

Confidentiality under Indian Competition Law and its Applicability

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Confidentiality, an inherent feature in commercial arbitration and a preferred one too, is of great importance to antitrust proceedings when information is supplied by any party. There are, however, two concepts envisaged within the Competition Act, confidentiality and privacy, although the nomenclature used in the General Regulations, 2009 is 'confidentiality' and this does not include the concept of privacy. After reading Regulation 35 General Regulations, 2009 and section 57 of the Competition Act (Act), it would be nonetheless clear that confidentiality is a procedural aspect which is granted by the Competition Commission of India (CCI) and the Director General (DG) upon request from the parties. Moreover, while interpreting it can be seen that is much more than a procedural requirement and has a vital role when conferred upon an enterprise for the protection of business or trade secrets, and importantly, to protect identity of an informant.

Confidentiality and Privacy

The mandate to not to disclose "information relating to any enterprise, being an information which has been obtained by or on behalf of the Commission or the Appellate Tribunal for the purpose of the Act" is provided within section 57 of the Act. Meaning, the principle of confidentiality strengthens the protection to information and identity of an informant, in order to not to put a person at disadvantage position. And this has to be in accordance to the objective of granting confidentiality under General Regulations which is 'to protect trade secrets or business secrets from competitors or which could cause destruction of appreciable diminution of commercial value of any information or cause injury to parties.'

In fact, these provisions on non-disclosure under the General Regulations, like a commercial arbitration, can be seen to have two concepts: privacy and confidentiality. The CCI has to ensure that the proceedings conducted are not open to public under Regulation 47 of General Regulations, with the exception that the CCI may allow, if it does not cause significant harm to the interest of the parties. Under Indian Competition law, privacy is ensured by excluding participation of unauthorised third parties or even observing, thus limiting transparency. Confidentiality, however, is pertaining to the access of information like written submissions and contents of it, evidence adduced and documents produced, record of the hearing and order or decision of the CCI.

Application of the principle of confidentiality in Indian Competition law

Confidentiality under section 57 of the Act, *firstly*, cannot give an absolute protection to information related to any enterprise from disclosing to public including the CCI, the DG and opposite parties. Logically, it leads to absolute redundancy to the right of defence of opposite parties and in some cases claim of private enforcement for the contravention of the provisions of the Act. This also cannot be possible for the reason that the decisions or orders of the CCI or the DG Report would be without substantial reasons for any infringement.

Secondly, what can be possible under section 57 of the Act is when the DG and/or the CCI under Regulation 35 of the General Regulations grant confidentiality to any information related to an enterprise to not be disclosed to public. Though, such information and evidence adduced would be shared with the CCI, the DG and their employees and experts. In this interpretation, when permission is not sought under Regulations 35, the information submitted would not be treated confidential and can be shared with opposite parties and, of course, be part of the decision of the CCI and DG Report.

However, once confidentiality is granted, the parties to proceedings may request under Regulation 37 and 50 for disclosure to prepare its defence as there is no absolute entitlement to parties to inspect the documents or to obtain copies of the same. This request is made to the CCI which can reject for inspection or furnishing copies if it is of the opinion that the documents/information require confidential treatment.[1] The CCI, of course, has to consider that an enterprise would not like to disclose confidential information to its competitors who are parties against them. That is why the protection under proviso of Regulation 20(4) General Regulation, 2009, requires the DG also to not to include in its report information once given confidentiality.

Typically, categories of confidential information include trade secrets, legally privileged information, financial information, information compiled for law enforcement purposes, and information about individuals. In this context, the CCI in *Pune Municipal Corporation* case[2] observed that evidence adduced from any information, including the statements from parties who may have sought for leniency and such statements are not part of leniency application, the confidentiality on such evidence can only be in terms of Regulation 35 General Regulation, 2009.

The observation of the CCI in *Pune Municipal Corporation* case differentiates the contents presented in an application for leniency under Leniency Regulations and statements of these applicants before the DG, and call them separate set of evidence. In this regard, confidentiality acts on different information as follows:

- confidentiality on an leniency application is governed under Leniency Regulations read with section 46 of the Act, and
- this confidentiality is not extended to evidences obtained or collected by the DG, even if such evidence is obtained from a leniency applicant under Regulation 35 or Leniency Regulations.

Procedure to acquire confidentiality

Confidentiality is not only assured for documents but also includes identity of an informant, upon request. The source of confidential documents can be produced as such or within written statements. After providing reasons to exclude information from public disclosure and in the orders of the CCI as mentioned under Regulation 35, the parties may be granted confidentiality. While deciding confidentiality, the CCI or the DG have to satisfy itself that information obtained could be commercially sensitive and its disclosure could result in harm to the enterprise.

If granted, the CCI & the DG then is required to maintain privacy and confidentiality, strictly, while conducting investigation and proceedings as provided under Regulation 35 and proviso of Regulation 20(4), respectively. The documents granted confidential treatment shall then be segregated from the public record and secured, bearing the title, the docket number of the proceeding with notation "confidential record under Regulation 35" and date on which confidential treatment expires. In case, the CCI includes in any order or decision or opinion the information that has been granted confidential treatment under this regulation, the CCI shall file two versions. The public version shall not include the confidential information and mark "subject to confidentiality requirements under Regulation 35" which shall be served upon the parties and kept for public record of the proceedings. In case of information submitted under the Leniency Regulation, where confidentiality granted to information in leniency application would be over and above to confidentiality permitted under Regulation 35.

In conclusion, there are advantages to include confidentiality- it reduces possible damages to continue business relations and parties are free to make any argument that cannot be done in a public forum. Protection of the confidential information is dependent on how an enterprise interacts with the CCI and every application should be considered in line of reasons provided. An enterprise discloses information considering specific conditions within the General Regulation and consequences that it would face.

[1] *Somi Conveyor Belting Ltd. and ors. v. Union of India and ors.* [W.P.(C) 1416/2016] & *Premier Rubber Mills v. Union of India & Ors.* [W.P.(C) 1969/2016] (clubbed), order by Delhi HC dated 11.04.2017

[2] In re: *Cartelization in Tender No. 59 of 2014 of Pune Municipal Corporation for Solid Waste Processing, Suo Motu* Case No. 04 of 2016, order by CCI dated 31.05.2018.