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**June 20, 2023**

VIA ELECTRONIC SUBMISSION

April J. Tabor  
Secretary of the Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, D.C. 20580

**Re: Solicitation for Public Comments on the Business Practices of Cloud Computing Providers**

Dear Ms. Tabor:

The Coalition for Fair Software Licensing (the “CFSL” or the “Coalition”) appreciates the opportunity to submit this letter to the Federal Trade Commission (the “FTC” or the “Commission”) in response to the Commission’s Solicitation for Public Comments on the Business Practices of Cloud Computing Providers, issued on March 22, 2023 (hereinafter, the “RFI”). The Coalition submits this letter on behalf of our members, which include technology providers throughout the cloud stack, end-user facing companies, and startup and scale-up entrants. As both customers and providers of information technology (“IT”) services, our membership represents a diverse cross section of market perspectives. We care deeply about competition and call for the adoption of the *Principles of Fair Software Licensing*<sup>1</sup> to ensure that the IT services market (including cloud) is vibrant, transparent, and fair.

We submit this letter to answer several questions posed by the RFI. We focus our comments on the anticompetitive practices used by one software vendor and the impact of those practices on customer choice, competition, and cybersecurity.

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<sup>1</sup> <https://www.fairsoftwarelicensing.com/our-principles/>

## Executive Summary

Virtually every business in the United States uses software to conduct its operations and generally licenses it from the vendors who design it. Software customers invest significant sums in these licenses expecting flexibility and control over how and where the software is deployed, be it on desktops, on-premises servers, leased data centers, or whatever combination best met their needs. This freedom of hardware choice is a widespread software policy known as “bring your own license” or “BYOL,” which has greatly benefitted software customers.

As cloud technology has become a viable alternative to legacy IT systems, customers want the same flexibility and control they were accustomed to on-premises when they migrate to the cloud. This includes the ability to deploy licenses for software on the cloud that they were already paying for on-premises. This allows customers to select cloud providers based on the price and quality of the service they provided – not on the cost of the software or services run on it. Software and cloud providers alike have largely embraced BYOL with the emerging cloud, and most continue this practice today.

Microsoft, however, which has long dominated operating and productivity software,<sup>2</sup> approaches licensing differently. Rather than supporting customer choice, Microsoft is unfairly leveraging customer dependencies to its own benefit. Specifically, Microsoft is using its market power and restrictive and discriminatory licensing terms to: coerce customers into using Azure cloud infrastructure and lock them into the Azure ecosystem; tie products in the vertical stack of Microsoft ecosystem into an ever-growing suite of services, regardless of customer preferences, to advantage its products over competitors; limit integration capabilities of competing services on equal terms with its own products; and set its own products as defaults.

While this behavior has evolved over the past several years, much of its origins can be traced to 2019 when the company effectuated a monumental change to its licensing practices. This change presented existing software customers with a Hobson’s choice: forego their previously purchased (often perpetual) software licenses and incur the additional cost of purchasing a second license to use the cloud provider of their choice; or migrate to Microsoft cloud services and have previously purchased licenses (and their beneficial terms) transferred to cloud-based subscription licenses at no additional cost.

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<sup>2</sup> See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

Instead of offering a better cloud product and competing on the merits, Microsoft's licensing and tying practices force customers into the Microsoft ecosystem and limit their choice by making it more difficult, if not impossible, to access key software without also using their other cloud products. Customers do not benefit, and the practices have elicited outcry from them. Microsoft, for its part, has offered nothing by way of justification. These practices skew competition in IT services in Microsoft's own favor, reduce choice, drive up costs, disincentivize innovation and create cybersecurity risks for customers large and small. That is why Microsoft's licensing and tying practices have already drawn the attention of competition agencies abroad.

The Coalition believes these practices raise serious concerns under U.S. antitrust law, including the FTC Act<sup>3</sup>; and respectfully requests the Commission open an investigation to examine and take action to stop them. Doing so presents the Commission with an opportunity to address the immediate needs of myriad software customers, by protecting competition in a marketplace that has been, can be, and should remain a driver for nothing less than the technological and economic growth of the United States and, more broadly, the world.

### **The Coalition and Cloud Computing**

The Coalition, which launched in September 2022, is part of a larger international movement dedicated to protecting fair and transparent software licensing terms, and working against the limiting impact that unfair and oblique licensing practices have on growth, opportunity, investment, and security. First launched in France in April 2021 as a collaboration of CISPE (the Association of Cloud Infrastructure Service Providers in Europe) and CIGREE (a CIOs' association representing over 150 French organizations, mostly the largest listed companies on the Euronext Paris Stock Exchange), the *Principles of Fair Software Licensing* provide the foundation needed to spur innovation, choice, and growth in the digital economy.<sup>4</sup> The *Principles* have since gathered the support of organizations representing interests ranging from cloud service startups and their venture funders to CIOs and customer companies in the United Kingdom, throughout the

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<sup>3</sup> 15 U.S.C. § 45.

<sup>4</sup> The principles are: (1) Licensing Terms Should Be Clear and Intelligible; (2) Freedom to Bring Previously Purchased Software to the Cloud; (3) Customers Should Be Free to Run their On-Premises Software on the Cloud of their Choice; (4) Reducing Costs through Efficient Use of Hardware; (5) Freedom from Retaliation for Cloud Choices; (6) Avoiding Customer Lock-In Through Interoperable Directory Software; (7) Equal Treatment for Software Licensing Fees in the Cloud; (8) Equal Treatment for Software Licensing Fees in the Cloud; and (9) Licenses Should Cover Reasonably Expected Software Uses. Our Principles, *available at*: <https://www.fairsoftwarelicensing.com/our-principles/>.

European Union (including Italy, Spain, Netherlands, Germany, and Denmark), and Israel.

The European-based allies of the Coalition have worked tirelessly to bring fair competition to and customer choice in the cloud in Europe, including by filing complaints with European antitrust authorities.<sup>5</sup>

As with the efforts of CISPE and others in Europe, the Coalition has worked to accomplish real change—but the restrictive licensing practices that limit customer choice and hinder competition persist.<sup>6</sup>

## 1. Brief Background on Licensing and the Cloud

Cloud services provide access to computing resources on demand, via the internet. The customer pays to access the computing resources as a service, without having to buy, own, and maintain the hardware and software necessary to operate similar resources on premises. There are three key elements to this definition<sup>7</sup>:

- Computing Resources: these include hardware (servers and network equipment) and software (applications) that are used to process workloads and store data.
- On Demand: the computing resources are available on a scalable and elastic basis. This typically involves the dynamic provision of virtualized computing resources. Users are typically billed for the amount of resources used.
- Via a Network: the transit of data to and from the cloud provider may be over the public internet or a private connection. This allows location-independent access to the cloud.

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<sup>5</sup> Paul Kunert, *Euro clouds lodge another complaint against Microsoft over anti-competitive licenses*, The Register, available at:

[https://www.theregister.com/2022/11/09/cispe\\_ec\\_microsoft\\_complaint/](https://www.theregister.com/2022/11/09/cispe_ec_microsoft_complaint/) (Nov. 9, 2022).

<sup>6</sup> While Microsoft is not alone in its cloud-related anticompetitive licensing, Microsoft's monopoly position in multiple critical upstream software markets makes it a powerful example of the ways in which competition is being substantially lessened, to the detriment of software and IT service customers.

<sup>7</sup> *The NIST Definition of Cloud Computing*, U.S. Department of Commerce National Institutes of Standards and Technology, available at: <https://nvlpubs.nist.gov/nistpubs/legacy/sp/nistspecialpublication800-145.pdf#page=6> (Sep. 2011).

For many customers, cloud computing is more efficient than “do it yourself” IT solutions. Demand for cloud computing services has exploded in recent years. For example, Gartner forecasts worldwide end-user spending on public cloud services to grow 20.7% to total \$591.8 billion in 2023, up from \$490.3 billion in 2022, with the highest end-user spending growth in IaaS (29.8%).<sup>8</sup>

Before the emergence of cloud computing, entities generally managed their own IT systems, including software and hardware. They licensed software, including for use on servers they owned or leased, with no restrictions as to how they would deploy the software (*i.e.*, location of the servers, brand of the hardware, etc.). Customers had the expectation of flexibility and control when they purchased perpetual, on-premises licenses.

When cloud computing first emerged, there were few restrictions for those entities choosing to move their systems to the cloud. In particular, entities were generally able to bring their on-premises software with them into the cloud.<sup>9</sup> For example, in January 2023, Guitar Center announced that it completed moving its “data and applications” onto “Oracle’s cloud and Exadata database service . . . helping the retailer save about \$1.5 million over the past year.”<sup>10</sup> This ability to take on-premises software into the cloud not only proved efficient for cloud customers, it also facilitated competition by lowering switching costs between cloud and on-premises solutions and among cloud providers. As the cloud developed, providers and customers alike understood that if you were moving from physical, on-premises servers to a cloud service provider, you would be permitted to bring your own license (“BYOL”) for any software license that you owned. As described below, however, Microsoft has continuously taken steps to limit customers’ ability to run its key software in any environment that is not its own, at a steep cost to competition in cloud IT services.

## **2. Anticompetitive Conduct in Information Technology**

A set of distinct yet interrelated practices threaten competition throughout the cloud stack and in information technology. As outlined below, Microsoft uses its dominance in desktop operating, server, and productivity software to impose

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<sup>8</sup> Gartner, *Gartner Forecasts Worldwide Public Cloud End-User Spending to Reach Nearly \$600 Billion in 2023*, available at: <https://www.gartner.com/en/newsroom/press-releases/2022-10-31-gartner-forecasts-worldwide-public-cloud-end-user-spending-to-reach-nearly-600-billion-in-2023> (Oct. 31, 2022).

<sup>9</sup> One exception to this was Microsoft, as discussed *infra*.

<sup>10</sup> Belle Lin, *Guitar Center Details Cloud Move*, *The Wall Street Journal*, available at: <https://www.wsj.com/articles/guitar-center-details-oracle-cloud-move-11674091101> (Jan. 19, 2023).

additional costs on or outright prohibit customers from licensing software for use on competing cloud providers and tie adjacent product market offerings together, preventing customers from picking only their preferred or best services. The result is that customers face a series of Hobson's choices pitting real interests in low prices, preferred service and better cyber resiliency against each other, and limiting the benefits cloud computing was intended to provide in the first place.

#### A. Leveraging Microsoft's Dominance to Skew Competition

Broadly speaking, Microsoft's anticompetitive practices involve leveraging its longstanding dominant positions in desktop operating, server, and productivity software, in which customers purchase licenses for Microsoft "must-have" products like Windows, Word, Excel and PowerPoint, to promote Azure, its cloud computing product, and other Microsoft products like Teams and Defender. As noted below, while they have invited complaints from customers and scrutiny from regulators, these practices have proven remarkably successful in driving business to Azure and expanding the reach of other Microsoft products.

Microsoft holds a dominant position in: (1) operating systems (OSs) for personal computers and servers (*i.e.*, Windows (desktop) 10 and 11; Windows Server);<sup>11</sup> (2) productivity software for PCs (*i.e.*, Office and Microsoft 365 (cloud-based));<sup>12</sup> and (3) enterprise mail server software and services (*i.e.*, Exchange Server).<sup>13</sup> As the Commission is well aware, in 1998, the Department of Justice sued to prevent the company from continuing to implement a set of exclusionary practices that protected Microsoft's OS monopoly from competition in the nascent "middleware" market.<sup>14</sup> The government prevailed, the practices in question

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<sup>11</sup> Case COMP/C-3/39.530 – Microsoft (Tying), Comm'n Decision (Dec. 16, 2009), [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39530/39530\\_2671\\_5.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_5.pdf) (client PC operating systems); COMP/C-3/37.792 – Microsoft, Comm'n Decision (Mar. 24, 2004), [https://your.caselex.eu/storage/announcement/37792\\_4177\\_3.pdf](https://your.caselex.eu/storage/announcement/37792_4177_3.pdf) (client PC operating systems and work group server operating systems). See also CMA, Anticipated acquisition by Microsoft of Activision Blizzard, Inc. Final Report (Apr. 26, 2023), [https://assets.publishing.service.gov.uk/media/644939aa529eda000c3b0525/Microsoft\\_Activision\\_Final\\_Report\\_.pdf](https://assets.publishing.service.gov.uk/media/644939aa529eda000c3b0525/Microsoft_Activision_Final_Report_.pdf) (findings on Microsoft's position in PC operating systems).

<sup>12</sup> [https://ec.europa.eu/competition/mergers/cases/202231/M\\_10290\\_8431645\\_854\\_3.pdf](https://ec.europa.eu/competition/mergers/cases/202231/M_10290_8431645_854_3.pdf); Case M.8124 – Microsoft/LinkedIn, Comm'n Decision (Dec. 6, 2016), [https://ec.europa.eu/competition/mergers/cases/decisions/m8124\\_1349\\_5.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf) (findings on Microsoft's market shares in productivity software).

<sup>13</sup> Ioana Patrigenaru, *Who's got your mail? Google and Microsoft, mostly*, UC San Diego Today, available at: [https://today.ucsd.edu/story/IMC2021\\_savage](https://today.ucsd.edu/story/IMC2021_savage). The research was funded by the National Science Foundation, the University of California San Diego, the EU H2020 CONCORDIA project and Google.

<sup>14</sup> *United States v. Microsoft*, No. 98-1232 (filed May 18, 1998).

ceased, and mobile computing developed; but the company maintained its OS dominance.<sup>15</sup>

Now, a quarter century later, the company is once again leveraging its dominance and using similar conduct to imperil competition across a broad range of cloud services.

#### i. Licensing

Microsoft's licensing terms restrict customers from using licenses they have already purchased to run Windows, Office, and the like on competing cloud services, but not on Azure. The company has never justified this conduct; and, after years of cloud customers and competitors drawing attention to the issue in Europe, Microsoft President Brad Smith last year conceded that "[t]here definitely are some valid concerns. . . . It's very important for us to learn more and then make some changes."<sup>16</sup> As set out in further detail below, recent licensing changes made by Microsoft that purport to address antitrust concerns not only fall far short of that promise, but skew competition further. As CISPE observed, "[o]n the contrary, the new contractual terms . . . add[ed] new unfair practices to the list."<sup>17</sup>

#### Enterprise License Agreements

Microsoft's licensing practices are extraordinarily complex and often opaque. Microsoft has hundreds of different licensing options consisting of overlapping suites of services that are used to negotiate special deals with enterprise customers. Notwithstanding the expansive number of different possible Microsoft Enterprise License Agreements (ELAs), there is little transparency around the price of individual products included in them, or general ability for customers to take an *a la carte* approach and to choose which Microsoft products and services they want to use.

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<sup>15</sup> Jordan Novet and Erin Black, *How Microsoft Windows Came to Dominate PC Operating Systems*, CNBC, available at: <https://www.cnbc.com/video/2021/07/10/how-windows-came-to-dominate-pc-operating-systems.html> (Jul. 10, 2021).

<sup>16</sup> Dina Bass, *Microsoft Customers Decry Cloud Contracts That Sideline Rivals*, Bloomberg, available at: <https://www.bloomberg.com/news/articles/2022-04-12/microsoft-customers-decry-cloud-contracts-that-sideline-rivals#xj4y7vzkg> (Apr. 11, 2022)

<sup>17</sup> CISPE, *CISPE files complaint against Microsoft in European Commission*, available at: <https://cispe.cloud/cispe-files-complaint-against-microsoft-with-european-commission/>. Paul Kunert, *Top cloud players reject Microsoft's attempt to settle EU licensing complaint*, The Register, available at: [https://www.theregister.com/2023/05/30/microsoft\\_cispe\\_settlement\\_rejected/?td=rt-4a](https://www.theregister.com/2023/05/30/microsoft_cispe_settlement_rejected/?td=rt-4a) (May 30, 2023).

Over time, as Microsoft has moved from Office 365 (e.g., E1, E3, E5) to Microsoft 365 (e.g., M1, M3, M5) licenses, the packages have included an increasing number of products from their vertical stack to drive adoption and dependence on the Microsoft ecosystem.<sup>18</sup> Many of these products are included even if customers have little or no initial interest in them, inhibiting competition by disincentivizing adoption of similar products offered by alternative providers. Microsoft's customer success managers (CSMs) use them to drive broader product adoption within a customer's existing install base,<sup>19</sup> using multi-year discounts and rebates to further entice adoption. Once a customer has sufficiently adopted a particular product offering, Microsoft can and does use customer dependencies to begin charging separately for those offerings.

All of this is accomplished through a web of agreements that enterprise customers often cannot see together to understand their current entitlements or needs. As a result, it is not uncommon for entities of varying sizes to have individual users assigned multiple, overlapping Microsoft licenses who are not aware of the full slate or actual cost of the services. Beyond tying, this opacity limits customer choice and effective competition.

### Restricting BYOL

As noted above, BYOL was a well-established norm in the software business before cloud computing and allowed customers to run purchased software in the hardware environment of their choice, be it on-premises or on cloud provider(s) of choice. It has predominated software use in cloud computing from its launch in 2006, with one notable exception. Since 2019, Microsoft has engaged a series of changes to their licensing terms that restrict BYOL; limiting customer use of non-Azure infrastructure to deploy Microsoft software and forcing legacy customers to move from flexible perpetual licenses purchased for on-premises use to subscription arrangements run on Azure.

At the outset of the cloud, Microsoft's software license terms required the licensed software to be housed on a server that was "fully dedicated" to the license-holder, something that was not possible for early cloud services

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<sup>18</sup> Arif Bacchus, *What's the Difference Between Office 365 and Microsoft 365?*, ONMSFT.com – The Tech News Site, available at: <https://www.onmsft.com/feature/whats-the-difference-between-office-365-and-microsoft-365/> (Oct. 8, 2019). Note that both the "E" and "M" level Microsoft licensing nomenclature continues to be used in spite of a transition toward the sale of Microsoft 365 (or "M") packages.

<sup>19</sup> Mary Jo Foley, *Microsoft makes changes in its field sales, support groups as FY'21 begins*, ZDNet, available at: <https://www.zdnet.com/article/microsoft-makes-changes-in-its-field-sales-support-groups-as-fy21-begins/> (Jul. 6, 2020).



customers. In response to this license term however, in 2008–2009, cloud service providers began offering “dedicated hosts,” individualized servers that were dedicated to a single cloud customer, as a service to permit Microsoft’s software customers to comply with the license terms while still leveraging the benefits of the cloud. This sapped cloud efficiency, as providers were required to dedicate whole servers to customers, as opposed to allowing servers to be used simultaneously by multiple customers and better utilizing available capacity. The whole service was more expensive.<sup>20</sup>

Microsoft’s Azure was announced in October 2008 and launched commercially in 2010. In 2011, the company introduced License Mobility, which permitted customers to bring Microsoft licenses to the cloud, provided they purchased Software Assurance, which added approximately 25% to the cost. License Mobility also did not permit the use of key products, such as Windows Server and Windows Desktop, although a customer that moved to Azure was permitted use of the desired products.<sup>21</sup>

In 2014, in response to competitive pressures and to grow the company’s share price, Microsoft pivoted to embrace the cloud. Just 52 days into Satya Nadella’s tenure as Microsoft’s CEO, he publicly announced his “Mobile-First, Cloud-First” initiative, focusing on developing Azure into “a cloud for everyone and every device”.<sup>22</sup>

During this period, customer demand for cloud services boomed. Numerous cloud providers entered the market, and thousands upon thousands of customers moved to the cloud. Prices went down.<sup>23</sup> Services flourished.

By 2018, Azure was driving Microsoft’s share price, and pressure to grow Azure share was immense.<sup>24</sup> Azure had grown aggressively from the first quarter

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<sup>20</sup> Christopher Mims, *Everything that’s wrong with Microsoft, as told by veterans who abandoned the company*, Quartz, available at: <https://qz.com/118513/the-long-hard-road-back-for-microsoft> (Aug. 26, 2013).

<sup>21</sup> Saul Hansell, Steve Ballmer Maps Microsoft’s Cloud-y Future, New York Times, available at: <https://archive.nytimes.com/bits.blogs.nytimes.com/2009/03/20/steve-ballmer-maps-microsofts-cloud-y-future/> (Mar. 20, 2009).

<sup>22</sup> Satya Nadella, Microsoft Press Briefing, available at: <https://news.microsoft.com/2014/03/27/satya-nadella-mobile-first-cloud-first-press-briefing/> (Mar. 27, 2014).

<sup>23</sup> Kurt Mackie, *Microsoft Cuts Prices on Some Azure Services*, Redmond Magazine, available at: <https://redmondmag.com/articles/2014/09/25/azure-price-cuts.aspx?admgarea=BDNA&m=1> (Sep. 25, 2014).

of 2017 until the third quarter of 2018, reaching revenue growth greater than 90% year over year in each quarter.<sup>25</sup> However, Azure's growth began to fall in the fourth quarter of 2018.<sup>26</sup> After two quarters of decelerated growth, Wall Street analysts reduced Azure's growth expectations.<sup>27</sup>

By July 2019, Wall Street still had lofty expectations of continued double-digit topline revenue growth for Azure.<sup>28</sup> In spite of Microsoft coming under pressure for a series of Azure-related outages,<sup>29</sup> Microsoft hit those Wall Street projections and offered guidance of double digit revenue growth into the next

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<sup>24</sup> "Microsoft's success in building out its cloud business has driven up shares of the company more than 40% in the past year . . . The performance of Microsoft's Azure cloud-computing services, as well as its Office 365 online-productivity service for businesses, has pushed Microsoft shares to record highs over the past two weeks. . . . After hours, shares touched record highs above \$108 following Ms. Hood's guidance for segments that include Azure and Windows. The projections topped Wall Street's expectations. . . . Azure revenue increased 89%, compared with 93% three months ago—the first time the business has grown slower than 90% since Microsoft began reporting the metric in October 2015." Jay Greene, *Microsoft's Revenue Gets Lift From Cloud*, The Wall Street Journal, available at: <https://www.wsj.com/articles/microsofts-cloud-continues-to-fuel-growth-1532032095> (July 19, 2018).

<sup>25</sup> Jay Greene, *Microsoft's Cloud Strategy Pays Off*, The Wall Street Journal, available at: <https://www.wsj.com/articles/microsofts-profit-revenue-rise-even-as-cloud-business-growth-slows-1540413172> (Oct. 24, 2018).

<sup>26</sup> *Id.*

<sup>27</sup> Jay Greene, *In Microsoft's Earnings, Watch the Pace of Cloud Growth*, The Wall Street Journal, available at: <https://www.wsj.com/articles/in-microsofts-earnings-watch-the-pace-of-cloud-growth-1540373401> (Oct. 24, 2018). "[E]xpects growth eased to 72.5% in the just-ended quarter." Jay Greene, *Microsoft's Expanding Cloud Is Likely to Limit Growth*, The Wall Street Journal, available at: <https://www.wsj.com/articles/microsofts-expanding-cloud-is-likely-to-limit-growth-11548844200> (Jan. 30, 2019) compare with "In the just-ended quarter, Azure grew 76%, a strong showing as the pace of growth has been decelerating as Azure gets bigger." Jay Greene, *Microsoft's Gain Tempered by Chip*, The Wall Street Journal, available at: <https://www.wsj.com/articles/microsoft-reports-slower-sales-in-some-product-lines-despite-cloud-strength-11548885062> (Jan 30. 2019); "Analysts at UBS estimate Azure revenue grew 66% in the fiscal third quarter . . ." Asa Fitch, *Microsoft Results to Hinge on Cloud-Computing Growth*, The Wall Street Journal, available at: <https://www.wsj.com/articles/microsoft-results-to-hinge-on-cloud-computing-growth-11556098203> (Apr. 24, 2019) compare with "Azure . . . saw revenue surge 73% year over year." Dan Gallagher, *Microsoft Resists Gravity's Pull*, The Wall Street Journal, available at: <https://www.wsj.com/articles/microsoft-resists-gravitys-pull-11556192166> (Apr. 25, 2019).

<sup>28</sup> Asa Fitch, *Microsoft Expected to Report Earnings Boost: What to Watch*, The Wall Street Journal, available at: <https://www.wsj.com/articles/microsoft-expected-to-report-earnings-boost-what-to-watch-11563442202> (July 18, 2019).

<sup>29</sup> See, e.g., M. Van Horenbeeck, *Office 365 Monitoring: 5/2/19 Office 365 and Azure Global Outage Recap*, ENow, available at: <https://www.enowsoftware.com/office-365-monitoring-outages/sharepoint-outage-2019-office365-monitoring> (May 2019).

fiscal year. This was despite Azure revenue growth falling to 64% by that point.<sup>30</sup> But Microsoft recognized that Azure was having trouble competing on the merits, beset among other things by insufficient redundancy and a lack of capacity (ultimately resulting in a 2020 Teams blackout that required the company to put resource limits on Azure subscribers).<sup>31</sup>

The company also recognized that customers were operating Microsoft services on non-Azure architecture. The next month, in August 2019, Microsoft announced a change to its licensing terms. Beginning in October of that year, it wrote: “on-premises licenses purchased without Software Assurance and mobility rights cannot be deployed with dedicated hosted cloud services offered by the following public cloud providers: Microsoft, Alibaba, Amazon (including VMware Cloud on AWS), and Google.”<sup>32</sup> As a practical matter, that meant that customers would need to repurchase their existing licenses to operate software on these other cloud providers, dubbed “Listed Providers.”<sup>33</sup>

Updated outsourcing licensing terms			
On-Premises/Traditional outsourcing services		Cloud services	
On-premises	Traditional outsourcing	Dedicated hosted cloud services by <b>Listed Providers</b>	Multitenant cloud services
On-premises use rights		License Mobility through Software Assurance where applicable Azure Hybrid Benefit for Azure only Cloud services with licenses included	
These terms apply to licenses purchased on or after October 1, 2019. Find details at <a href="https://aka.ms/dedicatedlicensingblog">https://aka.ms/dedicatedlicensingblog</a>			

The inclusion of Microsoft on the list was illusory: for customers of Azure, the “Azure Hybrid Benefit” enabled “costs savings” relative to using other, competing providers.<sup>34</sup> As the Economist observed, “Not to offend antitrust rules Microsoft put Azure on its list alongside AWS, GCP, and Alibaba Cloud. But it separately offered

<sup>30</sup> Asa Fitch, *Microsoft’s Cloud Business Drives Record Sales*, The Wall Street Journal, available at: <https://www.wsj.com/articles/microsofts-cloud-business-drives-record-sales-11563481232> (July 18, 2019).

<sup>31</sup> The Economist, *How Satya Nadella turned Microsoft around*, available at: <https://www.economist.com/briefing/2020/10/22/how-satya-nadella-turned-microsoft-around> (Oct. 22, 2020).

<sup>32</sup> Microsoft Blog, *Updated Microsoft Licensing Terms for Dedicated Hosted Cloud Services* (Aug. 1, 2019).

<sup>33</sup> *Id.*

<sup>34</sup> Microsoft, *Azure Hybrid Benefit*, available at: <https://azure.microsoft.com/en-us/pricing/hybrid-benefit/#features> (advertising that “AWS is up to 5 times more expensive than Azure for Windows Server and SQL Server”).

customers a better deal to move to Azure, offsetting the extra cost.”<sup>35</sup> In short, Azure Hybrid Benefits provides Microsoft with a way to bypass the limitations that it imposes on other “Listed Providers.” Under the program, customers can access the same software but have to forfeit their existing licenses in return for cloud-based subscriptions that only apply to Azure.

If a customer wished to use another cloud provider, they would need to purchase a new license in addition to the Microsoft license they already had for the same software, often at a significant cost, even if the non-Azure cloud provider was willing to dedicate servers solely to the customer. For some software, there was no option but to run Microsoft architecture.<sup>36</sup>

For Microsoft, this policy change accelerated the growth of Azure’s infrastructure offering.<sup>37</sup> As the cloud computing industry continues to grow, Azure is growing at a faster pace than any of its competitors.<sup>38</sup> As Raj Bala of Gartner told the Economist in 2020, “Microsoft is taking its arsenal of Windows Server, a massive software installed base, and using it punitively against its competitors.”<sup>39</sup> Azure has continued to grow despite offering little practical advantage to customers. As Gartner observed, “2021 was a relatively unremarkable year for Microsoft Azure as it relates to novel innovations....”<sup>40</sup>

In 2021 and 2022, many customers were coming up to the end of their Microsoft contracts. The new licensing rules coerced customer migration to the Azure architecture, from competitors large and small alike, which accelerated growth for Azure. Indeed, according to Flexera’s 2022 State of the Cloud Report, by 2022, Microsoft Azure usage met or exceeded that of cloud first-mover AWS for the

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<sup>35</sup> The Economist, *How Satya Nadella turned Microsoft around*, available at: <https://www.economist.com/briefing/2020/10/22/how-satya-nadella-turned-microsoft-around> (Oct. 22, 2020).

<sup>36</sup> One version of the Office suite—the one used in cloud-computing environments—is no longer allowed for use on rival cloud providers. And newer versions of the traditional Office product have similar limitations,” *Microsoft Customers Decry Cloud Contracts That Sideline Rivals*, Bloomberg, available at: <https://www.bloomberg.com/news/articles/2022-04-12/microsoft-customers-decry-cloud-contracts-that-sideline-rivals#xj4y7vzkg> (Apr. 11, 2022).

<sup>37</sup> CloudZero, *55 Cloud Computing Statistics That Will Blow Your Mind* at 23; see F. Jenny, CISPE Deck, Slide 4. Indeed, the data show that Microsoft’s growth has come at the expense of smaller cloud service providers. *Id.*

<sup>38</sup> CloudZero, *55 Cloud Computing Statistics That Will Blow Your Mind* at 23.

<sup>39</sup> The Economist, *How Satya Nadella turned Microsoft around*, available at: <https://www.economist.com/briefing/2020/10/22/how-satya-nadella-turned-microsoft-around> (Oct. 22, 2020).

<sup>40</sup> Gartner Research, CIP Magic Quadrant (2022) at 10.

first time.<sup>41</sup> These new rules also led some smaller cloud providers in Europe to bring confidential complaints to the European Commission, including France's OVHCloud, Italy's Aruba, several Danish cloud providers and CISPE.<sup>42</sup>

Even Microsoft was compelled to concede the problematic nature of its policy change. In Spring 2022, recognizing the impact on competing cloud providers and touting support for a "healthy competitive environment," Microsoft President Brad Smith acknowledged the validity of (at least some of) the concerns.<sup>43</sup>

In August 2022, Microsoft offered a reprieve from the additional licensing requirements for certain EU-based cloud providers, but who would qualify and whether they would be required to agree to Microsoft Software Assurance Programs<sup>44</sup> or other additional obligations was unclear. Most of the changes were added ways for other companies to resell access to Azure architecture. In addition, while purporting to address competition concerns in Europe, without any justification Microsoft refused to stop its practices with respect to Listed Providers, ensuring that its restrictive licensing continued to apply to its key competitors and maintaining significant restrictions on customer choice. The changes the

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<sup>41</sup> Flexera, *State of the Cloud Report* (2022) at 8.

<sup>42</sup> Foo Young Chee, Microsoft Faces New EU Antitrust Complaint on Cloud Computing Practices, Reuters, available at: <https://www.reuters.com/technology/microsoft-faces-new-eu-antitrust-complaint-cloud-computing-practices-2022-11-08/> (November 9, 2022). The complaint filed by OVH, Aruba, and Danish Cloud Providers has since been reportedly privately settled with Microsoft. However, the terms of any such settlement have not been publicly disclosed. Paul Kunert, *Euro cloud providers react to MS potentially cutting deal on antitrust*, The Register, available at: [https://www.theregister.com/2023/03/30/microsoft\\_euro\\_complaints/](https://www.theregister.com/2023/03/30/microsoft_euro_complaints/) (Mar. 30, 2023).

<sup>43</sup> Dina Bass, *Microsoft Customers Decry Cloud Contracts That Sideline Rivals*, Bloomberg, available at: <https://www.bloomberg.com/news/articles/2022-04-12/microsoft-customers-decry-cloud-contracts-that-sideline-rivals#xj4y7vzkg> (Apr. 11, 2022); *EU Policy Blog*, Microsoft responds to European Cloud Provider feedback with new programs and principles, available at: <https://blogs.microsoft.com/eupolicy/2022/05/18/microsoft-responds-to-european-cloud-provider-feedback-with-new-programs-and-principles/> (May 18, 2022); Paul Kunert, *Microsoft revises software licensing, cloud policies amid EU regulator scrutiny*, The Register, available at: [https://www.theregister.com/2022/05/18/microsoft\\_cloud\\_concessions/](https://www.theregister.com/2022/05/18/microsoft_cloud_concessions/) (May 18, 2022).

<sup>44</sup> Software Assurance programs provide the opportunity for Microsoft to create and develop further direct links to customers, enabling greater data transfer to the company, and increasing the risk of the anticompetitive use of such data. <https://www.microsoft.com/en-us/licensing/licensing-programs/software-assurance-default>.

company adopted were aimed at mollifying some critics, but clearly do not resolve the systemic issues.

In addition, Microsoft used this opportunity to introduce yet another restriction: partners will no longer be able to supply Microsoft software if the software will ultimately be deployed on infrastructure supplied by Listed Providers, preventing customers from choosing any infrastructure that is not Azure.<sup>45</sup> And customers adopting multi-cloud solutions, which combine offerings from multiple cloud service providers, including Listed Providers, could be forced to abandon the Listed Provider's cloud infrastructure services if they wish to use Microsoft applications for which they had already paid.

What had been an anticompetitive policy was now also anticompetitive and facially discriminatory. Or, as one customer member of the Coalition noted:

These business practices have resulted in little to no competition.... As a result of the licensing restrictions, the Company was forced to choose between additional cost and poor user experiences on the one hand, or make the transition to Microsoft's Cloud, all at significantly more cost in the end. No ability to negotiate can overcome the licensing restrictions that hamper cloud provider choice by the Company.<sup>46</sup>

Azure's growth in cloud computing would, meanwhile, accelerate.<sup>47</sup>

#### Discriminatory Provider Licensing

Microsoft offers two types of license agreements directly to cloud service providers. Through the Cloud Solution Provider Program ("CSPP"), a provider can resell Microsoft cloud products. These products must be hosted on Microsoft's cloud servers (Azure), so the cloud service provider is forced to bring its customers

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<sup>45</sup> Foo Yun Chee, *Amazon, Google slam Microsoft's cloud computing changes*, Reuters, available at: <https://www.reuters.com/technology/amazon-google-slam-microsofts-cloud-computing-changes-2022-08-30/> (Aug. 30, 2022); Ananya Bhattacharya, *Microsoft's cloud computing changes stir up a storm*, Quartz, available at: <https://finance.yahoo.com/news/microsofts-cloud-computing-changes-stir-070300853.html> (August 31, 2022); Kurt Mackie, *Microsoft To Ease Cloud Services Options for Partners and Customers in October*, Redmond Magazine, available at: <https://redmondmag.com/articles/2022/08/31/microsoft-cloud-services-options.aspx> (Aug. 31, 2022).

<sup>46</sup> Note that the Company asked to keep their comment anonymized out of concern that retaliatory measures will be taken against them for expressing discontent with these business practices.

<sup>47</sup> CloudZero, *55 Cloud Computing Statistics That Will Blow Your Mind at 23*.

(and its data) to Microsoft's servers. CSPP licensees risk losing their customers, due to the absence of value-added services and the fact that Microsoft establishes direct relationships with their customers.

The other option is to enter into a Services Provider License Agreement ("SPLA"), whereby the cloud service providers can offer cloud solutions directly hosted on their servers that integrate Microsoft products. Instead of the customer supplying the license to operate the Microsoft software on the cloud, the cloud provider is the licensee. The SPLA is a commercial agreement between Microsoft and a partner (cloud service provider), which pays for a license for the use of a Microsoft product, which is then used on the partner's servers. There is a direct relationship between the cloud service provider (using Microsoft's software) and its customers.

As Microsoft increased the restriction on BYOL licenses and ensured that certain dominant products such as Windows Server were unavailable for BYOL, customers were increasingly required to repurchase licenses or access software under a SPLA or CSPP—unless, of course, they chose to move to Azure. Around the same time that Microsoft was ending BYOL for its customers, it was increasing the price of the SPLA—but not the CSPP. That is, Microsoft began to charge more to cloud providers who were in direct competition with Azure. The distinction was substantial. In January 2018 and again in January 2019, the company increased SPLA prices 10–15%, while leaving CSPP prices unchanged.<sup>48</sup> In addition, certain Listed Providers have experienced even more significant cost increases in recent years—more than 60% increases in costs as compared to previous SPLAs—which often leaves the Listed Provider with no choice but to pass the cost onto customers. These price increases by Microsoft reflect not only the company's market power in the licensed products, but also its effort to hamstring competing cloud providers and drive business to Azure without having to compete on the merits.

Moreover, the SPLA does not allow competing cloud providers to offer their customers the full Microsoft productivity suite (Office 365 or Microsoft 365) that Microsoft offers on Azure. Cloud service providers are therefore unable to offer the full Microsoft 365 experience, which is required by many businesses and organizations, despite paying a higher license fee. Because Office 365 and Microsoft 365 are not available on SPLA and because there are restrictions on the licenses, customers are not able to purchase or bring Microsoft's most popular

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<sup>48</sup> Digital Edge Ventures, Inc., *Microsoft SPLA Price Increases*, available at: <https://knowledge.digitaledge.net/newsletters/microsoft-spla-price-increases/> (Oct. 2017).

and core products – which also happen to be central to the enterprise license – with them to a competing cloud.<sup>49</sup>

Customers want access to the best set of software and the best cloud providers, but the terms of the SPLA are structured to drive their business to Azure. This discriminatory licensing program exacerbates the problems that Microsoft's restriction of BYOL created.

In Europe, meanwhile, CSPPs have blossomed. Last month, updating the public on the purported success of the changes it announced in May 2022, Microsoft cited the fact that 75 companies had signed up for the program. The critical point, however, is that CSPPs are resellers of Azure. While purporting to support European cloud providers, Microsoft continued to implement a scheme to corral customers to the Azure infrastructure.

## ii. Tying

As noted above, while Microsoft leverages discriminatory and restrictive practices with the explicit aim of pushing adoption of Azure, its anticompetitive and discriminatory software licensing practices extend across all layers of its cloud service offerings. To wit, Microsoft ties several software products to its Microsoft 365 cloud-based office product (often marketed to enterprise customers in the form of "E" or "M" series enterprise license agreements), the net result of which is vendor lock-in and a less secure cloud experience for users.<sup>50</sup>

- OneDrive and SharePoint, cloud file hosting product and collaboration tool: under the SPLA, cloud service providers may not be licensed to provide a similar service to OneDrive. That means that unless they agree to use Microsoft's file hosting product and upload data to Microsoft's servers, cloud providers serving customers using the Microsoft Office suite of products cannot offer their customers default saving to another, better file hosting service or the ability to utilize the Autosave function. For example, if a

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<sup>49</sup> Moreover, security updates of Microsoft Office licensed under the SPLA are limited compared to the security updates provided to those with CSPP licenses. <https://www.microsoft.com/en-us/licensing/licensing-programs/spla-program>; <https://learn.microsoft.com/en-us/microsoft-365/cloud-storage-partner-program/>. Support for mobile devices, and other technical support are also more limited under SPLA than CSPP—despite the higher prices charged. *Id.*

<sup>50</sup> Microsoft's tying of "Azure credits" with Microsoft 365 exacerbates its leveraging of its dominant Office product suite to drive customers to Azure. These credits can only be used to acquire Azure cloud services and are not available when access to the Office product suite is purchased from a cloud service provider other than Microsoft.



customer wished to use DropBox or Box, they would still be required to pay for OneDrive.

- Defender, cybersecurity tool: all Microsoft 365 customers have Defender for Individuals forcibly installed on their devices. Steering customers toward one cybersecurity solution itself creates a cybersecurity problem. Experts in and out of the U.S. government have been emphatic that diversity and redundancy in cybersecurity is critical to protecting the nation's cyber infrastructure.<sup>51</sup> As Defender is widely-regarded as an inferior cybersecurity tool to others products in the security market,<sup>52</sup> it should come as no surprise that Microsoft's decision to tie Defender with the Microsoft 365 Office suite has raised cybersecurity rankles.<sup>53</sup> As one commentator explained: "Microsoft . . . is looking to cash-in by offering to protect everyone from the vulnerabilities they introduce into the market".<sup>54</sup> The net result of this tying has been expanded adoption of Defender and foreclosed competition for far superior products. As one commentator noted, Microsoft is getting paid as

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<sup>51</sup> Shaun Waterman, *Pentagon Hacking Fears Fueled by Microsoft's Monopoly on Military IT*, Newsweek, available at: <https://www.newsweek.com/pentagon-hacking-fears-raised-microsoft-military-software-it-antivirus-monopoly-cybersecurity-1794369> (May 16, 2023); John Zangardi, *A Diverse Cybersecurity Ecosystem is Critical for Network Security*, C4ISRNews, available at: <https://www.c4isrnet.com/opinion/2021/11/09/a-diverse-cybersecurity-ecosystem-is-critical-for-network-security/> (Nov. 9, 2021); Dan Gouré, *DoD's Software Acquisition Strategy Could Result In Dangerous Security Vulnerabilities*, RealClearDefense, available at:

[https://www.realcleardefense.com/articles/2023/03/22/dods\\_software\\_acquisition\\_strategy\\_could\\_result\\_in\\_dangerous\\_security\\_vulnerabilities\\_888706.html](https://www.realcleardefense.com/articles/2023/03/22/dods_software_acquisition_strategy_could_result_in_dangerous_security_vulnerabilities_888706.html) (Mar. 22, 2023).

<sup>52</sup> Sergiu Gatlan, *Microsoft Defender Mistakenly Tagging URLs as Malicious*, Bleeping Computer, available at: <https://www.bleepingcomputer.com/news/microsoft/microsoft-defender-mistakenly-tagging-urls-as-malicious/> (Mar. 29, 2023).

<sup>53</sup> Anthony M. Freed, *Microsoft's Failure to Prioritize Security Puts Everyone at Risk*, Cybereason Blog, available at: <https://www.cybereason.com/blog/microsofts-failure-to-prioritize-security-puts-everyone-at-risk> (Oct. 14, 2021); Ryan Kalember, *The Microsoft Paradox: Contributing to Cyber Threats and Monetizing the Cure*, Fortune, available at: <https://fortune.com/2021/12/06/microsoft-paradox-cybersecurity-solarwinds-exchange-national/> (Dec. 6, 2021).

<sup>54</sup> Anthony M. Freed, *Microsoft's Failure to Prioritize Security Puts Everyone at Risk*, Cybereason Blog, available at: <https://www.cybereason.com/blog/microsofts-failure-to-prioritize-security-puts-everyone-at-risk> (Oct. 14, 2021).

the “the arsonist, the fire department, and the building inspector,” despite providing inferior cybersecurity for its customers.<sup>55</sup>

- Azure Active Directory and Intune, user identity, authentication, and device management: Microsoft does not provide sufficient Application Programming Interfaces (“APIs”) needed to allow interoperability between Microsoft products ActiveDirectory, Azure ActiveDirectory, Intune and third-party identity and device management products. Microsoft has long tied its ActiveDirectory and Azure ActiveDirectory services to the license for its dominant offerings, including for Windows OS and Office productivity suite. This not only allowed Microsoft to capture a market leader position in the identity and access management market, it also created another barrier layer for customers to choose alternative providers; not only for operating systems or productivity, but also identity management. If you chose an alternative operating system or productivity suite, you would struggle with identity and authentication because a customer could not efficiently connect that to ActiveDirectory historically and now Azure ActiveDirectory. Conversely, if you chose an alternative identity management provider which used Microsoft’s Windows OS or productivity tools, you would struggle for equivalent connectivity as with ActiveDirectory or Azure ActiveDirectory. As Microsoft has moved to Microsoft 365 enterprise agreements, customers are now required to use an Azure ActiveDirectory identity – and for some licenses, Microsoft Intune endpoint management – to access Microsoft 365 products. That identity then serves as the core identity on Azure and Windows devices, making it difficult to connect to tools and services provided by competitors.<sup>56</sup> For example, if you want to leverage an Azure ActiveDirectory identity – which as noted above is required if you use Microsoft 365 – to authenticate a Mac, it is difficult to do so using an alternative operating system to Windows and creates a significant disincentive for customers to use competing operating systems. Similarly, if you want to use a third-party identity solution,

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<sup>55</sup> Ryan Kalember, *The Microsoft Paradox: Contributing to Cyber Threats and Monetizing the Cure*, Fortune, available at: <https://fortune.com/2021/12/06/microsoft-paradox-cybersecurity-solarwinds-exchange-national/> (Dec. 6, 2021).

<sup>56</sup> See Microsoft, *High level architecture for Windows 365*, available at: <https://learn.microsoft.com/en-us/windows-365/enterprise/high-level-architecture> (Jun. 15, 2023) (high level overview of interdependence of products within the Windows 365 ecosystem, noting the default versus optional settings and services).

you will not have all of the APIs required for equivalent services on Windows and Azure ActiveDirectory. Unless a customer solution is exclusively based on Azure AD, third party IAM providers cannot fully manage identities in Microsoft 365. This represents a significant technical barrier to those seeking to use Microsoft 365 on competing cloud infrastructure, in particular, in hybrid and/or multi-cloud environments where Microsoft products run alongside other applications. As the U.K. Office of Communications (“Ofcom”) found in its report on cloud (“Ofcom Report”), “Limitations to Interoperability are especially relevant in regard to Microsoft – limitations are not strictly imposed but stem from the difficulties of making the Microsoft stack work with a non-Azure cloud.”<sup>57</sup>

- Teams, communication and collaboration: nearly every Microsoft 365 subscription plan includes Teams by default. However, as outlined above, Microsoft does not price individual products within its ELAs. As a result, customers cannot either discern the price of Teams or avoid having it, even if they prefer another communication and collaboration product. Teams also limits integration capabilities with third party communication and collaboration solutions to the frustration of customers and despite the fact that other communication industry players ensure such functionality (e.g., Slack, Zoom).<sup>58</sup> Specifically, while Microsoft allows third parties to develop APIs that enable third-party platform customers to increase their engagement with Teams, these offered solutions are one directional. APIs that would enable third party services to integrate natively within Teams are not similarly supported. As a result, Teams has grown to a dominant collaboration product, despite users uniformly rating Teams below its competitors in virtually every major category – including usability, reliability and functionality – except price.<sup>59</sup> By leveraging its dominant desktop and productivity

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<sup>57</sup> Ofcom: [Cloud Services Market Research – Summary of Findings March 2023 \(ofcom.org.uk\)](https://www.ofcom.gov.uk/consult/condocs/cloudservices/cloudservices_market_research_summary_of_findings_march_2023/) at 80.

<sup>58</sup> Slack, Slack Files EU Competition Complaint Against Microsoft (July 22, 2020). Three years Slack filed its complaint, hoping to head off an investigation by EU competition authorities, Microsoft unbundled Teams from Office. See [cite: <https://www.ft.com/content/be838956-7038-4179-8a1c-851b83048d5d>]. But the remedy came too late—Slack sold to Salesforce soon after filing its complaint and Teams had won out by the time unbundling was on the table.

<sup>59</sup> Daniel Rubino, *Microsoft Teams gets trashed by Wirecutter, highlights lingering issues with consumer push*, Windows Central, available at: <https://www.windowscentral.com/microsoft-teams-personal-use-needs-help> (March 9, 2021); Melanie Pinola, *The Best Team Messaging App Is Slack*, WireCutter (New York Times), available at:

products to compel the adoption of Teams and limiting integration capabilities with competing products, Microsoft not only inhibits the ability of alternative communication and collaboration providers to effectively compete but also harms its own customers.<sup>60</sup> That harm is evident in Microsoft's February 2023 release of Teams Premium. The add-on license for separate purchase provides access to not only sets of advanced features but previously "free" features that "will move from Teams licenses to Teams Premium Licenses."<sup>61</sup> The monetization of Teams via Teams Premium – an expenditure over and above existing licenses that already make Teams available to clients – demonstrates how Microsoft leverages its dominance in adjacent product markets to drive adoption, and then raises prices. Then, Microsoft monetizes the product at issue (here, Teams) only after customer adoption is sticky enough that paying for what used to be "free" is more appealing than the friction of switching providers.

## B. Anticompetitive Effects

The requirement that customers re-license their existing licenses in order to deploy those on competing cloud services; the discriminatory treatment of competing cloud providers wishing to offer customers the ability to use Microsoft products on their own cloud infrastructure; and tying numerous software products to Microsoft's dominant positions are having an outsized and negative impact on cloud customers and end-consumers, while also stifling competition from other cloud service providers. This is of particular concern at a time when more companies across the US are considering the use of cloud services for the security, flexibility, and other benefits they can deliver.

Microsoft's licensing and tying practices, which leverage its dominant desktop operating, server, and productivity software products to its adjacent product market offerings throughout the Microsoft ecosystem, have clear anticompetitive effects across the cloud in the form of price increases, less

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<https://www.nytimes.com/wirecutter/reviews/best-team-messaging-app/#how-we-tested> (March 26, 2021).

<sup>60</sup> Jason Aten, *Microsoft is Trying to Force You to Use its Software Like it's 1998 all over again*, Inc., available at: <https://www.inc.com/jason-aten/microsoft-is-trying-to-force-you-to-use-its-software-like-its-1998-all-over-again.html> (Jan. 4, 2022).

<sup>61</sup> Nicole Herskowitz, *Microsoft Teams Premium: Cut costs and add AI-powered productivity*, Microsoft, available at: <https://www.microsoft.com/en-us/microsoft-365/blog/2023/02/01/microsoft-teams-premium-cut-costs-and-add-ai-powered-productivity/> (Feb 1, 2023).

customer choice, reduced innovation, and poorer quality products.<sup>62</sup> Of course, Microsoft’s anticompetitive licensing and tying practices have also negatively impacted competitive conditions relating to IT services in the cloud. In addition to the myriad of cloud customers, Microsoft’s competitors, large and small, have borne the costs of being foreclosed from competing effectively on the merits of their products, even where users may actively prefer the user experience offered by non-Microsoft products.

Meanwhile, Microsoft has benefitted handsomely from these practices, supporting the growth in several Microsoft products, including Azure, Defender, and Teams, even against products widely regarded as superior. Microsoft’s share of the global cloud infrastructure services segment jumped from 13% to 23% from 2018 to 2022.<sup>63</sup>

i. Increased Cost

As a result of the anticompetitive practices set out above, all of Microsoft’s licensed products, which are integral to the workloads of many American businesses and customers, are more expensive for end-users when used on third-party cloud service providers. As Wes Miller, an analyst at research firm Directions on Microsoft put it: “[y]ou can still run all of these products in someone else’s cloud, but you must be willing to pay a premium to do that.”<sup>64</sup>

A customer selecting a cloud service provider other than Microsoft faces higher costs for reasons unrelated to efficiency or competition on the merits. The licensing changes and discriminatory treatment of SPLA have led to increased prices—sometimes more than \$100M for a single customer<sup>65</sup>—for Microsoft software customers that wished to use the cloud services of the Listed Providers.

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<sup>62</sup> Frederic Jenny, *Cloud Infrastructure Services: An Analysis of Potentially Anti-Competitive Practices*, available at: [35b77d\\_4490e58b3da3490590cf55d15f561e4b.pdf \(usfiles.com\)](https://www.usfiles.com/35b77d4490e58b3da3490590cf55d15f561e4b.pdf). [CISPE English Report] (Oct. 2021).

<sup>63</sup> Synergy Research Group, *Cloud Spending Growth Rate Slows But Q4 Still Up by 10 Billion from 2021*, available at: <https://www.srgresearch.com/articles/cloud-spending-growth-rate-slows-but-q4-still-up-by-10-billion-from-2021-microsoft-gains-market-share> (Feb. 6, 2023); Statista, *Worldwide Market Share of Leading Cloud Infrastructure Service Providers*, available at: <https://www.statista.com/chart/18819/worldwide-market-share-of-leading-cloud-infrastructure-service-providers/> (Apr. 28, 2023).

<sup>64</sup> Richard Waters, *Microsoft’s Tactics to Win Cloud Battle Lead to New Antitrust Scrutiny*, *Financial Times*, available at: <https://www.ft.com/content/350e7fed-cd52-4a0a-9902-5f2d9ebc3fe7> (Apr. 12, 2022).

<sup>65</sup> *The Economist*, *How Satya Nadella turned Microsoft around*, available at: <https://www.economist.com/briefing/2020/10/22/how-satya-nadella-turned-microsoft-around> (Oct. 22, 2020).

Frederic Jenny estimates that Microsoft's licensing practices have imposed costs of some \$400M in Europe.<sup>66</sup> In the U.S., where the company has made no changes whatsoever, the dollar cost is surely much greater.

There is no rational explanation or objective justification for why Microsoft engages such a complex license and price differentiation. The cost of supply is not affected. It is simply a means to make their competitors' offers less attractive.

Microsoft has made recent proposals that it suggests resolves these concerns.<sup>67</sup> However, these proposals do nothing for, and indeed make no reference to, the effects of higher pricing for software running on other cloud service providers that results directly from their product license terms – significantly higher, prices that many of the Coalition's members today must endure. Nor do they address broader industry concerns. Indeed, Microsoft continues to impose key restrictions on Listed Providers and, in fact, introduced additional restrictions on SPLA partners hosting on Listed Provider infrastructure.

Because of the opacity in pricing of individual products and services, customers are prevented from being able to effectively price shop for the services they actually need. As one customer noted:

[We] can't do a straight comparison of costs. We have to do calculations with both separately. There is an element of them trying to muddy the waters in terms of costing – Microsoft tend to bundle things. They tell you it's cheaper to do things in Azure because they include an element of the license in the subscription – always a case of bundling and it being more expensive but explaining to you why it's cheaper because it includes things.<sup>68</sup>

The Ofcom Report found that Azure users are less likely to be paying the quoted price than Google and AWS users and that Microsoft users are most likely to have had price rises.<sup>69</sup> Among those that experienced a price increase when

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<sup>66</sup> Frederic Jenny, *Cloud Infrastructure Services: An Analysis of Potentially Anti-Competitive Practices*, available at: [35b77d\\_4490e58b3da3490590cf55d15f561e4b.pdf \(usfiles.com\)](https://www.usfiles.com/35b77d_4490e58b3da3490590cf55d15f561e4b.pdf) [CISPE English Report] (Oct. 2021).

<sup>67</sup> Microsoft Blog, *New Licensing Benefits Make Bringing Workloads and Licences to Partners' Clouds Easier*, available at: <https://blogs.partner.microsoft.com/partner/new-licensing-benefits-make-bringing-workloads-and-licenses-to-partners-clouds-easier/> (Aug. 29, 2022).

<sup>68</sup> Ofcom, *Cloud Services Market Research – Summary of Findings*, available at: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0031/256459/context-consulting-cloud-services-market-research-summary-of-findings.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0031/256459/context-consulting-cloud-services-market-research-summary-of-findings.pdf) (March 2023).

<sup>69</sup> *Id.*

renewing their contract, the mean reported increase was around 20%.<sup>70</sup> Gartner’s research confirms this: “Many Gartner clients report frustration with watching their Azure costs increase over time without knowing why.”<sup>71</sup>

Microsoft’s customers recognize the harm of Microsoft’s ties and increase on their budget spend. Some customers feel they are “paying Microsoft for dozens of features [they] don’t use”. One customer explained to Ofcom: “It’s why you pay what you pay sometimes, because they will tell us there’s thousands of features and like, yeah, I need about four of them.” Others feel that they should not consider other cloud-based software, because Microsoft’s programs have “no cost”.<sup>72</sup>

## ii. Less Choice for the End-User

This is not just a question of price but also of customer choice. It is vital that the customer has the choice of which services and IT service providers to use so that they may achieve the best solution for their IT needs. Microsoft’s practices inhibit that choice, weaken existing competition, and discourage potential competitors from innovating and entering the market.

Microsoft’s tying is preventing customers from accessing the benefits that competitors in cybersecurity, communication and collaboration, IAM, and other sectors may offer. The end-user is thus forced into choosing a provider on which it can run the software it relies on (*i.e.*, Microsoft), rather than the provider that is best suited to serving its specific IT needs.<sup>73</sup> This has been the experience of no less than the United States government.<sup>74</sup> As federal government procurement consultant Michael Garland put it, “[i]n this hyper-competitive environment, one tool to thwart competition is to leverage one’s existing software install base by

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<sup>70</sup> *Id.*

<sup>71</sup> Gartner Research, CIP Magic Quadrant (2022) at 10.

<sup>72</sup> Ofcom Report at 58.

<sup>73</sup> Omdia, Monoculture and Market Share: The State of Communications and Collaboration Software in the US Government (Sept. 21, 2021) (“Bundling can also be used as an effective strategy in the procurement process because vendors that combine products—or throw in ancillary products for free—can be more difficult for rivals that have smaller subsets of products to compete against. While it may still be possible to compete effectively by offering an alternate bundle, those vendors with a firstcomer advantage can significantly lower their costs or effectively commoditize entire categories of software and further entrench legacy systems even if they offer new or additional services as free or discounted add-ons. This can hurt the customer.”)

<sup>74</sup> *Id.*

erecting licensing barriers that penalize customers for using competitive cloud offerings. This is what Microsoft appears to be doing. . . .”<sup>75</sup>

The anticompetitive practices in question have also directly prevented innovation in precisely the technology that enables customers to make the most and best use of cloud computing: virtualization. Virtual Desktop Infrastructure (VDI) permits individuals to access a “virtual desktop” in the cloud, where they can perform all of their normal office functions from multiple devices and work remotely. It is a critical component of the modern workplace and an invaluable contribution to productivity from cloud computing. Third-party providers like Citrix, VMware, Cameyo and Ivanti have attempted to develop their own VDI offerings, but Microsoft charges additional license costs to use its technologies for remote connection and refuses to make certain software products (e.g., Microsoft365 and Windows Desktop) available under the SPLA. As outlined above, the 2019 licensing changes also prohibit the Listed Providers from being able to offer or host (BYOL) Microsoft365 at all, therefore preventing them from offering a viable VDI solution for many customers. Microsoft has since developed its own VDI offering for its clients on Azure.

Once again, recognizing a competition problem of its own creation, last summer Microsoft promised to remove the requirement for additional licenses to offer virtual desktop functions.<sup>76</sup> However, to date, the only changes we have seen have been to within the Azure Hybrid Benefit program<sup>77</sup> and these do not do anything to address competition concerns.<sup>78</sup>

### iii. Cybersecurity

One of the less discussed and increasingly concerning consequences of Microsoft’s anticompetitive restrictive licensing and tying practices is that of increased cybersecurity risk. By driving customers to adopt single cybersecurity product for reasons unrelated to the quality of security (namely, its inclusion in a

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<sup>75</sup> Michael Garland, *Vendor Locking in the Cloud*, FCW, available at: <https://fcw.com/comment/2022/04/vendor-locking-cloud/365665/>, (Apr. 14, 2022).

<sup>76</sup> Microsoft Blog, *New Licensing Benefits Make Bringing Workloads and Licences to Partners’ Clouds Easier*, available at: <https://blogs.partner.microsoft.com/partner/new-licensing-benefits-make-bringing-workloads-and-licenses-to-partners-clouds-easier/> (Aug. 29, 2022).

<sup>77</sup> Microsoft, *Explore Azure Hybrid Benefit for Windows VMs*, available at: <https://learn.microsoft.com/en-us/azure/virtual-machines/windows/hybrid-use-benefit-licensing> (Apr. 19, 2023).

<sup>78</sup> Simon Sharwood, *Microsoft makes Windows Server 2022 licenses a little less cynical*, The Register, available at: [https://www.theregister.com/2023/04/26/windows\\_server\\_license\\_changes/](https://www.theregister.com/2023/04/26/windows_server_license_changes/) (Apr. 26, 2023).



Microsoft 365 suite of otherwise unrelated products), Microsoft is removing the market mechanism for improving overall cybersecurity in favor of creating customer dependency on a single layer of defense. Sole reliance on Microsoft for cybersecurity solutions creates a less secure IT environment and runs counter to general recommendations for ensuring organizational cyber-resiliency. Further, it creates a concentrated and easier to access target for bad actors to identify vulnerabilities or common misconfigurations associated with the platform.<sup>79</sup>

Microsoft has been implicated in a number of security related concerns in recent years, including on a few occasions a disturbing lack of transparency. These have included issues in connection with the Microsoft operating system, Microsoft software, and Microsoft's Azure cloud solutions.<sup>80</sup> Commentators have raised this concern in a number of contexts. Generally, some have asked, "Far from a cybersecurity savior, is Microsoft effectively setting the house on fire and leaving organizations with the bill for putting it out?"<sup>81</sup> More specifically others have noted the implications of the federal government's contracts with Microsoft, particularly those related to the military.<sup>82</sup> As senior researcher at IDC and former

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<sup>79</sup> Omdia, *Monoculture and Market Share: The State of Communications and Collaboration Software in the US Government* (Sept. 21, 2021); Dan Gouré, *DoD's Software Acquisition Strategy Could Result In Dangerous Security Vulnerabilities*, RealClearDefense, available at: [https://www.realcleardefense.com/articles/2023/03/22/dods\\_software\\_acquisition\\_strategy\\_could\\_result\\_in\\_dangerous\\_security\\_vulnerabilities\\_888706.html](https://www.realcleardefense.com/articles/2023/03/22/dods_software_acquisition_strategy_could_result_in_dangerous_security_vulnerabilities_888706.html) (Mar. 22, 2023).

<sup>80</sup> See, e.g., Ryan Kalember, *The Microsoft Paradox: Contributing to Cyber Threats and Monetizing the Cure*, Fortune, available at: <https://fortune.com/2021/12/06/microsoft-paradox-cybersecurity-solarwinds-exchange-national/> (Dec. 6, 2021); Ionut Arghire, *Microsoft Azure Users Warned of Potential Shared Key Authorization Abuse*, Security Week, available at: <https://www.securityweek.com/microsoft-azure-users-warned-of-potential-shared-key-authorization-abuse/> (April 11, 2023); Anthony M. Freed, *Microsoft's Failure to Prioritize Security Puts Everyone at Risk*, Cybereason Blog, available at: <https://www.cybereason.com/blog/microsofts-failure-to-prioritize-security-puts-everyone-at-risk> (Oct. 14, 2021).

<sup>81</sup> Ryan Kalember, *The Microsoft Paradox: Contributing to Cyber Threats and Monetizing the Cure*, Fortune, available at: <https://fortune.com/2021/12/06/microsoft-paradox-cybersecurity-solarwinds-exchange-national/> (Dec. 6, 2021).

<sup>82</sup> Shaun Waterman, *Pentagon Hacking Fears Fueled by Microsoft's Monopoly on Military IT*, Newsweek, available at: <https://www.newsweek.com/pentagon-hacking-fears-raised-microsoft-military-software-it-antivirus-monopoly-cybersecurity-1794369> (May 16, 2023); John Zangardi, *A Diverse Cybersecurity Ecosystem is Critical for Network Security*, C4ISRNews, available at: <https://www.c4isrnet.com/opinion/2021/11/09/a-diverse-cybersecurity-ecosystem-is-critical-for-network-security/> (Nov. 9, 2021); Dan Gouré, *DoD's Software Acquisition Strategy Could Result In Dangerous Security Vulnerabilities*, RealClearDefense, available at: [https://www.realcleardefense.com/articles/2023/03/22/dods\\_software\\_acquisition\\_strategy\\_could\\_result\\_in\\_dangerous\\_security\\_vulnerabilities\\_888706.html](https://www.realcleardefense.com/articles/2023/03/22/dods_software_acquisition_strategy_could_result_in_dangerous_security_vulnerabilities_888706.html) (Mar. 22, 2023).

Director of Defense Information at the Department of Defense Paul Strassman stated, “Finding a crack through which one could induce mayhem with only a few keystrokes would be worth a great deal of money, especially when supporting an act of terrorism.”<sup>83</sup> This is especially true for governmental entities, companies, and organizations that are a target of Chinese-based advanced persistent threats (APTs), as Microsoft shares their source code with the Chinese government<sup>84</sup> and has identified at least one zero-day attack on its own products (CVE-2021-42321<sup>85</sup>) that was likely known by Chinese APTs before it was known by Microsoft.<sup>86</sup>

Microsoft’s practices are distorting competition in cybersecurity.

For example, Microsoft has been known to offer Microsoft Defender “for free” with its cloud or productivity software. By tying Defender to other products, Microsoft is effectively cloaking the true cost of Defender through its licensing structure. This practice removes the market mechanism for valuing cybersecurity solutions, undermining and skewing competition in the current and future cybersecurity market.<sup>87</sup>

This reduces the incentives for innovation and improvement overall. As the Atlantic asked in 2021, “Is Windows as good a product as it would be if it faced more robust competition? When Windows has major security flaws, for example, billions of customers and companies are impacted, because of its market share. If we’re wondering whether crappy airline experiences are a competition problem,

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<sup>83</sup> Paul Strassman, *The Pernicious Characteristics of Monocultures*, PBS, available at: <https://www.pbs.org/wgbh/pages/frontline/shows/hackers/blame/threat.html>

<sup>84</sup> Microsoft, *China Information Technology Security Certification Center Source Code Review Lab Opened*, available at: <https://news.microsoft.com/2003/09/26/china-information-technology-security-certification-center-source-code-review-lab-opened/> (September 26, 2003) (“Microsoft is the first commercial software company that provides the Chinese government with access to its source code.”)

<sup>85</sup> National Institute of Standards and Technology, *CVE-2021-42321: Microsoft Exchange Server Remote Code Execution Vulnerability*, available at: <https://nvd.nist.gov/vuln/detail/CVE-2021-42321> (August 29, 2022).

<sup>86</sup> Microsoft, *Digital Defense Report 2022*, available at: <https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RE5bUvv?culture=en-us&country=us#page=40> (December 6, 2022) (“The vulnerabilities described below were first developed and deployed by China-based nation state actors in attacks, before being discovered and spread among other actors in the larger threat ecosystem.”)

<sup>87</sup> Shaun Waterman, *Pentagon Hacking Fears Fueled by Microsoft’s Monopoly on Military IT*, Newsweek, available at: <https://www.newsweek.com/pentagon-hacking-fears-raised-microsoft-military-software-it-antivirus-monopoly-cybersecurity-1794369> (May 16, 2023).

should the same question apply to crappy computer security?”<sup>88</sup> Microsoft’s practices of locking customers into the Microsoft ecosystem (by increasing the switching costs for failing to use Azure) inhibits movement to potentially more secure cloud providers and removes incentive for Microsoft to innovate and continuously improve cybersecurity within its solutions.<sup>89</sup>

#### iv. Artificial Intelligence

While we are still seeking to fully understand how current licensing and technical integration models operate, there are reasons to be concerned that, if left unchecked, Microsoft’s anticompetitive practices will have serious implications for competition in the emerging AI space. Specifically, their practice of tying emerging products and services to dominant and widely adopted products to foreclose competition could spell the end for competition in AI just we are beginning to see its potential. The inclusion of new GPT AI services in dominant product offerings of Microsoft 365<sup>90</sup> present similar competitive concerns as those previously discussed in the above outlined product sectors.

Companies throughout the technology stack are working to develop and deploy solutions that leverage artificial intelligence (AI) and machine learning to deliver better customer experiences. Despite Microsoft’s public claims around democratizing AI, if left unexamined, we are concerned about the further transposition of the kinds of harmful and anticompetitive practices Microsoft has employed to date to this important emerging area of technology. If employed, this presents an existential threat both to future competition and innovation by new market entrants.

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<sup>88</sup> Molly Wood, *The Invisible Tech Behemoth*, The Atlantic, available at: <https://www.theatlantic.com/ideas/archive/2021/07/microsofts-antitrust/619599/> (July 29, 2021).

<sup>89</sup> John Zangardi, *A Diverse Cybersecurity Ecosystem is Critical for Network Security*, C4ISRNews, available at: <https://www.c4isrnet.com/opinion/2021/11/09/a-diverse-cybersecurity-ecosystem-is-critical-for-network-security/> (Nov. 9, 2021).

<sup>90</sup> Bernard Marr, *Microsoft’s Plan to Infuse AI and ChatGPT into Everything*, Fortune, available at: <https://www.forbes.com/sites/bernardmarr/2023/03/06/microsofts-plan-to-infuse-ai-and-chatgpt-into-everything/?sh=30f7f97153fc> (Mar. 6, 2023); Tom Warren, *Microsoft Announces Copilot: the AI Powered Future of Office Documents*, The Verge, available at: <https://www.theverge.com/2023/3/16/23642833/microsoft-365-ai-copilot-word-outlook-teams> (Mar. 16, 2023).

### 3. Regulatory Response

As the Commission recognized in issuing its RFI, now is a critical time for U.S. cloud computing. Cloud services provide numerous benefits to customers—including lower costs, greater flexibility, better security—and customers continue to adopt cloud services for their workloads. Microsoft is using monopoly power in adjacent software markets to win those workloads.

#### A. Attention from European Regulators

As described above, European regulators have already begun scrutinizing Microsoft's anticompetitive practices. CISPE and various European industry participants have lodged at least four complaints against Microsoft, and cases are pending before the European Commission.<sup>91</sup> The German Federal Cartel Office has also initiated an investigation.<sup>92</sup>

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<sup>91</sup> See e.g. Samuel Stolton, *Microsoft set to face EU antitrust probe over video calls*, Politico, available at: <https://www.politico.eu/article/microsoft-european-union-antitrust-video-calls-software-giant/> (Jan. 25, 2023); Nextcloud Press Release, *EU coalition urges EU to push back against gate keeping by Microsoft, files official complaint*, Nextcloud GmbH, available at: <https://antitrust.nextcloud.com/press-release.pdf> (Nov. 29, 2021); Paul Kunert, *Euro clouds lodge another complaint against Microsoft over anti-competitive licenses*, The Register, available at: [https://www.theregister.com/2022/11/09/cispe\\_ec\\_microsoft\\_complaint/](https://www.theregister.com/2022/11/09/cispe_ec_microsoft_complaint/) (Nov. 9, 2022); Samuel Stolton, *Microsoft to face new antitrust scrutiny in Germany*, Politico, available at: <https://www.politico.eu/article/microsoft-to-face-new-antitrust-scrutiny-in-germany/> (Aug. 11, 2022); Natasha Lomas, *Germany probes Microsoft's market power*, TechCrunch, available at: <https://techcrunch.com/2023/03/28/microsoft-german-fco/> (Mar. 28, 2023); Tobias Mann, *Germany sours on Microsoft again, launches antitrust review*, The Register, available at: [https://www.theregister.com/2023/03/29/microsoft\\_german\\_antitrust/](https://www.theregister.com/2023/03/29/microsoft_german_antitrust/) (Mar. 29, 2023); Richard Speed, *UK suit over reselling surplus Microsoft licenses rolls on*, The Register, available at: [https://www.theregister.com/2022/04/01/valuelicensing\\_microsoft\\_latest/](https://www.theregister.com/2022/04/01/valuelicensing_microsoft_latest/) (Apr. 1, 2023).

<sup>92</sup> See e.g. Examination of Microsoft's significance for competition across markets, Bundeskartellamt, available at: [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28\\_03\\_2023\\_Microsoft.html?nn=3591568](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_03_2023_Microsoft.html?nn=3591568) (Mar. 28, 2023); Paul Sawers, *Microsoft kickstarts settlement discussions with European cloud companies over antitrust complaints*, TechCrunch, available at: <https://techcrunch.com/2023/04/20/microsoft-kickstarts-settlement-discussions-with-european-cloud-trade-body-over-antitrust-complaints/> (Apr. 20, 2023); Preston Galla, *It's déjà vu all over again as governments put Microsoft in their crosshairs*, ComputerWorld, available at: <https://www.computerworld.com/article/3693114/it-s-deja-vu-all-over-again-as-governments-put-microsoft-in-their-crosshairs.html> (Apr. 12, 2023); Foo Yun Chee, *Microsoft offers to change cloud practices to ward off EU antitrust probe – source*, Reuters, available at: <https://www.reuters.com/technology/microsoft-offers-change-cloud-computing-practices-after-rivals-complaint-source-2023-03-28/> (Mar. 28, 2023).

In response to these complaints and investigations, the company has announced a number of small shifts in policy in an attempt to circumvent European regulatory concerns. But exceptions to the newly announced policies make clear that the impediments to competition persist.<sup>93</sup> And to be clear: the impact is felt most acutely by the customers of cloud providers, who cannot derive the benefits of free, open, and fair competition.

## B. U.S. Antitrust Law

The Coalition believes that Microsoft's practices may violate the Sherman Act and the Federal Trade Commission Act ("FTC Act") and merit investigation by U.S. antitrust enforcers. This response is intended to answer the Commission's questions, not as a legal brief; but we note briefly how some of the conduct described fits within the U.S. legal framework.

Microsoft's licensing conduct in the cloud computing industry amounts to an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.<sup>94</sup> While the technology of the cloud is relatively new, the framework for evaluating it is as old as antitrust law itself. The Supreme Court's landmark antitrust decision, *United States v. Standard Oil*, condemned business conduct that harmed the competitive process in a way not at all dissimilar from the licensing practices at issue here. The Rockefellers required the railroads to pay rebates to the Standard Oil combination even on non-Standard Oil shipments.<sup>95</sup> These rebates acted as a tax on railroads when they shipped for Standard Oil's competitors, which in turn limited the shipping discounts the railroads could give these competitors. As a

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<sup>93</sup> See e.g. Dina Bass, *Microsoft Customers Decry Cloud Contracts That Sideline Rivals*, Bloomberg, available at: <https://www.bloomberg.com/news/articles/2022-04-12/microsoft-customers-decry-cloud-contracts-that-sideline-rivals#xj4y7vzkg> (Apr. 11, 2022); Paul Kunert, *Microsoft revises software licensing, cloud policies amid EU regulator scrutiny*, The Register, available at: [https://www.theregister.com/2022/05/18/microsoft\\_cloud\\_concessions/](https://www.theregister.com/2022/05/18/microsoft_cloud_concessions/) (May 18, 2022); Foo Yun Chee, *Exclusive: Google says Microsoft cloud practices are anti-competitive*, Reuters, available at: <https://www.reuters.com/technology/google-says-microsofts-cloud-practices-anti-competitive-slams-deals-with-rivals-2023-03-30/> (Mar. 31, 2023); Jillian Deutsch, Dina Bass, Benoit Berthelot and Stephanie Bodoni, *Microsoft, OVH Prepare to Settle Cloud Complaint to EU*, Bloomberg, available at: <https://www.bloomberg.com/news/articles/2023-03-28/microsoft-ovh-prepare-to-settle-eu-antitrust-complaint-on-cloud?sref=2iPPCcg0#xj4y7vzkg> (Mar. 28, 2023); Paul Sawers, *Microsoft kickstarts settlement discussions with European cloud companies over antitrust complaints*, TechCrunch, available at: <https://techcrunch.com/2023/04/20/microsoft-kickstarts-settlement-discussions-with-european-cloud-trade-body-over-antitrust-complaints/> (Apr. 20, 2023).

<sup>94</sup> See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 69 (1911).

<sup>95</sup> *Id.* at 4, 21.

result, these rebates had the effect of raising the costs of Standard Oil's rivals and thereby reducing the competitive pressure these rivals could exert on Standard Oil. Microsoft requires its customers to pay far more to license software used on competing cloud products, and "partners" to charge higher rates for its software through the SPLA for worse products than Microsoft itself offers to its Azure customers. Like Standard Oil's rebates, Microsoft's practices effectively levy a tax when customers deal with Microsoft's rivals and ultimately raise those rivals' costs or otherwise limit their ability exert competitive pressure on Azure.

The Antitrust Guidelines for the Licensing of Intellectual Property, jointly issued in 2017 by the DOJ and FTC, (the "Licensing Guidelines") anticipate just this problem: "license restrictions with respect to one market may harm such competition in another market by anticompetitively foreclosing access to, or significantly raising the price of, an important input . . .", like Microsoft's software.<sup>96</sup> Microsoft's existing monopolies in software markets increases the "[t]he risk of anticompetitively foreclosing access or increasing competitors' costs".<sup>97</sup>

Less restrictive alternatives are clearly available to Microsoft.<sup>98</sup> If the company can remove restrictive licensing practices that impact customers of European cloud providers, they can do so for customers of Listed Providers. There are no technical barriers preventing Microsoft from changing its restrictive licensing practices and allowing customers to choose the software and cloud infrastructure most suited to their needs.

Media coverage is replete with customers and industry commentators raising the alarm bells about Microsoft's actions and at least four complaints have been filed against its conduct.<sup>99</sup> Industry observers are frank about the market

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<sup>96</sup> Licensing Guidelines at § 3.1; see *RealPage, Inc. v. Yardi Systems, Inc.*, 852 F. Supp. 2d 1215, 1219 (C.D. Cal. 2012) (denying motion to dismiss antitrust claim based on license provision that limited customer's ability to use licensed software on competitor's cloud).

<sup>97</sup> Licensing Guidelines at § 4.1.1; see *Lucasys, Inc. v. PowerPlan, Inc.*, 576 F. Supp. 3d 1331, 1337-40, 47-51 (N.D. Ga. 2021) (denying motion to dismiss antitrust claim based on company's use of monopoly power in one market to prevent customers from using competitors in another market).

<sup>98</sup> *N.C.A.A. v. Alston*, 594 U.S. \_\_\_ (2021), at slip op. 28 ("anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits").

<sup>99</sup> See, e.g., Aaron Holmes, *Microsoft Squeezed by Growing Resistance to Software Bundles*, The Information, available at: <https://www.theinformation.com/articles/microsoft-squeezed-by-growing-resistance-to-software-bundles> (Dec. 15, 2022); Paul Sawers, *Microsoft kickstarts settlement discussions with European cloud companies over antitrust complaints*, TechCrunch, available at: <https://techcrunch.com/2023/04/20/microsoft-kickstarts-settlement-discussions-with-european-cloud-trade-body-over-antitrust-complaints/> (Apr. 20, 2023); Dina Bass,

reality. Gartner describes it thusly: “Microsoft is using licensing for its products . . . punitively against competitive cloud providers by making it more expensive to deploy Windows workloads anywhere other than Azure.”<sup>100</sup>

Microsoft is no stranger to illegal tying. Twenty-five years ago, it was tying Internet Explorer to the OS monopoly.<sup>101</sup> Today, numerous products are tied to Windows, Office, and Azure. In situations where the party has monopoly power, courts may apply *per se* treatment against tying arrangements like the ones Microsoft has adopted.<sup>102</sup> In these cases, courts generally require that:

- (1) two separate products or services are involved, (2) the sale or agreement to sell one is conditioned on the purchase of the other, (3) the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product, and (4) a not insubstantial amount of interstate commerce in the tied product is affected.<sup>103</sup>

Microsoft ties its Azure cloud services to its Microsoft 365 Office suite software and ties certain programs (*i.e.*, Sharepoint, Teams, Defender) to its Office 365 software, thus creating a system whereby a customer who desires critical aspects of the Office suite must also commit to purchasing Sharepoint, Teams, Azure AD, OneDrive, Defender, and a growing list of additional products. Further, they must do so through Azure cloud unless they want to pay a great deal more. Microsoft has monopoly power in the productivity software market (with its Office 365 product), which is the primarily used productivity software across the country and the world.<sup>104</sup>

Microsoft has no valid business reason for tying its products. Whether in cybersecurity or communication and collaboration or cloud backup, numerous

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*Microsoft Customers Decry Cloud Contracts That Sideline Rivals*, Bloomberg Law, available at: <https://www.bloomberg.com/news/articles/2022-04-12/microsoft-customers-decry-cloud-contracts-that-sideline-rivals#xj4y7vzkg> (Apr. 12, 2022); Molly Wood, *The Invisible Tech Behemoth*, The Atlantic, available at: <https://www.theatlantic.com/ideas/archive/2021/07/microsofts-antitrust/619599/> (July 29, 2021).

<sup>100</sup> Gartner Research, CIP Magic Quadrant (2022) at 10.

<sup>101</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>102</sup> See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9, 16–18 (1984) (retaining *per se* treatment for “certain tying arrangements” but requiring consideration of market power); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1292 (2006); *id.* at 1291 (stating that an allegation of illegal tying must be supported by proof of market power).

<sup>103</sup> *Jefferson Parish*, 466 U.S. at 16–18.

<sup>104</sup> See *infra* p. [●].

(higher) quality products preexisted the Microsoft offering, with consumers expressing in no uncertain terms their desire to use those tools with Microsoft products. Customers clearly want the ability *a la carte* to select their preferred product, and in fact considerations such as national security demand that a diversity of products be permitted. Microsoft’s tying accomplishes a great deal for that company, but what benefits it has for customers is entirely unclear.<sup>105</sup>

Cloud customers are complaining because they are being coerced into using Azure, and into buying products like Defender, Teams and the like. Microsoft’s existing software customers are left with a choice between utilizing Microsoft’s Azure cloud, or potentially incurring tens of millions of dollars in increased cost to use another provider’s cloud. And as discussed above, Microsoft’s policies are designed to prevent customers from being able to price shop and select the services they actually need.<sup>106</sup>

Microsoft knows that this is the impact of its policies—indeed, it touts this distinction in its own marketing materials, telling its customers “Don’t Pay Double”.<sup>107</sup> This works because Microsoft is the market leader in three related product markets; it works because of market power. Microsoft’s tying conduct is coercive and deceptive, leading their customers to feel “basically trapped”.<sup>108</sup> In the Ofcom market research report, a customer explained: “Microsoft, on the other hand, they do want to tie you into contracts. They do want to remove flexibility. They do want to confuse you a bit, so you may end up buying stuff that you don’t need.”<sup>109</sup> The unfairness of Microsoft’s practices is laid bare by the fair competition they replaced—i.e., BYOL.

#### **4. Conclusion**

While the cloud computing industry is expected to continue to grow at a fast clip, Microsoft’s share has jumped in recent years and continues to outpace

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<sup>105</sup> Even if a tying arrangement does not satisfy all the elements of the modified *per se* test, a court may still deem it unlawful under the rule of reason analysis. Under the rule of reason test, a court considers whether, overall, the tying arrangement promotes or harms competition, and it is unlawful if the practice unreasonably restrains trade. *Jefferson Parish*, 466 U.S. at 16–18; see *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). The activities described herein clearly demonstrate a *prima facie* case of illegal tying under the rule of reason test and Microsoft has no procompetitive justifications for its actions.

<sup>106</sup> See *infra* p. [●]; Ofcom Report, at 58.

<sup>107</sup> Microsoft Blog, *Save Big by Using Your On-Premises Licenses on Azure*, available at: <https://azure.microsoft.com/en-us/blog/save-big-by-using-your-onpremises-licenses-on-azure/> (Jan. 26, 2022).

<sup>108</sup> Ofcom Report, at 58.

<sup>109</sup> Ofcom Report, at 58.



its rivals due to its ability to foreclose other rivals and boost its own market share via unfair and harmful practices<sup>110</sup> Microsoft's share of the global cloud infrastructure services segment jumped from 13% to 23% from 2018 to 2022.<sup>111</sup> This conduct harms consumers and also the competition among cloud providers and other participants in the technology stack. Once Microsoft locks its customers into the Azure/Office 365/Windows Server environment, Microsoft leverages its position to raise prices, with prices increasing on average about 20% and many customers not understanding why prices are increasing.<sup>112</sup>

Microsoft is leveraging its monopoly power in software markets to distort and avoid the competitive process for its own gain. This is firmly within Microsoft's playbook and has served it well in the past, to the detriment of consumers.<sup>113</sup> And the impact is happening now.

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The CFSL appreciates the opportunity to respond to the RFI and would be pleased to answer any questions that you might have concerning our comments.

Respectfully submitted,

**Ryan Triplette**  
**Executive Director**  
**Coalition for Fair Software Licensing**

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<sup>110</sup> CloudZero, *55 Cloud Computing Statistics That Will Blow Your Mind* at 23.

<sup>111</sup> Synergy Research Group, *Cloud Spending Growth Rate Slows But Q4 Still Up by 10 Billion from 2021*, available at: <https://www.srgresearch.com/articles/cloud-spending-growth-rate-slows-but-q4-still-up-by-10-billion-from-2021-microsoft-gains-market-share> (Feb. 6, 2023); Statista, *Worldwide Market Share of Leading Cloud Infrastructure Service Providers*, available at: <https://www.statista.com/chart/18819/worldwide-market-share-of-leading-cloud-infrastructure-service-providers/> (Apr. 28, 2023).

<sup>112</sup> See *infra* p. [●]; Ofcom Report, at 58; Gartner Report.

<sup>113</sup> Unfortunately, Microsoft is not alone in anticompetitive behavior with regards to licensing practices in the cloud. One study showed that Oracle licenses its software in its own cloud on an "actual" CPU basis, while in a competitors' cloud, it licenses on an "available" CPU basis. Michael Garland, *Vendor Locking in the Cloud*, FCW, <https://fcw.com/comment/2022/04/vendor-locking-cloud/365665/>, (Apr. 14, 2022).