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The TikTok Union: Unionization in the Age of New Media

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Abstract:

The National Labor Relations Act of 1935 (NLRA) is the cornerstone of employee's right to organize, collectively bargain and take collective action. As the act has been reviewed by the Supreme Court as well as the National Labor Relations Board, it has been seen as somewhat flexible, particularly when it comes to technology and how it can be used to for employee organization and communication. But as the labor market has shifted to a more technology based work-for-hire model, are those who choose to take part in new media, specifically influencer marketing technically employees entitled to the same rights and benefits of unionization? Influencer marketing is a multi-billion dollar enterprise and in 2021 SAG-AFTRA voted to expand its membership criteria to include specific influencers and content creators. If influencer contracts now include union dues and restrictions, the marketplace will undoubtedly shift with brands reevaluating marketing mixes and spend. And influencers will have to weigh the benefits of union membership with the detriments that might result from a loss of control over work product. This article will explore the impact unionization could have on new media, content creators and the brands who rely upon them for their marketing strategies. It will look back at how the NLRA has been interpreted, particularly when it comes to the definition of employees as well as the use of technology, and the benefits offered to influencers through unionization. The article will seek to answer if and how unions are changing as work evolves and how unions can continue to seek relevance and expansion in an era of new media and non-traditional work.

The National Labor Relations Act (NLRA) is the cornerstone of employee's right to organize, collectively bargain and take collective action. Congress enacted the NLRA in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy[1].

Arguably the most important section is [in] the NLRA is Section 7, which states, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."[2]

Labor unions significantly shaped the labor and employment law environment throughout this nation's history.[3] And although union membership has seen a decline over the past several decades, the majority of Americans still have a positive opinion of organized labor with union members generally seeing higher wages and better health and retirement benefits that non-union counterparts.[4] Most strikingly, particularly in an era of a global pandemic, 95% of union workers had access to employer-provided healthcare in 2019, compared to 68% of non-union workers.[5]

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[1] The Law, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law (last visited March 4, 2022)
[2] *29 U.S.C.A. § 157*
[3] Trent V. Testa, *State of the Unions: Where They Are, Where They Have Been, & Where They Are Going,* 51 Cumb. L. Rev. 193, 193 (2021)
[4] *Id.*
[5] *Id.* at 194

Also formed in the 1930, SAG-AFTRA brings together the Screen Actors Guild and the American Federation of Television and Radio Artists.[6] Together, these unions have a long history of protecting media artists.[7] As the definition of "media artist" continues to evolve, in February 2021, its board approved a new agreement that would allow union coverage to be extended to certain content creators and influencers.[8] This agreement offers these creators opportunities to earn union income and qualify for health and pension benefits, while also extending SAG-AFTRA coverage over the advertising created by these influencers. [9]

An influencer, or content creator is any person with a social media account who (1) has a relationship with their followers and can influence those followers' purchasing decisions and (2) commercially benefits from that influence. [10]

Influencers have perfected the art of self-commoditization, turning their "brand" or "persona" and personal recommendations into highly valuable tools.[11] These creators influence the decisions of millions of consumers around the world with such great success--influencers are one of the most effective marketing tools in the twenty-first century.[12]

With this new agreement, SAG-AFTRA has created an opportunity to expand and redefine what work is covered by the union.[13] Traditionally, the sponsored content created by influencers on behalf of brands has been considered work for hire done by independent

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[6] About, https://www.sagaftra.org/about (last visited March 4, 2022)
[7] *Id.*
[8] Press Release, Screen Actors Guild, Board Approves New Influencer Agreement (February 7, 2021) https://www.sagaftra.org/sag-aftra-national-board-meets-videoconference
[9] *Id.*
[10] Grace Greene, Instagram Lookalikes and Celebrity Influencers: Rethinking the Right to Publicity in the Social Media Age, 168 U. PA. L. Rev. Online 153, 158 (2020)
[11] *Id.*
[12] *Id.*
[13] Taylor Lorenz, *TikTok Stars and Social Media Creators Can Now Join Hollywod's Top Union, New York* Times, Updated October 4, 2021, https://www.nytimes.com/2021/02/12/style/influencer-union-hollywood-SAG-AFTRA.html

contractors. However, as influencer work has expanded into a multi-billion dollar revenue stream and as more consumers turn away from traditional television advertising in favor of streaming and social media, it is an opportunity for the union to replace one revenue stream with another.

The COVID-19 pandemic dramatically increased social media usage, in particular on TikTok which had an estimated 850 million monthly active users by the end of 2020 and contributed to several trends toward more authentic, active "real" content being shared across social platforms.[14] As social media usage shifts so too did company marketing budgets with brands now on target to spend nearly $15 billion on influencer marketing in 2022.[15]

But what will the new push toward unionization mean for the brands that employ influencers and the consumers who look to them for recommendations for what to buy? Unlike traditional advertising relationships, where someone is chosen for a long-term partnership as a "spokesperson," influencer/brand relationships are typically more transactional. Influencers are chosen by brands to create small numbers of pieces of content that are then shared on the influencer's own social media channels. The brand as the employer is responsible for supplying the critical information needed to create the content, product for use and payment. The influencer then takes on any additional employment responsibilities. Those costs include typical things like taxes and any expenses related to the content creation as well as larger employment costs such as health insurance and the salaries for any additional assistants, photographers or anyone else involved in the content creation. The influencer also supplies the location where the content is

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[14] Taylor Lorenz, *This is Why You Heard so Much About TikTok in 2020, New York Times,* Updated October 4, 2021, https://www.nytimes.com/2020/12/31/style/tiktok-trends-2020.html

[15] Ismael El Qudsi, *The State of Influencer Marketing: Top Insights for 2022,* Forbes, January 14, 2022, https://www.forbes.com/sites/forbesagencycouncil/2022/01/14/the-state-of-influencer-marketing-top-insights-for-2022/?sh=3fe44c385c78

created as well as anything else that might be needed to fulfill employment duties under the contract.

By this definition, influencers operate like "independent contractors," a category excluded on the face of the NLRA.[16] Under the current standard, independent contractors are categorized as such "...only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."[17]

As noted, influencers are without question independent contractors, supplying a service outside the employer's business, freely directing their own work and engaging in an independent trade, welcome to partner with multiple brands to create multiple pieces of content. The question then becomes, why afford these creators the rights of employees to collectively bargain and join a union? As with many questions, in the employment sector, the answer is likely money.

On average independent contractors make $56,000 annually.[18] In stark contrast, in 2021, the highest paid TikTok influencers made $17.5 million.[19] As TikTok has grown in popularity and influence, creators on the platform can charge as much as $500,000 for a single sponsored post, with most earning an average of $100,000 to $250,000 per post, which represents a

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[16] 29 U.S.C.A. § 152 (West)

[17] *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 7 (Cal. 2018)

[18] Average Independent Contractor Salary by State https://www.ziprecruiter.com/Salaries/What-Is-the-Average-Independent-Contractor-Salary-by-State (last visited March 4, 2022)

[19] Todd Spangler, *TikTok's Highest Earning Stars: Charli and Dixie D'Amelio Raked in $27.5 Million in 2021, Variety*, January 7, 2022, https://variety.com/2022/digital/news/tiktok-highest-paid-charli-dixie-damelio-1235149027/

doubling of costs over the past two years.[20] While those numbers are obviously much higher than an average influencer, as brands have shifted marketing budgets, the opportunity for payment has increased exponentially. And as influencer marketing has offered brands increased opportunities to target specific demographics that traditional advertising has not, influencer compensation inconsistencies continue to cause challenges across the industry.[21] By expanding its membership, the union can offer some protection, which it sees as a major and much needed shift to keep up with the changing media and advertising landscape.[22]

While the benefit to SAG-AFTRA in expanding its membership to encompass new members may lie in new dues collected, the benefit to the influencers themselves is less clear. Section 7 of the NLRA specifically outlines employee rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. [23] But there is very little structure or consistency across influencer marketing. Nor is there much benefit to creating those structures. Influencers have different primary channels, with some using more traditional Instagram and Facebook to create content and some venturing into new platforms like TikTok.

Influencers also have different content focuses across their own platforms which lead to different employment needs. For example, a travel-focused creator might be interested in some level of worker's compensation insurance provided by a union, but not typically a brand employer, while a recipe focused partner may not need that type of coverage when creating sponsored recipe content in their own kitchen.

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[20] *Id.*
[21] *The Pros and Cons of Influencers Joining* Unions, Blog (February 23, 2021) https://blog.carusele.com/the-pros-and-cons-of-influencers-joining-unions
[22] *Id.*
[23] *29 U.S.C.A. § 157*

Ultimately, again the question comes back to costs. There are currently no standard rates or pricing structures that exist in the influencer marketing sphere. Many smaller influencers set their own costs, negotiate their own contracts and truly operate as their own small businesses. As influencers grow in size and partnership opportunities increase, many develop professional rate cards and employ talent managers who negotiate deals, contracts and partnerships on their behalf. However what one influencer charges for content can vary widely from another partner of equal or similar size. It is possible that union membership may allow for some standardization across the industry.

For its part SAG-AFTRA has laid out several benefits it sees for opening up its membership to influencers. The biggest is health insurance and retirement benefits.[24] As independent contractors, influencers are very much small businesses and the importance of these more traditional employment benefits cannot be overstated. However, according to a July 2020 survey of influencers from Tribe Dynamics, 53% of influencers are between the ages of 25 of 34, and 15% are under 25.[25] While important, these benefits may not drive membership as they are not likely top of mind to the newer and younger crop of influencers who are driving the current marketplace and commanding increasing payments.

However, what SAG-AFTRA is not offering is any standardization of rates. In fact the union very clearly states, "…you freely bargain the rates directly with the brand. Once the contract is finalized you use your business entity to sign up with SAG-AFTRA as the direct

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[24] Influencer Agreement 101, https://www.sagaftra.org/contracts-industry-resources/influencer-resources/influencer-agreement-101 (last visited March 4, 2022)

[25] Liz Flora, *How Influencers 50-plus Are Changing Perceptions Around Age in* Beauty, *Glossy.co,* March 29, 2021 https://www.glossy.co/beauty/how-influencers-50-plus-are-changing-perceptions-around-age-in-beauty/

signatory for your project. This ensures the brand deal is covered and allows for your business entity to make pension and health contributions on your behalf."[26]

Additionally there are limits to who can qualify for coverage. Content has to include video or voiceover and must only feature the influencer without any additional performers.[27] Further, the influencer must have a corporate entity and have a contract directly with the brand in order to qualify for coverage.[28] Any content that is created in partnership with an ad or PR agency supplying the production or creative is expressly not covered.[29] And finally any content that is created to live outside of the social media ecosystem (TV, film, etc.) is also not covered.[30]

Based on the strict parameters, it is likely the union was targeting high-profile TikTok and YouTube partners who tend to command the most money and retain the most control over creative direction in the influencer marketing space. Interestingly these partners also tend to be the youngest, which stereotypically could mean the least business-savvy and unaware about unionization, its history and benefits.

Given that the criteria for eligibility for benefits is that the influencer has a contractual relationship directly with the advertiser or brand, what is the impact of unionization on those brands? Arguably very little. On its face, the costs to partner with an influencer will only marginally increase to cover union fees, typically a percentage of the overall contract, and that is where the brand responsibility ends. As the ostensible employer, there are no requirements on the brand regarding any of the traditional employer or employment parameters traditionally covered

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[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

by union contracts or collective bargaining. In this union relationship, the employer contributes nothing by pension and health insurance costs.

To the influencers themselves, the benefits of joining the union seem little. Aside from health insurance and pension, the main driver for union membership may be arbitration assistance. While many influencers enter mutually beneficial partnerships with brands and companies, as with any employment relationship disputes can arise between creators and their employers.[31] For many influencers without management, there is often little recourse as they are one person fighting against a multi-million [dollar] corporation. However, by joining SAG-AFTRA creators will have union support, to potentially help guide the process and offer its industry clout in fighting a dispute.[32] While this may seem valuable on its face, disputes in the influencer marketing workplace are rare and generally easily settled. If an employer is using influencer marketing on one campaign it likely will again on others. It is therefore in the employer's best interest to resolve any dispute in a way that is advantageous to all parties to avoid a reputation of being difficult, leading to overall weariness among influencers when it comes to future partnerships.

In a majority of self-directed industries like influencer marketing, the detriments of becoming a union member may outweigh the limited benefits. Reduction in flexibility may be the biggest of these damages. Traditionally, the union requires its membership to only work on union projects, and taking non-union jobs may result in fines.[33] Although there may still be options and opportunities to work around these requirements. Creators used to taking on

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[31] *The Pros and Cons of Influencers Joining* Unions, Blog (February 23, 2021) https://blog.carusele.com/the-pros-and-cons-of-influencers-joining-unions
[32] *Id.*
[33] *Id.*

partnerships that best align to their own personal channels and interests, this restriction may not be worth what benefits the union offers.

And what about the brands who employ influencers as a part of their marketing strategies to reach consumers? As with most employment contracts, the brand as employer retains most of the power in the relationship, but in influencer marketing the dynamics are more unique. An employer chooses an influencer based on inherent qualities of that particular person. Those qualities are not easily duplicated by moving on to the next person on a long list. The core tenant in influencer marketing is authenticity as influencers attract followers by showing their preferences, recommendations and experiences in detail on a daily basis.[34] Researchers have studied relationships between an influencer and audiences and have discovered influencers "build ... communities in which they're in the center."[35] Effective influencer partnerships build upon audience loyalty and maintain a level of trust and more importantly engagement that traditional advertising cannot generally match.[36] Because of this need for particular influencers for particular campaigns, creators retain more power than would be typical in an employment relationship. Any influencer, regardless of size, can and does walk away from partnerships that don't align with their own personal brands and aesthetics. To a certain degree influencer authenticity is not interchangeable among partners, which means employers are more willing to negotiate to ensure they are getting the right voices to resonate with the right audiences.

That isn't to say that brands give up all of their control in partnership with influencers. Employing content creators is often far less expensive than traditional advertising and can drive a

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[34] Alexandra J. Roberts, *False Influencing*, 109 Geo. L.J. 81, 92 (2020)
[35] *Id.* at 97
[36] *Id.*

much greater return on that investment.[37] Creating and executing a traditional ad campaign might require a separate agency employing a full creative team as well as production teams, models, days of shoots followed by days of editing, adding up to a significant investment of time and money.[38] A partnership with an influencer likely only requires the work of one person with a phone stand or maybe a photographer to create functionally similar content that reaches a larger audience addicted to scrolling while in their cars, waiting in line or simply sitting on the couch.[39] Adding union fees and restrictions to influencer contracts may lead to a loss of some of the ease of partnerships, leading brands to avoid union covered influencers in favor of those who still retain some control over how their partnerships are executed.

Although the focus of this article is influencers and content creators, none of these challenges are unique to the new media landscape. Economic opportunities and a workforce focused on flexibility have driven more workers to the gig economy, whether freelancing in the media industry to other forms of app-based labor like food delivery or ride shares.[40] The COVID-19 pandemic exponentially expanded the gig workforce, experiencing 33% growth in 2020 with about 2 million new employees entering the gig economy in 2020 alone.[41]

The expansion of union protections and rights to these independent, gig workers, in this case influencers, may be an opportunity to renew interest in and focus on the labor movement as well as protections against employers for violating workers' rights.[42] Specifically, these new

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[37] *Id.* at 96
[38] *Id.*
[39] *Id.*
[40] Erin Corbett, *TikTok Solidarity: Influencers Can Now Join a Union*, *Refinery29*, February 11, 2021 https://www.refinery29.com/en-us/2021/02/10308847/influencers-join-sag-aftra-union-workers-rights-impact
[41] Marcin Zgola, *Will the Gig Economy Become the New Working Class Norm?, Forbes*, August 12, 2021 https://www.forbes.com/sites/forbesbusinesscouncil/2021/08/12/will-the-gig-economy-become-the-new-working-class-norm/?sh=5bace5e8aee6
[42] Erin Corbett, *TikTok Solidarity: Influencers Can Now Join a Union*, *Refinery29*, February 11, 2021 https://www.refinery29.com/en-us/2021/02/10308847/influencers-join-sag-aftra-union-workers-rights-impact

shifts in union membership are likely indicative of a governmental shift toward a more inclusive labor movement. On February 6, 2020, the House of Representatives passed the PRO Act, which attempts to protect the right to join a union by increasing remedies and punishments for violating workers' rights while also protecting employees 'rights to collectively bargain for better working conditions.[43]

Most importantly, the PRO Act if signed would change who qualifies as an employee versus an independent contractor and seeks to ensure employees have the right to collectively bargain, thus opening the door for some of the biggest companies operating with gig workers organize their workforces.[44]

When taken together it appears that the labor organizations are attempting to evolve with the changing workforce to continue to stay relevant. However, as shown, the intricacies of influencer marketing may not lend themselves to unionization in a functional way that allows both employers and employees to thrive. While employee protections are genuinely important across industries and even more so in the gig workforce, in influencer marketing the work itself is completely dependent on the person creating it. Unlike delivery services or ride sharing or even other freelance media work where a substantial portion of the workforce could easily slide in and out of any role, influencer marketing depends almost solely on the influencer themselves.

Because of that, influencers retain more control in an employment relationship than would be typical. Union protections, while extremely important across most industries, may not be as useful in this context. An extremely young workforce is not driven by a need for health

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[43] Trent V. Testa, *State of the Unions: Where They Are, Where They Have Been, & Where They Are Going*, 51 Cumb. L. Rev. 193, 219 (2021)
[44] *Id.* at 220

insurance coverage or pension benefits enough to want to pay union dues. And although labor disputes do occasionally occur, they are rare and generally settled in a mutually expedient way.

Ultimately, it is still too early to tell if this expansion of union benefits will be valuable to either influencers or SAG-AFTRA. However, when evaluated against the current industry standards and power dynamics it seems unlikely that it will dramatically alter the current landscape. In its current iteration, the benefits to influencers do not outweigh the perceived detriments in a large enough way to swing the pendulum toward the loss of control likely to result from a massive push toward unionization. However, as the workforce in general continues its expansion into a less traditional gig economy model, the push toward standardization of working conditions for independent contractors will be top of mind for employees, employers and labor organizations alike.

IS THE INDIAN COMMISSION READY TO PUT A RING ON IT?

A COMPARATIVE ANALYSIS OF THE INTRODUCTION OF CONFIDENTIALITY RINGS IN INDIAN COMPETITION LAW

Earlier this year, the Competition Commission of India proposed an amendment to allow the creation of confidentiality rings in India. Given the complex nature of this advancement, there has been abundant discourse surrounding the implications thereof in the Indian antitrust landscape.

Through this article, the author shall gauge the preparedness of the Indian Commission to carry out this implementation. Setting out with a breakdown of the proposed amendment [I], we shall then understand the existing provisions and rules for the protection of confidential information in the Indian antitrust framework. Pursuant to this, we will learn from the creation of confidentiality rings across jurisdictions [III], and analyse European precedent [IV].

Equipped with this knowhow, we shall delve into the Indian regulator's handling of previous claims for protection of confidential information in antitrust enforcement [V], and finally, suggest recommendations [VI].

Keywords: confidentiality rings, confidential information, obligation to protect

JEL Code: K21

I. Proposed Amendment of 2021 by the Competition Commission of India

April of 2021 witnessed the introduction of the *Competition Commission of India (General) Amendment Regulations of 2021*, which also envisaged an amendment of *Regulation 35* of the *Commission's General Regulations* to allow the setting up of *Confidentiality Rings*.[1]

The Commission's intention is to allow these Rings to act as bodies that include authorized personnel from the parties who shall be allowed complete access to case records relevant to the investigation in question. These records shall also include

[1] Competition Comm. of India, *Inviting public comments regarding review of extant Confidentiality Regime as provided in Regulation 35 of the Competition Commission of India (General) Regulations* (2009), https://www.cci.gov.in/sites/default/files/news_ticker/ProposalalongwithDraftRegulation.pdf [hereinafter Comm. Report].

commercially sensitive information that is conventionally not made accessible to representatives of competing undertakings.[2]

The Commission has proposed an amendment to *Regulation 2(6)* of the *General Regulations*, which shall give it the power to set up a Confidentiality Ring that comprises authorized personnel from the relevant parties to afford a more efficient and exhaustive investigation and enforcement.[3]

It has also proposed that a similar Confidentiality Ring be operated by the Director General, when he is carrying out an investigation, to allow the parties to access data in an unredacted manner for the purpose of the investigation at hand.[4]

Additionally, the Commission has stated that these provisions must be enforced in harmony with the Commission's obligation to maintain confidentiality, vide *Section 57* of the Competition Act.

II. Provisional Framework for confidentiality claims in antitrust enforcement in India

While there is no provision that defines confidential information from an antitrust perspective, the following parameters are usually looked at while classifying a piece of information as confidential, irrespective of the jurisdiction or the nature of the alleged contravention of competition law.[5]

i. The information is only known to a limited, select number of people.
ii. Divulsion of the information would cause serious harm to the stakeholder parties or the informant.
iii. Further, in addition to the interests that shall be hampered by the divulsion, the information in itself must merit protection.

Section 57 of the *Competition Act, 2002* lays down that no information that has been obtained by the Competition Commission of India (CCI), or the National Company Law

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[2] Ingrid Vandenborre, ET AL., *Access to the Commission File and Confidentiality of Information under European Competition Law in the Context of Antitrust Damages Claims* 11 J. OF EUR. COMPETITION LAW AND PRAC. 199 (2020).
[3] Comm. Report, *supra* note 1.
[4] *Id.*
[5] DS Sengar, *Protection of Trade Secrets and Undisclosed Information: Law and Litigation*, 53 J. OF THE INDIAN LAW INST. 254 (2011).

Appellate Tribunal (NCLAT) (Appellate Authority) can be divulged without seeking written consent from the parties in question, unless said divulsion is in compliance with the Competition Act or the purpose thereof, or is essential for the enforcement of any other law that may in force at the given time.[6]

Regulation 35 of the *Competition Commission of India (General) Regulations, 2009* lays down the procedure that must be complied with in order to claim confidentiality during the course of an investigation that is undertaken by the CCI.[7] According to this Regulation, a request for the confidential treatment of a piece of information must be directed to the Director General (DG) of the CCI, or the Commission itself.

The Commission then assesses the application that has been made to determine whether disclosure of the information at hand will lead to the divulsion of a trade secret, destruction or appreciable depletion of the commercial value of the information in question, or has the potential to cause serious injury to the stakeholders in the instant matter.

Regulation 47 of the *Commission's General Regulations* mandates that proceedings that are carried out by the Commission must not be made available in the public domain.[8] However, it also lays down the following scenarios in which such protection can be rescinded.

i. If no significant harm shall be caused to the stakeholder parties due to the disclosure.
ii. The level of encouragement that is directed towards the Commission for publishing the information.
iii. The contribution of the disclosure towards the efficiency and efficacy of the proceeding.
iv. Miscellaneous considerations for the Commission such as resource constraints.

Regulation 6 of the *Competition Commission of India (Lesser Penalty) Regulations 2009* stipulates that the DG is to treat the identity of the lesser penalty applicant, and all

[6] The Competition Act, 2002, §57. IN.
[7] Competition Comm. of India (General) Regulations, 2009, Reg. 35.
[8] Competition Comm. of India (General) Regulations, 2009, Reg. 47.

information, documents and evidence that is furnished by the leniency applicant pursuant to said application, as confidential.[9]

The following exceptions have been recognized to the application of *Regulation 6* of the Lesser Penalty Regulations.

i. A disclosure of the information in question in required by law.
ii. The applicant has given his consent to such a disclosure in writing.
iii. The applicant has made a public disclosure of the information in question.

Regulation 9 of the *Competition Commission of India's Procedure for Engagement of Experts and Professionals 2009* states that if a breach of an agreement is made by an expert or professional, it shall be treated as a sufficient ground for terminating the engagement that has been made vide the agreement in question and lead to the debarment of the expert or the professional in question.[10]

II.A. Objective of Confidentiality Clauses in antitrust enforcement

The primary objective of a confidentiality clause in an antitrust enforcement is the protection of commercially sensitive information of the parties that are stakeholders in the matter, in order to prevent a loss being suffered by the enterprise(s) in question.[11]

Another objective of the insertion of a confidentiality clause in an agreement is the protection of the identity of an informant in the matter. This is done to ensure that the informant's goodwill in the market is not adversely affected, and his fundamental Right to Privacy, under Article 21 of the Constitution of India is not compromised either.[12]

Further, divulsion of potentially damaging information in the public domain may lead to loss of goodwill of the undertaking in the market, or may expose its indulgence in an

[9] Competition Comm. of India (Lesser Penalty) Regulations, 2009, Reg. 6.
[10] Competition Comm. of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009, Reg. 9.
[11] Dan Ciuriak & Maria Ptashkina, *Quantifying Trade Secret Theft: Policy Implications,* CENTRE FOR INT'L GOVERNANCE INNOVATION (2021).
[12] E George Rudolph, *Trusts: Constructive Trusts: Protection of Trade Secrets and like Confidential Information*, 41 MICH. L. REV. 747 (1943); Puttaswamy v. Union of India, ((2017) 10 SCC 1)(India).

untoward practice, or a defect in their product or service.[13] To this end, a disclosure of potentially sensitive information is circumvented in most instances.

III. Confidentiality Rings in Overseas Jurisdictions

While the Indian competition law regime has begun to explore the possibility and adoption of confidentiality rings recently, more mature antitrust jurisdictions have been toying with the concept for a while.

III.A. European Union

The European Commission has recognized access to information as a requisite of procedure during an investigation in an alleged contravention of competition law. This guarantee has been afforded with the objective of safeguarding the rights of the defense.[14]

In keeping with this protection, the DG of Competition will ensure that the addressees of the Statement of Objections are allowed an opportunity to access the Commission's files, except documents that classify as internal and confidential information. This access to files is granted to the addressees pursuant to the notification of the Statement of Objections.

Conventionally, the DG Competition directs each informant to prepare a non-confidential version of the original document that it is providing to the Commission, for the purpose of the disclosing to the other parties in the event of an investigation.[15]

However, often the preparation of such a version of the document which conveys the intended meaning is not practicable. In such instances, the Commission allows the parties to access the confidential version of the document, to equip them to form an informed opinion of the backdrop against which the investigation is being carried out.[16]

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[13] Paolo Iannuccelli, *Interim Judicial Protection Against Publication of Confidential Information in Commission Antitrust Decisions,* World Competition L. & Econ. Rev. (2019).

[14] Kyriakos Fountoukakos & Camille Puech-Baron, *What Happens in Luxembourg Stays in Luxembourg: Confidentiality Issues in Competition Law Proceedings Before the EU Courts,* 5 J. OF EUR. COMPETITION L. AND PRACTICE 331 (2014).

[15] Vandenborre, *supra* note 2.

[16] Ingrid Vandenborre, et. al., *Access to the EU Commission's File or Decision for the Purposes of Damages Claims, and Confidentiality of Information under European Competition Law*, 9 J. OF EUR. COMPETITION L. AND PRACTICE 655 (2018).

Article 339 of the *Treaty on the Functioning of the European Union* (TFEU) imposes a general duty to protect confidential information on the Commission. However, in the event that such information must be divulged to establish a violation of *Article 101* or *102* of the TFEU, the Commission is posited to make said divulsion.[17] Confidentiality Rings have been acknowledged as one of the methods of negotiated disclosure under *Point 96* of the *Commission's Notice on Best Practices for the Conduct of Proceedings Concerning Article 101 and 102 of TFEU*.

Under the functioning of a confidentiality ring, the addressee of the Statement of Objections who is entitled to access the information in question, will agree to receive the relevant information from the provider thereof, and then allow a select group of people to access the information that he has received.[18]

This group of people comprise the confidentiality ring. The provider of the information has the power to agree to enter into a confidentiality ring with regard to some parties, and refuse to do so with another party.[19]

III.A.i. Communication on the Protection of Confidential Information by National Courts in Private Enforcement 2020

In July of 2020, the Commission released its *Communication on the protection of confidential information by national courts in proceedings for the private enforcement of European Competition Law*.[20]

Here, it is noteworthy that the *Damages Directive*[21] places an obligation on Member States of the European Union to ensure that the relevant national courts are empowered to

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[17] Ingrid Vandenborre, *Access to File under European Competition Law*, 6 J. OF EUR. COMPETITION L. AND PRACTICE 747 (2015).
[18] Ingrid Vanderborre, Thorsten Goetz, *EU Competition Law Procedural Issues*, 4 J. OF EUR. COMPETITION L. AND PRACTICE 506 (2013).
[19] Nima Lorje & Ariela Stoffer, *Judicial review and the protection of privacy rights in dawn raids*, 20 COMPETITION L. J. 55 (2021).
[20] *Communication from the Commission on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law*, 2020 O. J. 4829 [hereinafter EU Communication].
[21] *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance*, 2014 O.J. L349/1.

order the disclosure of evidence in damages claims for infringement of European Competition Law.

For the national court in question to exercise this power, the following elements must be satisfied.[22]

i. The claim must be plausible.
ii. The evidence requested must be relevant.
iii. The disclosure request must be proportionate.

Alongside the above, the Member States must also ensure that the national courts are empowered with a mechanism to protect the confidential information in question.[23]

While this communication is not binding on the national courts of the member states, they have all received this is good stride, given that there was abundant ambiguity surrounding the protection of confidential information during an antitrust investigation.[24]

Over and above the conventional and loosely uniform definition of confidential information, the Commission has afforded the national courts leverage to classify information as confidential on a case-to-case basis. Additionally, the Commission has reiterated the fact, that recognizing the confidential nature of a piece of information in no way prohibits its necessary disclosure.[25]

Through this Communication, the Commission has proposed the following methods to safeguard the confidentiality of information. The measure to be applied shall be determined by the facts and circumstances of the instance at hand.

III.A.i.a. Redaction

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[22] Konstantina Strouvali & Efstathia Pantopoulou, *Balancing Disclosure and the Protection of Confidential Information in Private Enforcement Proceedings: The Commission's Communication to National Courts*, 12 J. OF EUR. COMPETITION L. AND PRACTICE 393 (2021).
[23] EU Communication, *supra* note 20.
[24] Lena Hornkohl, *The Protection of Confidential Information during the Disclosure of Evidence According to the Damages Directive,* EUR. COMPETITION L. REV. 105 (2020).
[25] Lena Hornkohl, *A new series: Main Developments Competition Law and Policy 2020- Kick off with the EU*, Kluwer Competition Law Blog (2020).

This provision allows for the information to be edited to eliminate the confidential information.[26] Here, the Commission has emphasized that the parties must only redact what is absolutely necessary. Further, the Commission has propelled the national courts to intervene in the action of redaction and direct the party(ies) to substitute the confidential part of the information with a non-confidential summary of the same.

III.A.i.b. Confidentiality Rings

In keeping with popular practice, the Commission has recognized the formation of a select group of people to access the confidential information, which we have come to know as a confidentiality ring.[27]

Members of these rings may comprise external advisors, external legal counsel or other representatives that do not have an active role in the commercial operations or decision making of the undertakings in question.[28]

The Communication also discusses regulation of the extent of access to members of the ring, allowing a relatively limited disclosure for the outer confidentiality ring, and a deeper disclosure for the inner confidentiality ring. In addition, the Communication has also proposed the appointment of experts to access the confidential information from a third-party perspective, to give an unbiased account.[29]

III.B. United States of America

The Department of Justice (DoJ) and the Federal Trade Commission (FTC) place reliance on commercially sensitive, confidential information from undertakings to facilitate their antitrust investigations.[30]

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[26] EU Communication, *supra* note 20.

[27] *Id.*

[28] Richard F. Beltramini, *Ethics and Use of Competitive Information Acquisition Strategies*, 5 J. OF BUS. ETHICS 307 (1986).

[29] EU Communication, *supra* note 20.

[30] R Mark Halligan, *Protection of U.S. Trade Secret Assets: Critical Amendments to the Economic Espionage Act of 1996*, 7 J. Marshall Rev. of Intell.Prop. L. 656 (2008).

The American antitrust jurisprudence too fails to unequivocally define confidential information, and resorts to the commonly used definition to classify information in terms of confidentiality.[31]

One unique characteristic of the American antitrust investigations is that protection of confidential information continues to extend even after the Agencies in question have initiated administrative proceedings or filed a complaint in a Federal Court.[32]

Further, the Agencies have been empowered to utilize the confidential information that has been furnished to them during an investigation against the parties involved in the matter. However, said parties can furnish a good cause before the court and prevent the admission of the confidential information, and its divulsion beyond a select set of individuals.[33]

When assessing such a request for protection, the Court takes the following parameters into consideration.[34]

i. The confidentiality interests at issue.
ii. The efficiency, efficacy and fairness of limiting access to the information in question.
iii. The importance and relevance of the instant litigation to the community at large.

IV. Instances of confidentiality rings in the European Union

IV.A. Infederation v. Google LLC & Ors.

In this case, Infederation Ltd. operated a vertical search engine which allowed consumers to compare the prices that were being offered by third-party websites for various goods and services. Infederation alleged that Google LLC and Google Ireland were abusing their

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[31] Kevin R. McCarthy, *Maintaining the Confidentiality of Confidential Business Information Submitted to the Federal Government*, 36 THE BUS. LAW. 57 (1980).
[32] Shirley Z. Johnson, *Treatment of Confidential Documents by the Federal Trade Commission*, 46 ANTITRUST L. J. 1017 (1978).
[33] Maarten C. W. Janssen & Santanu Roy, *Competition, Disclosure & Signalling*, 125 ECON. J. 86 (2015).
[34] Michael A. Epstein & Stuart D. Levi, *Protecting Trade Secret Information: A Plan for Proactive Strategy*, 43 BUS. L. 887 (1988).

dominant position in the horizontal search regime market, and thus were acting in contravention of *Article 102 of TFEU* and *Section 18 of the Competition Act, 1998.*[35]

This case delved into determining the extent to which confidential information must be afforded protection.

Mr. Justice Roth sailed into unchartered territory and asked Google to either amend their case to remit the confidential information from their submissions, or that an expert witness representing Infederation would be admitted into the relevant confidentiality ring, allowing him to access and assess the confidential information in question.[36]

This course of action was proposed to Google after Infederation had sought to have its expert witness admitted into two highly protected confidentiality rings, in which Google had disclosed technical material regarding the algorithms and techniques that it utilized to rank its search results. Google had gone to the extent of defining this information as its *crown jewels* and indicated that it was at a risk of colossal loss, should this information find its way to the public domain.

Further, Mr. Justice Roth also chided the rampance of confidentiality claims over documents and information made by undertakings usually triggered as a response to a complaint by the opposite party, or intervention by the Court. He stated that such activities are a portrayal of regressive and wasteful tendencies, and are not in keeping with the modern vision for litigation and antitrust enforcement. The derivable crux of his statements is that protection such as a confidentiality ring must only be sought for information that merits such protection.[37]

This case also brought to light the aspect of closed material procedures and the apparent conflict between the principles of natural justice which must allow each party to access the evidence on which the charges against it are being based and the critical requirement

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[35] *Infederation Ltd. v. Google Inc.*, [2013] EWCH 2295 (Ch), (2013) All ER (D) 326 (Jul) (Eng.); *Infederation Ltd. v. Google Inc.*, (2020) EWCH 657 (Ch), (2020) All ER (D) 146 (Mar) (Eng.).

[36] Nating Group, *Infederation Ltd v Google Inc and others,* THOMSON REUTERS PRACTICAL LAW, https://uk.practicallaw.thomsonreuters.com/7-535-7208?__lrTS=20170711210916311&transitionType=Default&contextData=%28sc.Default%29 (last visited Aug. 16, 2021).

[37] Hayley M. Pizzey, *High Court Rules on Confidentiality Claims in Competition Proceedings*, LATHAM & WATKINS (Apr. 22, 2020), https://www.latham.london/2020/04/high-court-rules-on-confidentiality-claims-in-competition-proceedings/.

to regulate disclosure and access of sensitive information to salvage the commercial interests of the parties in question.

It is noteworthy that while judicial authorities have acknowledged that closed material procedures are essential in some instances, they have consistently found that such a procedure is special and exceptional, and must be used sparingly.

While deciding such a matter, the Court will deliberate on the extent of the confidential nature of the information in question, and the consequences of the availability of the information outside the confidentiality ring, in the public domain. Such considerations are especially critical in competition law cases, since more often than not, parties are competitors of one another, and they invariably operate in the same markets.

IV.B. Goode Concrete v. CRH Plc.

In this case, Goode Concrete made a claim against CRH Plc. alleging a contravention of European and Irish competition law, in the Irish cement market and the Irish ready-mix concrete market. Goode Concrete alleged that the anti-competitive conduct of CRH Plc. had caused immense damage to its commercial operations, and ultimately led to its insolvency.[38]

During the investigation, Goode Concrete sought certain disclosure from CRH, claiming that it could not furnish evidence of its claims unless these disclosures were made. This led to a disagreement between the parties on the terms and extent of the discovery, which was heard by Mr. Justice Barrett of the High Court.

The Court allowed for discovery of certain categories of the requested documents, aided by the formation of a confidentiality ring comprising experts hired by either party and their respective legal counsel. Notably, directors of Goode Concrete were excluded from the confidentiality ring.

While rationalizing the creation of the confidentiality ring, the Court stated that the information in question was confidential, and public disclosure of commercially sensitive and had the potential to cause harm to CRH. Further, it stated that Goode Concrete had failed to justify its request for inclusion of its directors in the confidentiality ring, and the

[38] *Goode Concrete v. CRH Plc.*, (2017) IEHC 534, accessed through LexisNexis on Apr. 5, 2022.

undertaking that was provided by them was barely effective since its enforceability remained bleak at best.[39]

This decision of the High Court was appealed by Goode Concrete claiming that it found themself incapable of instructing their legal counsel without access of the desired document to its directors, and that the requested information was historic, and not commercially sensitive. The Court of Appeal upheld the order given by the High Court, and expressed its disagreement with the contentions raised by Goode Construction. It also stated that once some information was made available to the opposite party, no undertaking could ensure that they would unsee it and not use it to leverage a competitive advantage in the relevant market.[40]

This precedent serves as an instance of an attempt to exploit the provision of a confidentiality ring, in order to access commercially sensitive intelligence. Such occurrences and attempts by profiteering undertakings are bound to present themselves time and time again and the relevant regulator must steel itself against such frivolous claims.

V. Treatment of confidentiality claims in the Indian Competition Regime

Although a conventional confidentiality ring has not been afforded statutory recognition in the Indian Competition regime yet, there have been several instances in which the Competition Commission of India or another adjudicating authority has been faced with a complication arising from the treatment of confidential information during an antitrust investigation.

In *Telefonaktiebolaget Ericsson v. CCI*, the Delhi High Court held that the duty of protection of confidential information is incumbent on the Commission and the Director General, and they must act in conformity thereof. Further, it ordered the creation of what was

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[39] Hilary Biehler, *Upholding Standards in Public Decision-Making: Getting the Balance Right*, 57 IR. JUR. 94 (2017).

[40] *Members only club: Court of Appeal upholds appropriateness of confidentiality rings/clubs for discovery*, ARTHUR COX (Mar. 3, 2020), https://www.arthurcox.com/knowledge/members-only-club-court-of-appeal-upholds-appropriateness-of-confidentiality-rings-clubs-for-discovery/.

called a confidentiality ring, which was to include a specified number of lawyers and expert witnesses.[41]

While caution was exercised in the Ericsson order, and only external legal counsel was permitted in the ring, such vigilance was missing in the order of *MVF 3APS v. M. Sivasamy*, which simply spoke about the inclusion of legal representatives, making no demarcation on the basis of allegiance to the parties in question.[42]

In *Sterlite Industries v. Designated Authority*, the Supreme Court of India held that a piece of information being treated as confidential shall be determined on a case-to-case basis which shall be determined by the relevant authority in the particular instance.[43] Although this matter did not relate to a contravention of competition law, the Apex Court made a statement regarding the confidential treatment of information and must be borne in mind while understanding the treatment of sensitive information in India.

In *Shamsher Kataria v. Honda Siel Cars India*, the Commission was in agreement with the Director General's observation that a piece of information seeking protection on a claim of confidentiality must be bolstered by an obligation of confidence between the parties sharing the information in question.[44]

In *Vishal v. Google*, the Commission encountered an argument on the ground that confidential treatment of confidential information amounted to a violation of the principles of natural justice.[45] The Commission found this argument to be baseless and without merit, and stated that its acceptance of such an argument would result in the invalidation of Section 57 of the Competition Act and Regulation 35 of the General Regulations.

A discernible consistency can be mapped in the observations of the Commission and the Court(s) in the aforementioned precedent. There is agreement that confidential

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[41] *Telefonaktiebolaget LM Ericsson v. Competition Commission of India & Anr.*, (2019) DEL 1489 (Ind.), http://delhihighcourt.nic.in/writereaddata/orderSan_Pdf/gro/2016/84828_2016.pdf (aff'g *Telefonaktiebolaget LM Ericsson v. Competition Commission of India & Anr.*, (2016) DEL 1658 (Ind.)).

[42] *MVS 3 APS v. Sivasamy*, (2012) DEL 2054 (Ind.).

[43] *Sterlite Industries (India) Ltd. v. Designated Authority*, (2006) 10 SCC 386.

[44] *Shri Shamsher Kataria v. Honda Siel Cars India Ltd.*, Case No. 03 of 2011 (Competition Commission of India, 07/27/2015).

[45] *Shri Vishal Gupta v. Google LLC*, Case Nos. 06 & 46 of 2014 (Competition Commission of India, 07/12/2018).

treatment of information must only be afforded when the information in question warrants it; the Commission and its officers must remain mindful of its obligation to protect commercially sensitive information; and a generic criterion for classification of information as confidential cannot be devised and must be determined by taking the instant facts and circumstances into account.

VI. Confidentiality Rings in the Indian Competition Law Regime

If the author seeks to objectively answer whether there is a need for a provision for confidentiality rings in the Indian antitrust enforcement regime, it shall be in affirmative.

Consequently, when posed with the question of whether the current amendment shall allow an efficient framework for the setting up and functioning of confidentiality rings, the author must express her apprehension. Below mentioned are a few considerations for the Indian and antitrust community to dwell upon before embracing the amendment of 2021.

VI.A. Grounds for the setting up of a Confidentiality Ring

The status quo of the amended regulation does not specify grounds which shall merit the creation of a confidentiality ring. This ambiguity shall invite exploitation of this provision, and might deter undertakings with meritorious claims from making such a request, due to lack of knowledge regarding whether their claim would qualify for the creation of a confidentiality ring.[46]

Bearing this in mind, the Commission must stipulate grounds which can call for the formation of a confidentiality ring. Inspiration can be drawn from the European Commission which has laid down the following grounds for requesting the setting up of a confidentiality ring[47]:

i. A confidentiality ring can only be set up when it is necessary to prove the infringement at hand.

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[46] James Webber & Savas Maoussakis, *Access to Evidence in Market Investigations*, 13 COMPETITION L.J. 72 (2014).

[47] Sebastian Peyer, *Access to competition authorities' files in private antitrust litigation*, 3 J. ANTITRUST ENF'T 58 (2015).

ii. A confidentiality ring can only be set up when it is essential for protection of the rights and interests of the defense party(ies).

VI.B. Procedure for setting up a Confidentiality Ring

The current amendment makes no indication towards whether the setting up a confidentiality ring can also be requested by an undertaking in the market which is a stakeholder in the instant matter or if only the Commission can call for the creation of a confidentiality ring of its own accord.[48]

In case the former is a right that the Commission intends to vest with market players, the Commission must specify the qualifications and disqualifications for a party looking to make such a request, and devise a mechanism to process such requests in keeping with the practices that have been adopted by other jurisdictions.[49]

For instance, in the European Union, the DG Competition may either call for the creation of a confidentiality ring of his own accord, or on the request of an addressee of the Statement of Obligations. Hence, the DG has been vested with the power of accepting or rejecting a request made by an addressee for the formation of a confidentiality ring.[50]

VI.C. Objections to the setting of a Confidentiality Ring

Given that the concept of a confidentiality ring hinges on the divulsion of commercially sensitive information of an undertaking, any objection that said undertaking raises towards the formation of such a ring must be acknowledged and a redressal mechanism must be formulated to that end.[51]

Principally, the consent of all stakeholder parties in the matter must be a requisite for the creation of a confidentiality ring. This would also be in keeping with the International Competition Network's Best Practices which states that the party whose confidential information is being disclosed must be given an opportunity to object to said disclosure.[52]

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[48] Comm. Report, *supra* note 1.
[49] Peter Davis, *Economic Evidence and Procedural Fairness: Lessons from the UK Competition Regime*, 14 J. COMPETITION L. & ECON. 1 (2018).
[50] Tanya Aplin, The Limits of EU Trade Secret Protection (May 15, 2020) (research paper, King's College London) (SSRN).
[51] Jeremie Jourdan & Fanny Abouzeid, *Competition Law and Fundamental Rights*, 11 J. EUR. COMPETITION L. & PRAC 623 (2020).
[52] Kyriakos Fountoukakos et al., *If you would keep a secret from an enemy, tell it not to a friend: disclosure of sensitive information and the chilling effect of leniency*, 1 COMPETITION L. & POL'Y DEBATE 34 (2015).

Hence, the Commission must also lay down a mechanism for a party to raise its objections and concerns regarding the divulsion of its commercially sensitive information via a confidentiality ring, and appoint an unbiased panel to address such complaints.

VI.D. Undertaking by members of a Confidentiality Ring

The proposed amendment to *Regulation 2(7)* states that members that are admitted to the confidentiality ring shall be allowed to access the unredacted versions of the confidential information at hand only after they sign an undertaking. The objective of the undertaking is to ensure that the information that is viewed is not utilized to further commercial interests or alter the market dynamic.[53]

While the amendment mentions the requirement for such an undertaking, no format thereof has been mentioned, and the enforceability and consequences of violating the undertaking has not been addressed.

With the objective of ensuring uniformity, and unequivocally establishing the obligations of the signee of the undertaking, the Commission must issue an exhaustive template undertaking which shall be utilized by all members that are included in a confidentiality ring.[54] Further, a provision must also be made for specific clauses to be added to the undertaking, subject to the facts and circumstances of the instant case.

In addition, the Commission must also specify the ramifications that an individual acting in violation of the undertaking shall be subjected to. Possible punishments could be imposition of a monetary penalty, debarment from inclusion in any subsequent confidentiality ring, or removal from the position that the individual was holding in the relevant party (undertaking) to the investigation.

VI.E. Inclusion of the Informant in a Confidentiality Ring

Conventionally, the Informant cannot be made a part of the confidentiality ring that shall be accessing and analysing the information that he has furnished.[55] However, the

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[53] Comm. Report, *supra* note 1.

[54] Daniele Calisti, *Getting Hold of the Evidence: Access, Disclosure and the Use of Information in the Commission's File*, COMPETITION LAW JOURNAL 279 (2014).

[55] W. Donald McSweeney, *Privileged Communications, Attorney's Work Product, Confidential Information and Availability of Governmental investigative Files and Grand Jury Transcripts*, 38 ANTITRUST L.J. 24 (1968).

Commission has stated that the in case it, or the DG deems the inclusion of the Informant critical to the effective investigation of a particular case, it shall do so.[56]

In light of this, the other parties in the matter, or other members of the confidentiality ring must be afforded an opportunity to specifically object to the inclusion of the informant in the ring.

The Way Forward

The pivotal role of confidential information in antitrust enforcement has echoed through decades, and is one of the primary impediments in the creation of an international competition law framework.[57] Hence, the Indian regulator must be mindful of the precarious nature of the ground that it is looking to venture into and take proportionate measures to ensure that this apparent advancement does not prove to be counterproductive.

The creation of a confidentiality ring has in turn led to the emergence of a tussle between the divulging party's right to privacy and the principles of natural justice.

When the Supreme Court's Puttaswamy judgment recognized every citizen's right to privacy as a fundamental right, its bearing effect started to be felt across disciplines.[58] Here too, while on one hand there is the consideration of one party being granted access to commercially sensitive information to allow it to holistically understand the market locale and the allegations in question, on the other hand, there is the divulging party's Right to Privacy which must also be honored and respected.

On another tangent, the principles of natural justice entail a complete understanding of the allegations that are being brought against a party, and the evidentiary material that is being relied on.[59] Applying this principle to the confidential treatment of information, if such withholding of information leads to a party being deprived of information that is

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[56] Comm. Report, *supra* note 1.

[57] Henry Kolowrat et al., *Restraints on Technology Access: Protection of Trade Secrets & Confidential Information*, 49 ANTITRUST L.J. 735 (1980).

[58] *Puttaswarmy v. Union of India (I)*, GLOB. FREEDOM OF EXPRESSION, COLUM. U., https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/ (last accessed Aug. 16, 2021).

[59] RAJ KUMAR, COMPETITION LAW IN NEW ECONOMY (2016); Vijay Kumar Singh, *Competition Law and Policy in India: The Journey in a Decade*, 4 NUJS L. REV. 523 (2011).

essential to understand the litigation that is being brought against him, such treatment must not be allowed at all.

In light of this, the Indian Commission must strive to harmoniously construe both considerations, and not favour either over the other. Given the nascent stage of this concept in the Indian antitrust landscape, and the peculiar and complex nature of the claims that the Commission shall encounter, it would be myopic to predetermine the parameters that the Commission should resort to while deliberating a request for a confidentiality ring.

Thus, the Commission must assess each request on the basis of the facts and circumstances accompanying it, and allow the principles of justice, equity and good conscience to steer their decisions.