Why HP’s whistleblowing didn’t shield it from big CCI fines

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The recent order by the Competition Commission of India (CCI) against American multinational HP has underscored the key limitation faced by whistle blowers in the rules governing competition. In an order dated July 13, the anti-trust regulator had imposed a penalty of Rs 139 crore on HP India for cartelization and bid-rigging on public procurement platforms.

In this case, HP itself was the whistle blower as the probe was initiated on the basis of information provided by the HP. The company had informed the commission that some of its suppliers and distributors were indulging in market cartelization in public procurement projects.

Legal experts say that such proactive whistleblowing under CCI’s ‘Leniency Route’ doesn’t assure any kind of immunity for companies indulging in serious anti-trust violations like market abuse and cartelisation. This contrasts with the framework adopted by some of the major global jurisdictions such as the US and EU which offer full immunity to whistle blowers in competition cases.

To be sure, CCI imposed a reduced penalty on HP India as the company had voluntarily come forward.

In the US, not just companies, even top executives of a company indulging in cartelisation are provided immunity from any federal proceedings. The federal government of the US recently also launched a bounty program wherein such whistle blowers get immunity and a monetary reward as well.

As per EU competition rules, the first company providing sufficient evidence which will allow the EU to carry out target inspections or establish violation of anti-cartel rules receives 100% immunity from proceedings.

“The success of any leniency regime ultimately depends on whether companies believe that coming forward is worth the risk. The HP India order brings that question into sharp focus. While it reaffirms that cooperation will be recognised, it also demonstrates that self-reporting does not necessarily guarantee immunity. The policy debate is therefore about whether India's framework creates sufficiently strong incentives for early disclosure while preserving effective enforcement,” Ketan Mukhija Partner and Co Head PE & VC, Kocchar & Co.

CCI’s leniency rules offer upto 100% waiver of penalty for whistle blowers. However the commission has discretion to decide how much penalty to waive off. Legal experts say there is lack of uniformity in CCI’s action involving leniency casers.

Emails sent to CCI and HP India remained unanswered.

“Since the inception of leniency regime, the CCI has received over 20 leniency applications, and more often than not, it has granted a 100% penalty reduction to the first leniency applicant. In one case, even though the leniency application was filed at a relatively later stage, after the CCI had already commenced its investigation into a cartel in the paper manufacturing industry, the applicant was still granted a 100% reduction in penalty on account of the information and cooperation provided by the applicant,” said Aparna Mehra, partner, Trilegal.

CCI alleged HP had rigged government tenders on the GeM portal instead of letting resellers compete fairly on price. It further said HP controlled the entire process by telling resellers what prices to bid and setting up fake cover bids to make sure pre-selected favorites won. There are also allegations of abuse of power as they were giving mandatory authorization certificates only to friendly resellers while withholding them from outside competitors.

"Leniency programs save the CCI critical time and resources. To mature our enforcement regime, we must secure market confidence and that requires the regulator to honor the primary whistleblower with full immunity in a case like this” said Pranjal Prateek, Partner at Khaitan & Co.

Apart from HP India, CCI also imposed a cumulative penalty of Rs3.5 crore on several of its authorised dealers. The case pertains to manipulation of Government e Marketplace (GeM) tenders between 2017 and 2020. The probe found these authorised dealers were coordinating bid prices in such a way to ensure a chosen seller wins the bid and their rivals don’t win the bid.

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