

**COMPETITION COMMISSION OF INDIA**

Case No. 36 / 2010

Dated 22.06.11.

**Filed by:** **Singhania & Partners LLP**, Advocates & Solicitors.  
H-186, Sector 63, Noida- 201301, NCR-Delhi,

**Against:** **1. Microsoft Corporation (I) Pvt Ltd.**  
Through Managing Director, 9th Floor, Tower A, DLF Cyber Greens,  
Gurgaon -122 022.

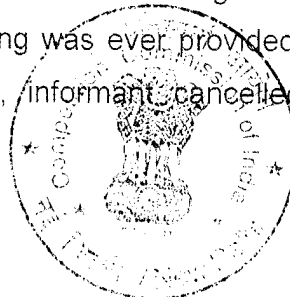
**2. Embee Software Pvt Ltd.**  
Through, Managing Director, 118, 1<sup>st</sup> Floor, Near J.P.House,  
ShahpurJat, Khel Gaon Marg, New Delhi-110049.

**Order u/s 26(1) of Competition Act, 2002**

**As per Member R. Prasad (Dissenting)**

1. The present information has been filed under section 19 (1) (a) of the Competition Act, 2002 (hereinafter referred to as 'the Act') on 30<sup>th</sup> August, 2010 by the informant for instituting an investigation into alleged abuse of dominant position and anti competitive agreements indulged into by the opposite parties named hereinabove.

2. The informant is a limited liability partnership of advocates and solicitors which placed orders for "Microsoft Vista Business" under original equipment manufacturers (OEM) category through a dealer of the Microsoft i.e. opposite party no. 2. For this, the informant paid 50% of the price as an advance to the dealer. However, the informant was later told by the opposite party no.1 that the informant has wrongly placed an order under the OEM category for which the informant firm was not eligible and instead it was eligible for the "Volume license category". The price difference in the two categories was quite substantial and it costs around double of the OEM price, though the products are same. According to the Informant no reasonable justification for this differential pricing was ever provided to them by the opposite parties. Left with no other choice, informant cancelled its earlier



purchase order and placed a fresh order under "Volume license category" informing the opposite parties of its right to a legal recourse.

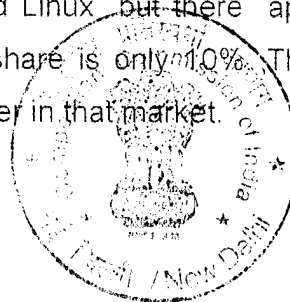
2. Another allegation leveled against the opposite parties is that the informant purchased the "Microsoft Office Professional 2007" from a website alleged to be launched by opposite party no.1 "www.buyoriginalms.com". The Microsoft, however, has denied the ownership of this website. When the informant tried to install the above software, it was noticed that it could be used only with a new PC having 2007 MS Office Suite or component application software pre installed". As per the informant no such condition was ever mentioned while purchasing the product.

3. The informant, therefore, has alleged that :-

- i. The opposite party no.1 has abused its dominant position by directly imposing unfair, excessive and discriminatory prices on the consumers in the sale of the above two softwares and thereby contravened the provisions of Section 4(2)(a)(ii) of the Act.
- ii. The agreements between Microsoft and the Original Equipment Manufacturers infringe provisions of the Act by-
  - a) directly determining the sales price violating Sec.3(3)(a);
  - b) controlling the supply of software under Sec. 3(3)(b);

4. Though the information provided by the information providers is limited, it is the duty of the Competition authorities to take into account all the factors which are anti competitive even if they are not part of the information.

5. I have carefully considered the facts of the case, the averments made in the information as well as information available in public domain. It is found that Microsoft on the basis of its annual reports has around 80% of market share in the operating systems (Windows Systems). Though there are other competitors in the operating systems market e.g Apple, Google, and Linux, but there appears to be marginal competition as their combined market share is only 10%. Thus, there is strong possibility that Microsoft is a dominant player in that market.

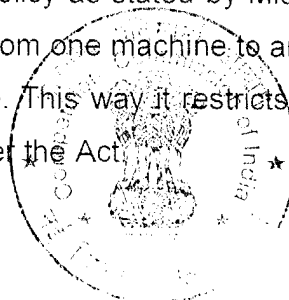


6. The Microsoft is selling its software packages under two different categories i.e. 'OEM category' and 'Volume License Category' having two different price structure. The price under Volume License Category is almost double that under the OEM category. The conditions laid down in selling the products under different categories i.e. through Original Equipment Manufacturer (OEMs), Volume Licensing or Full Packaged Product (FPP), even though the products are by and large same, with different price structure for the same product. Microsoft charges much lower price for software bundled into a new PC, but charges upto thrice of that for software purchased separately for an old PC. The difference is not enough to suffice as bulk discount and appears an attempt to exploit its monopoly in the software market, by exploiting one segment of buyers. This practice can be seen as unfair and discriminatory in view of the Act.

7. On the second issue that the desktop software packages of Microsoft which has 90% market share do not run smoothly on other operating systems and it can run only on windows Operating system of Microsoft. In order to mitigate competition in the operating system segment Microsoft is trying to protect its operating system (OS) market by making the software packages compatible only with windows Operating system of Microsoft. The blocking of interoperability with other OS can be considered as abuse of its dominance as prohibited under the Act.

8. This also came to our knowledge that the Volume license of the Microsoft can only be used as an upgrade for older version of Windows to incorporate the features of a new version of Windows. The Microsoft offered an upgrade version of Windows at price higher than the Full version of new Windows. The Consumer already having the older version will be bound to purchase full new version. This is the abuse of dominance by discriminating in terms of price and attracting likely infringement of the Act

9. Another possible practice as per the licensing policy as stated by Microsoft does not allow the OEM licensee to transfer the license from one machine to another even if the person is abandoning the use of old machine. This way it restricts the right of consumers which apparently violates provision under the Act



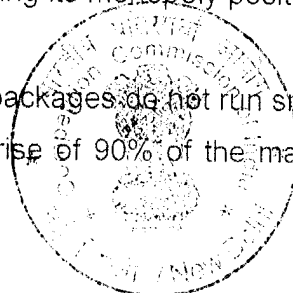
10 In accordance with the information available in the Public domain, a search was made for the price of Windows Vista Home Basic Version Full. In China the price of this product was USD \$72.53 in 2008 and same product is available at prices ranging between the \$100 - \$190 at various websites. Through this model Microsoft discriminates among the consumers which are seemingly against the spirit of the Act, which can only be substantiated through investigation under the Act.

8. Further, the OEM license is available only through the manufacturers, FPP for individual intending to buy for 5 or less PCs and Volume license only for upgradation. It creates a baffling situation for a customer who intends to buy more than 5 PCs. The only option left to him is to go for OEM. This in a way supports the sale of OEM and contributes in maintaining the monopoly of the Microsoft in the Operating system segment. Microsoft sells its office package to retail purchasers at a much higher price than what it charges to OEMs (i.e new machines). To have cheaper version of office package one has to buy a new PC. Thus, Microsoft is able to maintain retail price of its office package. Therefore the vertical agreement between Microsoft and the OEMs is a mutually beneficial deal, whereby they support each other to expand business and hinders competition in the relevant market.

9. Microsoft once has sold the softwares to the intermediaries (resellers) like Embee, even though it maintains full control on the prices of various software at which the resellers further sell to end users in the garb of licensing policy. This practice has every chance to restrict the competition in the market.

10. It also came to knowledge that In the State of Iowa and California at United States Microsoft was sued on behalf of consumers alleging that the Microsoft abused its monopoly position in the desktop computing market through price discrimination, overcharging and unfair competition for products such as Windows and Office thereby violating the respective states Antitrust Law. In 2007, Microsoft was ordered to refund the difference to volume licensees for abusing its monopoly position.

14. Further more it was also seen that Microsoft packages do not run smoothly on other operating systems. Since MS packages comprise of 90% of the market, such

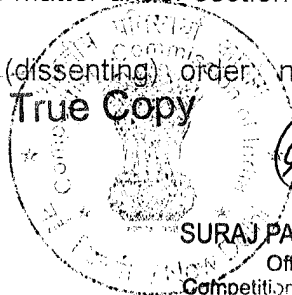


situation stunts the growth of other operating systems and also chokes development of other software. The practices adopted by the Microsoft appears to be limiting or controlling production, supply, markets and technical development. Therefore, its agreement with OEMs appears to attract infringement of the Act, 2002.

15. On through perusal of the information provided by the informant, material on record and submissions by the opposite parties, and also the information available in the public domain, I find substance to opine that there exists a prima facie violation of the Act related to abuse of dominance and anti competitive agreements and I am inclined to direct DG to investigate the matter under section 26 (1) of the Act

16. However, this is a minority (dissenting) order, no further compliance is required for the same.

**Certified True Copy**



*SP Gahlaut*  
30/6/2011

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