MICROSOFT RESPONSE - 17 May 2013

Public Consultation on Proposed Technology Transfer Package

I. Introduction

On 20 February the European Commission (Commission) published for public consultation a draft revised technology transfer block exemption regulation (draft TTBER) and draft revised guidelines on technology transfer agreements (draft Guidelines) inviting interested parties to submit comments by 17 May 2013. Microsoft welcomes this opportunity to comment on the drafts and share with the Commission its views on a limited number of elements that it believes are of particular importance to the ITC industry.

Microsoft is pleased that the draft TTBER and Guidelines largely continue to provide a valuable, established analytical framework that acknowledges the pro-competitive effects of licensing and enables licensors and licensees to enter into stable relationships that provide clear freedom of action necessary for innovation. Promoting such stability is critical to resolving the patent litigation that has engulfed the ITC industry, and mitigating its harmful effects, while promoting healthy competition. As the draft Guidelines acknowledge, “in sectors where large numbers of patents are prevalent licensing often occurs in order to create design freedom by removing the risk of infringement claims by the licensor. When the licensor agrees not to invoke its intellectual property rights to prevent the sale of the licensee's products, the agreement removes an obstacle to the sale of the licensee's product and thus generally promotes competition.”

Microsoft also commends the Commission for its inquiries into the abuse of standards essential patents (SEPs). We think it is very important, however, not to conflate SEPs with other patents and, moreover, that arrangements involving non-SEPs should not be subject to the same competition analysis. The exercise of patent power over standards presents unique competitive risks simply not present in other contexts. Entities and organizations rely on FRAND commitments to make informed choices in creating and adopting complex technical standards that take many years to develop that drive widespread implementation and interoperability. Entities that hold SEPs thus have unparalleled “hold up” power often vastly disproportionate to the value of the corresponding innovation. Accordingly, those that have made RAND commitments must be held to their promise not to exercise that hold up power.

Microsoft is concerned that a few elements of the draft TTBER and Guidelines are likely to have unintended adverse consequences for procompetitive licensing within the EU or that may inadvertently lead to confusion regarding the SEPs and other patents. Our response

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1 See e.g. draft Guidelines ¶17.
focuses on the following issues: Section II addresses the proposed treatment of termination for challenge clauses generally. Section III addresses the proposed treatment of settlement agreements, particularly terms relating to patent validity challenges. Section IV addresses the treatment of non-SEPs patents with respect to technology pools. Finally, section V covers licensing of software copyright and prevailing licensing models in the industry.

II. Non-challenge Termination Clauses

Article 5(1)(b) of the draft TTBER proposes to exclude from the safe harbour of the block exemption contract provisions that entitle a party “to terminate the technology transfer agreement in the event that the other party challenges the validity of any of the licensed intellectual property rights which a party to the agreement holds in the European Union.”

The draft Guidelines explain that “such a termination right can have the same effect as a non-challenge clause, in particular where the licensee has already incurred significant sunk costs for the production of the contract products or is already producing the contract products. In these cases, the licensee may be deterred from challenging the validity of the intellectual property right as it would risk the termination of the licensing agreement and thus face significant risks which go far beyond its royalty obligations.”

This is a very significant change compared to the current TTBER and its predecessor Regulation 240/96 which block exempt(ed) termination clauses.

Microsoft submits that this proposed change is unwarranted in all cases that do not involve SEPs and is likely to have unintended adverse consequences. In the case of SEPs, the FRAND commitment in itself entails a promise to license that should not be broken even if the licensee challenges the validity of a licensed SEP. Thus we agree that specifically with respect to licenses for SEPs no-challenge termination clauses should not benefit from the block exemption.

Termination clauses are very common in license agreements and promote stable commercial relations throughout term of the agreement. It is highly disruptive when a commercial bargain that has been struck can be reopened by one of the parties. When a licensee challenges the validity of the licensed intellectual property, it strikes at the very subject-matter of the agreement and potentially depriving the licensor of the right to respond by terminating the license has serious consequences for both existing and future license agreements. While licensees may be well-placed to determine whether or not an intellectual property right is invalid, they should be incentivised to make that assessment before the license agreement is concluded. Licensees should not be encouraged to wait by changes to the TTBER that make it difficult for the licensor to respond to a challenge by severing the commercial relations with the challenger.

3  ld., ¶125.

4  Article 5(1)(c) of Regulation 772/2004 provides that the block exemption applies to agreements “providing for termination of the technology transfer agreement in the event that the licensee challenges the validity of one or more of the licensed intellectual property rights.” Article 2(15) of Regulation 240/96 provides that the block exemption applies to “a reservation by the licensor of the right to terminate the agreement if the licensee contests the secret or substantial nature of the licensed know-how or challenges the validity of licensed patents within the common market belonging to the licensor or undertakings connected with him.” According to Regulation 240/1996 such provision is “generally not restrictive of competition”.

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Termination rights should be seen in the light of the general rule in EU competition law that (save in exceptional circumstances) firms are free to decide with whom to deal (unless they have made a SEP related FRAND licensing commitment). When a contracting party challenges the very subject matter of the agreement and the licensor’s property right, the licensor must be entitled to respond by terminating the agreement save in exceptional circumstances. The TTBER enables intervention in such circumstances in two ways. First, the block exemption is limited by market share thresholds that serve to enable individual assessment under Article 101 TFEU in cases where the parties have a certain degree of market power. Second, Article 29 of Regulation 1/2003 empower the Commission and national competition authorities to withdraw the benefit of the block exemption where an exempted agreement infringes Article 101 TFEU. Thus, the existing framework is sufficiently flexible to ensure effective intervention in the rare case that a termination right restricts competition.

The proposed amendment of Article 5(1)(b) sends a strong signal to technology holders that termination clauses may well be problematic and more so than other license terms such as non-compete obligations that are and remain block exempted. The general rule is that all license restraints are block exempted subject to the market share thresholds. The only exception is the limited number of hard core and excluded restrictions. Exclusion signals that the restraint is more suspect that other licensing restraints. It is submitted that there is no valid basis for including termination rights in this category of restraints.

The position taken in the draft TTBER appears to be inspired by recent cases involving standards-essential patents (SEPs) and Microsoft shares the Commission’s concern that licensees should not be unduly restricted in challenging the validity of SEPs. However, in Microsoft’s view this concern is adequately addressed by the fact that the exemption under the draft TTBER is subject to market share thresholds. Since there are no substitutes for SEPs, holders of such patents will not benefit from the block exemption due to their market shares. In Google/Motorola Mobility the Commission took the view that each SEP can be considered as a separate market in itself as it is necessary to comply with a standard and thus cannot be designed around, i.e. there is by definition no alternative to or substitute for each such patent. Moreover, the specific concerns regarding SEPs can be addressed by limiting the exclusion from the safe harbour to such patents.

A. Existing Agreements

Existing licence agreements containing termination clauses were concluded on the assumption that such clauses are highly unlikely to raise competition concerns. Termination clauses were white listed in Regulation 240/1996, implying that they are “generally not restrictive of competition”, and block exempted by Regulation 772/2004. Thus, for the past 20 years the Commission has given licensors a high degree of comfort that termination rights

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6 See Microsoft’s complaint against Motorola Mobility Inc. (MMI) of 22 February 2012 and its reply of 6 June 2012 to MMI’s complaint response.
7 Case No COMP/M.6381 – Google/Motorola Mobility (2012), ¶61.
8 See footnote 6 above.
do not raise competition concerns under Article 101 TFEU. The proposed exclusion of termination rights risks destabilising a large number of existing agreements and exposing the licensor to opportunistic behaviour by the licensee (see below).

The proposed change is subject to the transitional period in Article 10 of the draft TTBER such that termination clauses in existing agreements would remain block exempted until 31 March 2015. The transitional period gives parties to existing agreements a period of time to renegotiate the agreement but does not in Microsoft’s view address the fundamental problem that existing agreements become exposed to claims that the licensed intellectual property and the termination clause are invalid without this risk being reflected in the commercial terms of the license. The Commission should at the very least consider limiting the application of the proposed new rule to agreements concluded after the entry into force of the revised TTBER. Otherwise there is a significant risk of destabilising license agreements that were concluded in reliance of the Commission’s previous view that termination clauses generally do not restrict competition.

Article 4(3) of the draft TTBER confirms that a distinction between existing and new agreements is consistent with the legal framework of block exemptions and that the Commission is prepared to make such distinction where bona fide license agreements would otherwise risk being destabilised. The proposed distinction would in Microsoft’s view be consistent with the fact that termination rights are very common and the Commission’s view that the great majority of license agreements are compatible with Article 101 TFEU.\footnote{Draft Guidelines, ¶19.}
B. New Agreements

In Microsoft’s view the Commission should also block exempt termination clauses in new agreements and thus maintain the rule contained in Article 5(1)(c) of Regulation 774/2004. It is submitted that the proposed new rule unduly favours licensees and risks making it more difficult to achieve durable patent peace. It is submitted further that the Commission’s competition concerns are adequately addressed by the market share thresholds which ensure that termination clauses are subject to individual assessment when “the licensed technology is valuable and therefore creates a competitive disadvantage for undertakings that are prevented from using it or are only able to use it against payment of royalties.”

The proposed changes would expose in particular smaller licensors to opportunistic behaviour

The exclusion of termination clauses from the safe harbour of the TTBER is particularly likely to expose smaller technology companies to undue pressure from larger licensees. The validity of intellectual property rights is often far from clear cut. Thus, there is considerable scope for making invalidity claims that in the end would be rejected by the courts. However, the path is very costly litigation. Thus, there is a clear risk that licensors would succumb to licensee demands if in addition to incurring litigation costs they must continue licensing the challenger until the matter is resolved.

Imagine a small innovative company that licenses its technology to a licensee that undertakes to use the licensed technology in a production process against payment of a per unit royalty of 2.5% of the selling price of the products incorporating the licensed technology. The royalty provides funding for further R&D and expansion of the licensor’s business. The license is exclusive and granted for the term of the licensed patents. Three years into the agreement the licensee informs the licensor that it intends challenge the validity of the licensed patents but that it is willing to reconsider if the royalty rate is reduced to 0.25%. The licensee also makes clear that it intends to challenge under Article 101 TFEU any termination of the license because it would prevent it from challenging the licensed intellectual property and force it to pay royalties for intellectual property that might be invalid. The licensee points to the fact that termination rights are excluded from the EU block exemption regulation because the Commission considers such clauses problematic. Unable to afford expensive litigation, the licensor agrees to the licensee’s demands.

The licensor would remain exposed even if it decides not to cave in to the licensee’s demands. If it terminates the license it runs the risk that a court relying on the Commission’s statements in the draft Guidelines finds that termination was contrary to Article 101 TFEU and awards damages. If due to this risk the licensee refrains from terminating the agreement due to the challenge, it is forced to deal with a licensee that is challenging its intellectual property rights with the following consequences:

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10 Id., ¶123.
11 If the license is terminated for other reasons, the licensee is likely to challenge it as being caused by the validity challenge.
• If, as in the above example, the license is exclusive the licensor is prevented from contracting with another licensee for the duration of the challenge which may be a very lengthy process.

• Even if the license is not exclusive a potential new licensee may be reluctant to accept a license if it has to face direct competition from the incumbent licensee or do so only at a substantially reduced royalty.

As these examples illustrates, the proposed change affects the parties’ relative bargaining power and one-sidedly favours licensees. While invalid intellectual property rights should be eliminated, this objective should not be promoted by a rule that deprives licensors of the means to react to challenge by their licensees. It is submitted that the rule reflected in Article 5(1)(c) of the current TTBER strikes a reasonable balance. Non-challenge clauses are subject to individual assessment regardless of market share while termination rights are block exempted. The licensee is free to challenge validity but in general cannot invoke EU competition law to force the licensor to maintain the license despite the fact that the licensee is challenging the very subject-matter of the agreement and the licensor’s property rights.

**The proposed change would makes it more difficult to achieve patent peace**

Since the adoption of the current TTBER and Guidelines it has become increasingly clear that there is a need to promote patent peace between technology owners such that they can each develop their respective technologies without the risk of infringement claims. Licensing arrangements are often an effective way to avoid escalation of disputes or bring them to an end. EU competition law should encourage arrangements that seek to achieve and maintain patent peace.

The draft Guidelines helpfully make clear that licensing to ensure design freedom is generally procompetitive and that non-challenge clauses in settlement agreements generally fall outside Article 101(1). However, this more favourable view of non-challenge clauses is limited to settlement of disputes, whereas licensing often occurs to avoid disputes in the first place. Such licensing would be subject to the proposed rule in Article 5(1)(b) of the draft TTBER that not only excludes non-challenge clauses from the safe harbour of the block exemption but also proposes to treat termination rights in the same way. This is likely to reduce incentives to enter into procompetitive patent peace arrangements. Durable patent peace cannot be achieved if the parties remain free to challenge each other’s intellectual property rights without risk of termination since it allows a party to rescind on the agreement at any time without consequence.

Imagine two companies A and B that each develop and sell smartphones. The devices offer a large number of features that incorporate numerous patented technologies. Each company has a significant portfolio of patents that read on a number of these technologies. In order to ensure that they can each develop their respective products without interference from the other party, they license each other their respective portfolios. The parties agree that A’s portfolio is more valuable than B’s portfolio. As a result, B agrees to pay a net royalty to A. Several years after the conclusion of the agreement B’s device business starts declining and it decides to focus on monetising its intellectual property. Therefore, it decides to challenge the

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12 *Id.*, ¶¶ 17 and 226.
validity of a number of A’s key patents, claiming that since these patents are invalid A must start paying net royalties to B. B also claims that any termination of the license by A while the dispute is pending would infringe Article 101 TFEU referring to the exclusion of termination rights from the benefit of the block exemption. A disputes B’s claims and retaliates by challenging a number of B’s patents. B escalates the dispute by seeking injunctions against A’s products and A responds in the same fashion. The dispute spins out of control.

It is submitted that the prospects of preserving patent peace is substantially improved if it is clear that save in exceptional circumstances termination clauses involving non-SEPs are valid and enforceable. Moreover, given the benefits of avoiding destructive patent disputes through licensing the Commission may want to consider making an exception to the general exclusion in Article 5(1)(b) of non-challenge clauses from the safe harbour of the block exemption. It is submitted that non-challenge clauses and termination rights (to the extent that the latter raise issues at all) are mainly an issue in the context of non-reciprocal licenses involving licensees that lack the resources or ability to screen ex ante the validity of the licensor’s intellectual property rights. In such circumstances there is a risk that a non-challenge clause “creates a competitive disadvantage for undertakings that are prevented from using [the licensed technology] or are only able to use it against payment of royalties.”

It is submitted that in general such risk is not present when licenses are granted to create patent peace. Such arrangements generally involve reciprocal licensing between sophisticated companies and the purpose of the arrangement is to ensure that each party can develop its own technologies and products. It is recalled that Article 4(1) of the draft TTBER already distinguishes reciprocal and non-reciprocal licensing. Microsoft submits that the Commission should introduce a similar distinction in Article 5(1)(b) of the proposed TTBER in order to extend the benefit for the safe harbour of the TTBER to agreements that promote design freedom and patent peace between technology holders.

III. Settlements, Non-challenge Clauses and Financial Inducements

The proposed Guidelines provide that non-challenge clauses in settlement agreements may be anticompetitive under specific circumstances, giving the example of the case “where the licensor knows or could reasonably be expected to know that the licensed technology does not meet the respective legal criteria to receive intellectual property protection, for example where a patent was granted following the provision of incorrect, misleading or incomplete information.”

Microsoft agrees that Article 101 TFEU should preclude the application of a non-challenge clause agreed as part of a settlement when the licensor knows that the licensed technology does not meet the respective legal criteria to receive intellectual property protection. In such circumstances there is no legitimate interest in protecting the settlement that has been concluded.

By contrast, it is submitted that this rule should not be extended to cases in which the licensor could reasonably be expected to know that the licensed technology does not meet the respective legal criteria to receive intellectual property protection. This standard is open-
ended and to some extent speculative and therefore risks unduly opening the door to *ex post* challenges of the intellectual property rights which were the centre of the dispute covered by the settlement.\(^\text{15}\) In order not to create disincentives to settle costly litigation any exception to the rule that non-challenge clauses in settlement agreements are compatible with Article 101 should be limited in scope and clearly circumscribed. In Microsoft’s view the proposed exception does not meet this standard.

The proposed language appears to be inspired by *AstraZeneca* and language used by the General Court in its judgment in that case. The General Court found that AstraZeneca “could not reasonably be unaware” that its conduct was misleading.\(^\text{16}\) However, when describing AstraZeneca’s conduct in view of the facts, the European Courts used terms such as “highly misleading”, “deliberately attempted to mislead” and “knowingly accepted [that the rights would not have been granted had the relevant facts been disclosed].”\(^\text{17}\) Thus, the conduct that the Commission took issue with in this case would clearly be caught even if §227 of the draft Guidelines was limited to circumstances in which the licensor knows that the licensed technology does not meet the respective legal criteria to receive intellectual property protection.

§227 of the draft Guidelines provides further that scrutiny of non-challenge clauses in settlement agreements “is also necessary if the licensor induces, financially or otherwise, the licensee to agree not to challenge the validity of the technology.” It is submitted that also this exception is insufficiently precise and therefore risks enabling parties to unduly reopen settlements by challenging the intellectual property rights that were the very subject-matter of the settlement. It is important that the Commission takes due account of the fact that in the ITC sector settlements very often involve an exchange of value between the parties and that such value is exchanged in order to achieve a settlement. For instance, the parties may cross-license or transfer intellectual property rights as part of the settlement. Since non-challenge clauses are inherent to settlements\(^\text{18}\) it would seem to be a simple matter for a party to argue that due to the exchange of value it is being induced not to challenge the validity of licensed technology. It is submitted that the proposed rule would create significant uncertainty regarding the stability of settlements without being necessary to protect competition.\(^\text{19}\) In the ITC sector, settlements are an essential tool to forge patent peace and design freedom.

In a similar vein, the statement at §223 of the draft Guidelines that “[s]crutiny is necessary if licensor provides an inducement, financially or otherwise, for the licensee to accept more restrictive settlement terms that would otherwise have been accepted based on the merit of the licensor’s technology” is highly likely to open the door to challenges and opportunistic

\(^{15}\) *Id.*, ¶226.

\(^{16}\) Case T-321/05 *AstraZeneca* [2010] ECR II-2805, ¶¶492 and 493.

\(^{17}\) Case C-457/10 P *AstraZeneca* [2012] ECR I-0000, ¶¶93 and 95.

\(^{18}\) See draft Guidelines, ¶226.

\(^{19}\) The proposed exception appears to be inspired by investigations into “pay for delay” settlements in the pharmaceutical sector, the concern being that non-challenge clauses might enable “evergreening” of products. See in this regard draft Guidelines, ¶223, and Final Report of the Pharma Sector Inquiry, ¶480. It is not for Microsoft to comment on competition concerns in a sector in which it is not active. However, the Commission should consider very carefully the consequences of addressing in general guidelines issues that are highly specific to a particular industry.
behavior by licensees. While the Commission seems to be inspired by “pay for delay” arrangements in the pharmaceutical sector, the proposed language is much broader, vague and open-ended. It provides an open invitation for any licensee to argue after the fact that the licensor’s technology doesn’t merit the restrictions it willingly agreed to.

IV. Patent Pools and Essential Patents

Section IV.4 of the draft Guidelines provides useful guidance as to which patent pools arrangement the Commission deems compatible with Article 101 TFEU. The distinction between “essential” and “non-essential” technologies is one the pillars of the analysis. The safe harbour set out in the draft Guidelines (¶244) applies only when the pool is limited to essential technologies. Moreover, one of the implication of pooling essential technologies is that the pooled technologies must be licensed to all potential licensees on FRAND terms. The draft Guidelines provide that “[a] technology can be essential either (a) to produce a particular product or carry out a particular process to which he pooled technologies relate or (b) to produce such product or carry out such process in accordance with a standard which includes the pooled technologies.” (Emphasis added) The addition of subsection (a) means that patents that are not SEP or even related to a standard or standards development process are nonetheless treated the same because they are somehow “technically essential” or “commercially essential”.

As noted in the preamble to this response, particular competition issues arise in relation to SEPs that are not applicable to non-SEPs. Accordingly, arrangements with respect to non-SEPs should not be subject to the same competition analysis. Standards such as the 3G and 802.11 wi-fi are often covered by hundreds (if not thousands) of patents, and are adopted by entire industries leading to long-term lock-in. Each individual SEP thus confers market power disproportionate to the particular innovation claimed by the SEP. As a consequence holders of SEPs generally make commitments to license on FRAND terms as a condition for having their technologies included in the standard. By contrast, patents that are not SEPs typically are not similarly contributed to the public effort and usually no FRAND commitment is made on which the industry or adopters are induced to rely. Moreover, and there is likely considerably greater scope for inventing around the technologies in question and efforts to do so promote inter-technology competition. Accordingly, the Commission should make clear in the draft Guidelines that competition concerns in relation to the pool includes SEPs are different from those that comprise non-SEPs. Among other things, arrangements regarding non-SEPs should not, for example, be subject to the FRAND safe harbour criteria set forth in paragraph 244 of the Guidelines.

V. Licensing of Software Copyright

The draft TTBER and Guidelines apply to technology transfers pursuant to which software is exploited for the production of goods and services, referred to as “contract products”.

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20 Draft Guidelines, ¶244(e). ¶250(b) provides further that “the stronger the market position of the pool, the more likely that agreeing not to license to all potential licensees or to license on discriminatory. terms will infringe Article 101.”

21 Draft Guidelines, ¶236.

22 See draft TTBER, Recital 7 and draft Guidelines, ¶42.
Licensed technology may be exploited by incorporating it into a contract product or by using it in a production process. By contrast, agreements involving the supply of software for resale (where the distributor does not acquire a licence to any rights in the software but only has the right to resell the copies) are agreements for the resale of goods. The latter are vertical distribution agreements falling within the Vertical Restraints Block Exemption Regulation (VBER) and related guidelines.

It is very helpful that the draft Guidelines (¶52) make clear that “the TTBER and the guidelines cover the licensing of software copyright where the licensee has the right to reproduce the software by incorporating it into a device with which the software interacts”. Licensing of software to an OEM for pre-installation on devices clearly involves a transfer of technology.

However, there are many other instances where software is licensed for incorporation it into a contract product or use in a production process that do not involve pre-installation on a device. For instance, when analysts like Gartner and IDC license Windows and Excel and use these software products to create pivot tables providing data analyses for clients or as part of industry reports, the licences are used for the purpose of producing services and therefore involve a transfer of technology.

It would be very helpful if the Commission would further clarify the notion of technology transfer in the revised Guidelines. Otherwise there is a significant risk that attempts will be made to disrupt prevailing software licensing models by arguing that they involve vertical agreements subject to the stricter regime of the VBER.

Agreements whereby software is licensed for the purpose of producing goods and services are fundamentally different from ordinary vertical distribution agreements. In particular, the user rights granted under such software licences are an important means of product differentiation that permits the licensor to cater to individual customer demand and the use that it makes of the licensed software.

For example, the licences that Microsoft conclude with OEMs grant a very particular set of rights, including the rights to reproduce and preinstall the software on a large number of devices (so that users do not have to do it themselves) and provide their customers with the means to re-install the software if it malfunctions. They also require OEMs inter alia to provide customer support.

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23 Draft Guidelines, ¶44.
26 See in this regard draft Guidelines, ¶46.
27 Approximately 15% of Windows-related support calls relate to difficulties experienced by users trying to install software.
28 The OEM licence fees reflect the fact that Microsoft’s own customer support costs are reduced significantly for customers acquiring integrated devices and software from OEMs.
Enterprises that use the software for productive purposes have different needs that are reflected in the license terms. Enterprise licensees obtain “volume licenses” from Microsoft that permit deployment of the licensed software many times across the licensees’ businesses, upgrading and replacing hardware, and reinstalling the software, at will to accommodate employee turnover and mobility. These licences grant rights to install the software by deploying a single desktop image simultaneously to many devices from a central deployment server (rather than having to deploy the software to one device at a time), reinstall the software in the event that devices need to be reimaged, replace devices and reinstall on new devices (which means that licensees are permitted to install many more copies than licensed), use a single activation key for all installations (so that there is no need to individually activate each installation against the Microsoft’s activation servers), centrally manage the licence, and manage upgrades for all installations (with a single point of contact). This flexibility reflects the fact that the software is licensed for productive purposes in a variety of circumstances.

This is the model used across the software industry: licensors offer a range of licences, each conferring rights that are tailored to the needs of a particular type of licensee. HP, for example, offers a Single Licence Pack (one installation key and the right to use a single copy of the software), Flexible Quantity Packs (that enable licensees to choose the number of copies they deploy), Pay as you go Volume Licences (again, for various numbers of seats) and Bundles with Hardware (combinations of software purchased together with the related hardware). IBM offers an even broader array of client licences, including Authorised User (use of the software by a specific user on any device), Concurrent User (use of the software simultaneously by a specific user), Floating User (use of the software by one user at a time on any device) and Client Device Licences (use of the software on a designated device). These models depend on tailoring rights granted, using limitations in the licences to do so.

The draft TTBER and Guidelines are sufficiently flexible to accommodate these licensing models and the associated tailoring to licensee needs. For instance, the exclusion from the hard core list of captive use restrictions\(^\text{29}\) enables licensors to provide the flexibility that licensees need without having to permit that this flexibility is used to make and sell additional copies of the software in direct competition with the licensor.\(^\text{30}\) By contrast, since the VBER does not exclude captive use restrictions from the hard core list, application of the vertical restraints rules to these instances of software licensing would undermine prevailing licensing models to the detriment of licensees.

Microsoft would be pleased to meet with the Commission to discuss the various issues raised in this response to the public consultation should it find it useful.

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\(^{29}\) See draft TTBER Article 4(1)(c)(vi) and 4(2)(b)(ii).

\(^{30}\) The draft Guidelines (¶204) provide helpfully that captive use restrictions are normally procompetitive: “In the absence of the restraint the licensor may not grant the licence or may do so only against higher royalties, because otherwise it would create direct competition with itself on the component market. In such cases a captive use restriction is normally either not restrictive of competition or covered by Article 101(3).”