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Analysing developments impacting business

CCI STREAMLINES ITS CONFIDENTIALITY REGIME

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Background

Adhering to the principles of “due processes”, Indian judicial and regulatory authorities have been taking steps to reduce delays in adjudicatory processes. Enforcement proceedings relating to anticompetitive agreements or abuse of dominance before the Competition Commission of India (**CCI**) may also not be immune to such inordinate delays. Thus, it may require fresh attempts to get the processes streamlined to the extent possible.

During enforcement proceedings, parties disclose confidential information before two authorities: (i) the Director General (**DG**) of the CCI during the investigation phase; and (ii) the CCI itself during the hearing stage. If confidential information is placed / shared before the DG or the CCI, a non-confidential version of the same filing is also required to be submitted where the disclosing party redacts confidential information. This non-confidential set is subsequently placed before other parties to the proceedings.

Competitive, and commercial necessities require parties to claim confidentiality on certain sensitive commercial information - the disclosure of which to the other parties may cause unforeseen commercial harm to the disclosing party. However, access to the complete submissions made by one party is often required by the other parties to prepare effective submissions of their own. In this regard, due care must be taken of principles of natural justice which has been succinctly noted by the Supreme Court of India as “...nothing should be used against the person which has not brought to his notice”.¹

Issues relating to the protection of one’s confidential data / gaining access to the confidential data of the other parties at the CCI generally take a life of their own in the form of parallel or interlocutory adjudicatory processes. At times, such issues can percolate to the Indian constitutional courts for adjudication. In the past, the Delhi High Court tried to achieve a balance by limiting the number of people who would gain access to confidential information on behalf of the receiving party on an *ad hoc* basis.²

Further, timeline delays and issues also arise when the DG rejects claims of confidentiality by the disclosing party. Such situations typically lead to a limited appeal

¹ *Kanwar Natwar Singh v. Director of Enforcement and Ors.* (2010) 13 SCC 255.

² *Telefonaktiebolaget v. Xiaomi Technology* (2017 SCC OnLine Del 11069); and *Mvf Aps and Others v. M Sivasamy and Others* (2012 SCC OnLine Del 4554).

before the CCI, which determines whether confidential treatment should be accorded to a particular set of information. In many cases, such proceedings result in the DG submitting an updated non-confidential version of its report.³ Therefore, CCI felt the necessity to create a streamlined and faster process which could align the right to protect confidential information with the right of the party affected by such confidentiality claims.

Scope of the Indian CR Regime

The CCI considered adopting a confidentiality ring (**CR**) regime in April 2021 to resolve this issue and accordingly, requested public opinions on a draft amendment. After extensive consultation with stakeholders, the CCI (General) Amendment Regulations, 2022 was notified on 8 April 2022 which introduced the CR regime in India (**Amendment**).

Per the Amendment, confidential information of one party can be received by another party by way of a CR. A CR will include certain authorised representatives of the receiving parties (respondents / defendants) and only such persons will have access to unredacted / confidential information. The Amendment also confirms that the CCI will have the right to decide: (i) the extent of information made available in the CR; and (ii) the constituent members of the CR. However, the Amendment does not disqualify any kind of personnel from being selected as a CR member.

The Amendment also clarifies that access to unredacted / confidential information will only be granted to members of the CR pursuant to receipt of confidentiality undertakings. Such undertakings need to be furnished both, to the CCI and the disclosing party, stating that the member shall not share or disclose the information to any person whatsoever. Further, such information should only be used for proceedings under the Competition Act, 2002 (**Act**). The undertaking shall also state that the CR members will destroy the documents after culmination of the present proceedings.

As per the Amendment, in case of breach of undertakings by any member of the CR, the aggrieved party shall have the liberty to avail of suitable remedies as per law. Regardless, the members in breach of their undertakings will also be held liable under the Act.

Comments

While the Amendment has brought the Indian confidentiality regime in line with other competition law jurisdictions, one will have to observe the implementation of such provisions in real time to gauge their success in day-to-day operations of the CCI. As time progresses, it is possible that some issues (*as identified below*) may require certain clarity or modification for best results.

With respect to CRs, the amended provision states that the CCI “*may*” set up a CR if it is necessary or expedient. It is unclear whether the CCI would take this decision *suo moto*, or on the request of parties. Broadly, if parties are allowed to request the formation of a CR based on factual necessity, then the CCI will not be required to step into the shoes of the parties themselves to determine the necessity of a CR in every case.

Further, the draft amendment stated that members of CRs shall be from “*commercially non-operational streams*” to the extent possible. However, the extant Amendment empowers the CCI to make any person a member of the CR, including a market facing employee. In this regard, market distorting competitive concerns may potentially arise if market facing employees utilise such confidential information in their day-to-day

³ *Meru Travel Solutions Private Limited v. Uber India Systems Private Limited* (Case No. 96 of 2015), order dated 14 July 2021 (Paragraph 14).

functioning. Pertinently, this risk can be mitigated if such information is accessed only by members from "*commercially non-operational streams*" who cannot use the confidential information in their usual operations to lower the level of competition in a market.

Further, liability imposed on CR members for breach of confidentiality undertakings seems to be dual pronged. While the CCI has stated that members breaching the CR undertaking will be proceeded against "*as per the provisions of the Act*", it also gives a right to the disclosing party to avail suitable remedies "*as per law*". Accordingly, once a breach of CR is established, a member may face two parallel proceedings, (i) one under the scheme of the Act; and (ii) another civil proceeding for compensation / damages.

The proviso to the amended Regulation 35(7) also states that "*representatives*" of parties shall be held liable for breach of undertakings. However, a CR arrangement is strictly *inter se* the CCI and the parties, and the definition of "*party*" under the existing CCI (General) Regulations, 2009 does not include "*representatives*".⁴ Thus, it appears that the Amendment is drafted specifically to expand the scope of the master regulation.

Further, legal representatives of parties are already bound to maintain client confidentiality under the Indian Evidence Act, 1872 and the Advocates Act, 1961. Therefore, adding further pecuniary onus in this regard may cause friction between various legal frameworks.

We also note that Section 53A of the Act does not include regulations made under the Act. Accordingly, appeals arising from a breach of any regulation, including the Amendment, will not be appealable before the National Company Law Appellate Tribunal. In other words, any appeal arising out of the Amendment will be a matter of writ jurisdiction and can be filed before respective High Courts.

Therefore, we will have to wait for the exact evolution of this new regulation to assess its impact on procedural delays.

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⁴ As per Regulation 2(i) of the CCI (General) Regulations, 2009- "*party*" includes a consumer or an enterprise or a person defined in clauses (f), (h) and (l) of Section 2 of the Act respectively, or an information provider, or a consumer association or a trade association or the Director General defined in clause (g) of section 2 of the Act, or the Central Government or any State Government or any statutory authority, as the case may be, and shall include an enterprise against whom any inquiry or proceeding is instituted and shall also include any person permitted to join the proceedings or an intervener.