

India's antitrust authority overhauls confidentiality regime

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14 April 2022



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Local competition lawyers have praised the Competition Commission of India for overhauling its confidentiality regime to ensure that parties to an antitrust investigation have access to relevant confidential documents in a timely manner while protecting against unauthorised disclosure.

The CCI announced the changes on Tuesday, which were published in India's official gazette on 8 April.

The amendments mean parties to a CCI investigation can request access to confidential documents held by the agency's investigative arm. Previously, businesses could typically only access non-confidential documents and information in antitrust proceedings.

Under the revised regime, a party claiming confidentiality over information shall provide an undertaking certifying that the information is not available in the public domain and is known only to limited employees, suppliers, distributors and others involved in the party's business.

Parties must additionally certify that "adequate measures have been taken...to guard the secrecy of the information", which also cannot be acquired or duplicated by others, according to the revisions.

If the confidentiality claims are proven to be false, the agency can punish businesses under the Competition Act, the CCI said.

The agency said it would also set up a confidentiality ring – "if considered necessary or expedient" – that includes only authorised representatives of parties to access relevant information in unredacted form.

The CCI said it would have the final say on who is part of the confidentiality ring, which will allow access to all confidential documents, e-mails, call records or other information relied upon by the director-general – the head of the CCI's investigative unit – in its reports.

Vaibhav Chouske, a partner at J Sagar Associates in New Delhi, said the revised regime will enable parties to have access to all the relevant documents and will ensure that business-sensitive or commercially sensitive information is protected against disclosure to any unauthorised person.

Prior to the amendments, a party could only ask to inspect non-confidential records after the filing of a report by the director-general, Chouske said. But now parties can also request and gain access to documents and information relied upon in the confidential version, he said.

“A similar mechanism is also followed in some other matured jurisdictions while dealing with the sharing of confidential information in antitrust cases,” Chouske said.

He said the CCI has already adapted this modified practice in some recent matters, allowing lawyers and a select few other officers in non-commercial roles – such as legal and compliance officers – to look at the unredacted versions of filings.

Ravisekhar Nair, a partner at Economic Laws Practice Bengaluru, said the revisions are “significant” and “essentially recognise certain inherent practical limitations that existed under the earlier regime”.

The previous process “presented several challenges that impacted the rights of parties – both the owners of information over which confidentiality was claimed, as well as those who needed access to such information to meaningfully defend themselves in ongoing investigations”, Nair added.

The earlier regime also impacted the overall timing of investigations, as the CCI was constantly having to deal with requests to access information that were grounded in legitimate due process requirements, he said.

That forced the agency into “a delicate balancing act” of honouring legitimate confidentiality requests and granting access to all the necessary information or data that a party needs, Nair said. The issue “spawned some court challenges”, which delayed matters further, he added.

New Delhi-based partner Kunal Mehra at L&L Partners said “these amendments are significant in nature and have been made pursuant to a public consultation that was proposed in 2021.” The self-certification process for confidential information and the formation of a confidentiality ring for antitrust cases are based on global best practices, Mehra added.

Confidentiality rings will enable the parties to prosecute or defend their claims more effectively, Mehra said, noting that the agency did employ such a ring in a cartel case involving electronic power steering system suppliers.

Manas Kumar Chaudhuri, a partner at Khaitan & Co in New Delhi, said the updated confidentiality regime intends “to minimise procedural delays in antitrust litigation processes”.

The CCI’s objective seems to be protecting the interests of respondents by adopting a fair and transparent disclosure mechanism for sensitive commercial information based on the international best practices of advanced competition agencies, Chaudhuri said.

One debatable issue of the new regulations is the expansion of the scope of confidentiality to cover “external representatives” of parties, which can include lawyers who are not parties to disputes, Chaudhuri said.

Breaches of the new confidentiality regime will be considered violations of the Competition Act, which could be controversial since lawyers are governed by the Advocates Act and Evidence Act when acting for their clients, which are the real parties before the CCI, he said.

So an alleged breach of the confidentiality rules may raise a direct conflict with the Advocate Act and Evidence Act since the relationship between lawyers and their clients is privileged and confidential under the former two statutes, Chaudhuri said.

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