

## What you need to know about the CCI's new confidentiality regime

1. On April 8, 2022, the Competition Commission of India (“**CCI**”) announced important changes to the regulations for the treatment of confidential information in its proceedings. The changes were notified by substituting Regulation 35 of the Competition Commission of India (General) Regulations, 2009 (the “**Amended Regulation**”).<sup>1</sup>
2. The Amended Regulation traces back to last year when the CCI had invited comments from the public on the proposed changes to the confidentiality regime. Here are some of the key changes:

### Self-Certification

3. Parties now have to submit an undertaking certifying their confidentiality claims, along with cogent reasons for seeking it. The process for assessment of each such claim by the CCI/ Director General (the “**DG**”), the acceptance/ rejection orders passed by the CCI/ DG and the appeals process against such orders stand replaced by the self-certification regime in the Amended Regulation.
4. Parties would continue to explain their reasons for claiming protection against making the information public.
5. The self-certification is subject to an undertaking that (i) the information is not available in the public domain; (ii) it is ‘known only to limited persons’ involved in the party’s business; (iii) ‘adequate measures’ have been taken to guard the secrecy of such information; and (iv) it cannot be acquired or duplicated by others.
6. If an incorrect self-certification is furnished, the party will be liable to be penalised under the provisions of the Competition Act, 2002 (as amended) (the “**Act**”). The penalty for providing an incorrect undertaking could be covered under Section 45 of the Act, dealing with penalty for furnishing, *inter alia*, false statements/ documents, where the CCI may impose a monetary penalty of up to INR 10 million (approximately USD 130,608).
7. All ‘personal information’ has automatic protection under the Amended Regulation. That said, personal information has not been defined under the Act or the regulations. However, guidance is available in the Information Technology (Reasonable security practices and procedures and sensitive personal data



<sup>1</sup> Competition Commission of India (General) Amendment Regulations, 2022 vide notification no. L-3(2)/ Regl- Gen. (Amdt.)/ 2022/ CCI, available [here](#).

or information) Rules, 2011<sup>2</sup>, which defines personal information.

## Confidentiality Ring

8. With a view to allow parties access to confidential information/ documents of other parties during an investigation, to defend themselves effectively, the CCI has introduced the concept of the “confidentiality ring”. The CCI may at its discretion set up a confidentiality ring comprising representatives of the parties who will be given access to all confidential information (including the confidential version of the DG’s report, documents obtained during search and seizure and complete version of the CCI’s orders).
9. Parties would have to undertake that their respective members would not disclose the information provided to them with anyone outside the confidentiality ring. If members breach their undertaking, the CCI will have complete authority to impose penalties, and counter parties may also seek suitable remedies as per applicable law. It is unclear which provision of the Act would be applicable for the imposition of such penalty by the CCI.
10. The informant (complainant) will be included in the confidentiality ring only if the CCI considers it necessary.
11. The changes to the confidentiality regime bring the CCI’s standard closer to global best practices. In practice, the CCI had already started creating confidentiality rings after sharing the DG report with parties, codifying this practice is a step in the right direction. It will not only help the CCI in preserving confidential information of parties, but also in balancing the right to defense of one party *vis-à-vis* the right of the other party to protect its confidential information.
12. For a confidentiality regime that is primarily based on self-certification by parties, it is crucial that rules are unambiguous. There is still some scope for clarity on certain aspects:
  - (a) the circumstances/ minimum threshold where the CCI will set up confidentiality rings. Will it be a standard protocol for all enforcement matters?
  - (b) the process of setting up a confidentiality ring and at what stage of investigation it would be set up. For instance, in the recent cases, confidentiality rings were set up by the CCI and members were granted access only after the DG’s investigation report was shared with the parties. It is unclear if the CCI will be open to setting up a confidentiality ring at an earlier stage, i.e., before passing a *prima facie* order;
  - (c) as regards the reasons for claiming confidentiality:
    - i. what would be acceptable to the CCI as amounting to ‘disclosure of trade secrets’, or ‘destruction or appreciable diminution of the commercial value’ of any information, or ‘disclosure which is reasonably expected to cause serious injury’ in order to claim confidentiality? For example, the European Commission’s guidance note on confidentiality claims during antitrust procedures<sup>3</sup> provides illustrations of the information that may or may not be considered as business secrets<sup>4</sup>.

## Our Observations

<sup>2</sup> “Personal information” means any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person. Under the rules, personal information includes “sensitive personal data or information”, which includes passwords, financial data, medical records, biometric data, etc.

<sup>3</sup> Annex XX, Guidance on Confidentiality Claims during Commission Antitrust Procedures, 2018, accessible at: [https://ec.europa.eu/competition/antitrust/business\\_secrets\\_en.pdf](https://ec.europa.eu/competition/antitrust/business_secrets_en.pdf)

<sup>4</sup> Under the EC Guidance, confidentiality claims are allowed for “business secrets” and certain “other confidential information”. Illustrations of “business secrets” include technical and/or financial information relating to an undertaking’s know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy. Other confidential information includes information other than business secrets, insofar as its disclosure would significantly harm a person or undertaking.

Similar guidance from the CCI will be helpful, considering the penalty risks associated with incorrect identification of confidentiality claims; and

- ii. what the terms such as 'known only to limited persons' or 'adequate measures' to guard the secrecy of such information state.

13. The Amended Regulation does not provide any clarity as to which provision of the Act will be invoked by

the CCI to penalise breach of an undertaking by the member of a confidentiality ring. The current penalties prescribed under the Act for similar violations are unlikely to deter malicious breach of confidentiality. This remains a real concern. In light of recent leaks of confidential information in some matters before the CCI, it would have helped to provide stronger repercussions (monetary or otherwise) for breach of confidentiality, sending a clear message as regards the importance that the CCI assigns to the protection of commercially sensitive information.

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