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The issue of disclosure on the second-hand license market: opinions and facts

There is a strange and destructive discourse surrounding the term 'disclosure' in relation to used software. Strange because the alleged beneficiary was not involved in the relevant discussions, and destructive because an entirely fictitious legal dispute is alluded to based on arguments couched in legal-sounding terms, all in order to pit market players against each other and ultimately undermine the market itself.

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Andreas E. Thyen studied Economics, Law and Sociology as well as International Economic Relations and Socioeconomics in Hamburg. He has consulted on numerous matters relating to planning, processes and management for over 20 years, including for an international consultancy firm, and has authored a number of publications in the course of this work. Nowadays, Mr Thyen acts as Chairman of the Board at LizenzDirekt AG, a role to which he brings around 15 years of management experience on the pre-owned software market. He has established himself as an industry representative and passionate advocate and visionary, helping both companies and public authorities to take advantage of this unique European possibility. In addition to imparting his knowledge about the legal underpinnings of this market, he regularly shares his views on the implications of the associated economic and business aspects and interests with enthusiasm and foresight. He has consequently become a highly sought-after interview partner by media outlets across Germany, Austria and Switzerland and regularly publishes articles on the sociopolitical and economic facets of digitalisation. Moreover, he sponsors and is involved in various educational, social and sports projects for children.

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01 | Introduction

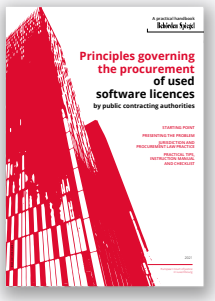
‘Used’ software refers to (standard) software that has been purchased by an initial buyer from a software company or one of its partners and which that buyer now wishes to sell for one of various reasons. For example, they may have purchased a new version of the software or a different software solution. There are software dealers on the market who specialise in this type of resale and who sell software – including ‘used’ software – to their customers as subsequent purchasers.

Software companies across the world generally acknowledge the possibility to purchase and sell ‘used’ software, and as such this is common practice even in major corporations.

So why is this paper necessary? Although all of the underlying legal questions have now been definitively ruled on by the European Court of Justice and national supreme courts, disclosure of documents and information remains a frequent topic of discussion on the resulting used software market. This can sow doubt among potential buyers and customers, which in turn sadly reduces acceptance of the trade in used software despite it being a real European treasure.

This paper is intended to alleviate that doubt, shed light on the background to the discussion and briefly set out and weigh up the various viewpoints.

Reasons for writing this paper



Our recommended guidelines:
Principles governing the procurement of used software licenses
www.lizenzdirekt.com/en

02 | What does ‘disclosure’ mean?

Despite the existence of relevant case law from European and German supreme courts, it is evident that there is still some uncertainty and a need for discussion in relation to the question of ‘disclosure’ and what it means in practice.

Disclosure: a vague term

The rather vague term ‘disclosure of the chain of rights’ is used to allude to the question of whether a dealer who has purchased used software (licenses) is legally obliged to disclose information such as the original license agreements – including contract numbers and information about the companies and individuals from whom they were acquired – and other documentation when selling used software to subsequent purchasers.

The meaning of the term ‘disclosure’ is as unclear as its contents and scope. As a consequence, it is impossible to discuss it in any serious manner.

The reason why it is still being discussed in this context in spite of this lack of clarity is that immaterial goods like usage rights are intangible, which means that people can sometimes feel uncertain about the legality of purchasing them. Therefore, they naturally have an urge to find out more information. This has resulted in diverging opinions about whether and to what extent ‘disclosure’ is a good idea, whether it is even necessary or whether it might actually be harmful, depending on the stakeholder in question’s interests and perspective.

The risks of disclosure

At first sight, the term ‘disclosure’ itself seems to have positive connotations, but this can be deceiving: **‘disclosure’ not only leads to a misinterpretation of the law but also puts the used software market at risk whilst shifting all responsibility onto the customer.**

The following discussion is based on German law. However, the relevant software legislation is in line with European Union law due to the necessary implementation of the Computer Programs Directive (Directive 2009/24/EC). As a result, the European Court of Justice has issued the relevant decision of principle under discussion here for the entire European Union.

03 | What is the legal situation?

The discussion essentially revolves around whether such a requirement even exists in legal terms. This has not been confirmed by any of the relevant judgments issued by the European Court of Justice (ECJ)[1] or national supreme courts[2]. In fact, claims that such a requirement does exist have actually been successfully struck down in court.[3] At present, there is no legal requirement to hand over confidential documents for this purpose.

No claim to disclosure

The founding concept behind the **ECJ** was and remains to establish **free movement of goods** across the EU – once exhaustion of rights has occurred. Consequently, it is the European freedoms and the principle of practicability that must be used as benchmarks. This is all the more true in a competitive market dominated by global monopolists like US software companies.

Precedence of the European freedoms

At the time of the relevant legal dispute, the competent national court **merely stressed** that the buyer of used software must receive information from the seller about the 'designated use' of that software. In other words, the buyer does not need to be provided with contractual information relating to sources of procurement but instead requires information about the relevant license terms so that they can comply with them when using the software.

Apart from that, the dealer of course has an **obligation** to duly provide the used software licenses in the form of usage rights as agreed in the contract.

Since the consent of the software company is not required for the resale of used software, any **disclosure** for their benefit is not only unnecessary but also **fallacious**, as it suggests the need for judicial evidence without there actually being any court proceedings. The provision of judicial evidence is simply not possible outside of such proceedings, not even if some fictitious legal proceedings are alluded to.

Allusion to a fictitious legal process is misleading

Although some form of 'disclosure' is arguably conceivable, it should not lead to a requirement for consent from software companies being introduced via the back door, **nor should it be presented as the only option without taking into account other legitimate interests.** Indeed, it must be borne in mind that this would undermine the implicitness of the freedom postulated by the ECJ and would mean that today's used software market would not exist.[4]

Freedom of the market offers various options

[1] ECJ Judgment of 3 July 2012 in Case C-128/11
[2] German Federal Supreme Court, Judgment of 11/12/2014 - I ZR 8/13; Judgment of 17/07/2013 - I ZR 129/08
[3] Hamburg Regional Court, Decision of 14/09/2016 - case 406 HKO 148/16
[4] The used software market came about because dealers and customers did not comply with the software companies' expectations. Essentially all efforts undertaken by software companies since 2000 to bring about legal restrictions have been met with the exact opposite verdict from the courts.

04 | What are the opinions among dealers?

Public bodies and companies are the ones who truly stand at the centre of this discussion, both as buyers and sellers of used software licenses. Another group of stakeholders is the software companies, who want to ensure that their intellectual property rights are protected but have so far kept a low profile in this discussion. As a consequence, opinions vary widely.

Opinions vary widely

04.01 | Dealers

At the heart of this matter lies the diversity of opinions among different dealers, some of whom support disclosure and some of whom reject it.

Once the (albeit typically abstract) landmark decisions had been issued by the courts, the question of how to implement them in practice was left to the relatively newly established dealers in such (used) software. Whilst the particular dealer involved in the original proceedings managed to sway the court's decision towards upholding the prevailing legal rationale after spending years battling the world's biggest software companies – with their essentially unlimited resources – thanks to the support of some renowned firms, **other used software dealers emerged who actively sought the introduction of a disclosure requirement and involvement of software companies.** Other dealers clung to the legal rationale upheld in the court judgments and refuse to disclose their sources of procurement to this day.

Disclosure as a concept that benefits software companies

04.02 | In favour of disclosure

Essentially, some dealers wanted to enjoy the benefits of free trade in used software licenses and claim a small piece of legal history for themselves, yet they did not want to run the risk of being met with the disapproval of the software companies. Indeed, some even sought (alleged) protection from them. In fact, it was in order to achieve this alleged unique selling point (USP) over the main litigant usedSoft that the aforementioned specious discussion was originally instigated – though no-one remembers how and why (namely, to obtain a USP) it started in the first place.

Specious discussion

These dealers have essentially acted as proxies for the software companies in the discussion surrounding disclosure, so it is no surprise that they recommend disclosure of all sources of procurement and documentation to every subsequent purchaser and either proactive notification of the sale to the software company or that the latter is permitted access to that information and a certain degree of control in the course of a **SAM project or audit**. The arguments presented serve to illustrate just how long a shadow is cast by the 'audit right'[5] that software companies have invented for themselves.

Dealers as proxies and apparent audit anticipation

An argument often cited in favour of disclosure is that in the event of an audit by the

software company, the customer would be in a better position whilst also ensuring that the software company's interests are protected. In addition to considerations relating to transparency, legal arguments such as failure to purchase software licenses in good faith are put forward.

04.03 | Against disclosure

However, other dealers approach the discussion from the perspective of **the founding principle of the ECJ, i.e. free trade,** raising a number of concerns and doubts about whether disclosure actually serves the interests of free trade and customers. Many dealers thus fear that the information about **sources of procurement** will unnecessarily and proactively be placed into the hands of software companies who may then **exert a negative influence**.

Risk of influence being exerted

This is not what simple, practicable trade should look like. At the same time, larger companies in particular often do not want the circumstances of the sale to be made public beyond what is strictly necessary and require used software dealers to sign a non-disclosure agreement (NDA) whereby they agree to disclose the minimum information required and only as a last resort.

In addition there are **concerns regarding data protection** and trade secrets, which cannot be easily dismissed given the current controversy surrounding the sharing of data with the USA (see ECJ judgment regarding the invalidity of the 'Privacy Shield' – Judgment of 16 July 2020 in Case C-311/18) and given the extensive use of telemetry by Microsoft.

Data protection and confidentiality

A further argument against disclosure is the huge burden this places on customers in terms of legal verification (see Section 6 for more detail) and the associated costs and obstacles.

Burden for customers

Moreover, a dubious situation arises when documents are disclosed at the latest at the first request of the software company's SAM partner out of fear of an audit or lack of compliance. This brings us back to the situation that existed before the case law was developed, but instead of the software company being asked for consent (in advance), which is not legally required, they are practically being asked for their approval (retrospectively).

Back to the start

[5] See Got an Audit? (Not) A Problem

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04.04 | Consideration of the arguments

When considering both sides of the discussion, the various values and interests at stake must be weighed up appropriately and in some cases ranked in order of priority. **The principle that takes precedence here is the freedom of movement of goods, which the ECJ was created to ensure, and the associated principle of EU-wide exhaustion of rights.**

Freedom takes absolute precedence

This absolute exhaustion of rights takes precedence over all other interests, including those of the software company. **If the software company's consent is not required for resale, then there is no reason why they need to be informed about that sale. Quite the opposite: the monopoly built up by software companies over the years and the resulting dependencies mean leads to a certain subservience on the part of other stakeholders.** Supporting disclosure suggests that these companies command some kind of elevated position, but that is not the case. Even the software companies are not calling for this (see Section 4.2), which demonstrates that this is purely an attempt by dealers to try and create a USP for themselves in the form of the attractive-sounding attribute of disclosure.

In light of this, the purported audit right[6] cannot be regarded as a decisive factor, either. This audit right, together with customer dependency, has allowed global suppliers of many software solutions to bring about a **sword of Damocles** that is intentionally being exploited in order to achieve commercial goals yet usually has no basis in law. Indeed, the copyright provisions of the EU Computer Program Directive do not grant software rights holders a general right to information and to perform audits. Instead, they must have good reason to suspect a lack of compliance, something that in certain cases the software company would struggle to provide evidence of in a legal dispute.

Threat of audit versus legal situation

Thus, even an auditor sent by the software company would not be able to provide any evidence of probative value in case of a dispute. In light of this, any requests made by the software company should be acceded to with due caution whilst ensuring strict adherence to the principle of proportionality. In particular, this involves refraining from voluntarily disclosing more information than is strictly necessary. Instead of disclosing all documents, the least restrictive, most appropriate measure should be opted for. In this regard, there are a number of less restrictive measures that should be considered instead of (or in addition to) disclosure as part of a graduated approach.

[6] See Got an Audit? (Not) A Problem

First and foremost this would involve disclosing the used software dealer's purchase documents. Alternatively, a purchase confirmation for the used software licenses from a (neutral) third party like an **auditor** who has agreed to keep information confidential from the software company would be suitable. This holds even more true since such expert opinions are often used as evidence before court and are deemed suitable for this purpose.

However, company (i.e. customer) employees are sometimes all too easily convinced to provide the software company with all disclosed contractual documents belonging to the initial purchaser, etc., preferably in full and upon their first request, in the hope of rapidly closing the matter – even when this is precluded by their contractual arrangements with the dealer.

The further arguments laid out below also demonstrate in detail that the legitimate interests and needs at stake speak against disclosure. In particular, it is important not to believe the fallacy that disclosed documents can be used as evidence in court (see Section 5 for more details).

04.05 | Software companies

It is interesting to note that since the relevant landmark decisions were announced, not even the software companies have publicly come out in favour of a legally binding disclosure obligation in the event of resale. This may come as a shock, but once again **this confirms that this obligation simply does not exist**.

Even software companies are not calling for disclosure

It is therefore all the more surprising that the subject of disclosure is raised by so many used software dealers, despite the fact that the software companies whom this would benefit long ago switched to alternative subscription licensing models in order to circumvent the matter of used licenses altogether.

If no prior consent is required, then the same must apply to a retrospective request for approval – as the software companies are surely aware. Thus, there can be no obligation to disclose information to the software company for this purpose without justification.

The software company's rights were exhausted when the software was sold, and they therefore do not need to be involved in the subsequent sale process. **Strictly speaking, this could even be regarded as undermining the postulated freedoms in that there is an attempt to involve the software company when the ECJ specifically intended to preclude this.**

Disclosure undermines principles

04.06 | Customers

Turning to the customer side, their views depend on the role in which they find themselves.

Customers who want to sell their (used) software licenses generally request **special confidentiality provisions and agreements (NDAs).** Although this does not preclude disclosure to the extent legally required, the dealer in their role as purchaser has an obligation to ensure protection of the information and to limit any exchange of information to the minimum that is legally necessary. As explained above, there is no such legal obligation in the case of regular sales.

Need for protection on the part of sellers

This requirement on the part of the seller is not an arbitrary one; very few customers would want information to be disclosed to an indefinite number of subsequent purchasers. Applying different rules would be questionable.

In the case of larger packages of licenses, there is also the fact that these are provided to multiple customers (buyers/dealers/sellers) if the package is split. This might mean hundreds or even thousands of recipients, resulting in huge practical difficulties upon resale and a substantial increase in the risk of abuse.

When companies are acting in the capacity of buyer, the question of disclosure is likely to be irrelevant or of no interest to them. Instead, it is factors like the reputation of the dealer, their professional image and attractive prices that make the difference. **However, when multiple companies are vying for customers they will often try and tout the aspect of disclosure as a USP in their favour or inform the buyer of its necessity. The customer is then suddenly faced with conflicting statements, which usually leaves them feeling extremely uncertain. This is far from ideal and can lead to poor decision making.**

Uncertainty instead of disclosure as a USP

05 | Probative value of disclosure

Although disclosure is also regarded as a threat to market freedom and can be associated with practical and legal disadvantages for customers, it is necessary to consider whether it does actually entail any other legal benefits – for customers, at least.

Situation regarding evidence in court proceedings

The discussions around disclosure can't shake off the fact that certain dealers and software companies invoke statements by the competent national court, which at the time were only meant in that particular context of the proceedings to highlight a **self-evident fact** in procedural law, namely that anyone wishing to invoke a provision from which they would benefit before a court is responsible for providing evidence hereof in the event of a dispute. However:

- This is merely a fact of procedural law and is not specific to used software.
- It is only within court proceedings that this can occur in various, legally stipulated ways.
- This is still possible without having to disclose confidential documents to the other party.

Any copies of contracts or other documents made available by dealers may not actually be sufficient evidence in court, despite what many customers might expect. What is relevant is whether the conditions for exhaustion have actually been met.

Impossible and nonsensical anticipation

In any case, we cannot speak of 'evidence' outside the context of court proceedings. Equally, the question of which evidence *might* be acceptable to a software company in these fictitious proceedings is irrelevant in the case of resale.[7] What is important, though, is safeguarding the customer and protecting their interests, something that cannot ultimately be achieved through disclosure, as demonstrated quite clearly throughout this paper.

What is often forgotten in cases where extrajudicial disclosure is requested is that only a court is competent to decide on the validity of evidence, not the software company.

[7] The author is unaware of any proceedings having been initiated in relation to any of the most well-known dealers in the past 10 years.

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06 | Risks for customers

Before accepting a full set of **contractual documents** and declarations, buyers should ask themselves whether they are **in fact willing and able to check them in a way that is legally watertight** once the (reputable) dealer has already done so. First of all, this would involve voluntarily familiarising themselves with the vast body of supreme court case law and the associated legal questions or getting their own legal department or an external expert to do the job for them.

Competence for inspecting documents

However, the question of whether all exhaustion criteria have been met in a particular case is generally seen as not always being an easy one to answer, even though those exhaustion criteria comprise only five essential aspects. And this presents us with a dilemma. **The burden of information can be extremely onerous in practical terms, despite the fact that the (factual) criteria are not legally complex.** This starts with the sheer volume of documents – particularly in the case of international 'Enterprise' contract structures – which may go back years or even decades. Customers may well ask themselves why they should bear this burden when it is the dealer who is contractually responsible for ensuring the products they sell are free of defects and they have been compensated accordingly.

Shifting of the burden of inspection

Upon receiving any documents, it becomes the **duty** of **commercial customers** to carefully inspect any documents they receive, which is in their interest.

Duty to report defects falls to the customer

However, it is often simply not possible for buyers to carry out an **'authentic and legally binding inspection'.** That is why customers must pay to engage specialist auditors or lawyers to check for any deficiencies and notify the seller accordingly. In certain cases and under certain circumstances, it remains doubtful whether documents can even definitively resolve all questions relating to the factual criteria for exhaustion. This certainly does not sound particularly practical, nor does it come cheap in most instances.

Conversely, **customers who** want to **sell** their (used) software licenses should ask themselves **whether they** (also) **consent to documents being disclosed to an indeterminate number of subsequent purchasers.** If the seller is a **company or a public body**, they should therefore consider **whether handing out** their contracts is actually **in line with their compliance and confidentiality provisions, especially since there is no legal obligation to disclose documents, at least according to the Computer Program Directive.**

Ambivalence of disclosure

In the case of larger packages of licenses, there is also the fact that these are provided to multiple customers (buyers/dealers/sellers) if the package is split.

07 | Acquisition in good faith: a fallacy

Some dealers invoke failure to acquire the product in good faith as grounds for disclosure. However, what advocates of disclosure are aiming at is indeed implying good faith by suggesting that the customer can gain certainty thanks to the disclosed documents and their expert knowledge. The argument can just as well be turned around, rendering it pointless. This would also result in even greater responsibility for the customer. Given that the legal background to this is largely a national matter, this version of the paper will not address this aspect in any further detail.

Good faith argument is not helpful

08 | Status of the discussion

The more prominent dealers have essentially fallen into two camps, with an almost equal number in favour of and against disclosure. This means there is no standard to speak of, making discussions around this topic particularly fraught and causing dealers to enter into a war of attrition in their efforts to win over customers. This does not appear particularly conducive to creating market opportunities and building acceptance. The real winners in this debate – who are conspicuous by their absence from it – are the software companies, as doubt-ridden customers end up purchasing 'new' licenses or opting for a subscription model instead.

Those dealers who choose or are even obliged to protect their sources of acquisition for the aforementioned understandable reasons go above and beyond to offer numerous **additional measures.** These include indemnity and guarantee declarations as well as external audits and retention of documents by an **auditor** in order to ensure they remain accessible in the event of insolvency.

Equal numbers on both sides of the argument

If you have any questions or you would like to discuss this subject ***with me personally****, please get in touch.*

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SOFTWARE FOR YOUR BUSINESS

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09 | Summary

Software companies undoubtedly have a legitimate interest in rigorously exposing and sanctioning misuse of their products. It goes without saying that the software companies' exploitation rights should be safeguarded and shored up via legal measures.

The rights holder has been granted the freedom to provide their software in the European area of justice under their own terms and to receive appropriate compensation to this end. However, after this point their rights are largely curtailed and the European trade freedoms come into play thanks to the principle of exhaustion. Rights may **no longer** be assigned back to the rights holder except in cases of relevant (including criminal) abuse or in the event that proceedings under the rule of law are initiated, at least until stipulated otherwise by a legally binding judgment or legislative provision.

Freedom precludes transfer of rights back to rights holders

The free movement of goods within the European Economic Area, which is the decisive principle here, is therefore the outcome of the weighing up of interests, not its starting point.

Even though the risk of legal claims by software companies has not materialised in the past 12 years since 2012 as far as this author is aware, and even though such claims are barely even recognised in the case law, no buyer wants to risk court proceedings and have to provide real evidence. That is why **customers, companies and authorities** have an understandable **interest in some form of guarantee**, an interest that should be acknowledged and catered for. Moreover, it must remain possible to preserve freedom, and that freedom should be accorded much greater value.

Legitimate interest

There are a range of different practices on the used software market in this respect, all of which are legally permissible. These include indemnity declarations, no-fault liability guarantees and, in some cases (usually a premium option), customised audit certificates.

It should be noted that these are **extra-mandatory and cost-intensive measures** taken by dealers in order to allay the (usually unjustified) mistrust among customers.

What is in no way in the interest of buyers or sellers (i.e. customers) is the burden of inspection incumbent upon them when they receive disclosed documents, especially since disclosure is being falsely touted as a form of protection against the risk of legal proceedings to which the customer may not even be subject.

Determining customer interests

Nor is it in the interest of buyers or sellers (i.e. customers) or in the spirit of ECJ case law for buyers to receive documents or for sellers to disclose them purely for the purpose of being able to present them to the software company at the next opportunity. Instead, the customer selling the software would be well advised to contractually preclude arbitrary disclosure of documents to a potentially large number of subsequent purchasers.

This is why a **dealer** is needed to act as an auditing body and buffer that carefully checks all of the relevant parameters and only discloses documents and information in court proceedings as a last resort. The economic risk of such proceedings will, of course, be borne by the dealer, since they have explicitly indemnified the customer against this. **This is strictly based on an assessment of necessity and on a graduated approach in keeping with the principle of proportionality.**

Graduated approach balances out interests

Yet since the relevant market players cannot be denied the right to disclosure for their own different motives, it is merely important to bear in mind that disclosure is not categorically beneficial to the customer and is never the only option. In fact, there are a host of other possible options available that would serve customer interests better. **It would be a fatal error for customers to categorically base their opinion of whether or not a provider is reputable based on disclosure or certificates.**

Disclosure not an indicator of good repute

As such, only well-informed customers will be able to see through how that freedom has been interpreted – provided that they are bold enough to overcome any misgivings they may have. It should be the general consensus to recognise freedoms that ultimately bring economic benefits as such and protect those freedoms by refraining from a particularly restrictive interpretation or from indulging the whims of the software companies who dominate the market in any case in spite of the postulated freedom.

Information instead of dogma

This represents a unique opportunity to start breaking down the oligopolistic distribution structures of software companies' monopolies and to strengthen the European area of justice as an area of freedom and as its own 'brand' in order to finally allow customers to benefit from the comparatively low price of used software over new software. **This would significantly increase digital sovereignty – a top priority in Europe – through the liberalisation of the market.**

That makes it all the more regrettable that this freedom is being chewed over yet again, that doubt is being sown by dealers in order to set themselves apart by touting disclosure as a USP, and that dealers are not joining forces to bolster a sector whose time is running out due to subscription licenses gaining ground.

Robert Kneschke, Adobe Stock

10 | Recommendation

The key recommendation is to regard the European used software market not only as a historic gesture in defiance of the US software giants, but to actively harness and benefit from it in these times of constant price increases for cloud and subscription products like M365.

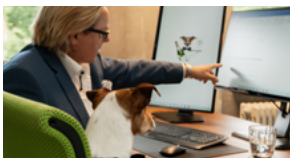
This includes not being deterred by specious discussions based on arguments that have not been thought through to their logical conclusion and do not provide added value for a liberalised market that provides legal certainty. This is particularly true of the discussion surrounding disclosure. It is clear that disclosure only seemingly offers greater legal certainty and that in actual fact it also entails its risks.

It is therefore **important** to have a certain degree of **basic understanding** and to apply **common sense**. Even disreputable suppliers use disclosure of various documents as an advertising tool. It is not clear whether these documents are authentic or are used multiple times. Nor is it clear how long these suppliers – some of whom have not been around for long – will actually remain contactable for. What it comes down to, thus, is choosing a reliable, experienced and competent supplier with a good reputation who is able to withstand any liability claims.

Skyrocketing prices for subscription and cloud services

Common sense and reputation

Find out more at: www.lizenzdirekt.com/en/knowledge-base



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Only then can a guarantee offer added value. Here is an example of what this kind of **self-declaration** might look like for customers **in practice:**[8]

Standard (mandatory information)

- Dealers usually offer a guarantee in the form of specific indemnity against claims made by the software company arising from the purchase of the software. Most dealers offer this despite the fact they are not obliged to do so by law.

Recommended indemnity declaration

- This particularly legally intensive undertaking provides commercial protection in the event of a legal dispute and renders **anticipatory** discussions about the provision of evidence, for example in the form of documentation that may or may not have probative force, superfluous.

Questions relating to evidence rendered obsolete

Premium (additional guarantee)

- If the liability risks are deemed to be particularly high due to the contract volume, experts may provide advice with regards to the sale in accordance with the relevant case law.
    - This task may be performed not only by specialist lawyers but additionally by auditors who are also commissioned by software companies to carry out software audits.
    - Certain dealers also offer this kind of **customised audit certificate issued by an auditor** that takes into account the **specific procurement process in question**.[9] An audit certificate, in conjunction with the declaration from the dealer, once again relieves the customer of the burden of carrying out their own inspections whilst balancing the interests of all stakeholders, including the legitimate interests of the software company in preventing misuse.

Auditor certificate in special cases

    - The auditor may also retain copies of the documents so that they remain accessible in case of insolvency and ensure that surrender claims are provided for.

It is important to note that these kinds of declarations and certificates can entail high costs for dealers. That is why getting an **audit certificate should not be the go-to option**; it is necessary to consider the circumstances in question first. **However, if it is tailored to the specific case in question, such a certificate can offer a very high degree of protection as well as guaranteeing that legal and business administration regulations have been complied with.**

Greater protection & reliability

[8] A detailed description can be found in the BehördenSpiegel's practical guidelines entitled *Principles governing the procurement of used software licences by public contracting authorities.*

[9] An example/template can be found in the appendix on page 18.

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Smith's Sports Cars Ltd Mr
John Smith 1 Meadow Street
SE1 5DG London

Date:
01/04/2023

Our reference:
WB

Handled by:
Walter Brown

Extension:
0221 / 789 3-23

Transaction number:
TE-1-789-3B-220

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Confirmation of the supply chain for software licenses for order no.: LS-1234 and invoice no.: R-56789 for customer no.: 10001 Smith's Sports Cars Ltd

Dear Sir/Madam,

We have received documents from [software company] showing that the following licenses that were supplied and invoiced under

- Order no.: LS-1234 and invoice no.: R-56789

were duly purchased by the original buyer from an authorised Microsoft dealer:

- 900x Office Professional Plus 2011 LTSC Windows
- 24x Windows Server 2022 Datacenter Core 2Lic
- 9x Windows Server 2022 Standard Core 2Lic
- 900x Windows Server 2022 User CAL
- 900x Remote Desktop Services 2022 User CAL
- 1x Exchange Server 2019 Standard
- 810x Exchange Server 2019 Standard User CAL

We have also been provided with the documentation relating to the transfer of the licenses to [software dealer], the Microsoft license purchase order confirmation for the original buyer and confirmation of the deactivation of the licenses by the original buyer.

Based on this documentation, we can confirm the origin and traceability of the supply chain for the aforementioned software licenses.

Smith´s Savings Bank London
IBAN: GBXX 1234 5678 9012 3456 78
BIC: MUSTEXXRBA

Smith´s Building Society
IBAN: GBXX 9876 5432 1098 7654 32
BIC: GENODEFXMUS

Groß & Klein
Beratungsgesellschaft mbH

The documents received for the purpose of this certificate shall be retained by us for a period of 10 years and can be made available where this is in the legitimate interest of the requesting party.

Yours Sincerely,

W. Brown

Walter Brown
Auditor

Smith´s Savings Bank London
IBAN: GBXX 1234 5678 9012 3456 78
BIC: MUSTEXXRBA

Smith´s Building Society
IBAN: GBXX 9876 5432 1098 7654 32
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About LizenzDirekt

The LizenzDirekt Group is one of Europe's leading dealers in used software licences.

The company has numerous sites in Switzerland, Austria and Germany and buys and sells usage rights (volume licences) for business software and operating systems used by business customers and public agencies.

LizenzDirekt is a **Microsoft Partner, Cloud Solution Reseller** and **Authorized Education Reseller** and is included in the official register of **pre-qualified companies for public tenders** as a 'competent, highly capable and reliable company for public tenders'.

The group's customers are primarily corporations, larger mid-size enterprises and ministries, but it also works with a host of small and medium-sized companies as well as district and city administrations.

Together, the **management team** boast **several decades of experience** in the area of second-hand software. Many of the group's **employees** are also **certified by software companies** and have acquired a vast amount of knowledge about licences and the **SAM process**. This means they are well placed to help customers tackle the issue of audits without compromising security and without any stress.

LizenzDirekt deals in tailored software solutions, whether you're looking to buy, sell or lease new or pre-owned licences or are in the market for cloud-based Software as a Service.

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