

Inviting public comments regarding review of extant Confidentiality Regime as provided in Regulation 35 of the Competition Commission of India (General) Regulations, 2009

Through this public consultation, the Competition Commission of India (‘the Commission’/ CCI) is inviting comments on the proposed review of the *extant* Confidentiality Regime in light of experience gained and difficulties faced.

As per the provisions of Section 57 of the Competition Act, 2002 (‘the Act’), “*No information relating to any enterprise, being an information which has been obtained by or on behalf of the Commission or the Appellate Tribunal for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force*”. Further, as per the provisions contained in Regulation 47 of the Competition Commission of India (General) Regulations, 2009 (‘the General Regulations’) “*Except where the Commission may so direct, for reasons to be recorded, the proceedings before the Commission, during an ordinary meeting, shall not be open to public...*”.

Further, Regulation 35 of the General Regulations provides a detailed mechanism to deal with the confidentiality request made by the parties. It *inter alia* provides the procedure and the parameters for seeking confidentiality claims.

Thus, the proceedings before the Commission are only open to the parties to the proceedings and to maintain the sanctity of the information relating to any enterprise obtained by or on behalf of the Commission, a statutory restriction on disclosure of such information has been placed save and except to the extent and in the manner, as provided under the law. At the same time, by virtue of the provisions contained in Section 36 of the Act, in the discharge of its functions, the Commission is mandated to be guided by the principles of natural justice and, subject to the other provisions of the Act and of any rules made by the Central Government, the Commission has the powers to regulate its own procedure.

In the last over 10 years of enforcement experience, it has been observed that in terms of the present dispensation for seeking confidentiality, parties file their submissions [before the Director General (DG) or the Commission] in confidential and non-confidential versions along with an application seeking confidentiality. This necessitates a clause by clause disposal of such confidentiality claims by the Commission or by the DG. Further, in case such submissions and applications are filed before the DG, the aggrieved party may file an appeal before the Commission challenging the order of the DG declining confidentiality. This again requires a clause by clause examination of such claims in appeal by the Commission.

After the final disposal of such claims, parties have to submit revised versions in light and in accordance with the final decision on confidentiality claims. This necessitates multiple filings by the parties and record keeping thereof by the Office of the DG/ Commission. In fact, in the matters sent for investigation, the DG initially submits confidential version of the investigation report only so as to await the decision of the Commission on the confidentiality claims made by the parties in appeal against the order of the DG declining confidentiality. Only thereafter, the DG prepares and submits non-confidential version of the investigation report, after receiving the revised submissions from the parties in light of the order of the Commission in appeal. This further delays the inquiry considerably.

Moreover, it has been observed that on many occasions, the parties seek access to confidential versions of the submissions/ filings/ DG report *etc.* by other parties so as to effectively present their cases citing principles of natural justice which the Commission is mandated to observe. Many such cases result in litigation putting the investigation/ inquiry in limbo defeating the very purpose of correcting the markets in a swift manner. As the markets are dynamic, any delay in concluding the process defeats the purpose of anti-trust investigations.

In the past, the Commission has addressed such competing interest of maintaining the sanctity of commercially sensitive information and the rights of the parties to have full access to unredacted information so as to effectively defend themselves, through *ad hoc* arrangements by examining such pleas on case-to-case basis. Besides, the present practice and procedure are highly onerous and unsatisfactory not only for the parties but also for the regulator. This has caused unnecessary litigation and delays in concluding the inquiry.

In the aforesaid backdrop, the matter was deliberated in the Commission at length and it was decided to review the *extant* mechanism and to institutionalise a dispensation which can satisfactorily address the twin competing claims without compromising the sanctity of the information furnished by the parties or the rights of the parties to defend themselves effectively.

Accordingly, it is proposed that the present practice of filing of pleadings in two versions confidential as well as non-confidential, may continue, however, it is proposed that the parties would submit their confidential as well as non-confidential versions of their filings on self-certified basis stating and undertaking categorically that such versions have been prepared in accordance with the parameters for seeking confidentiality as per the new regulation in this regard. This would obviate the need for determination of confidentiality claims and the consequent appeals arising therefrom and would result in swifter disposal of inquiries. Such undertakings shall be required to be given by Company Secretaries or Compliance Officers or any other Senior Officer authorised in this behalf by the party concerned.

Needless to state, in appropriate cases, the Commission may direct the parties to file non-confidential versions strictly in accordance with the parameters for seeking confidentiality, if the self-certified non-confidential version is found to be deficient and not in accord with the undertaking furnished in this regard. This may also expose the concerned party for penal action as per the provisions of the Act.

Further, a Confidentiality Ring may be set up by the Commission in exercise of its powers conferred under Section 36 of the Act read with Section 57 thereof. Such Confidentiality Ring shall comprise of the authorised representatives (internal as well as external) of the parties who would be able to review the entire case records in an unredacted form subject to appropriate undertakings against disclosure. As far as practicable, ordinarily, internal representatives in the Confidentiality Ring shall be from commercially non-operational streams. A similar set up (Confidentiality Ring) may also be constituted at the level of the Office of the DG, if so required, for the purposes of investigation.

Such a mechanism would enable all the parties to have access to all the relevant documents and at the same time, would also ensure that the business sensitive or commercially sensitive information is protected against disclosure to any unauthorised person which may include officials and/ or employees of their competitors (including their sales team, marketing team, business team, *etc.* or their joint-ventures, or subsidiaries, or group companies *etc.*) or any other person whatsoever.

So far as the role and participation of the Informant in such arrangement is concerned, the same would be decided on case-to-case basis in the discretion of the Commission. This is to ensure that commercially sensitive information is not unduly accessed by the Informants. In appropriate cases, the Informant through its authorised representatives may be made part of the Confidentiality Ring, as deemed appropriate, taking into consideration facts and circumstances of the case.

Lastly, the issue of confidentiality over the identity of the Informant was also examined in light of difficulties faced and experience gained, being the incidental issue that needs to be suitably addressed. The existing default position which enables the Informant to seek confidentiality over its identity on mere making a request in writing is proposed to be done away with. However, the Commission may accord confidentiality over the identity of the Informant in appropriate cases.

A copy of the draft amendment to the General Regulations is annexed. Comments are invited from the public and may be emailed to atdregistry@cci.gov.in by May 12, 2021.

DRAFT FOR INVITING PUBLIC COMMENTS

[To be published in the Gazette of India, Extraordinary, Part III, Section 4 dated __April, 2021]

**THE COMPETITION COMMISSION OF INDIA
NOTIFICATION**

New Delhi, the __ April, 2021

The Competition Commission of India (General) Amendment Regulations, 2021

No. -----/ Regl- Gen. (Amdt.)/2021/ CCI – In exercise of the powers conferred by Sections 36, 57 and 64 of the Competition Act, 2002 (12 of 2003), the Competition Commission of India hereby makes the following regulations further to amend the Competition Commission of India (General) Regulations, 2009, namely:—

1. Short title and commencement.—

- (1) These regulations may be called the Competition Commission of India (General) Amendment Regulations, 2021.
- (2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Competition Commission of India (General) Regulations, 2009, regulation 35 shall be substituted by the following:-

- (1) The Commission may grant confidentiality over the identity of an informant in appropriate cases, if deemed necessary and expedient.

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.

- (2) 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:

- (a) the extent to which the information is known to outside public;
- (b) the extent to which the information is known to the employees, suppliers, distributors and others involved in the party's business;
- (c) the measures taken by the party to guard the secrecy of the information;
- (d) the ease or difficulty with which the information could be acquired or duplicated by others.

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.

Provided however that the Commission or the DG as the case may be direct the parties to file non-confidential versions strictly in accordance with the parameters for seeking confidentiality, if the self-certified non-confidential version is found to be deficient and not in accord with the undertakings furnished in this regard.

- (3) The party claiming confidentiality shall file a complete version of such documents with the words "restriction of publication claimed" in red ink on top of the first page and the word 'confidential' clearly and legibly marked in red ink near the top on each page together with a non-confidential version, which shall not contain such document or documents or part or parts thereof.
- (4) The non-confidential version of such written submissions shall be an exact copy of the confidential version with the omissions of the confidential information being indicated in a conspicuous manner, as stipulated in sub-regulation (2).
- (5) The document or documents or a part or parts thereof that have been claimed confidential treatment under this regulation shall be segregated from the public record and secured in a sealed envelope or any other appropriate container, bearing the title, the docket number of the proceeding, the notation "confidential record under regulation 35" and the date on which confidential treatment expires.

- (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.

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.

- (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 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.
- (8) As far as practicable, ordinarily, internal representatives in the Confidentiality Ring shall be from commercially non-operational streams.
- (9) The representatives of the parties concerned forming part of Confidential Ring shall be liable for penal action as per the provisions of the Act for breach of undertakings or submitting incorrect information while claiming confidentiality on self-certification basis.
- (10) In respect of documents/ material obtained through search and seizure operations, only those of such documents/ material *etc.* which have been used in investigation/ inquiry, shall be shared through Confidentiality Ring.

Further, information/ documents collected during investigation/ inquiry but not used, shall be segregated at the level of DG or CCI, as the case may be, and such information/ documents *etc.* shall also be not open for sharing through Confidentiality Ring.

- (11) The Informant shall not be part of Confidentiality Ring and shall have access to non-confidential records only.

Provided that the Commission/ the DG may consider Informant to be part of Confidentiality Ring in appropriate cases, if participation of Informant is deemed necessary and expedient for effective investigation or determination of cases, as the case may be.

- (12) If the Commission includes in any order or decision or opinion, information that has been claimed confidential treatment under this regulation, the Commission shall file two versions of the order or decision or opinion. The non-confidential version shall omit the confidential information that appears in the complete version, shall be served upon the parties, and shall be included in the public record of the proceeding. The complete version shall be placed in the confidential record of the proceeding as provided in sub-regulation (4).

- (13) Any person or party, including any officer or employee appointed by the Commission under sub-section (1) of section 17 of the Act or any officer appointed by the Central Government under sub-section (1) of section 16 of the Act or any expert or professional engaged by the Commission under sub-section (3) of section 17 of the Act or any expert called upon to assist the Commission under sub-section (3) of section 36 of the Act privy to the contents of the document or documents or a part or parts thereof that have been claimed confidential treatment under this regulation shall maintain confidentiality of the same and shall not use or disclose or deal with such confidential information for any other purpose other than the purposes of the Act or any other law for the time being in force:

Provided that breach of confidentiality by any officer or employee of the Commission/ Office of the DG shall constitute a ground for initiation of disciplinary proceedings under the relevant rules or regulations, as the case may be:

Provided further that breach of confidentiality by any expert or professional engaged by the Commission under sub-section (3) of section 17 of the Act or any expert called upon to assist the Commission under sub-section (3) of section 36 of the Act shall be sufficient ground for termination of the engagement or contract, as the case may be.

Secretary
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Note:--- The principal regulations were published in the Gazette of India, Extraordinary, Part III, Section 4 *vide* Notification number R-40007/6/ Reg- General/ Noti/ 04- CCI, dated the 21st day of May, 2009 and subsequently amended and published in the Gazette of India, Extraordinary, Part III, Section 4 *vide* notifications number L-3(2)/ Regln.-Gen. (Amdt.) 2009-10/CCI dated the 20th August, 2009; number L-3(2) Regln.- Gen. (Amdt.)/2009-10/CCI dated the 20th October, 2010; number L-3(2) Regln.-Gen. (Amdt.)/2009-10/CCI dated the 31st March, 2011; No. L-3 (2)/Regln.- Gen. (Amdt.)/2011/CCI dated the 8th November, 2011; number L-3 (2)/RegIn.- Gen.Amdt./2013/CCI dated the 7th October, 2013; number L-3 (2)/RegIn.- Gen.(Amdt.)/2018/CCI dated the 6th December, 2018; number L-3 (2)/Regln.- Gen.(Amdt.)/2019/CCI dated the 20th November, 2019 and number L-3 (2)/Regln.- Gen.(Amdt.)/2020/CCI dated the 6th February, 2020.
