

**FORMAL COMMITMENTS**  
**CASE COMP/C-3/39.692 – IBM (MAINTENANCE SERVICES)**

In accordance with Article 9 of Regulation 1/2003, International Business Machines Corporation (“IBM”) hereby voluntarily records in formal commitments (the “Commitments”) to the European Commission (the “Commission”) its current practices, effective since late July 2010 and confirmed to the Commission in writing on December 8, 2010, regarding the availability to Third Party Maintainers (“TPMs”) of LICCC-Enabled Replacement Parts and Machine Code Updates for IBM System z servers.

Nothing in these Commitments may be construed as implying that IBM agrees with the concerns expressed in the Commission’s preliminary assessment of August 2, 2011. Consistent with Article 9 of Regulation 1/2003, the Commitments are given in the understanding that the Commission will confirm that there are no grounds for further action and will close all open investigations in relation to maintenance services for System z servers. For the avoidance of all doubt, IBM strongly contests that it is dominant or that it has engaged in abusive conduct contrary to Article 102 TFEU, and these Commitments are without prejudice to IBM’s position should the Commission or any other party conduct proceedings or commence other legal action against IBM.

**I. Availability Of LICCC-Enabled Replacement Parts And Machine Code Updates**

IBM commits to maintain the expeditious availability to TPMs under commercially reasonable and non-discriminatory terms and conditions, for repair purposes,<sup>1</sup> of LICCC-Enabled Replacement Parts and Machine Code Updates for System z servers in the European Economic Area, as follows:

1. This commitment applies to all IBM System z machine models and types that have not been withdrawn from service by IBM (what is known as “end of service”).
2. IBM will enter into a contract, substantially containing the standard clauses provided in Annex A, with any TPM. The contract will be based on commercially reasonable terms and conditions and, among other things, provide for:
  - An obligation to supply TPMs in an expeditious manner with LICCC-Enabled Replacement Parts (and any LICCC Record Updates required to install such parts) under the terms and conditions outlined in Annex A, without any obligation on the part of the TPM to return the defective part.

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<sup>1</sup> TPMs can also continue to buy LICCC-Enabled Replacement Parts, other than Processor Parts, for stocking purposes, and thus build their own repair part inventories.

- An obligation to make Machine Code Updates available in an expeditious manner to TPMs acting on behalf of a Machine Code Licensee under the terms and conditions outlined in Annex A.
  - The possibility of specific performance and liability in case of late delivery of LICCC-Enabled Replacement Parts (and/or the LICCC Record Updates required to install such parts) or Machine Code Updates, as set out in Annex A.
  - The possibility for TPMs to opt for court enforcement or enforcement through arbitration proceedings, as set out in Annex A.
  - The invalidity of any modification or amendment of the substance of the standard clauses contained in Annex A, unless authorized by the Commission.
3. To facilitate dealings with TPMs, IBM has created the position of EU-wide TPM Relationship Manager. The TPM Relationship Manager acts as a contact point for TPMs and coordinates TPM-related issues internally within IBM. The TPM Relationship Manager is charged with assisting TPMs in resolving any questions, issues, or concerns regarding, *inter alia*, the availability of LICCC-Enabled Replacement Parts for IBM System z servers. In addition, the TPM Relationship Manager is charged with coordinating, documenting, updating, and maintaining IBM's business practices related to TPMs. The EU-wide TPM Relationship Manager can be contacted at [etpm@uk.ibm.com](mailto:etpm@uk.ibm.com).

## **II. Non-Circumvention**

These Commitments are intended to maintain the expeditious availability to TPMs for repair purposes, on commercially reasonable and non-discriminatory terms and conditions as set out in Annex A, of LICCC-Enabled Replacement Parts (and any LICCC Record Updates required to install such parts) and Machine Code Updates for current and future IBM System z servers during the term of these Commitments. IBM will not in any way circumvent or attempt to circumvent these Commitments.

## **III. Reporting**

IBM commits to provide the Commission with a report on the implementation of these Commitments each December during the term of these Commitments. The reports will in particular address any formal written complaints made by authorized representatives of TPMs to IBM concerning matters within the scope of these Commitments.

## **IV. Duration**

The term of these Commitments will be five years from the date of adoption of the Commission's decision under Article 9 of Regulation 1/2003.

## **V. Definitions**

"IBM System z" means, for purposes of these Commitments, IBM's z800, z900, z890, z990, z9, z10, and zEnterprise server series, and successor System z series during the term of these Commitments.

“LIC” means Licensed Internal Code as that term is defined in the IBM License for Machine Code. This is a type of machine code (i.e., code used in computer hardware to enable the hardware to function), which can be used, *inter alia*, to determine the capacity of certain IBM System z parts.

“LICCC-Enabled Replacement Parts” means, for purposes of these Commitments, (1) all field replaceable Processor Parts; and (2) other field replaceable spare parts that are activated at the purchased capacity configuration through the use of a LICCC Record that resides at the part level (e.g., Memory Cards for the z900 series, ISC-D Cards, and ESCON Channel Cards).

“LICCC Record” is a portion of LIC that is used to activate the purchased capacity configuration of certain System z parts.

“LICCC Record Update” means an update to the LICCC Record.

“Machine Code” means Machine Code as that term is defined in the IBM License for Machine Code.

“Machine Code Licensee” means Licensee as that term is defined in the IBM License for Machine Code.

“Machine Code Updates” means updates to a System z server’s Machine Code designed to resolve defects or safety issues.

“MCM” means a field replaceable multi-chip module.

“Processor Book” means a field replaceable physical package that contains processors, memory, and other components.

“Processor Parts” means Processor Books, SCMs, and MCMs.

“SCM” means a field replaceable single chip module.

“TPM” means a Third Party Maintainer that is not affiliated with or authorized by IBM but which offers repair services for IBM System z servers.

October 21, 2011

Duly authorized for and on behalf of IBM

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David L. Walsh, Vice President and Assistant General Counsel, IBM

## Annex A – Standard Contract Clauses

The contract referenced in Section I(2) of the Commitments shall be based on commercially reasonable and non-discriminatory terms and conditions and, among other things, substantially contain the following:

### 1. Clauses

- **Term.** This Agreement will expire no later than the date of expiration of the Commitments.
- **Sale And Delivery Of Parts.** Upon receipt of a valid order, and with credit authorization or a valid letter of credit in place, or against cash or cash-equivalent payment, IBM will sell LICCC-Enabled Replacement Parts to TPM. Subject to *force majeure*, IBM LICCC-Enabled Replacement Parts will be delivered to TPM at IBM's central spare parts stocking facility in Venlo (The Netherlands) within two hours from receipt of a valid order. Any LICCC Record Update required to install LICCC-Enabled Replacement Parts will be sent to TPM by email within the same two hour period.

For Processor Parts, TPM must submit an accurately completed standard order form known as "Annex 1" or "Annex 1a", depending on machine type, containing machine type, model number, and serial number. Orders for other LICCC-Enabled Replacement Parts must be placed by time-stamped fax or email. To obtain a LICCC Record required to install a part, the TPM must submit an accurately completed standard order form (known as "Annex 2").<sup>2</sup> TPM will be responsible for making and paying for all shipping arrangements (including insurance) from Venlo.

- **Availability Of Credit From IBM.** IBM may grant credit to TPM in its sole discretion. Applications for IBM credit may be submitted through TPM's local country sales office during normal business hours. The standard turnaround time is approximately 48 hours. Orders may be placed against credit outside normal business hours only with pre-approved credit authorization or a letter of credit in place from an EU-based financial institution with a Standard & Poor's credit rating of AA or better.
- **Refund For Parts Exchange.** TPM has no obligation to return the defective part when purchasing a LICCC-Enabled Replacement Part for repair purposes. If TPM chooses to return the defective part to IBM in unaltered ("as failed") condition within 30 days after IBM delivers a LICCC-Enabled Replacement Part to TPM in Venlo, however, IBM will return 10% of the purchase price. The refund will be credited to TPM after IBM receives the defective part.
- **Orders For And Use Of Parts For Repair.** TPM represents and warrants that it will use LICCC-Enabled Replacement Parts supplied by IBM exclusively to repair IBM System z servers in the European Economic Area that the rightful possessors of such System z servers have authorized TPM to

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Annexes 1, 1a, and 2 will be accessible on IBM's website.

repair. TPM represents and warrants that it will use Processor Parts supplied by IBM exclusively to repair the specific serial-numbered IBM System z server identified in the order for such Processor Parts.

Where there is an objective reason to doubt the accuracy of the data provided in connection with an order or the order otherwise appears abnormal (i.e., not a normal order for repair parts but an order that appears to be intended for manufacturing, modification, distribution, or any other purpose other than repair of an IBM System z server for the rightful possessor of that server), IBM may, within one hour of receipt of the order form(s), require that an authorized representative of TPM unconditionally confirm in writing (including fax or email) that TPM is authorized by the rightful possessor to repair the specific machine for which the part is being requested and that such part will be used by TPM to repair that machine. The order will not be valid, and IBM's obligation to deliver such part within 2 hours under Section "Sale and Delivery of Parts" will not be triggered, until receipt by IBM of such TPM confirmation.

- **Orders For and Availability Of Machine Code Updates.** TPM may order and use Machine Code Updates only if properly authorized by a Machine Code Licensee and exclusively for the benefit of such Machine Code Licensee. IBM will make Machine Code Updates available to TPM through SUL DVDs. SUL DVDs contain all Machine Code Updates released for the relevant machine type up to the SUL DVD's date of issuance. SUL DVDs are available for ordering on a quarterly basis or within two weeks from the release of a HIPER Fix. SUL DVDs can be ordered through normal IBM country sales channels and, with credit authorization or a valid letter of credit in place, or against cash or cash-equivalent payment, will be delivered within approximately three business days from receipt of a valid order (which must include the serial number of the machine for which a SUL DVD is ordered). IBM's online ECA Library (which contains notices of new Machine Code Updates) will be updated within approximately 2-3 business days from the release of a HIPER Fix and within approximately two weeks for other Machine Code Updates.
- **Orders For And Use Of LIC.** TPM may order and use LIC only if properly authorized by a Machine Code Licensee and exclusively (1) for the benefit of Machine Code Licensee; (2) for the installation of LICCC-Enabled Replacement Parts for repair purposes on a System z server rightfully possessed by Machine Code Licensee; (3) for the installation of Machine Code Updates on such a System z server; and (4) subject to the obligations that apply to Machine Code Licensee under the Machine Code License. IBM's consent to TPM's ordering and use of LIC is expressly conditioned upon the preceding conditions and upon TPM's continued compliance with all of the terms and conditions of the Machine Code License.

TPM represents and warrants that it will: (1) obtain signed, written authorization in hard copy form, to order and use LIC as described in the preceding paragraph, from an authorized representative of each Machine Code Licensee on whose behalf TPM orders or uses LIC; and (2) notify IBM immediately in the event that any authorization by Machine Code Licensee, in whole or in part, is withdrawn, expires, or otherwise terminates.

TPM represents and warrants that it will comply with all Machine Code Licensee obligations under the applicable Machine Code License as if TPM were the Machine Code Licensee. TPM will indemnify and hold harmless IBM from any claims, losses, damages, or causes of action brought by a Machine Code Licensee against IBM that arise out of TPM's activities in connection with LIC.

Without prejudice to an assertion by either party that any other breach of this Agreement constitutes a material breach, IBM and TPM expressly acknowledge that any breach by TPM of its obligations under this Section, "Orders For And Use Of LIC" will be a material breach of this Agreement.

- **Audits.** IBM will have the right to engage at its own expense a certified public accounting firm (the "Auditor") to audit whether TPM has obtained proper authorizations under Sections "Orders For And Use Of Parts For Repair," "Orders For And Availability Of Machine Code Updates," and "Orders for and Use Of LIC." The Auditor will sign a confidentiality agreement that permits the Auditor to disclose the results of such audits to IBM while preventing the Auditor from disclosing the identity of rightful possessors or Machine Code Licensees to IBM. Notwithstanding the preceding, the Auditor will be authorized to disclose to IBM the identity of any rightful possessor or Machine Code Licensee: (1) where TPM fails to cooperate with the audit (e.g., fails to respond promptly to the Auditor's requests for information or documents concerning TPM's authorization); or (2) from whom TPM has failed to obtain proper authorization if TPM fails to cure such failure within ten (10) days of the discovery of such failure by the Auditor.
- **Dispute Resolution.** In the event either TPM or IBM believes the other party has breached this Agreement, the party claiming breach or initiating the dispute (the "Claim" and the "Disputing Party") must complete the following procedure before commencing any litigation or arbitration proceedings, other than an action for equitable relief before the High Court of Justice in London, England.
  - The Disputing Party must provide the other Party with written notification and a detailed written description of the Claim. IBM's TPM Relationship Manager will meet with an authorized representative of TPM in person or by telephone within three (3) working days of the receipt of the written notification by the non-Disputing Party. At this meeting the parties will attempt to reach an agreement about the nature of the Claim and appropriate corrective action to be taken. If the parties reach agreement on a resolution of the Claim they will memorialize their agreement. If the parties do not reach agreement on a resolution of the Claim they will jointly memorialize their respective views of the dispute and their proposals to resolve it.
  - If IBM's TPM Relationship Manager and TPM's authorized representative are unable to agree upon a resolution to the Claim prior to the tenth (10th) working day after their first meeting, IBM's Vice President, Sales, Maintenance & Technical Services will meet with TPM's chief executive officer in person or by telephone within three (3) working days after such tenth (10th) working day to attempt to agree upon a resolution to the Claim.

- If IBM's Vice President, Sales, Maintenance & Technical Services and TPM's chief executive officer are unable to agree upon a resolution to the Claim prior to the tenth (10th) working day after their first meeting, either IBM or TPM may take commence litigation or arbitration to enforce its rights and remedies under this Agreement.
- **Equitable Relief (Including Specific Performance).** IBM acknowledges and agrees that monetary damages may not be a sufficient remedy for IBM's breach of its obligations to make (1) LICCC-Enabled Replacement Parts, (2) LICCC Record Updates required to install such parts, or (3) Machine Code Updates available to TPM, and that the failure to do so may cause TPM immediate, severe, and irreparable injury. Accordingly, IBM acknowledges that TPM will be entitled in such circumstances, without waiving or prejudicing any other rights or remedies, to such injunctive or equitable relief as the High Court of Justice in London, England may grant.
- **Arbitration.** Instead of court enforcement, TPM or IBM may opt for arbitration administered by the London Court of International Arbitration ("LCIA"), in accordance with its rules in effect at the time of arbitration, except as may be modified in this Agreement or by written agreement of the parties (the "Rules"). The arbitral tribunal will resolve disputes within a reasonable time, and will have the authority to award specific performance of this Agreement (but not any other form of equitable relief) as set out in Section "Equitable Relief (Including Specific Performance)" and damages, including the damages set out in "IBM Liability For Late Delivery Of LICCC-Enabled Replacement Parts." The arbitral tribunal shall have no authority to decide any matter other than the enforcement of this Agreement according to its terms, and will have no authority to award damages excluded by this Agreement or in excess of the limitations contained in this Agreement.
- **IBM Liability For Late Delivery Of LICCC-Enabled Replacement Parts.** In the event of any breach by IBM of its obligations under Section "Sale and Delivery of Parts" to deliver any LICCC-Enabled Replacement Part or send any LICCC Record Update required to install such part, IBM's total, sole, and exclusive liability to TPM for losses or damages (regardless of the legal theory upon which any claim for such losses or damages is based) will be limited to the following liquidated amounts:
  - A reduction of 10% in the purchase price of the LICCC-Enabled Replacement Part where such delivery or sending is late by more than one hour but fewer than or equal to 4 hours; or
  - A reduction of 20% in the purchase price of the LICCC-Enabled Replacement Part where such delivery or sending is late by more than 4 hours but fewer than or equal to 24 hours; or
  - A reduction of 50% in the purchase price of the LICCC-Enabled Replacement Part where such delivery or sending is late by more than 24 hours but fewer than or equal to 72 hours; or

- A reduction of 75% of the purchase price of the LICCC-Enabled Replacement Part where such delivery or sending is late by more than 72 hours.

The above liquidated damage provisions will not apply in the event late delivery is caused by an event of *force majeure*. The parties acknowledge that the foregoing amounts reflect their assessment of the losses or damages which TPM is likely to incur as a result of such breaches.

- **Limitations Of Remedies & Liability.** To the maximum extent permitted by applicable law, and except for IBM's liability to TPM for liquidated damages under Section "IBM Liability For Late Delivery Of LICCC-Enabled Replacement Parts," neither party will be liable for any indirect, incidental or consequential losses or special damages whatsoever, or for loss of profits, anticipated savings, business opportunity or goodwill or loss of data, (regardless of the legal theory upon which any claim for such losses or damages is based) arising out of or in any way connected to the acquisition or use of, or the inability to acquire or use, (1) LICCC-Enabled Replacement Parts, (2) LICCC Record Updates required to install such parts, or (3) Machine Code Updates, or otherwise under or in connection with any provision of this Agreement, whether arising out of negligence or otherwise. The foregoing exclusion applies even if a party has been advised of the possibility of such losses or damages in advance and even if any available remedy fails of its essential purpose, but does not apply to any infringement or misappropriation of either party's intellectual property rights. Nothing in this Agreement excludes IBM's or TPM's liability for death or personal injury arising from negligence.
- **Limitation Of Liability For Losses or Damages.** Both parties agree that except as expressly required by law without the possibility of contractual waiver, and except for IBM's liability to TPM for liquidated damages under Section "IBM Liability For Late Delivery Of LICCC-Enabled Replacement Parts," IBM's liability for losses or damages under this Agreement will in no event exceed (regardless of the legal theory upon which any claim for such losses or damages is based) five hundred thousand Euro (€500,000.00).
- **Choice of Law.** This Agreement and any non-contractual obligations or liabilities arising out of or in connection with it will be governed by and construed in accordance with the laws of England and Wales, without regard to their conflict of laws provisions.
- **Jurisdiction; Venue.** Subject to TPM's and IBM's ability to opt for arbitration in accordance with the terms of this Agreement, the courts of England and Wales will have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including a dispute relating to the existence, validity or termination of this Agreement or any non-contractual obligation arising out of or in connection with it). Any action or proceeding in respect of any such dispute or claim shall be brought before the High Court of Justice in London, England. Both IBM and TPM hereby consent to such jurisdiction and venue and agree that they will not directly or indirectly challenge either such jurisdiction or such venue.



- **No Third-Party Beneficiaries.** No entity or person will be a third-party beneficiary under this Agreement, notwithstanding any agreements contained herein that may operate to the benefit of such third party, and notwithstanding any status that IBM or TPM may have as a third-party beneficiary with respect to any third-party agreement.
- **No Amendment Without Prior Approval.** Any modification or amendment to these standard clauses will be invalid unless authorized by the European Commission.

## 2. Definitions

“Agreement” means the agreement that IBM, pursuant to Section I(2) of the Commitments, has committed to enter into with any TPM interested in providing maintenance services for IBM System z servers in the European Economic Area.

“Commitments” means the commitments that IBM has voluntarily submitted to the European Commission and that have been rendered binding by a formal Commission decision pursuant to Article 9 of Regulation 1/2003.

“ECA Library” means the online resource at <http://www-05.ibm.com/services/ecalib/library.html> that contains Engineering Change Announcements or “ECAs.”

“ECAs” means Engineering Change Announcements. These are communications of the release or availability of Engineering Changes.

“Engineering Changes” means machine updates designed to resolve known defects or safety issues, and may include new parts as well as Machine Code Updates.

“ESCON Channel Cards” means Enterprise Systems Connection channel cards.

“HIPER Fixes” means Machine Code Updates designed to address a “Hi Impact or Pervasive” (“HIPER”) problem.

“IBM System z” means IBM’s z800, z900, z890, z990, z9, z10, and zEnterprise server series, and successor System z series during the term of the Commitments.

“ISC-D Cards” means InterSystem Coupling Daughter Cards.

“LIC” means Licensed Internal Code as that term is defined in the IBM License for Machine Code.

“LICCC-Enabled Replacement Parts” means (1) all field replaceable Processor Parts; and (2) other field replaceable spare parts that are activated at the purchased capacity configuration through the use of a LICCC Record that resides at the part level (e.g., Memory Cards for the z900 series, ISC-D Cards, and ESCON Channel Cards).

“LICCC Record” is a portion of LIC that is used to activate the purchased capacity configuration of certain System z parts.

“LICCC Record Update” means an update to the LICCC Record.

“Machine Code” means Machine Code as that term is defined in the IBM License for Machine code.

“Machine Code License” means the IBM License for Machine Code.

“Machine Code Licensee” means Licensee as that term is defined in the IBM License for Machine Code.

“Machine Code Updates” means updates to a System z server’s Machine Code designed to resolve defects or safety issues.

“MCM” means a field replaceable multi-chip module.

“Memory Card” means a part in a computer that stores the information and processes that are taking place on that machine at any one time.

“Processor Book” means a field replaceable physical package that contains processors, memory, and other components.

“Processor Parts” means Processor Books, SCMs, and MCMs.

“SCM” means a field replaceable single chip module.

“SUL DVD” means Systems Update Level DVD. A SUL DVD contains all Machine Code Updates released by IBM for the relevant machine or Machine Code driver up to the date of issuance of the SUL DVD.