

To,
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Subject: Comments on Draft Competition Commission of India (General) Amendment Regulations, 2021

Sir,

We are a full-service law firm headquartered in New Delhi and are actively advising several players in competition law. Over the years we have spent considerable time on complex legal issues in this space relating to leniency programs and confidentiality. At the very outset, we would like to express our gratitude to the Competition Commission of India for recognising the need for a review of the extant confidentiality regime. The draft Competition Commission of India (General) Amendment Regulations, 2021 dated April 13, 2021 are praiseworthy and ably address concerns regarding the conflict between maintaining privacy and confidentiality while also upholding the principles of natural justice. It is a great practical initiative which can expect to significantly reduce unnecessary delays in concluding an enquiry.

As mentioned in your proposal, we have enclosed a set of high-level recommendations which will hopefully assist you in creating a balanced regime which shall be a win-win for all the stakeholders involved in the anti-trust process.

Sincerely,



For PSA
Dhruv Suri
Partner

COMMENTS ON DRAFT COMPETITION COMMISSION OF INDIA (GENERAL) AMENDMENT REGULATIONS, 2021

Introduction

The Competition Commission of India (“**CCI**”) seeks to replace the extant confidentiality regime under regulation 35 by amending the Competition Commission of India (General) Regulations, 2009 (“**2009 Regulations**”). The Competition Commission of India (General) Amendment Regulations, 2021 (“**new Regulations**”) introduce the concept of confidentiality rings along with other remarkable changes to improve the efficiency of anti-trust investigations.

Protection of confidential information plays a crucial role in any investigation by a regulatory body. The CCI has extensive access to sensitive information of enterprises under investigation. Thus, any confidential information obtained by the CCI during such investigation must be accorded due protection. This protection can often conflict with the need to share such information with parties that are pursuing their right of defense. The CCI must always endeavor to protect confidential information while balancing it with the principles of natural justice for a fair and transparent investigation.

In recent years, the European Commission (“**EC**”) and the Competition Committee of the United States Directorate for Financial and Enterprise Affairs have formulated policies and guidelines on confidentiality claims. These provide a frame of reference and offer insight into the concerns which can arise.

Keeping all the aforementioned factors in mind, we have aimed to address certain additional aspects on the protection of confidential information and hope you will take them into consideration while formulating the final guidelines.

1. Informant rights to confidentiality

Present position: As per Regulation 35(1) of 2009 Regulations, the CCI has to maintain confidentiality of the identity of an informant on a request made to it in writing. Provided that where it is expedient to disclose the identity of the informant, the CCI can do so after giving an opportunity to the informant of being heard.

Proposed position: Regulation 35(1) of the new Regulations places the onus on the CCI, which may grant confidentiality over the identity of an informant in appropriate cases. If the identity of the informant is required to be disclosed, the CCI can revoke the same after recording reasons in writing.

Impact: The new Regulations could be read as unilateral powers of the CCI to grant or revoke confidentiality, without affording any right to the informant to put forward reasons for seeking confidentiality. This will remove the delays caused by the automatic grant of confidentiality to the informant, which is subsequently challenged by the opposite party. However, there need to be measures in place to protect informants.

Over the years, several cases have been brought forth by anonymous informants.¹ These confidential informants have ranged from public minded litigants, to competitors, to whistle blowers within the company. XYZ v. Indian Oil Corporation² is a case in point on the importance

¹ XYZ v Alphabet Inc. and Others, CCI, Case No. 07 of 2020 (9 November 2020); XYZ v. REC Power Distribution Company Ltd, CCI, Case No. 33 of 2014 (5 May 2016).

² XYZ v. Indian Oil Corporation Ltd. and Ors., CCI, Case No. 05 of 2018 (4 July 2018)

of informant confidentiality. The informants were bidders in a tender and had challenged the tenders floated by the opposite parties for price-fixing and arbitrary conditions. If their identity was made known to the opposite parties, it could impact how the opposite party assesses any future bids made by them.

The treatment of whistle blowers under the new regulation is also a cause for concern. A person involved with the company in terms of employment or trade would be risking their own economic wellbeing over the economic wellbeing of the market. Though the new regulation improves efficiency and reduces time, it could also potentially discourage informants.

The second issue lies with the principles of natural justice and the right of hearing. As discussed above, the informant could face retaliation or other negative consequences due to their decision to report anti-competitive behaviour. Before the CCI determines if the informant's identity should be kept confidential, some opportunity should be given to the informant to explain the need for confidentiality. Denial of this opportunity could impact the fair trial rights of the informant.

Suggestion: It may be in the interest of all parties involved to grant the informant of the right of hearing after the CCI determines whether confidentiality should be granted or not. In this manner the cumbersome process of applying for confidentiality is removed and the informant is granted an opportunity of hearing if confidentiality is not granted.

Sub-regulation	Suggested Amendment
<p>(1) The Commission may grant confidentiality over the identity of an informant in appropriate cases, if deemed necessary and expedient.</p> <p>Provided however that if the identity of the informant is required to be disclosed for the purposes of the Act, the Commission shall revoke the same after recording reasons in writing.</p>	<p>(1) The Commission may grant confidentiality over the identity of an informant in cases where breach of confidentiality could cause grave prejudice, if deemed necessary and expedient.</p> <p>Provided however that if the identity of the informant is required to be disclosed for the purposes of the Act, the Commission shall revoke the same after giving an opportunity to the informant of being heard. The Commission shall record its reasons in writing.</p>

2. Delineating confidential information

Present position: As per regulation 35(3) of the 2009 Regulations, the CCI will grant confidentiality of certain information only if making it public will result in disclosure of trade secrets, destruction or appreciable diminution of the commercial value of any information, or can be reasonably expected to cause serious injury. The party seeking confidentiality must submit a statement with cogent reasons under regulation 35(4). Finally, under regulation 35(9) the CCI when arriving at a decision on confidentiality, must consider; the extent to which the information is known to outside public, the extent to which the information is known to persons involved in the party's business, the measures taken by the party to guard the secrecy of the information, and the ease with which the information could be acquired or duplicated by others.

Proposed position: The new Regulations shift the burden from the CCI to the parties seeking confidentiality. The parties seeking confidentiality under the amended regulation 35(2) must now self-certify, through authorised representatives that making the information public will

result in disclosure of trade secrets, destruction or appreciable diminution of the commercial value of any information, or can be reasonably expected to cause serious injury. They must also produce details on the extent to which the information is known to outside public, the extent to which the information is known to persons involved in the party’s business, the measures taken by the party to guard the secrecy of the information, and the ease with which the information could be acquired or duplicated by others, on a self-certification basis. If the self-certified non-confidential version is found to be deficient the CCI or director general can direct the parties to file non-confidential versions strictly in accordance with the parameters for seeking confidentiality.

Impact: This is a marked improvement from the extant regulation since it compresses three steps into a single compliance requirement. However, the regulation retains its vague terminology and methodology for classifying confidential information. The party must either prove that the information becoming public will in all certainty lead to disclosure of trade secrets or destruction in value of the information. Alternatively, the party may also show that releasing the information to the public can be reasonably expected to cause serious injury. This definition can be simplified.

Moreover, the details required under self-certification do not establish the value of the confidential information. Information may not deserve to be kept confidential simply because the party has guarded it. The focus should be on impact rather than method. If the information is revealed, what losses are likely to occur, whether third parties are likely to be affected, etc.

Suggestion: The new Regulations could further improve efficiency by defining the term “confidential information”, and provide guidelines similar to the ones put forward by the European Union³ and the United States of America.⁴

Under Regulation 2 the following definition could be inserted;

“Confidential Information” means any information which contains business secrets of the company or any third party, which on becoming public could lead to disclosure of trade secrets, destruction or appreciable diminution of the commercial value of any information, or serious injury.

Sub-regulation	Suggested Amendment
<p>A party seeking confidentiality over the information or the documents furnished by it shall set out cogent reasons for such treatment and shall self-certify that making the document or documents or information or a part or parts thereof public will result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury. Further, the party shall detail the following on self-certification basis:</p> <p>(a) the extent to which the information is known to outside public;</p>	<p>A party seeking confidentiality over the information or the documents furnished by it shall set out cogent reasons for such treatment and shall self-certify that making the document or documents or information or a part or parts thereof public will result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury. Further, the party shall detail the following on self-certification basis:</p> <p>a) the extent to which the information is known to persons involved in the party’s business and the outside public;</p>

³ See: https://ec.europa.eu/competition/antitrust/business_secrets_en.pdf [accessed on June 4, 2021]

⁴ See: <https://www.justice.gov/sites/default/files/atr/legacy/2015/04/02/311212.pdf> [accessed on June 4, 2021]

<p>(b) the extent to which the information is known to the employees, suppliers, distributors and others involved in the party's business;</p> <p>(c) the measures taken by the party to guard the secrecy of the information;</p> <p>(d) the ease or difficulty with which the information could be acquired or duplicated by others.</p> <p>The party claiming confidentiality on self-certification basis shall provide an undertaking certifying the claims in terms of the requirements as above and such undertaking shall be filed by a Company Secretary or Compliance Officer or any other Senior Officer authorised in this behalf by the party concerned.</p>	<p>b) the possibility of serious harm to the person who has provided it or to third parties in case of disclosure;</p> <p>c) whether the interests liable to be harmed by the disclosure are objectively worthy of protection</p> <p>The party claiming confidentiality on self-certification basis shall provide an undertaking certifying the claims in terms of the requirements as above and such undertaking shall be filed by a Company Secretary or Compliance Officer or any other Senior Officer authorised in this behalf by the party concerned.</p>
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3. Confidentiality rings

Present position: The 2009 Regulations provide no mechanism for confidentiality rings. Regulation 35(15) imposes a duty on persons, parties, experts, and officers appointed by the CCI to maintain confidentiality of any confidential documents to which they are privy and allows for termination and disciplinary proceedings in case of breach.

Proposed position: Regulation 35(6) of the new Regulations allows the CCI to set up confidentiality rings. These shall comprise of internal and external authorised representatives of the parties who will be able to access the full case records. These representatives can only access the confidential information if they undertake that stating that the information accessed shall not be disclosed by them to any other person. shall only be used for the purposes of the investigation, shall be kept within their sole custody, and shall be destroyed at the culmination of the present proceedings. Ordinarily, internal representatives in the Confidentiality Ring shall be from commercially non-operational streams. Information obtained through search and seizure operations, will only be shared through Confidentiality Ring if it has been used in the investigation or inquiry.

Under regulation 35(9) of the new Regulations, the representatives forming part of Confidential Ring will be liable for penal action under the Competition Act for breach of undertakings or submitting incorrect information while claiming confidentiality on self-certification basis The duty to maintain confidentiality and penalties for breach under regulation 35(15) of the 2009 Regulations have been retained with minor modifications under regulation 35(13) of the new Regulations.

Impact: This is a highly welcome amendment with obvious benefits. The Delhi High Court has ordered the creation of confidentiality clubs in various patent litigations, comprising of a specified number of lawyers and expert witnesses.⁵ However, the new Regulations could be more efficient if they were more detailed about the composition of the confidentiality ring, the mode of

⁵ Interdigital Technology Corporation and Ors. vs. Xiaomi Corporation and Ors., 277 (2021) DLT 396; Telefonaktiebolaget LM Ericsson (PUBL) vs. Xiaomi Technology and Ors., CS (Comm.) 434/2016; Telefonaktiebolaget LM Ericsson (PUBL) vs. Lava International Ltd., CS(OS) No. 764/2015

access to the confidential information, and the mode of determining any additional terms and conditions as may be required.

For instance, a party could take issue with the representative selected by the other party to be a part of the confidentiality ring. This very issue arose in *Transformative Learning Solutions Pvt. Ltd. vs. Pawajot Kaur Baweja*⁶, wherein prior to formation of the confidentiality ring, the petitioners filed an injunction suit seeking to restrain the defendants from being a members of the ring. The defendants were ex-employees of the petitioner who had started a new company, and the confidential information included a list of clients. The new Regulations provide no inherent remedy for such a scenario. Thus, such unanswered questions could lead to litigation and filing of writ petitions, which would delay the investigation process.

The new Regulations provide no compensation to parties in case of breach, regulation 35(9) only provides for penal action under the Competition Act. Parties suffering damages due to illegal disclosures by members of the confidentiality ring have no remedy under the new Regulation and may seeks compensation through litigation.

Confidentiality rings are usually in the form of bilateral agreement between parties as observed by the Delhi High Court in *MVF 3 APS and Ors. vs. M. Sivasamy and Ors.*⁷ :

"The Division Bench has also noticed the UK Court proceedings while passing the said order where the disclosure of confidential information or information containing trade secrets is involved; a "Confidentiality Club" is set up. This operates by way of:

*(a) an **agreement signed between the parties to the proceedings** that information which is designated as confidential will only be seen by a limited number of people on each side usually almost entirely consisting of professional, technical and sometimes foreign legal advisors as is the case herein). All of these people are bound by confidentiality undertakings in relation to the confidential information which is disclosed to them;*

*(b) the **hearings** pertaining to or involving perusal of or making submissions on the confidential documents filed by both the parties **are conducted in camera with only the members of the Confidentiality Club** being present in Court."*

The European Commission⁸ when investigating anti-competitive behaviour, also uses confidentiality rings, as a form of negotiated disclosure. The EC through the director general, facilitates the confidentiality ring by proposing a suitable draft negotiated disclosure agreement and preparing the DVDs/USB sticks or any other form of electronic media which contain the documents that form part of the confidentiality ring. The following kinds of confidentiality rings have been used:

*(i) A confidentiality ring whereby the **external counsel selects from the documents included in the ring only those documents that are considered potentially exculpatory**. For these documents **a non-confidential version is prepared by the information provider** that can be shared with the SO addressee⁹. The non-confidential versions can also be used in the reply to the SO, the Oral Hearing and in possible further Court submissions.*

⁶ *Transformative Learning Solutions Pvt. Ltd. and Ors. vs. Pawajot Kaur Baweja and Ors*, AIR 2019 Delhi 197

⁷ *MVF 3 APS and Ors. vs. M. Sivasamy and Ors.*, 193 (2012) DLT 352

⁸ See: https://ec.europa.eu/competition/antitrust/conf_rings.pdf [accessed on June 4, 2021]

⁹ Statement of Objection addressee, i.e. the party under investigation.

(ii) A confidentiality ring whereby the external counsel of an SO addressee selects from the documents included in the ring those documents that are considered potentially exculpatory but no non-confidential versions are prepared of these documents. In this case, special arrangements will be sought to protect the confidential nature of the information from disclosure to the SO addressee and others in the reply to SO, the Oral Hearing as well as in possible further Court submissions. An optional clause may provide a possibility for the external counsel to apply for client access for some of the information if required by the rights of defense.

Both these rings allow the authorised representative to select documents which can potentially be used in defence. The information provider can then choose to prepare a non-confidential version for the opposite party or the information can be used by the authorised representative when preparing a defence and the confidential information will be protected and not disclosed in any manner during oral hearings, replies, or any other court submissions.

Suggestion: The new Regulations could further elaborate on the form and functions of the confidentiality ring. This can be done by providing details within the new Regulations for parties to confer and contest the authorised members, and impose penalties in case of breach of undertakings.

Sub-regulation	Suggested Amendment
<p>(6) The Commission may set up Confidentiality Rings comprising of such authorised representatives (internal as well as external) as considered expedient and necessary for the purpose, in terms of the provisions contained in Section 35 of the Act, of the parties who would be able to access the case records, as required, in unredacted form in terms of Regulation 37 of these regulations.</p> <p>Provided that a similar Rings may also be set up at the level of the DG if access to unredacted data is required to be given to the parties concerned for the purposes of investigation.</p> <p>(7) Access to case records in terms of sub-regulation (5) shall be provided on filing of undertakings by the members of Confidential Ring stating that the information accessed by them pursuant to such Ring, shall not be shared and/ or disclosed by them, to any other person including to any official and/ or other employee of enterprise concerned (such as sales team, marketing team, business team etc.) or to any official and/ or employee of any joint-venture, subsidiary, group entity of the concerned enterprise, or to any third party, whatsoever, and that they shall use such information and documents only for the purposes of the proceedings before the</p>	<p>(6) The Commission may set up Confidentiality Rings comprising of such authorised representatives (internal as well as external) as considered expedient and necessary for the purpose, in terms of the provisions contained in Section 35 of the Act, of the parties who would be able to access the case records, as required, in unredacted form in terms of Regulation 37 of these regulations.</p> <p>Provided that a similar Rings may also be set up at the level of the DG if access to unredacted data is required to be given to the parties concerned for the purposes of investigation.</p> <p>To set up the confidentiality ring, DG or Commission as the case may be:</p> <ol style="list-style-type: none"> a. Help the parties to consent to the use of a confidentiality ring by proposing a suitable draft negotiated disclosure agreement. This includes supervising the parties' efforts to define the members of the confidentiality ring; b. Prepare the DVDs/USB sticks or any other form of media which contain the documents that form part of the confidentiality ring. <p>(7) Access to case records in terms of sub-regulation (5) shall be provided on filing of</p>

Commission/ Office of the DG, and shall keep such information and documents within their sole custody, and shall destroy the same at the culmination of the present proceedings.

undertakings by the members of Confidential Ring stating that the information accessed by them pursuant to such Ring, shall not be shared and/ or disclosed by them, to any other person including to any official and/ or other employee of enterprise concerned (such as sales team, marketing team, business team etc.) or to any official and/ or employee of any joint-venture, subsidiary, group entity of the concerned enterprise, or to any third party, whatsoever, and that they shall use such information and documents only for the purposes of the proceedings before the Commission/ Office of the DG, and shall keep such information and documents within their sole custody, and shall destroy the same at the culmination of the present proceedings, along with any other terms and conditions as may be mutually agreed upon by the parties.

Provided however that if certain information is potentially exculpatory, the authorised representative may request for a non-confidential version to be prepared by the information provider that can be shared with the party to such extent as may be permitted.

Conclusion

The proposed amendment to the 2009 Regulations by the CCI is a step in the right direction and could prevent several unnecessary delays and needless litigation. However, it needs to go a step further and provide more comprehensive definitions, details and descriptions of the procedure which must be followed. It could also provide for a more formal structure for parties to collectively negotiate their rights to privacy and due process.