

COMPETITION COMMISSION OF INDIA

CASE NO. 36/2010

Dated 22.06.2011

Information filed by:

Singhania & Partners LLP

Against

1. Microsoft Corporation (I) Pvt. Ltd.,

2. Embee Software Pvt. Ltd.

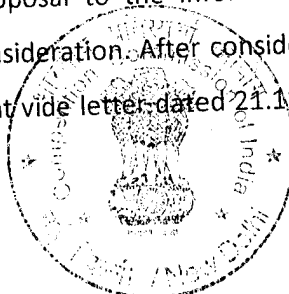
Order under Section 26 (2) of the Competition Act, 2002

The instant information has been filed by M/s Singhania & Partners LLP, (hereinafter referred to as the Informant) on 03.08.2010 under Section 19 of the Competition Act, 2002 (hereinafter referred to as "the Act"), against M/s Microsoft Corporation (I) Pvt. Ltd. (herein after referred to as "Opposite Party No. 1") and M/s. Embee Software Pvt. Ltd (hereinafter referred to as the "Opposite Party No. 2"), inter-alia alleging anti competitive conduct and abuse of dominant position by the Opposite Party No. 1 in the sale of Operating System and Office Suite Software.

2. The facts and the allegations as stated in the information, in brief, are as under:-

2.1 As per the Informant, the Opposite Party No. 1 is one of the world's leading multinational computer technology Corporation that develops, manufactures, licenses and supports a wide range of computer Operating Systems and other software products for computing devices.

2.2 The Informant has submitted that it required Microsoft products "Microsoft Operating System" and "Microsoft Office 2007" for the computers at its office. During the marketing calls with Microsoft, one of the executives forwarded the name of Opposite Party No. 2, who is one of the dealers of the Microsoft. Pursuant to discussion as to the requirement for the various licensed software and after understanding the requirement of the Informant, the Opposite Party No. 2 official vide e-mail dated 20.11.2008 sent a proposal to the Informant for "Microsoft Vista Business" and "MS Office 2007" software for consideration. After considering the said proposal received from Opposite Party No.2, the Informant vide letter dated 21.11.2008 placed an order



Informant also sent a cheque for Rs.1,97,250/- on 24.11.2008 towards 50% of the advance payment against the said order as requested by Opposite Party No.2.

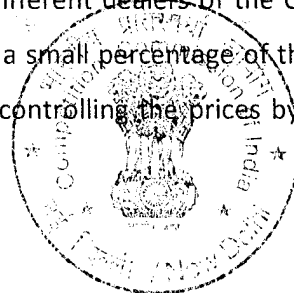
2.3 As per the Informant, subsequent to the placing of the order, the Informant was informed by one of the executives of the Opposite Party No. 1 that only the Volume licenses of the ordered products can be purchased and not the Original Equipment Manufacturer (OEM) Licenses, which are available only when a new machine is purchased.

2.4 As per the Informant, the above executive of the Opposite Party No.1 pressurized the Opposite Party No.2 to cancel the purchase order placed by the Informant. The above executive further directed the Informant to place an order for the volume licenses instead of OEM license. The Informant was also informed that the price for the volume licenses was almost double to the prices quoted for the OEM license, in spite of the fact that the products were same.

2.5 The Opposite Party No. 2 vide its email dated 27.11.2008 cancelled the order of the Informant and insisted to place another Purchase Order for the required software at the prices quoted for volume license. As per the Informant, due to the urgency of the software, the Informant placed the revised order with the Opposite Party No. 2 at the quoted higher rates of volume license amounting to Rs. 5,71,816/- excluding of taxes.

2.6 As per the Informant, if the same software is licensed to new computer i.e. OEM license then the same is cheaper and if it is licensed to existing computers i.e. Volume License, then the same shall cost more.

2.7 It is also submitted by the Informant that in another instance, the Informant on 20.01.2009 placed an online order for the purchase of Microsoft Office Professional 2007 Software after enquiring on the alleged web site of the Opposite Party No. 1. On receipt of the software, it was found by the Informant that the above software was labeled as "*for use only with a new PC with 2007 Microsoft Office Suite or component application software pre installed*". As per the Informant, at the time of the placing the order on the alleged web site of the Opposite Party No.1, there was no mention of such a condition. It has been alleged by the Informant that as per the aforesaid website of the Opposite Party No.1, different dealers of the Opposite Party No. 1 are selling the same product at different prices and a small percentage of them offers the same at the lowest price which appears to be artificially controlling the prices by the Opposite Party No. 1.



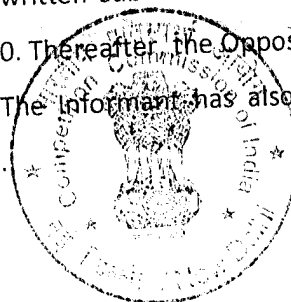
2.8 As per the Informant, it was noticed by him that on different dates, one dealer of the Opposite Party No.1 quoted the lower prices and the other quoted higher prices giving an impression to the buyer/customer that he is getting the lowest price available in the market.

2.9 It has also been alleged by the Informant, that Opposite Party No.1 is having a market share of 90% and a dominant firm in the market, it's over pricing in the name of volume license and coercing the Informant to buy volume license rather than OEM license, which was offered at double the price, in spite of the fact the product were same, is a violation of Section 4 (2) (a) (ii) of the Act, as there was a discriminatory pricing by the Opposite Party No. 1.

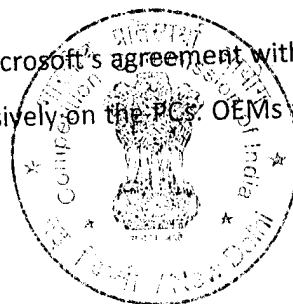
2.10 The Informant has also alleged that the Opposite Party No.1 has violated the provisions of Section 3 of the Act by imposing restriction on the consumer in acquiring license of Windows Operating System and thereby artificially controlling the supply and pricing of its products. It has been further alleged that the Opposite Party No.1 has entered into agreement with the original equipment manufacturers and offers them operating system at a rebate, this leaves an adverse impact on the market whereby all the other manufacturers of the Operating System will be eventually dragged out of the market because most of the computer shipped by the OEMs will be having pre installed Windows Operating System as per the agreement between the Opposite Party No.1 and OEMs.

3. On 18.08.2010, Amarchand Mangal Das & Shroff, Advocates on behalf of the Opposite Party No. 2 filed an application before the Commission and requested for an opportunity to inspect the case file and appear before the Commission before framing any opinion by the Commission. The above said request was considered by the Commission in its meeting held on 19.08.2010 and the permission as requested was granted to the Opposite Party No. 1.

4. On 20.09.2010, the Informant filed certain additional document which were the transcripts of conversation between the Informant and the Official of the Opposite Party No.1 . On 01.10.2010, the Opposite Party No. 1 through its Advocate, Amarchand Mangal Das, filed written submissions. The Informant on 08.11.2010 filed the rejoinder to the written submission filed by the Opposite Party No.1 and also filed additional Affidavit on 19.11.2010. Thereafter, the Opposite Party No.1 has filed its reply to the rejoinder filed by the Informant. The Informant has also filed the written synopsis of the argument advanced by him on 14.12.2010.

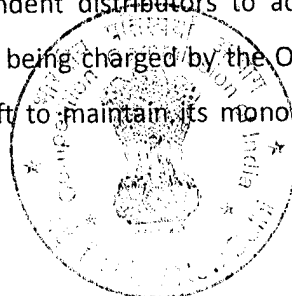


5. The Commission has carefully considered all the relevant material filed by the parties and the oral arguments advanced by the parties. The brief of the written submissions filed by the Opposite Party No.1 is dealt with in the ongoing paragraphs.
6. It is submitted by the Opposite Party No. 1 that the Informant has failed to raise a competition law concern in this case. As per the Opposite Party No. 1, it licenses its products through three main channels of distribution namely OEM, Volume License and Retail chain. Further, it has to protect its Intellectual Property Rights and prevent piracy of its products. Software is a form of an IP Right and Software licenses govern the usage and re-distribution of that property. As per the Opposite Party No.1 its relationship with its distributors and resellers is independent and does not create any principal-agent relationship. It sells its products/licenses to its distributors and resellers on a principal to principal basis.
7. As per the submissions of the Opposite Party No.1, it does not sell its products rather license them to its customers for specific uses on specific licensing terms. Further, it is the license itself which determines the nature of the product that is being granted to the customer. The licensing policy followed by it is its global policy, which is similar to the practices utilized by most IT firms, across the globe.
8. The Opposite Party No. 1 has submitted that the three aforesaid distribution channels are distinct with different licensing rights to maximize distribution efficiency. OEM distribution is the highest volume channels of Microsoft, It involves sales and distribution to branded PC manufactures and because of the size of its distribution channel, it offered the lowest royalty rates for Windows and Office software.
9. As per the Opposite Party No.1, OEM license are different in the nature than those purchased through other channels. OEM version of the Operating System may not be resold unless it is installed on a PC. OEM channel provides efficiencies such as installation, testing, support, warrantee, activation and updates and stability.
10. It is also submitted by the Opposite Party No. 1 that Microsoft's agreement with the OEMs does not require that OEMs can install Windows or Office exclusively on the PCs. OEMs are free to distribute

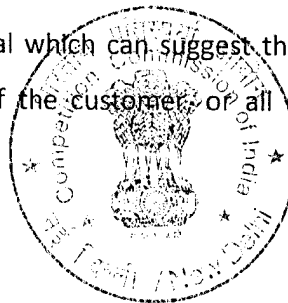


PCs with non Microsoft Software or without software at all. As per the Opposite Party No.1, approximately 30% of the PCs sold by OEMs in India have Windows preinstalled and less than 1% of PCs have licensed Microsoft Office software pre installed.

11. As per the Opposite Party No.1, Volume License channel is the most significant channel for businesses and other organizations. These are sold in larger volume and the customers can upgrade from older OEM or retail version to the most recent version of the Operating System. Volume Licensing customers do not provide with many of the benefits and services as compared with the OEMs, including the benefit of testing. In addition, Microsoft has to consider the cost of support for volume license customers, coupled with higher packaging costs.
12. As per the Opposite Party No.1, in its third distribution channel i.e. retail distribution it offers Windows and Office for sale through retailers, this is the lowest volume channel however, with highest cost.
13. The Opposite Party No. 1 denied each and every allegation leveled against it by the Informant and stated that the Informant and the Opposite Party No. 2 were informed by it that the Software licenses being purchased by the Informant were inappropriate for the intended use and requested the Informant to purchase the appropriate software licenses. Further, discounts for OEM channels are not unique to the software industry, the difference between the wholesale price and the retail price is common in every industry and offers greater benefits to the consumers.
14. In response to the written submissions filed by the Opposite Party No.1, the Informant filed rejoinder dated 08.11.2010 and reiterated all the facts stated earlier in the information. The Informant further submitted that the Opposite Party No. 1 is attempting to divert the Commission's attention to an irrelevant issue by raising the issue of protection of IP Rights and Piracy. As per written submissions of Informant, the network of distributors and resellers engaged by Opposite Party No. 1 are not independent and it exercises tight control over the network and pursues a highly interventionist policy in steering the so called independent distributors to act as per it. The Informant further submitted that different royalty rates being charged by the Opposite Party No.1 for different licenses is a strategy adopted by Microsoft to maintain its monopoly in the market under the garb of its licensing policy.



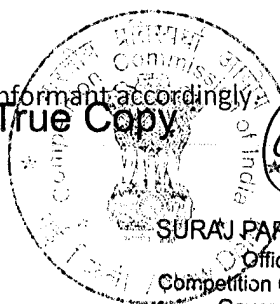
15. The Informant has also alleged that the licensing policy of the Opposite Party No. 1 is nothing but an artificial device for controlling the downstream distribution chain and a pretext for imposing unfair prices and conditions on consumers at the next level in the chain which is prohibited under the Act. The Informant has further alleged that the coordination between the Opposite Party No.1 and Opposite Party No.2 would qualify as a practice/ action to maintain resale price in the distribution chain and is therefore, violative of Section 3 (4) (e) of the Act. The Informant has also submitted that the global licensing policy is not uniform as claimed by the Opposite Party No.1.
16. The Commission has carefully gone through all the above submissions, documents and the other material filed by the parties. It is noted that the information is centered on the fact that the Opposite Party No.1 is selling the same product i.e Operating System and Office Program at different prices in the garb of its various licensing policies.
17. It is observed by the Commission that the Opposite Party No.1 is selling its various Software Licenses throughout the world and as per the submissions of Opposite Party No.1 the policy of selling these licenses is followed across the World by it. The Opposite Party No.1 has also submitted that it is licensing its products through three channels which are different in pricing, royalty, intended use of the user and efficiency etc. The Commission has carefully considered the various arguments advanced by the parties and observed that there is nothing adverse which can contradict the above submissions of the Opposite Party No.1.
18. The Commission, *prima facie*, has not found any substantial material which can establish that the different pricing policy adopted by the Opposite Party No.1 in respect of different types of licenses raises any competition issue. There is nothing on record which could *prima facie* indicate that the three types of licenses which are being sold by the Opposite Party No.1 through its dealers/ retailers are actually similar to each other and there is no difference between these licenses. Further, the Informant has also not placed on record any material which can suggest that the aforesaid three licenses are similar on the basis of intended use of the customer, or all are equal in terms of efficiency, royalty and on technical aspects.



19. The Commission also does not find any material which could indicate that because of the dominant position of the Opposite Party No.1 in the Operating System and its agreement with the OEM manufacturers, it has driven any competitor out of the market. Further, the Informant has himself admitted in his information that all the dealers are quoting different rates of the same product of the Opposite Party No.1 therefore, *prima facie*, there cannot be any resale price maintenance restraint existing.
20. It is important to note that the Informant has not been able to bring any cogent evidence on record to show that the Opposite Party is abusing its dominant position in the relevant market and the conditions imposed by it are violative of the provisions of Section 4 of Act. The allegations and averments made by the Informant have not been supported and corroborated in material particulars by any reliable evidence. In this respect, in the absence of any material to the contrary, the Commission sees no reason to disagree with the explanation offered by the Opposite Party No .1 on its policy relating to different distribution channels.
21. The Commission, therefore, is of the opinion that the Informant has failed to make out a *prima-facie* case for making a reference to the Director General for conducting investigation into the matter under Section 26 (1) of the Act and the proceeding related to the instant case deserve to be closed forthwith.
22. In view of the above discussion, the matter relating to the information is hereby closed under Section 26 (2) of the Act.

23. Secretary is directed to inform the Informant accordingly.

Certified True Copy



SURAJ PARKASH GAHLAUT
Office Manager
Competition Commission of India
Government of India
New Delhi

SP
Gahlaut
30/6/2013

8