



11 June 2021

To
The Secretary,
The Competition Commission of India,
9th Floor, Office Block - 1
Kidwai Nagar (East)
New Delhi: 110023,
India

Email: atdregistry@cci.gov.in

Ref. Consultation concerning review of extant Confidentiality Regime as provided in Regulation 35 of the Competition Commission of India (General) Regulations, 2009

Dear Secretary,

We have great pleasure in enclosing a submission on behalf of the Antitrust Litigation Working Group and Cartels Working Group of the Antitrust Committee of the International Bar Association (IBA).

The Co-chairs and representatives of the Antitrust Committee would be delighted to discuss the enclosed submission in more detail with the representatives of the Hon'ble Commission.

Yours sincerely,

Daniel G. Swanson

Co-Chair Antitrust Committee

Thomas Janssens

Co-Chair Antitrust Committee



IBA ANTITRUST COMMITTEE COMMENTS ON THE EXTANT CONFIDENTIALITY REGIME AS PROVIDED IN REGULATION 35 OF THE COMPETITION COMMISSION OF INDIA (GENERAL) REGULATION, 2009

I. INTRODUCTION

The International Bar Association (“IBA”) is the world's leading international organization of legal practitioners, bar associations and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at <http://ibanet.org>.

The IBA’s Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The comments set out in this document have been prepared by the Litigation Working Group and Cartels Working Group of the IBA’s Antitrust Committee (“Antitrust Committee”) and draw on that combined experience.

The Antitrust Committee understands that, to date, the Competition Commission of India (“CCI”) has had in place a confidentiality regime set out in Regulation 35 of the Competition Commission of India (General) Regulation, 2009, and that the CCI is now inviting comments on a proposed review of that regime given the experience gained while that regime has been in place. Specifically, the CCI is seeking comments on a new proposal that is intended to address parties' competing interests in the maintenance of confidential information while ensuring that

unnecessary litigation over confidentiality claims, and delays caused by that litigation, are minimised.

We understand that the CCI is proposing to implement changes to its confidentiality rules that:

1. address competing claims for confidentiality versus disclosure for reasons of natural justice;
2. permit the creation of confidentiality rings which would enable the review of documents subject to appropriate undertakings being implemented; and
3. in all cases, permits the CCI to maintain its discretion concerning disclosure of the identity of the Informant.

The Antitrust Committee welcomes the opportunity to provide the Hon'ble Commission with brief comments on this proposal which are set out in draft Amendment Regulations, 2021 ("Amendment Regulations"). Specifically:

1. The Antitrust Committee welcomes changes intended to reduce delays caused due to disputes over confidentiality issues. To the extent that such delays are time consuming, expensive and unsatisfactory for all parties *and* can be managed by alternative means, the Antitrust Committee supports such changes being made.
2. The Antitrust Committee understands the CCI's desire to move to a system of simple acceptance of confidentiality claims and confidentiality rings. In the experience of the Antitrust Committee, the addition of confidentiality rings should provide comfort to those who provide information to the CCI while nevertheless granting those who are alleged to have breached the law access to sufficient information, that is necessary to defend against, those allegations.

Accordingly, having reviewed the proposed Amendment Regulations, and subject to our specific comments below, the Antitrust Committee believes the system proposed is workable and likely to instill confidence that information disclosed to the CCI in India will be properly protected, while still permitting the operation of natural justice. This is particularly relevant for multinational entities who may become part of a CCI process due to allegations made, or who may be considering the implications of their conduct in India, wish to report it, and have it dealt with in a timely fashion.

II. EXECUTIVE SUMMARY

This submission offers recommendations regarding certain proposals put forward by the CCI in the Amendment Regulations. These comments are not comprehensive with respect to each provision because the Antitrust Committee is broadly supportive of the Amendment Regulations.

III. COMMENTS ON THE AMENDMENT REGULATIONS

Issue 1 - identity of the informant - paragraph 2(1)

The Antitrust Committee understands that under the current confidentiality framework, an Informant may request confidentiality over its identity and that such request is granted automatically without further consideration by the Commission. In this respect, the "power" to claim and maintain confidentiality is currently in the hands of the Informant. During the investigation or thereafter, the Commission may, if it considers necessary and expedient, disclose the identity of the informant after granting the informant an opportunity to be heard. However, Antitrust Committee notes that in practice the Commission seldom discloses the informant's identity, since the proceedings before it are considered to be *in rem* and not *in personam*.

By way of the Amendment Regulations, the CCI would be empowered to determine confidentiality claim requests concerning an Informant's identity, and it "may" choose to disclose the informant's identity if it considers it necessary or expedient to do so.

In the view of the Antitrust Committee this is the correct approach and is consistent with the approach taken by other antitrust authorities internationally, such as in Canada and Australia. While the confidentiality of informants may be maintained during investigatory phases, parties may be informed of the informant's identity before the competition authority arrives at a final finding. This will provide them with an effective right of defence before the authority and during subsequent appellate or court proceedings.

Accordingly, since the CCI is responsible for both the investigation of a matter and for determining contraventions and imposing penalties under the Competition Act, 2002 ("Act"), the Antitrust Committee supports the proposed changes to the Amendment Regulations which permit the informants to keep their identities confidential for a limited duration and allow the CCI to withdraw such confidentiality at later stage of its proceedings to allow for a robust right of defence.

To further bolster the proposed provision, the CCI should consider outlining broad factors that it will consider when deciding whether to grant an informant's request for confidentiality. This would ensure transparency and certainty in the evaluation of such requests. These reasons may include genuine concerns of the informant including, but not limited to, demonstrable fear of retaliation, disruption of commercial arrangements, significant economic harm, and protection of business secrets.

The Antitrust Committee notes that the Amendment Regulations remove the informants' right to be heard before revoking confidentiality over its identity. Instead, the Amendment Regulations allow the CCI to revoke such confidentiality by a written, non-appealable order. The adherence to the principles of natural justice requires that the CCI hears the informant before taking a decision that could adversely affect its commercial position in the market and may affect its rights. To this end, the Commission should order the informant to show cause as to why its identity should not be revealed. Additionally, since the reasons for which the informant would request confidentiality would relate to the opposite parties, the Commission should permit such opposite parties to be heard, either by way of oral or written submission, before arriving at its decision. This will not only ensure fairness and completeness in the process, but also reduce delays due to disputes over confidentiality claims. Thus, the Commission should provide the informant as well as the opposite parties an opportunity to be heard before making such a decision.

Accordingly, the Antitrust Committee **agrees** that the Commission should be vested with the discretionary power to grant as well as revoke confidentiality over an informant's identity, if considered expedient and necessary. However, for the reasons specified above, we **recommend** that at any stage of the proceeding, if the Commission considers it necessary to disclose the informant's identity, it should grant all parties an opportunity of hearing, before arriving at its decision.

In the alternate, the Commission may also consider the approach followed by European Commission ("EC") or the Brazilian Administrative Council for Economic Defence ("CADE") which aims to balance the need for protecting confidentiality of informant's identity vis-à-vis right to an informed and effective defence of the opposite parties.

European Commission's Approach

The process followed by the EC allows informants to file either, a) a formal complaint or b) an informal complaint. In a formal complaint (analogous to filing of an information under Section 19(1) of the Act), the complainant's identity is not kept confidential and it has a right to be

involved in the investigation and subsequent proceedings. An informant may alternatively elect to file an “informal complaint”, where its identity is kept confidential, but it does not have the right to be involved in the investigation and subsequent proceedings.¹

CADE’s Approach

Similarly, CADE provides for a mechanism of ‘anonymous’ complaints, whereby the complainants fearing the risk of retaliation can claim confidentiality over their identity, for a period of 100 years. However, such complainants are not allowed to participate in any subsequent court proceedings or before the appellate authority.² On the other hand, in a formal complaint, the identity of the complainant may be kept confidential during the inquisitorial stages, until CADE decides to launch a formal investigation (i.e., analogous to an order passed under Section 26(1) of the Act directing the Director General to investigate). The complainant’s identity is revealed immediately after CADE initiates a formal investigation, in the interest of protecting the right to an effective and informed defence.³

Essentially, both the EC and CADE allow sufficient protection to an informant who seeks to inform the antitrust authority of anti-competitive conduct, purely in the public interest, by granting confidentiality over their identity but revoke the right to participate in subsequent proceedings by treating such proceedings in *rem*. On the other hand, an informant who may suffer personal damage/injury as a result of anti-competitive conduct can be a part of the proceedings, but their identity is revealed to the opposite parties. In the Antitrust Committee’s view, the approach followed by CADE and EC also strikes a proper balance.

In view of the above, the Antitrust Committee recommends the following **alternative** approach:

- a. In relation to an information filed under Section 19 of the Act by an informant, Regulation 35 may specify that informant’s identity would be revealed to the opposite parties upon the initiation of proceedings under Section 26 (1) of the Act; and
- b. The Commission may consider introducing in Regulation 35, a provision for an informant to file an ‘anonymous’ information. In such cases and based on such information, the Commission could on its own accord choose to initiate an investigation under Section 19 of the Act. The informant’s identity would be kept confidential during the proceedings and subsequent appellate review, but the informant would not be able

¹ European Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC treaty.

² CADE Ordinance no. 292/2019, which regulates the proceedings for anonymous complaints.

³ Articles 66, §10 and 70, §1º, Law 12.529/2011 (Brazilian Competition Law).

to participate in any such proceedings. This would not require significant change to the existing process for conducting *suo moto* proceedings under Section 19 of the Act.

Issue 2 - requirement of self-certification for confidentiality claims - paragraph 2(2)

The Amendment Regulations seek to bring a significant change to the current confidentiality framework by introducing a requirement of self-certification for confidentiality claims. The self-certification procedure intends to enable swifter disposal of cases. The Proposed Regulation 35 (2) indicates the contents of the self-certification but does not provide its form and format. We recommend provision of a form and format for the self-certification to ensure that the certification language remains consistent.

We also note that the Proposed Regulation 35 (2) only authorises the **company secretary, compliance officer and any other authorised senior officer** to execute the self-certification on behalf of the party concerned (**Claimant**). Obtaining these certifications may be burdensome, especially where submissions have to be filed at a short notice. To ensure efficiency and ease of process, we recommend that legal representatives should also be allowed to provide such self-certification provided that such legal representatives are specifically authorised by the Claimant to self-certify such confidentiality claim. The Commission may clarify that a specific authorization be executed by the Claimant authorising their external legal representatives to self-certify the confidentiality claims.

We also note that while the Amendment Regulations do not expressly allow the Claimant's legal representative to execute the self-certification, the text of Proposed Regulation 35(9) suggests imposing penalty on the Claimant's representative for incorrect self-certification. Accordingly, we suggest an explicit clarification by the Commission to the effect that legal representatives are allowed to execute the self-certification.

Issue 3 - potential for penalty for representatives of the parties - paragraph 2(9)

The proposal set out in this paragraph of the Amendment Regulations is to the effect that the legal representatives of parties may be penalized for two matters:

1. a breach of undertakings given concerning the use of confidential information included in a Confidentiality Ring; and
2. the submission of incorrect information while claiming confidentiality on a self-certification basis.

The Antitrust Committee notes that with the introduction of this provision, counsel or legal representatives of parties will be liable for penalties. The Amendment Regulations proposes to penalize legal representatives for incorrectly certifying information as being confidential based on the instructions of their clients. However, the Antitrust Committee notes that statutory liability imposed on legal counsel for incorrect certification must be borne solely by the Claimant if such certification is based on specific client instruction received by an advocate. In most jurisdictions, allegations of misconduct by advocates and legal representatives, is regulated under separate professional misconduct rules – such as the Advocates Act, 1961 in India. This obviates the need for an amendment to provide for penalties on a Claimant’s legal counsel under the Act.

Further, the Antitrust Committee understands that the Amendment Regulations that would allow the Commission to penalise legal counsel, cannot be judicially reviewed. This is because there is currently no statutory power in the Act to appeal such decisions under Section 53A of the Act. This suggests additional precaution is required before introducing the Proposed Amendment.

Should the Commission decide to retain the Proposed Amendment in its current form and permit the imposition of penalties on legal representatives, the Antitrust Committee recommends the introduction of appropriate guard-rails. These could include (a) a signed declaration from the Claimant that any self-certification of confidentiality claims by their legal representatives is based on specific client instructions by the Claimant. With such a declaration, the Claimant (and not its legal representatives), would be liable for any penalties for mis-declaration and (b) any decision to impose penalties should be subject to judicial review and consistent with the existing structure of Chapter VI of the Competition Act read with Section 53A of the Act.

The Antitrust Committee supports the Commission’s proposal to move to a self-certification mechanism for confidentiality claims and to introduce a corresponding provision for the imposition of penalties for incorrect self-certification. However, by extending such penalties to legal representative acting on client instruction, and denying parties the right to appeal the Commission’s decision, the proposed self-certification mechanism may not be used extensively, and risks protracted legal proceedings and delay in writ proceedings before High Courts. The Antitrust Committee suggests that the CCI may adopt a less onerous approach to self-certification. The Antitrust Committee suggests that the CCI consider, as an alternative proposal, the following:

- (a) Penalties may be imposed only for the deliberate breach of an undertaking in a confidentiality ring;
- (b) Penalties may be levied only on Claimants, and not their legal representatives provided that all such self-certification undertakings that are signed by legal representatives are accompanied by a signed declaration from the Claimant that the certification is being

undertaken on its specific instruction/authorization.

- (c) Penalties for incorrect self-certification⁴ must be the subject of judicial review corresponding to the existing provisions of Chapter VI of the Act. The CCI may consider imposing such penalties under existing provisions in Chapter VI, i.e., Section 44 (for merger control proceedings) or Section 45 (for antitrust proceedings) of the Act which would also allow Claimants an opportunity to a formal hearing before the imposition of such penalties. The Antitrust Committee is mindful that while such a process may seem to lengthen confidentiality proceedings before the Commission in the short term, it would in the long term substantially truncate delays before High Courts in writ. Further, this process would also be in accordance with the procedure observed in several international jurisdictions (such as EU, UK, Brazil, and South Africa) which allow for a right of statutory appeal in relation to claims for confidentiality.

We are of the view that the above proposals to the proposed self-certification mechanism will strike the right balance between facilitating a simpler confidentiality process and affixing appropriate responsibility for its misuse.

IV. CONCLUSION

The IBA appreciates the opportunity provided by CCI to comment on the Amendment Regulations. We would welcome any further opportunity to provide any additional comments or clarification, or answer any questions, that CCI may have.

⁴ Based on our review of the Proposed Regulation 35(9) of the General Regulations and introduction to the Amendment Regulations.