



# Executive Summary of CISPE Complaint against Microsoft

Anti-competitive practices including unjustified and discriminatory bundling, tying, self-preferencing pricing and technical and economic lock-in, continue to be used by dominant software companies to restrict the choice of European companies as they move to the cloud.

In particular, Microsoft uses its dominance in productivity software to direct European customers to its own Azure cloud infrastructure to the detriment of European cloud infrastructure providers and users of IT services.

Announcements made by Microsoft since May 2022, and changes to Microsoft licences, imposed from 1st October 2022, have done nothing to change this situation. Indeed, we believe these changes exacerbate the harms and introduce new forms of tying, lock-in and removal of choice for customers.

The market share of European cloud infrastructure providers has halved in the last 5 years even as the overall market has grown. Microsoft's share of the same market has outperformed all other players who kept stable market shares, growing at the expense, we believe, of European providers, by more than 800%.

If allowed to continue, these abuses will inevitably lead to the demise of a European cloud infrastructure sector. European businesses and public sector organisations will be permanently and irrevocably deprived of any option to build, operate or support cloud services using the IT service provider of their choice.

The cloud is fundamental to growth, the digital economy and many other political, social and economic benefits desired by the European Union and its citizens. Thriving European cloud infrastructure providers are an essential element in promoting European technology innovation and excellence and ensuring strategic autonomy in the cloud. They provide cloud infrastructure designed to support European values and which enshrine protections for European citizens.

Failure to act now to restore fair and robust competition in relation to cloud infrastructure will result in some providers being foreclosed from the market and material harm to customers, who will be prevented from choosing IT providers on the merits.

The Cloud Infrastructure Service Providers in Europe (CISPE) represents the interests of 24 cloud infrastructure providers with headquarters and operations across the European Union. Many of our members are SMEs offering specific, bespoke cloud services to public and private sector customers across the continent.

Cloud infrastructure providers build the foundations for IT services, but virtually all their customers want the ability to run software on that infrastructure. Licensing this software fairly to ensure choice and avoid lock-in is essential to deliver a vibrant and competitive IT services market in Europe.

Two members, OVHcloud and Aruba, have already filed a complaint against Microsoft's unfair preferencing of its own cloud infrastructure through abuse of software licensing terms. The majority of CISPE members are confronted with similar unfair practices. This complaint does not seek to reiterate the detail of that complaint. Instead, it seeks to give a voice to those members without the resources to file their own complaints, or for whom the fear of retaliation is too great to risk standing alone.

However, this CISPE complaint does lay out in detail the legal arguments and precedents that establish how Microsoft's unfair licensing practices are abuses in violation of Article 102 TFEU and provide legitimate legal grounds for the Commission to open a formal investigation.

It provides detailed legal analysis of both indispensability and unfairness as clear grounds for action on this issue.

More fundamentally, this complaint seeks to outline a potential approach and tools to resolving the situation and create a fair and easily deployable solution that will swiftly and sustainably remedy the situation either through a commitments process, or as directions forming part of an infringement decision in the absence of voluntary early resolution.

While CISPE is an association of vendors in the cloud infrastructure sector, this complaint draws upon and promotes work and tools developed closely with customers across the whole of Europe over the last several years and that is representative of the whole industry. We have worked closely with customer representative groups to develop the thinking and tools offered as remedies in this complaint.

As such, we anticipate that proposed remedies based on the approaches we outline in this complaint will quickly gain broad support from customers and vendors across the cloud industry.

CISPE believes that the introduction of the Ten Principles for Fair Software Licensing, jointly developed and launched by CISPE and Cigref, the French association of digital leaders, in April 2021 can form the basis of a restitution of competition in the IT sector. Promoting best practices for the licensing of the essential software that European customers want to run in the cloud can address concerns in relation to both Microsoft's anti-competitive behaviour; and the potential for other suppliers to leverage dominance in legacy software markets to unfairly increase market power in adjacent sectors.

Following their launch, the Ten Principles have been promoted and endorsed by customers organisations across Europe, including in Italy, Germany, the Netherlands, Spain, Denmark, the UK and more recently in Israel. If properly implemented, adhered to, and monitored, the Ten principles will address the unfair practices alleged in the initial complaints.

To further this, again working closely with customer and provider organisations, we have devised a Control Framework that facilitates independent, impartial audits of any software license terms for compliance with the Ten Principles of Fair Software Licensing.

Using the Control Framework, the European Commission can itself, or through its choice of independent 3rd parties, effectively audit the license terms of any software provider, to quickly ascertain whether those contracts are supportive of, or detrimental to, fair competition in the IT sector.

The same auditable Control Framework can be utilised to assess the conformity of any remedies proposed by defendants in the case or any directions imposed by the European Commission as part of an infringement decision.

As part of its complaint, CISPE has used the Control Framework to assess the changes to license terms proposed by Microsoft in its recent (29th August) blog posts and the new terms discernible in its 1st October implementation of new licences. This provides an example of application of the Control Framework and illustrates its utility in practice. In particular, it highlights how and where the Microsoft proposals fail to tackle the harms to consumers and providers outlined by the plaintiffs in the initial complaint.

Not only do the Ten Principles for Fair Software Licencing activated through the Control Framework provide an easy to deploy immediate remedy, but we believe they can form the basis of an ongoing market-based solution.

We advocate the creation of a European Observatory with the power and capacity to monitor the compliance of software licensing terms against the Principles. Periodic audits of software terms by this independent body would ensure that no vendor could unilaterally impose new unfair practices on its customers.

Regular auditing of software licensing terms against these principles will provide European customers with confidence that terms continue to support fair choice, open competition and a vibrant marketplace. Standard and proportionate fees will be paid by vendors to cover the costs of these audits and the operations of the Observatory.

Given the importance of the cloud infrastructure industry to Europe's Digital Decade, its growth and recovery programmes and its strategic autonomy in technology markets, and the now clear potential for dominant software vendors to disrupt competition in this market, CISPE further suggests that the European Commission updates the Digital Markets Act (DMA) to to prohibit Gatekeepers from leveraging their core service platforms to discriminate against competitors and self-preference their own software applications, particularly when they hold dominant positions in certain markets, such as Microsoft with its productivity software.

CISPE therefore calls for an update of the DMA in the form of a European Commission Delegated Act prohibiting abusive software practices and related self-preferencing by software gatekeepers, under Article 12.

This complaint has been authorised by the CISPE board, is supported by the entire membership, and is intended to quickly find and implement remedies to the anti-competitive situation that threatens our members.

Our members are not only European innovators and technological champions in their own right but provide the foundations for a vibrant European cloud and digital economy. They are neither pawns in a fight between other players, nor unfortunate casualties caught in the crossfire. To characterise them as such is arrogant and adding insult to injury.

These are European businesses which provide specific, important and differentiated services to thousands of business and public sector customers across Europe. Their customers in turn offer cloud-based products and services to millions of European citizens. The loss of these players will not only remove choice for customers, but pave the way for increased prices, remove the impetus for innovation and lower quality of service.

More fundamentally, without strong, innovative European cloud infrastructure vendors ambitions for strategic autonomy and data sovereignty will be harder to achieve. Customers in Europe will not have the ability or opportunity to choose providers whose approach and values align with their own.

Therefore, on behalf of the entire European cloud infrastructure industry CISPE humbly asks the European Commission to open a formal investigation into Microsoft's unfair software licensing practices and to consider the Ten Principles for Fair Software Licensing in the cloud and its auditable Control Framework as the basis of its remedies.