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## CCI Amends Confidentiality Regime

The Competition Commission of India (CCI) has published the Competition Commission of India (General) Amendment Regulations, 2022 (*Amendment*)<sup>1</sup> amending Regulation 35 of the Competition Commission of India (General) Regulations, 2009 (*General Regulations*), which is the primary provision that governs the CCI's confidentiality regime.

The Amendment comes a year after the CCI's announcement that it was revisiting the confidentiality regime based on its enforcement experience over the past decade. At that time, CCI published a draft amendment (*Draft Amendment*) for public comments.<sup>2</sup>

A snapshot of the key changes brought about by the Amendment is set out below:

**1. Self-certification of confidentiality claims:** The Amendment introduces a self-certification requirement, whereby parties will certify that confidentiality claims over information/ documents being filed with the CCI (or its investigative wing, the Office of the Director General (DG)) are consistent with the requirements set out under the regime. This shifts the burden on the parties, which was earlier on the CCI/ DG to undertake an item wise assessment of each confidentiality claim and then pass an order granting or denying such claims, leading to significant delays. Whilst the criteria for seeking confidentiality remain the same, any false claims by parties would attract a penalty, which represents an additional burden.

The Amendment provides some detail in relation to this self-certification process:

a) *Test for seeking confidentiality:* The strict and limited criteria to claim confidentiality remain the same as under the current regime; that is, the disclosure of the information would result in: (i) disclosure of trade secrets; or (ii) destruction

or appreciable diminution of the commercial value of the information; or (iii) reasonable expectation of serious injury.

b) *Confirmation:* The party seeking confidentiality is required to mention the date on which such confidential treatment shall expire as well as confirm by self-certification that: (i) the information is not available in the public domain; (ii) the information is known only to limited employees, suppliers, distributors and others involved in the party's business; (iii) adequate measures have been taken by the party to guard the secrecy of the information; and (iv) the information cannot be acquired or duplicated by others.

c) *Signatory:* The claim for confidential treatment needs to be accompanied by an undertaking certifying the confidentiality claims. Such document is to be signed by either the party itself or any employee who has been authorised by the Board or any other equivalent body to issue such authorisation.

d) *Penalty:* Parties furnishing false undertakings are liable to be proceeded against under the Competition Act.

**2. Default confidential treatment:** The Amendment requires that the following shall, as default, be marked as 'confidential' and kept separately (i.e., even if the parties do not explicitly seek confidentiality):

- a) documents/ material obtained through search and seizure operations (dawn raids);
- b) e-mail dumps (increasingly being sought by the DG/ CCI);
- c) call detail records; and
- d) any other document/ material in the nature of personal information.

**3. Confidentiality rings:** In order to balance the need to preserve confidentiality while providing an effective right of defence, the Amendment introduces 'confidentiality rings'. The confidentiality rings will comprise authorised representatives of the parties

<sup>1</sup> The notification for the Amendment is available at: <https://egazette.nic.in/WriteReadData/2022/234981.pdf>.

<sup>2</sup> See our April 2021 Alert on the Draft Amendment. The Draft Amendment released by the CCI can be accessed at: [http://cci.gov.in/sites/default/files/whats\\_newdocument/ProposalalongwithDraftRegulation.pdf](http://cci.gov.in/sites/default/files/whats_newdocument/ProposalalongwithDraftRegulation.pdf).



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who will be able to access case records in an unredacted form, subject to appropriate undertakings and certain limitations. This seems to have been inspired by practice in jurisdictions such as the European Union and United Kingdom. In terms of functioning of confidentiality rings, the following should be noted:

- a) *CCI's discretion*: A confidentiality ring may be set up by the CCI if it considers it necessary or expedient. However, there are no provisions for parties themselves to apply for a confidentiality ring, or even for parties with confidential information to oppose the creation of a ring. The CCI also has the discretion to decide the extent of information to be made accessible, as well as the parties (and their members) to be included, as it deems appropriate.
- b) *Composition*: While the Draft Amendment had stated that, as far as possible, parties' in-house representatives should be from commercially non-operational streams (and not from sales, marketing and business teams), this requirement is not contained in the Amendment. Accordingly, even market-facing individuals may now be a part of confidentiality rings (subject to any restrictions imposed by the CCI on a case-by-case basis (discussed above)).
- c) *Exclusion of the complainant from the confidentiality ring*: The complainant will not be part of the confidentiality ring, and will have access only to non-confidential records, unless the DG/ CCI considers inclusion necessary and expedient for the effective investigation and determination of the case.
- d) *Confidential information available under the ring*: Apart from documents otherwise available in the confidentiality ring, in the event the CCI prepares a non-confidential version of its orders, complete versions of such orders must be placed before the confidentiality ring.

Information/ documents that are confidential by default (as discussed above) shall be made accessible to the confidentiality ring if it has been relied upon in the confidential report of the DG.

- e) *Signing of undertakings*: Each member of the confidentiality ring will be required to sign an undertaking provided to the CCI and each of the parties whose confidential information is being accessed, certifying that he/she shall: (i) not share any information disclosed to them either within or outside their organisation; (ii) only use the information for the purposes of the proceedings; and (iii) destroy the information at the end of the proceedings.

These parties will have the liberty to avail of suitable legal remedies for any breach of such undertaking(s) (in addition to any proceedings that the CCI may itself initiate).

The Amendment is overall a welcome change and addresses shortcomings in the previous regime which often led to a considerable delay in deciding on confidentiality claims. However, the self-certification system shifts the burden on to the parties claiming confidential treatment and they will have to address the risk of penalties if they get it wrong. We believe that confidentiality rings will enable the sharing of confidential information with other parties in a secure manner and help to address natural justice concerns which have up to now caused significant delays. Certainty on certain aspects, such as the extent to which parties themselves may be able to initiate or oppose the creation of confidentiality rings, may become clearer when the CCI puts the Amendment into practice.

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