can consider other submitted resolution plans which have lesser anticompetitive effects. It would be more viable to modify resolution plans at the stage of negotiation and bidding itself.[122]

The First and Second Insolvency Law Committee Reports, as discussed earlier, recommended a fast-track approval route for all combinations arising out of a resolution plan. This seems to be a more feasible and practical approach to the issue of delay. In fact, as seen in industry practice, the CCI already provides quick decisions for combinations arising out of a resolution plan. Granting statutory recognition to such a fast-track mechanism should be the path ahead.

VI. IBC AND COMPANIES ACT: LACK OF CONFLICT

The requirement of notice of a combination to CCI under the Companies Act is found in the provisions of §230 of the Companies Act.[123] The

[117] *Id*., ¶13.
[118] Mohan & Raj, *supra* note 111, at 22.
[119] *Id*., 24.
[120] Tata Steel Ltd. v. Liberty House Group Pte. Ltd., 2019 SCC OnLine NCLAT 13, ¶35.
[121] Case No. IV/M.890, Blokker/Toys R Us, 1998 O.J. (L 316), 1.
[122] Mohan & Raj, *supra* note 111, at ¶6.
[123] The Companies Act, 2013, §230.

overlap of the Companies Act with the IBC comes through §255 and Item 7 of the Eleventh Schedule of the IBC.[124]

The overlap, however, does not occur in the context of insolvency resolution. It arises in the context of liquidation. It is crucial to note that §230 and §232 of the Companies Act operate after the Adjudicating Authority has passed an order for liquidation of the corporate debtor under §33 of the IBC, and the resolution professional has been appointed as the liquidator.[125] This overlap of the Companies Act with the IBC has nothing to do with the submission or approval of the resolution plan. In fact, it is obvious that the liquidation process is initiated under §33 of the IBC inter alia due to the failure to submit or rejection of the Resolution Plan.

It is thus plain that there is no obligation on the persons or enterprises involved in the combination to give notice to the CCI *suo moto* in the scheme of §230 and §232 of the Companies Act. The requirement for sending the notice of a combination to the CCI arises only when the Tribunal orders for a meeting of creditors pursuant to an application by the liquidator for the same under §230(5) of the Companies Act. This provision expands the scope of §394A of Companies Act, 1956, which mandated that the Tribunal give notice to the Central Government of every application made to it under §391 (§230 in the Companies Act) or 394 (§232 in the Companies Act).[126] The Companies Act has broadened the scope of this provision by including the CCI and other sectoral regulators such as income tax authorities, Reserve Bank of India, Securities and Exchange Board of India, Registrar, respective stock exchanges, and Official Liquidator.

Interestingly, in the context of the Companies Act, the judgment of the NCLAT on December 14, 2018, in *Edelweiss Asset Reconstruction Company Ltd.* v. *Synergies Dooray Automotive Ltd.*, while dealing with a pre-2018 IBC Amendment case, held that the "question of filing an application before the National Company Law Tribunal under §§230-232, does not arise at the stage of filing of the 'Resolution Plan' as it is not known as to which of the 'Resolution Plan' will be approved".[127] It was further observed[128] that the IBC is a code by itself, and in case of conflict with other statutes, §238 provides an overriding effect to the IBC.[129] This approach seems to be what the Second Insolvency Law Committee Report took inspiration from.

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[124] The Insolvency and Bankruptcy Code, 2016, §255, read with the Eleventh Schedule to the IBC provides for amendments to the Companies Act, 2013.

[125] *Id*., 2016, §33.

[126] The Companies Act, 1956, §394-A.

[127] National Company Law Appellate Tribunal (New Delhi), Edelweiss Asset Reconstruction Co. Ltd. v. Synergies Dooray Automotive Ltd., 2018 SCC OnLine NCLAT 1005, ¶71 (December 14, 2018).

[128] *Id*., ¶72.

[129] The Insolvency and Bankruptcy Code, 2016, §230.

VII. CONCLUSION AND RECOMMENDATION

In view of the foregoing discussion, it is my opinion that as the present timelines stand, the notice of a combination in the course of a CIRP should be sent at the stage of the trigger event, i.e., the submission of a resolution plan to the resolution professional. This is borne out by industry practice as well since resolution applicants value certainty as central to the CIRP. Crucially, this position also has CCI's implicit endorsement. Given further that the 2018 IBC Amendment treats CCI approvals as a class apart, it is submitted that the proposed 'Explanation' to §6(2) of the Competition Act through Clause 7 of the Draft Competition (Amendment) Bill, 2020, should correctly reflect IBC's distinct treatment to CCI approvals, in the following manner:

> Explanation. – For the purposes of this sub-section, "other document" shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets […] Where a Resolution Plan has been submitted to the Resolution Professional in the course of a Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016, such Resolution Plan shall be deemed to be the 'other document'.[130]
> [emphasis indicates the suggested language]

This amendment would give formal recognition to the implicit practice of CCI accepting notices sent to it at the stage of submission of resolution plans to the resolution professional and maintain consonance between the two legislations. This is crucial since this mechanism had been instituted in the IBC to facilitate obtaining CCI's views on a resolution plan at the earliest stage in the CIRP, given how pivotal such approval is to the success of a resolution plan.

The fact that the CCI has not rejected any combination proposal it has investigated till date betrays a false sense of security. This position would not necessarily continue as India's commercial regime matures and transactions become ever more complex. In the event that CCI approval is sought at a belated stage, the CCI would be presented with a *fait accompli*. In such a scenario, the prospect of liquidation is merely a factor that weighs with the CCI since the 'failing firm defence' has still not gained traction in India. In such a case, rejection of the proposal would render the entire CIRP nugatory. Hence, it is most prudent to seek this approval at the earliest. There may be situations where the CoC and CCI would be at cross-purposes, especially when the failing firm defence is invoked. The CCI must maintain its independent role and stay true to its mandate even in the face of a *fait accompli*.

[130] The Draft Competition (Amendment) Bill, 2020, Cl. 7.

The early notice to and approval of the CCI is a prudent practice, since the CoC should ideally have the benefit of considering alternative resolution plans at the stage of negotiation and bidding itself. It is of the nature of a 'protective measure' for the preservation of the CIRP's sanctity.[131] Given the impressive performance of the CCI in passing orders on notices of combinations in resolution plans, this practice is effective and in line with CIRP timelines as well.

The Green Channel Route in its present form excludes a large number of proposals that involve overlaps which are horizontal or vertical, and involve the production of complementary products. Significantly, however, the prospect of deemed approvals being declared void *ab initio*, coupled with the fact that a deemed approval deprives the CoC of the CCI's opinion, takes away from it being a viable mechanism for a CIRP.

The Second Insolvency Law Committee Report is encouraging in as much as it advocates for a separate window for approvals. However, this separate window is still being considered only for a plan approved by the CoC. I take issue with such a recommendation on two grounds. *First*, the CoC will not have the benefit of the CCI's opinion before voting on the plan. This will deprive it of a ready opportunity to consider other lesser anticompetitive resolution proposals. *Second*, even if the forty-five day period is excluded from the CIRP timeline, in case a plan is rejected at a later stage, the CIRP timeline would have already been significantly exhausted, thus leaving lesser scope for resolution in addition to value reduction and decrease in recovery rate. While I agree with a special window for statutory approvals, it is recommended that the window be provided *after* the submission of the resolution plan to the resolution professional and *before* the CoC considers and votes on the plan. Such an arrangement would be harmonious with the existing law and provide an ideal mechanism for resolutions of corporate insolvency.

In this article, I opine that the 2018 IBC Amendment's treatment of CCI approvals as a separate class is apposite since such approvals go to the core of the resolution plan itself. Be that as it may, it is not possible to strictly give effect to the mandate of the proviso to §31(4) of the IBC. As has been seen in the cases discussed in this article, the NCLAT has prudently chosen the substantive right of a corporate debtor to resolve their insolvency over procedural stipulations that may deprive them of it. The predominant interest in a CIRP is the resolution of the corporate debtor's insolvency, and its purpose must be served by any mechanism connected to the CIRP, including CCI approvals. In my opinion, the mechanism recommended in this article subserves that interest. Commercial wisdom dictates and industry practice bears out that the provision not be reduced to, as Hamlet said, a custom more honoured in the breach than the observance.

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[131] Mayank Udhwani & Ragini Agarwal, *An Argument in Favour of an Effectively Mandatory CCI Approval Under Section 31(4) of the IBC – Part I*, INDIA CORP LAW, October 12, 2020, https://indiacorplaw.in/2020/10/an- argument-in-favour-of-an-effectively-mandatory-cci-approval-under-section-314-of-the-ibc-part-i.html (Last visited on March 27, 2021).