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Dear Customer / Partner,

Microsoft occasionally receives inquiries regarding the purchase and use of so-called secondhand software. In addition, customers sometimes provide secondhand software documentation as proof of adequate licensing in Software Asset Management reviews and audits. In light of these questions, we would like to provide you with some background information and important facts to consider in the context of secondhand software.

Within the European Economic Area (EEA), software may be redistributed without the rightholder's consent if his distribution right is "exhausted". Pursuant to Art. 4 para. 2 of the *EU Directive 2009/24/EC on the legal protection of computer programs*, the distribution right within the Community (EEA) is exhausted with the first sale of a computer program in the Community by the right holder or with his consent.

In the case *Oracle International Corp. (decision of July 3, 2012, case no. C-128/11)* the European Court of Justice (CJEU) specified the requirements, which must be fulfilled in order for exhaustion and the statutory usage right according to Article 5(1) of Directive 2009/24 to occur, as follows:

- The software must have been originally brought into commerce by sale in the EEA by the copyright owner or with his consent.
- The license for the software must have been granted in return for payment of a fee intended to enable the rightholder to obtain a remuneration corresponding to the economic value of the copy of his work.
- The rightholder must have granted the first acquirer a license to use the copy of the computer program for an unlimited period.
- The original acquirer must make his own copies of the computer program unusable at the time of its resale.

Provided these requirements are met, the subsequent purchaser can make a copy of the program in order to use it in accordance with its intended purpose (Article 5(1) of Directive 2009/24). The scope of the "intended purpose" is defined by the license agreement between the rightholder and the first acquirer.

In the case *Aleksandrs Ranks and Jurijs Vasiļevičs vs. Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra and Microsoft Corp.* (decision of October 12, 2016, case no. C-166/15) the CJEU reiterated the aforementioned requirements.

The CJEU has further held in the case *Van Doren and Q.GmbH vs. Lifestyle sports and sportswear Handelsgesellschaft mbH* that the existence of the conditions for "exhaustion must, as a rule, be proved by the third party who relies on it" (decision of April 8, 2003, case no. C-244/00). In the case *Aleksandrs Ranks and Jurijs Vasiļevičs vs. Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra and Microsoft Corp.* the CJEU pointed out that the acquirer of a license for the use of a used copy of a computer program, who relies on the rule of exhaustion, must "establish, by any available evidence, that he acquired that license in a lawful manner". This also means that in case the user did not obtain the exhausted program copy directly from the original licensee but from a third party, which itself acquired the copy directly or indirectly from the first licensee, the user also has to prove that this third party, as well as any other interim acquirers, have rendered previous copies of the program unusable.

After the case *Oracle International Corp.* was referred back to the German Federal Court of Justice (decision of July 17, 2013, case no. I ZR 129/08) and later to the Munich Court of Appeals, the latter court found that the defendant had "utterly" failed to satisfy his burden of proof regarding the exhaustion he had claimed.

Finally, in the case *Aleksandrs Ranks and Jurijs Vasiļevičs vs. Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra and Microsoft Corp.* the CJEU held that an acquirer of a perpetual right to use a computer program, who acquired the software on a data carrier (e.g. a DVD), cannot, if the data carrier is damaged or lost, resell his back-up copy of the computer program to the subsequent acquirer without the rightholder's authorization.

Microsoft therefore recommends to carefully examine the origin and conditions of software offered as secondhand, and to make sure that the requirements for exhaustion set by CJEU are actually met and can be proven when exhaustion is claimed.

Best Regards,



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