

## RESPONSE TO WORKING PAPER

# CCIA response to public cloud infrastructure services market investigation licensing practices working paper

The CMA [working paper on licensing practices](#), an area where CCIA and a number of associations and companies have argued for reform, considers a range of remedies. In this short note we aim to set out thoughts on the different options laid out in the working paper and the advantages and limitations we see with each of them.

## Overall approach

In general, we would argue for an approach that reflects the specific circumstances applying in the case of software licensing:

- **Relevant to legacy software** - the problem reflects the licensing conditions applied to existing software and to be effective a remedy will need to address customers that are already experiencing some degree of lock-in, not only those that might in future.
- **Simple for customers** - ideally a remedy will not require extensive negotiation or legal action by individual cloud customers; regulators and competing cloud providers may in some cases be better-placed to ensure infringements are identified and responded to appropriately.
- **Comprehensive** - there are a range of means by which licensing terms for legacy software can restrict the choices of customers in ways that either directly or indirectly (by impeding their ability to choose alternatives) raise quality-adjusted prices. If only some of those means are limited, this may simply lead to other restrictions being used to extract the same rents.

In light of that, we believe that some of the remedies identified by CMA are likely to be particularly effective and a mix of approaches is likely to be required.

## Remedies considered in the working paper

### Remedy 1: Non-discriminatory pricing of Microsoft software products, regardless of which cloud infrastructure they are hosted on

This remedy addresses a number of the conditions described above, particularly if there is a combination of specific rules and wider principles. For example, prohibiting discrimination in wholesale pricing is extremely simple from a customer perspective, as it diminishes the prices charged to cloud providers and customers benefit as a consequence without needing to take further actions themselves. However a broader set of principles (such as [Principles of Fair Software Licensing](#)) can complement this by preventing workarounds that produce the same costs or constraints on customer choice.

CMA notes that establishing the suitable point of comparison for prices would be complex. This is right but further speaks to the merit in addressing this sort of wholesale pricing as there are providers that can engage with this process and inform a CMA process that arrives at the right scope for a non-discriminatory price.

The main limitations on this remedy are that (a) listed providers (Microsoft's closest competitors) would still need to host certain software on dedicated hardware, meaning they will have artificially higher costs than Microsoft; and (b) Microsoft would still be able to use software assurance as a means to monetise the transfer of its licences to other providers. CMA may want to bear this in mind as it seeks to avoid workarounds and the need for multiple rounds of interventions to address these issues.

The risk identified by the CMA, that a requirement for non-discrimination would lead to higher prices, is important but could be limited in practice if other barriers to switching created by restrictive software licensing practices are addressed. In that case, customers would be able to respond to any increase in prices by finding other providers. This reinforces the merits of a mixed approach.

## **Remedy 2: Allowing customers to transfer previously purchased Microsoft software products to the cloud infrastructure of their choice without additional cost**

This remedy has the advantages of both being clearly practical, it would in large part restore commercial practice to where they have stood in the past, and impactful in terms of mitigating barriers to switching. In our view, it should be the central remedy in this case and would give customers easily-comprehensible rights that will address the barriers to their switching.

This will eliminate barriers at the level of customer choice, however, not discriminatory pricing that might distort how those choices are exercised. This means again a mixed approach may be and prohibitions on discriminatory practices (i.e. Remedy 1) are a suitable complement. As above, software assurance costs will provide a means for Microsoft to monetise software licences being used with other providers, could reestablish barriers to competition and might be an area that CMA wishes to scrutinise in terms of potential workarounds.

## **Remedy 3: Increasing price transparency in relation to the use of Microsoft software products on Azure and third party cloud infrastructure**

Pricing transparency is often a helpful measure and could be a useful part of an overall package of measures to address restrictive licensing practices. However, the impact if required in isolation should be treated cautiously. The problems reflect decisions that have often been made some time ago and in the context of markets where there have historically been limits in competition.

Transparency can help customers make better-informed choices now, but if those choices are genuinely limited due to restrictive licensing competitions, or transparency reveals pricing



distorted by discriminatory terms, it will only reinforce the impact of those remaining restrictions.

## **Remedy 4: Parity of Microsoft software products and product functionality for use on Azure and third party cloud infrastructure**

As with Remedy 1 this might be most effective with a mix of specific requirements (to spur immediate action) and principles (to avoid workarounds that undermine the effectiveness of the intervention). Within this, we can separate two kinds of interventions:

- (1) Where terms explicitly limit functionality, or diminish the customer offer when working with other products, this might include whether or not the provision of support and patches explicitly favours legacy products. In this case there are fewer plausible technical obstacles to doing so and there is a strong case for requirements such as the CISPE principle of Permitting Fair Software Transfers.
- (2) Where there might be a requirement for interoperability with legacy software functions, this might include tools such as Active Directory. In this case (as with technical barriers more widely), the distinction might be whether (a) existing standards (either explicit, or in the form of longstanding technology norms) mean that changes can be implemented easily, making these more akin to licensing restrictions, or (b) it would require the creation of standards that do not yet exist, where the CMA and other regulators might need to play more of an encouraging and convening role to avoid distorting commercial relationships.