

New Study links unfair software licences to distortion of competition in cloud infrastructure market

Critical reading as MEPs consider obligations of Gatekeepers in Digital Markets Act

Brussels, October 26th 2021. Today, Professor Frédéric Jenny, renowned expert on competition law, published a study that illustrates how unfair software licence terms enforced by certain legacy software companies can distort competition in the nascent market for cloud infrastructure services in Europe. The study documents practices through which a handful of companies with market power in enterprise, productivity and database software can steer business customers to their own cloud infrastructure services. If allowed to continue, the study suggests, these bad practices will significantly harm competition in the cloud damaging growth, innovation and viability of European cloud infrastructure providers, and the businesses that rely on them. Ultimately, this will lead to less choice and higher prices for cloud services for European consumers.

The study, which has been circulated to Members of the European Parliament, the European Commission and the Council as they examine, debate and vote on the Digital Markets Act (DMA), clearly indicates a number of practices used by legacy software firms to limit the choice of European businesses as they seek to move to the cloud. Technical, financial and contractual restrictions are employed to keep business users within the software providers' own cloud infrastructure ecosystem, whether or not it provides the best solution for the customer. Typical license terms identified by Professor Jenny's study as restricting fair competition include:

- Removal of Bring Your Own Licence (BYOL) deals meaning customer are forced to pay again to use software they already own on competing cloud infrastructure.
- Bundling and tying software products with cloud infrastructure to make other cloud providers' offerings less attractive/more expensive.
- Contractually restricting the ability to use software in the most hardware efficient manner by forcing customers to dedicated cloud infrastructure.
- Increasing prices for partners using their own cloud infrastructure whilst keeping them unchanged for partners selling on the software provider's cloud infrastructure.
- Artificially limiting data portability to make it expensive if not impossible to use competing cloud infrastructure.
- Demanding customer information from cloud services' partners for 'billing purposes' but then approaching those customers directly to solicit them to switch cloud infrastructure.

Commenting on his research, **Professor Jenny** said; *"Over the course of several months I have spoken to business software users of all sizes and across sectors. Some users were fearful of possible reprisals if they spoke out against alleged unfair practices. Even some large users of cloud services recognised that they could not do without the core productivity suites that these software companies control."*

Henri d'Agrain, Secretary General of Cigref, the French CIO Association which represents leaders in digitalisation in France, added; *"This independent study by Professor Jenny, a recognised economist, objectifies the observations made consistently by Cigref members over many years. It provides a factual assessment of the economic consequences of the unfair practices that Cigref regularly denounces. It is important to regulate these practices, which are mainly carried out by non-European providers. These practices constitute an illegitimate drain on the European economy and contribute to stifling the digital innovation of European players through killing acquisitions."*



Dr. Hans-Joachim Popp at Voice, the German CIO Association said: “Clearly, several large software players seek to use their license agreements to limit competition and choices. Our members see this every day and are adamant that these practices are effectively prevented by the DMA.”

Simon Besteman, Managing Director of the Dutch Cloud Community, contributed: *"The findings of Prof. Jenny's research confirm what the Dutch Cloud Community has been seeing among its members for years. Licensing practices are being abused by parties with a de facto monopoly to strangle the independent cloud providers. Ultimately, if nothing is done, this will lead to the disappearance of the European Cloud Industry. It is essential to fight this abuse of power and restore a level playing field by including the principles of fair software licensing in the DMA".*

Carlos Mateo, President of Asociación Española de Startups, added: *"This report is no surprise to our members. We have seen the stringent enforcement of one-sided and unfair software licensing terms by a few large vendors seeking to limit choice and exclude alternative providers for years. These practices cannot be allowed to extend where innovative businesses need the flexibility and choice of a range of suppliers in order to develop and deliver the next generation of services and products to people across Europe."*

Alban Schmutz, Chairman of CISPE, concluded; *"We'd heard from our members, and from their customers, that certain legacy software providers were limiting choice in cloud infrastructure through unfair license terms. We commissioned Professor Jenny to make a study of these practices and their impact, to support the Principle of Fair Software Licensing we crafted with Cigref. The Study clearly demonstrates the need for the Principles, and for the DMA to include them within its provisions. This is a significant issue which requires legislation as well as voluntary adoption of our Principles to ensure compliance and a better deal for European businesses and consumers."*

--- Note to editors ---

The full study can be found at <https://cispe.cloud/studies/fairsoftware>

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Professor Jenny Biography

Frederic Jenny is Emeritus Professor of Economics at ESSEC Paris Business. He is also Co-Director of the European Center for Law and Economics of ESSEC since 2008. He was previously Non-Executive Director of the Office of Fair Trading in the United Kingdom, Judge on the French Supreme Court from 2004 to August 2012, Vice Chair of the French Competition Authority from 9 years and Chairman of the World Trade Organisation's Working Group on Trade and Competition from 1997 to 2004. Jenny has a Ph.D. in Economics (University Paris II) and a Master's in Economics (Harvard University). His research areas concern the relationship between structure and performance in European countries, particularly France, antitrust legislation in Europe. He was Global Professor of Antitrust in the New York University School of Law's Hauser Global Law School (2014), visiting professor at University College London Law School (2005-2012), Haifa University School of Law in Israel (2012), University of Capetown Business School in South Africa (1991), Keio University Department of economics in Japan (1984), Northwestern University Department of Economics in the United States (1978). He has published extensively on issues of trade, competition and economic development.