A practical handbook

Behörden Spiegel

Principles governing the procurement of used software licences

by public contracting authorities

STARTING POINT

PRESENTING THE PROBLEM

JURISDICTION AND PROCUREMENT LAW PRACTICE

PRACTICAL TIPS, INSTRUCTION MANUAL AND CHECKLIST

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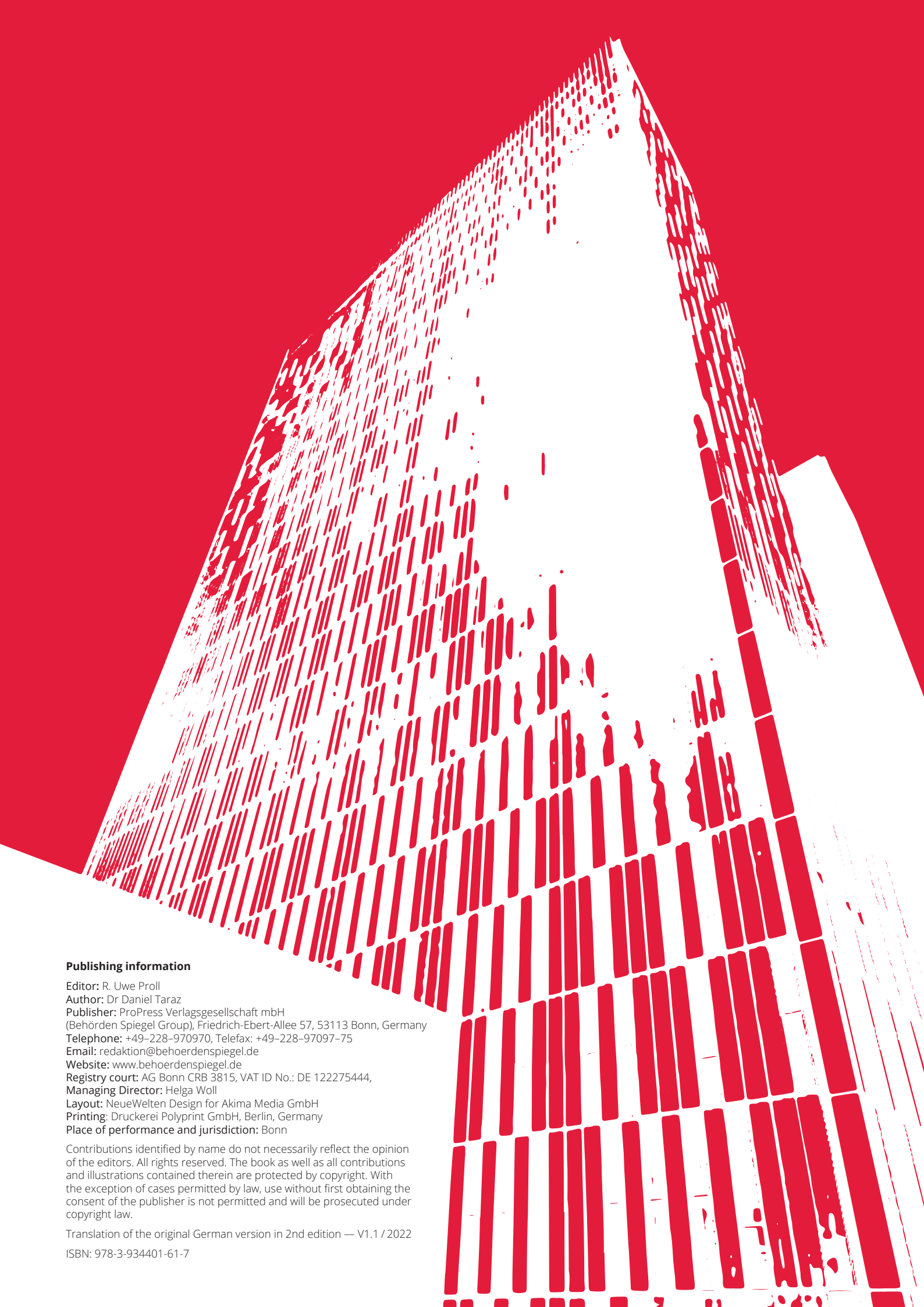
in Luxembourg



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An author of software cannot oppose the resale of his ‘used’ licences allowing the use of his programs downloaded from the internet.

The exclusive right of distribution of a copy of a computer program covered by such a licence is exhausted on its first sale.

Headline of the European Court of Justice (ECJ) press release No. 94/12 regarding the judgement in case C-128/11, UsedSoft GmbH / Oracle International Corp., 03/07/2012

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Nevertheless, used software offers leeway in making use of often dominant manufacturers and at the same time make important contributions to strategic objectives of digital sovereignty and circular economy.

*In this way, the guide helps by managing the flood of arguments and assisting with concrete design.**

* Free translation of the original German text.

Preface

Prof. Dr. Michael Eßig

Recognise opportunities and make the most of freedom!

Public procurement in European countries, such as in Germany, Austria and Switzerland, has evolved in recent years from the purely administrative act of 'contracting' to a strategic function at the interface between the state and private actors. It is vitally important in several respects. Firstly, the level of procurement volume, which in Germany, for example, is estimated to be no less than 15 % of the gross domestic product (€350 billion). Secondly, the contribution that procurement can make to achieving the strategic goals of government action is significant.

As a matter of principle, public procurement should be guided by fair, transparent and, in particular, competitive practices. This is where digitalisation presents us with challenges we have never encountered before. A study by the management consultancy PwC Strategy& for the German Federal Ministry of the Interior (Bundesminesterium des Innern, BMI), Building and Community carried out in 2019 shows that the increasing dependence on a few software providers significantly endangers

the digital sovereignty of the German state in its administration of federal affairs. This structural problem is also being vigorously discussed in Switzerland, for example, in the Digital Sustainability Research Unit at the University of Bern Institute of Computer Science. There, digital sustainability is also examined very closely with regard to the social benefit aspect and its accessibility for all — with the result that proprietary solutions in particular are seen as problematic. Instead, there is a plea for crowd-sourced digital initiatives, which represent a high social benefit and, while opening the door to innovations from the private sector.

In this context, this guide is a great great aid to practitioners. The case of used software not only shows that legal rights can be successfully enforced even against US software giants, but also that it is worthwhile from a business and economic perspective to protect and champion freedoms. At the same time, practical help in procurement is also provided.

In addition to the strategic goal of increasing competition, public procurement must also make a particular contribution to achieving sustainability — which is now an integral part of Switzerland's new procurement law. Used software may make an important contribution here as well. In the German Circular Economy Act (Kreislaufwirtschaftsgesetz, KrWG), the legislator speaks of the primacy of 'high-quality recovery' (§ 8, Para. 1 KrWG) — and it is hardly conceivable that higher-quality recovery will take the place of the reuse of products that still work perfectly. Digital products such as software are often perceived as 'virtual' and many believe that creating these kinds of products requires no resources — quite the opposite. As early as 2013, the German Environment Agency, among others, commissioned a study on the topic of 'green software' and demonstrated that considerable material resources are involved in producing digital goods. Consequently, 'Green IT' is also being advanced in Austria, specifically through the optimised combination of sustainability and digitalisation.

The guide therefore addresses important strategic issues of the public sector in Europe in general and public procurement in particular. Without wanting to exaggerate the topic of used software, these products show the interface between the political dimension of state action and actual practice in public organisations particularly well.

It would, however, be inappropriate to place too much responsibility on the individual procurer. Nevertheless, second-hand software offers leeway with regard to using often dominant manufacturers and at the same time makes important contributions to strategic objectives of digital sovereignty and trade within a circular economy. In this way, the guide helps in managing the flood of arguments and assisting with concrete planning and structuring.

We hope, therefore, this paper is a valuable contribution to the all too pressing issues of this age. It calls on state actors in particular to make use of the still remaining room for manoeuvre and to profit from it economically, in some rare cases. This still leaves, however, much more to be done to align the state and its citizens with a digital age which they themselves actively shape.

Yours sincerely,
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- and much more

1 Introduction and methodology

The following compendium attempts to present the background of the topic of 'used software' in a simplified and practice-focused manner[1] without requiring in-depth previous knowledge. As the paper progresses the issues will be analyzed from the perspective of public procurement as further background.

In this regard, a liberal approach is pursued resulting in a deliberate attempt not to interpret the software manufacturers' desires in practical terms, rather to take as a starting point the legal obligations (which are in any case the only decisive ones under public procurement law) in connection with acquiring used software.

Parties who value the benefits of highest judicial precedent over the interests of manfacturers will likely find their positions underrepresented in the paper. For those who, on the other hand, would like to view the issue as an opportunity and who recognise or want to recognise the financial incentives found in new savings and revenues, the following will be of great aid. [2,3]

At the same time, we intend to dispel half-truths and reject false arguments.

David vs. Goliath

1 Based on German and European Law and jurisdiction.
2 The market for second-hand software has been developing because dealers and customers have not followed the manufacturers' ideas. Essentially, all efforts made by the large standard software manufacturers to prevent the lawful trade of used purchase licences remained unsuccessful.
3 All judicial decisions mentioned herein are judgements made by German courts or the ECJ, unless otherwise expressly stated.

2 Summary of fundamentals

2.1 Fundamental concepts

The topic of used software deals with (standard) software that a so-called first purchaser has acquired from the respective software manufacturer, or via one of their partners, and now would like to resell that software for various reasons. This could be, for example, because they have acquired new software versions or other software solutions. In these cases of re-sale, there are software dealers on the market who also resell software 'used' to their customers as so-called subsequent purchasers.

First of all, the software copyright owner is already comprehensively protected by copyright law against all actions such as copying or distributing their work against their will. For that reason, a manufacturer has the right to object to a use without license. However, if the producer of a computer program (as software is referred to in German copyright law (Urheberrechtsgesetz, UrhG)) sells it in the European Economic Area (EEA), their distribution right is exhausted under identical statory norms, with the exception of tenancy law. For this reason, according to highest judicial precedent from the Court of Justice of the European Union (ECJ)[4], they are not entitled to control or authorise any resale of the software.

After initially bringing a product into circulation in the EEA, the manufacturer shall be conclusively excluded from further sales in this respect.

As a result of this legal starting position, the interests of second-hand dealers and software manufacturers usually diverge, as the manufacturer cannot profit financially (again) from the resale of the software it has already sold.[5]

Trade that involves the manufacturers might therefore not only be counter-productive and limit the market due to conflicting interests and associated barriers, but also and as a consequence be deemed legally unnecessary. Accordingly, as in the case of other used works, such a book, involving the copyright holder is also not required.

4 ECJ, Judgement dated 3.7.2012 — C-128/11.
5 Although the associated market acceptance of the software as a result of wider distribution and the remuneration for peripheral services such as maintenance and extension services can also be an advantage for the manufacturer from an economic point of view.

Since the ECJ ruling, some manufacturers have changed their licensing model and, in some cases, offer rental models without exception (regularly within the framework of so-called cloud offers). Here, neither trading in (used) licences nor offering them for tender is possible. Whether this ultimately benefits the customer financially is debatable.

Sometimes attempts are made to keep pure purchase licences away from the used market by means of additional extensions of the use rights that are only offered as part of ongoing service contracts.

See example: Software Assurance, see Chapter 5.3.2 ▶

Measures that contradict various fundamental ideas of free trade as well as guiding principles of the European fundamental freedoms are rightly scrutinized by the highest judicial authority of the ECJ again and again. The fact that numerous severe fines have been imposed by the EU Commission on market dominating companies show how consistently the fundamental concepts are defended, thereby encouraging consumers, authorities, and companies alike to exercise their rights.

2.2 Legal problematic

The initial question before the ECJ which compelled its fundamental decision and subsequently gave rise to decisions from the German Federal Court of Justice (Bundesgerichtshof, BGH) **based on this,** was whether and to what extent the described exhaustion also occurs in the event that software is downloaded.

German courts have had difficulty with this issue as the phrase '*reproduced version*' (Vervielfältigungsstück) in the relevant provision was predominantly understood in the sense of a tangible object, which was lacking in the case of the (digital) download. Moreover, these kinds of non-physical downloads are also not capable of being owned under German law.

Ownership is of vital importance in our social system and in law. This is where the owner's permanent exclusive right to do whatever they want with their property comes from. This permanently protects the value associated with the property and the owner's rights.

When transferred to computer programs, the situation is fundamentally more complicated (especially due to the copyright requirements). It was only the ECJ that was able to overcome this complexity and address the question of ownership with regard to (used) software. The court

recognised that the scope of application of the exhaustion doctrine is just as relevant in the case of non-physical copies of the software and that a transfer of ownership also takes place when these are downloaded, whereby in this respect, according to the BGH[6], a separate (EU-wide) concept of ownership must be assumed.

The purchaser of software is the 'owner' and can therefore freely dispose of their own 'property'.

Anyone who acquires a computer program in the context of a sale and pays a fee for acquiring it has therefore acquired property in this sense. The software represents an important investment in every company and must (like other assets) not only be taken into account for tax purposes, but must also be valued commercially when acquired and the potential proceeds in the event of sale must be considered.

Thus, the ECJ was faced with the issue of what stands in the way of the free trade of software made available by download alone. This would mean that although the manufacturer saved themselves the effort of producing data carriers, the resale of the software would be (inadvertently) excluded thereby.

As a result, the courts of final appeal, the ECJ and BGH, dealt intensively with this issue and achieved clarification after years of dispute, finding in favour of an open European market and customers.

2.3 The principle of exhaustion as the basis for discussing the problematic

Apart from generally applicable legal provisions, the so-called exhaution principle, as found in the German Copyright Act (UrhG), provides the basis for the trade in used software. Accordingly, § 69 c, No. 3 Sentence 2 of the UrhG provides that a manufacturer's right to distribute a copy of software[7] is exhausted with respect to the entire internal market of the European Union or the European Economic Area (Community-wide exhaustion) at the moment it is first put on the market with their consent.

First of all, the right of distribution lies with the manufacturer as the rightholder. When this right is granted, it is intended to ensure that the rightholder receives adequate consideration for creating their work through the sale of their product. However, once this right has been exercised, it has now been exhausted.[8]

Thereafter, the work in question is free to be further distributed. More-

6 BGH, judgement dated 17.7.2013, Ref.: I ZR 129/08.
7 Called "copy of a computer program" in the directive.
8 With the exception of the rental right.

over, such a distribution may occur *notwithstanding any restriction on the content of the right of use granted*[9], as understood from the holding of the first fundamental judgement hereto from the BGH on 6 July 2000.[10]

The exhaustion doctrine in copyright applies in Germany and in the entire territory of the European Union, and exists in a similar way in Switzerland (see cantonal court (Kantonsgericht, KG) of Zug, judgement of 4 May 2011 — ES 2010 822).

Tribunal federal, Lausanne Switzerland

2.4 Fundamental decision of the European Court of Justice

Since this ruling by the BGH in 2000, there have been a number of court decisions dealing with specific issues in this context. As early as 29 June 2006, the Hamburg Regional Court[11] ruled that individual Microsoft licences from volume licensing agreements may also be resold second-hand.

The court confirmed that the exhaustion principle applied to each individual licence under a volume licensing agreement with the judgement stating that: ***The exhaustion of copyright is not precluded by provisions in the Microsoft Select contract.***[12]

Each individual licence for a volume licence agreement is subject to exhaustion.

Provisions within the licence agreements that are intended to restrict the resale of a software are therefore invalid, as exhaustion is 'mandatory law' that cannot be annulled by contract. The BGH took another case[13] as an opportunity to compel the ECJ to render an interpretation on the regulations on exhaustion. These proceedings between a (used) software distributor and Oracle on the interpretation of the provisions of §§ 69 a et seqq. of the UrhG[14], forced the ECJ to consider used software licences.

Principle of exhaustion

- Art L122–6 Code de la propriété intellectuelle
- Art. 99 Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual
- § 40c Urheberrechtsgesetz

9 Quote freely translated from the original German judgement.
10 BGH, judgement dated 6.7.2000 — I ZR 244/97 (OEM).
11 Hamburg Regional Court (Landgericht Hamburg, LG Hamburg), judgement dated 29.6.2006 — 315 O 343/06.
12 Quote freely translated from the original German judgement.
13 BGH, decision dated 3.2.2011 — I ZR 129/08.
14 These were based on an EU judgement (Directive 2009/24/EC), which regulates the question of the so-called exhaustion of the software author's distribution right in particular.

The BGH posed various questions to the ECJ with regard to the exhaustion of software that is offered as a download.

Interim conclusion

Against the backdrop of the initial question posed at the onset, the historic judgement of the ECJ not only appears to be correct, a differing view is incomprehensible from an anaylsis based on legal fundamentals. The court therefore allowed the purchase of software irrespective of the question of whether a physical data carrier had been made available. Along with the software itself, the original purchaser is selling the ownership to which it is entitled.[15]

On 3 July 2012, the ECJ[16] then handed down a fundamental decision on the resale of computer programs:

Fundamental decision

- **A software manufacturer cannot oppose** the **resale** of its 'used' licences allowing the use of its programs downloaded from the internet.[17]
- **Downloading** a copy of a computer program and the conclusion of a user **licence agreement** for that copy form an **indivisible whole**, through which **the right of ownership** of the copy of the computer program in question is transferred.[18]
- Furthermore, the exhaustion of the distribution right extends to the copy of the computer program as **corrected and updated by the copyright holder**.[19]

Tip. For additional information and checklist, see Chapter 7 ▶

15 Or its "copy of a computer program" (in the sense of EU law).
16 ECJ, judgement dated 3.7.2012 — C-128/11.
17 Headline ECJ PRESS RELEASE No. 94/12 on ECJ, Judgement dated 3.7.2012 — C-128/11; for context: The questions posed by the Federal Supreme Court in the proceedings before the ECJ related in particular to the question of whether, in the case of a software copy "download" from the manufacturer's website, the so-called exhaustion of the manufacturer's distribution right is to be assumed. In Germany, this was largely denied by jurisdiction and literature until the decision from the ECJ.
18 See ECJ, judgement dated 3.7.2012 — C-128/11, cit. 44, 46.
19 According to the status of the software maintained by the manufacturer on the basis of contractual agreements at the time of resale; ECJ, judgement dated 3.7.2012 — C-128/11.

With regard to potentially rendering all copies of the first purchase unusable, the ECJ stated that it is generally a software producer's risk that copies of programs will be further used.[20]

On the other hand, the ECJ did not mention if the subsequent purchaser would have to provide the manufacturer with certain evidence or similar regarding the rendering the software unusable or other circumstances of the purchase.[21] Strictly speaking, the ECJ was not obliged to assume that rendering the software unusable is a prerequisite for the occurrence of exhaustion.[22]

2.5 Clarifying the most important issues

Following the previously mentioned decisions from the ECJ and BGH, it was initially unclear what their jurisprudence meant for so-called volume licences and associated (special) discounts, for example, in the context of so-called EDU programs, government licences, and the like.

As a result, in 2014, the issue of whether volume licences could be split up was ripe for decison by the highest judicial authority, the BGH, and this they answered in the affirmative.[23] To this end, the manufacturers had partially argued that this was still inadmissible. However, the BGH[24] essentially confirmed the statements of the lower court[25] and in this respect stated with regard to volume licences that several individual copies were involved. These each constitute independent rights of use which could be transferred separately.[26]

Volume licences can each be transferred separately.

Moreover, the courts did not follow the economic arguments of the software manufacturer with regard to discounted licences for the edu-

20 Both in the case of a physical and in the case of a digital installation medium, see ECJ, loc. cit. 79.
21 The ECJ addressed the manufacturer with regard to rendering the product unusable: The manufacturer (!) is free to take technical protective measures (ECJ, loc. cit. 87). The ECJ obviously did not consider the original and subsequent purchaser to be solely responsible in this respect. The court also states again at a later point: "It should also be noted that when a user licence is resold by reselling a copy of a program downloaded from its website, the copyright holder, i. e. Oracle, is entitled to ensure by all the technical means at his disposal that the copy still in the hands of the reseller is made unusable." (ECJ, loc. cit. 87).
22 See K. Stein, „UsedSoft"-Entscheidungen des EuGH und BGH, p. 149 et seq (2017).
23 The backdrop here was the ECJ's statement in the fundamental ruling that a single licence should not be split.
24 BGH, judgement dated 11.12.2014, Ref. I ZR 8/13 ("UsedSoft III").
25 Frankfurt Higher Regional Court (Oberlandesgericht Frankfurt, OLG Frankfurt), judgement dated 18.12.2012 — 11 U 68/11.
26 In contrast to the ECJ case, the BGH considered that the licences in question were not so-called client-server licences, which were not allowed to be split according to the ECJ. The opinion of the lower court was also correct, according to which the uniform serial numbers in this case did not speak for a uniform licence either, but these merely represented an access key without any further legal significance; BGH, judgement of 11th December 2014, Ref. I ZR 8/13.

Special discount programs don't play a role in the resellability.

cation sector (EDU licences). The existence of separate pricing systems, in particular for resellers on the one hand and so-called EDU customers on the other, as assumed by the courts, was found to be irrelevant.[27]

Where special contractual conditions and discounts are granted, whether these lead to sales proceeds that are below the profit line is not decisive. The court found that a review of the economic efficiency of the pricing policy of the plaintiff (here: Adobe) or the appropriateness of the relationship between performance and counter-performance exceeded their judicial mandate. The only decisive factor was whether it had been possible for the plaintiff to demand compensation equalling the value of the claim.[28]

Also, according to the BGH, the provisions of the membership agreement to the Educational Licensing Unit (EDU) contract licensing program did not lead to any restriction of the right to the exhausted copy of the subsequent purchaser.[29] It is true that according to the provisions of the membership agreement, the licence is not transferable and may only be reproduced for the sole purpose of distributing the licences internally in the program member's company within the framework of the program.

However, according to the BGH, the right of the subsequent purchaser to use the work for their intended purpose according to § 69 d of the UrhG could not be excluded by contractual provisions reserving these rights to the original purchaser.

Federal Court of Justice (Bundesgerichtshof, BGH), Karlsruhe

27 OLG Frankfurt, judgement dated 18.12.2012 — 11 U 68/11.
28 OLG Frankfurt, judgement dated 18.12.2012 — 11 U 68/11.
29 BGH, judgement dated 11.12.2014, Ref. I ZR 8/13 ("UsedSoft III").

3 Legal stucture of the ECJ's fundamental decision

3.1 Application of the ECJ decision by the German Federal Court of Justice (BGH)

In the original proceedings in 2013, the BGH took up the decision of the ECJ and applied it on the basis of the German regulations[30]. Accordingly, so as to provide the purchaser relilable guidelines, the court opined that exhausation occurs in the view of the court as meant by German copy-right law[31] on standard software under the following conditions:

ECJ decision in application

- The software must have been originally **brought to commerce** in the territory of the EU or another contracting state of the **EEA** by way of sale **(either on a physical medium or by download)** with the consent of the rights holder.
- The licence for the software must **have been granted in return** for the payment of **a consideration** intended to enable the rights holder to obtain a fair remuneration (with the licensor's ability to do so being sufficient).
- The licensor must have granted the first purchaser the **right** to use the software **permanently** (indefinitely).
- Any **improvements and updates**, which the computer program downloaded by the subsequent purchaser has in comparison to the computer program downloaded by the original purchaser must be covered by an **agreement** between the licensor and the original purchaser.
- The previous licensees must have rendered any **copies unusable**; they may therefore no longer use the software.

30 BGH, judgement dated 17.7.2013 — I ZR 129/08 — ("UsedSoft II"); see also BGH, judgement dated 11.12.2014, Ref. I ZR 8/13 ("UsedSoft III").
31 According to § 69 c, No. 3 of the UrhG.

Consent from the manufacturer is not required.

As a result, consent from the software manufacturer is not required, as the subsequent purchaser (the buyer of the used software) can invoke the (legal) right of use as a result of exhaustion.

Moreover, according to the court, the right[32] of the subsequent purchaser of the 'exhausted' copy of a computer program to use it for its intended purpose, which is conferred by law, can not be excluded by contractual provisions.

What constitutes the intended use of the computer program is determined in particular by the licence terms agreed between the copyright holder and the first purchaser.

3.2 Significance of licence keys and data carriers

Two further judgements rendered by the highest judicial authority again dealt with second-hand software. In the first case, the BGH[33] addressed the issue of license keys. While these (also according to the software manufacturer) are not intended to provide proof of authorisation but merely to overcome a technical hurdle, the question was whether the exhaustion of the distribution right of the software also extends to the associated licence keys, to which the BGH answered in the affirmative. In 2017, the Munich Higher Regional Court[34] once again explicitly deemed trading with mere serial numbers to be impermissible. This means that product keys that are needed to activate a computer program are not considered licences.

In its judgement of 12 October 2016, the ECJ[35] once again dealt with the issue of used software. In this respect, the question was whether self-created backup copies of the original data carrier may be made available to a purchaser when the original data carrier is lost or defective. The court again denied this as the seller had no right of explotation. In these kinds of cases, the subsequent purchaser was referred to a download of an installation medium from the manufacturer of the software, which was also recognised by the manufacturer (Microsoft) in these proceedings.

32 BGH, judgement dated 17.7.2013 — I ZR 129/08 — ("UsedSoft II"); see also BGH, judgement dated 11.12.2014, Ref. I ZR 8/13 ("UsedSoft III").
33 BGH, judgement dated 19.3.2015 — Ref. I ZR 4/14 ("Green-IT").
34 Oberlandesgericht München (OLG Munich) (, judgement dated 1.6.2017 — Ref. 29 U 2554/16.
35 ECJ, judgement dated 12.10.2016 (C-166/15).

3.3 Intended use and and notice of the licence conditions

The subsequent purchaser's right to use the software for their intended purpose follows from § 69 d, Para. 1 of the German Copyright Act (UrhG). A further decision of the BGH[36] once again emphasised that the intended use of the computer program again resulted from the licence agreement agreed between the copyright holder and the first purchaser. This includes correspondingly the obligatory information to the purchaser regarding the use to which the licences have entitled the first purchaser.

▷ Reference to Chapter 3.7 Public Procurment Law Requirements

Subsequently, the Hanseatic Higher Regional Court[37] (Hanseatisches Oberlandesgericht, HansOLG) found that a consumer[38] must in particular receive information on the type of licence originally granted, in order to be able to assess whether they can obtain an effective right to use the software, whether or not a copy had already been handed over to the original purchaser. However, an obligatory full disclosure of the licence chain by the distributor to the buyer did not follow from the judgement, despite some initially raised concerns to the contrary.[39]

Full disclosure of the licence chain is not required.

Palace of Justice in Vienna, Austria

36 BGH, judgement dated 11.12.2014 — I ZR 8/13 ("UsedSoft III").
37 HansOLG, judgement dated 16.6.2016 — 5 W 36/16.
38 The underlying proceedings involved an online sale to a (private) consumer. Whether this also applies in equal measure in B2B business was not the subject of the proceedings.
39 Accordingly, a statement referring to this had to be omitted, as the Hamburg Regional Court (LG Hamburg) ruled; see judgement dated 14.9.2016 — Ref. 406 HKO 148/16.

For the sake of better understanding, it should be pointed out that the used licences or their associated use right arise even by operation of law (as a result of exhaustion) as a right to use for the intended purpose.

The licence agreement with the manufacturer is therefore not transferred to the subsequent purchaser, which however could result in a relaxation of certain obligations.[40]

3.4 Possibilities of verification

On the subject of evidence, it should first be clearly mentioned that a distributor or seller is already obliged to effectively transfer the licences or grant the rights of use within the scope of their obligations under the purchase contract. In the event of a (legal) defect, the purchaser shall have statutory warranty claims (defect rights[41]), among other things, to subsequent performance and, if applicable, compensation for damages.

▷ Reference to Chapter 5.4.4 Warranty and indemnification

The advice sometimes given by manufacturers and some distributors to customers of used software to demand further proof expresses a certain scepticism as a result of this primary legal obligation of the seller, which the Public Procurement Chamber of Westphalia[42] (Vergabekammer Westfalen) has rejected as unfounded against the backdrop of highest judicial precedent.

The issue arises in connection with used software, as the BGH stated at the time, that the person who invokes the fact that the reproduction of a computer program according to § 69 d, Para. 1 of the UrhG (as a result of exhaustion) does not require the consent of the right holder also bears the burden of proof in showing that the requirements of this provision are met.[43]

Questions regarding the burden of demonstration and proof (only) arise in the context of court proceedings.

In this respect, however, it is a matter of the general procedural principle in civil procedural law, according to which the person who invokes a (disputed) case favouring them bears the burden of production and proof. Thus, in line with the situation before the BGH, it is a case of a software manufacturer suing a customer who relies on a used licence.

40 This would be conceivable, for example, in relation to a contractually agreed audit right of the manufacturer.
41 See § 437 German Civil Code (Bürgerliches Gesetzbuch, BGB).
42 In this sense, a "risk" of being held liable by the manufacturer when acquiring used software is "no longer objectively comprehensible" due to the supreme court jurisdiction, see Public Procurement Chamber of Westphalia, judgement dated 1.3.2016 — VK 1 – 02/16.
43 BGH, judgement dated 17.7.2013, I ZR 129/08 ("UsedSoft II").

However, at this point, it should be remembered raising that the manufacturer does not have to participate in the transfer of the licence in any manner.

Classification of evidence raising

- The above consideration makes it **seem fundamentally wrong to even discuss evidence,** that is then haphazardly presented to the manufacturer out of court, without any reason as a request to validate the used licences. This may seem convenient but it disregards the previously mentioned requirements of precedence and is also likely to be anti-market, due to the associated barriers to sale vis-a-vis first-time purchasers.

- Nevertheless, to this day software manufacturers (or their service providers such as auditors, authorised distributors, etc.) still argue pursuant to the burden of proof mentioned by the BGH in some SAM projects or audits. **In fact, the question of actual evidence does not even arise in the extra-judicial sphere.**

- Evidence can be presented **in court** through various means of proof (witness statements, experts, documents, party) by the party (in each case) bearing the evidentiary burden in the case of a dispute. Additionally, even in court proceedings, in the case of interests worthy of protection, it is possible to produce certain documents without the opponent's insight for the purpose of proof by involving an expert witness.[44]

- Whereas, it is neither possible nor reasonable to place such a judicial evidentiary delimma in the phase of the (out-of-court) **sale of the software**.

In general, in any court proceedings, it is likely that the first purchaser will be heard as a witness and their systems will be examined by an expert.

The question still arises here as to how the day-to-day handling and trading of licences can be managed through strict, formal requirements for declarations by the first purchaser and similar actors. The involvement of an auditor (as envisaged by some distributors) appears to be cost-intensive, and the expense for this is hardly reasonable for distributors.

44 Within the scope of the court's discretion, it's conceivable to submit the case to a third party bound to confidentiality. In practice, this is regularly done in an in-camera procedure known from administrative law, following § 99 of the German Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO), see Ohst, Wandtke/Bullinger, Praxiskommentar zum Urheberrecht, 4th edition 2014, § 101 a UrhG, ref. 30.

Due to its particular professional obligations and focus on auditing, an auditor nevertheless appears to be both suitable and reliable to check and, if necessary, confirm the transfer of rights in a legally binding manner. **Unlike in the case involving a notarial certificate, which has already been the subject of court proceedings regarding used software, the auditor's audit competence and audit scope goes beyond formal audits and declarations to an economically focused evaluation of the licence transfer as an economic asset.**

Moreover, the software manufacturers themselves usually employ auditors for their audits.

Nevertheless, subsequent purchasers are occasionally asked by manufacturers for contract numbers and first purchaser names, for example, in order to be able to trace the source of purchase. Some distributors fear that as a result of this 'disclosure' of documents and information, they won't be able to procure additional licences due to the influence of the manufacturers and/or that trade will become more difficult in general. This means that there is a need to protect this information and avoid negative effects.

The fact that the manufacturers actually do have a close eye on the used software market and want to limit the supply was clearly demonstrated last year by adjustments to Microsoft's regulations in connection with 'from SA', which were only reversed after criticism and the fact that more than one year had passed.

Those who sell licences (public authorities as well as companies), on the other hand, often demand so-called NDAs or confidentiality agreements from the distributor as part of the sales negotiations. In these cases, distributors are contractually obliged to protect the data of first-time purchasers and to prevent uncontrolled dissemination of non-mandatory information.

Conversely, the Procurement Chamber of Westphalia[45] also recognises a legitimate interest on the part of the purchaser to demand proof for its own protection. This could, however, be sufficiently achieved by a deed of release from the distributor in the event of recourse claims.

45 Procurement Chamber of Westphalia, decision dated 1.3.2016 — VK 1 – 02/16.

Whereas, it should be noted that various documents that are requested (for alleged proof) are not likely to be suitable for evidentiary purposes in court on the basis of evidence already presented, as moreover their content has not been clarified. This is because what must be declared in terms of content, e. g. with regard to rendering the software unusable, by whom, how (in what form), has not been defined by highest court precedent. In the case of companies, the question has already come up with regard to declarations as to who may order the deletion of all installations/copies at all (in an accurate and legally binding manner).

Furthermore, it should not be overlooked that the possible request from the awarding authority for an out-of-court submission of certain documents always triggers the purchaser's own comprehensive legal review, and, in the absence of any immediate notification of recognisable defects by the purchaser, warranty claims (failure to disclose) may be excluded (§ 377 of the German Commercial Code (Handelsgesetzbuch, HGB)). This in turn leads to costs that are not insignificant.

However, if such **evidence is** ultimately **unsuitable as (judicial) evidence** regardless (and therefore should not be owed by the distributor), and these are only demanded because a manufacturer asks for them (out of court) on ocassion of the purchase of used software, the result would be **to pursue exactly what the ECJ has declared inadmissible** or unnecessary:

Namely, the requirement that the manufacturer must **consent or authorise** the sale or purchase of the (used) licence.

Considering all this it begs the question, how the legal practice hereto has partially committed itself to an extra-mandatory willingness to disclose, or where this willingness would even come from.

Tip.
See Chapter 3.5 ▶

Ultimately, the argument occasionally put forward that it is not possible to acquire used software in good faith misses the point. The same applies in the event that the customer is handed over documents. The only significant difference is that the customer is only then obliged to check carefully in order to avoid lliablity, that is, or even worse, be allowed to be lulled into a false sense of security.

Tip.
See Chapter 3.6 ▶

3.5 'Disclosure' root cause analysis

◁ Reference back to Chapter 3.4 Possibilities of verification

Why, then, is the 'disclosure of the chain of title' still partly endorsed or offered as a possible solution?

After the pioneering but typically abstract decisions from the courts, the practical arrangement remained with the more or less young distributors of this kind of (used) software. While the distributor involved in the proceedings, with the support of well-known companies and the basic legal principles, was able to hold their own in the years-long battle against the largest software manufacturers in the world, who have almost unlimited financial resources some distributors then stepped forward who sought both disclosure and involvement from the manufacturers.

The pursuit of manufacturability.

They wanted to claim the advantages of free trade in used software licences and, in doing so, a piece of legal history for themselves, while at the same time not wanting to risk displeasing the manufacturer or losing its (supposed) protection. In order to obtain this perceived 'USP' against the litigant usedSoft, a discussion was triggered, the starting point or motive of which nobody seems to remember today.

To the author's knowledge, not even the manufacturers have at any time claimed that there is an obligation to disclose information on resale as legally required (publicly). In this regard it is all the more astonishing that the issue of disclosure is being driven by some used software distributors, whereas the manufacturers who are advantaged in this way have long since switched to alternative rental licence models in order to avoid second-hand licences.

Nevertheless, **this discussion regarding disclosure is being conducted by the distributors just mentioned somewhat on behalf of the manufacturer.** It goes without saying that it is preferred that all sources of purchase and documents are disclosed to any subsequent purchaser, and that the manufacturer is either proactively notified of the sale or, in the case of a **SAM project or audit** is freely provided knowledge and, to a certain extent, has control over it.

If, on the other hand, this discussion of disclosure is supported by the ECJ's **fundamental idea of free trade**, reservations and doubts exist as to whether this truly does more justice to these fundamental values and the interests of the customer.

European fundamental freedoms at risk upon disclosure

- Firstly, this is due to the **burdens of legal verification** and the associated costs and other obstacles described below; uncomplicated, practicable trade is not this complicated.
- Moreover **doubts** exist in any case if the documents are submitted **at the latest at the first request** of the manufacturer's SAM partner, **out of fear of an audit** or concern **about** non-compliance. This is because it goes back to the **beginning of the case law**, in that instead of the legally unnecessary consent of the manufacturer (in advance), **authorisation** is **practically** obtained (in retrospect).

If, however, the manufacturer does not have to give their consent to resale, why should they then be informed of this?

The **monopoly position of the manufacturers that has grown over the decades and the dependencies associated with it** often lead to a certain degree of submissiveness. It suggests a supremacy that should not exist. The fact is there are distributors of used software who do this and others who refuse to do it for various reasons that are quite understandable (and oblige themselves accordingly to the sellers).[46]

Submissiveness to manufacturer vs protection of confidentiality and freedom.

3.6 Misconception regarding good faith purchase vs. disclosure of the chain of rights

In part, lack of good faith purchase is cited as a factor to motivate disclosure. This legal issue is also complicated and is sometimes communicated incorrectly, truncated, and/or at least presented very one-sidedly to potential buyers. However, the consequences of a misjudgement by those buyers can be serious.

46 In particular, there are fundamental data protection concerns in the case of US providers due to the recent jurisdiction of the ECJ (judgement dated 16.07.2020 — C-311/18).

3.6.1 Legal bases and classification

The fact is a purchase made in good faith is only possible in the case of (tangible) property on the basis of an accompanying legal certificate. According to the prevailing view (in Germany), software licences cannot be acquired in good faith because, in legal terms, these are in essence **rights of use** under copyright law.

This means that rights (of use) cannot be acquired in good faith, at least **under German law**, but must be effectively assigned (transferred) by the respective owner or, in the case of used software (according to the BGH), are effectively established by law through the resale.

However, as mentioned above, **the ECJ** has even emphasised the (European) nature of **ownership** in the purchase of software.

◁ Reference back to Chapter 3.4 Possibilities of verification

3.6.2 Significance to the market of 'used' software licences

As a result of the legal situation in Germany, it is therefore occasionally stated that a purchaser of used software should, in particular, have the software licence agreements and declarations for the chain of title disclosed, because they can refer to them, for example, against the software manufacturer. This, however, would also only be legally necessary in the case of (very unlikely[47]) court proceedings, would hardly be sufficient with such documents and, outside of a trial, would return the jurisprudence process to its beginning through a (practical) authorisation requirement.

In addition to this, it is also true that no legally protected legal document results from the previously mentioned documents themselves. This means that the disclosure of 'evidentiary documents' does just as little to show the presence of a purchase in good faith. Incidentally, it should be mentioned here that it is by no means guaranteed that documents will not be used more than once during different purchase transactions.

47 See Procurement Chamber of Westphalia, judgement dated 1.3.2016 — VK 1 – 02/16.

Disadvantages as a result of disclosure

- With respect to all documents retained, the customer is not only obliged to uphold their own defect rights
  - to enable **precise and comprehensive auditing and if necessary, to give notice of** any deficiencies (§ 377 HGB — so-called obligation to give notice of defects for merchants),
  - but in this case, a **failure** to carry out a detailed audit with corresponding legal assessment will then trigger a **separate allegation of fault.**
- In addition, there are **data protection concerns** and there is a **risk of the manufacturer exerting influence or exercising control** via free trade.

Due diligence therefore requires an examination of the exhaustion requirements, which can be extremely demanding. Various distributors, SAM consultants, auditors or solicitors can report experiences, e. g. in audits, in which numerous questions in this context could only be answered after intensive examination and evaluation. **This is because, in the case at hand, it is often a matter of tracing a long-standing licensing history in complex contractual arrangements,** but also tracing and proving the **actual** circumstances, the details of which may be in dispute, and this entails rendering the software useless.

Audit obligations.
Failure to carry out audits can establish fault and strip away rights.

Knowledge of deficiencies, even if only possible on the part of the purchaser, can speak in favour of grounds for an allegation of fault. If the purchaser is found more culpable this may result in criminal liability under copyright law.

In this regard, the applicable **argument of good faith purchase** (for Germany), may even turn out to be a **trap or bogus argument** if it is intended to shift the burden of all possible documents and the associated responsibility, up to and including liability, to the customer. This is legally permissible and understandable, and, from the distributor's point of view (strategically) in their own interest. By contrast, there is no good faith in relation to the documents received when they are disclosed, meaning the argument of a lack of good faith applies in equal measure in this circumstance.

Many distributors, on the other hand, take responsibility. For the reasons mentioned above, among others, these distributors do not hand over all documents, but provide information on the use right in accordance with the law (see Chap. 3.3, 5.42). Additionally, they would be allowed to examine each individual licence back to its origin. If a purchase is made, they store all documents in a transaction-related, tamper-proof and insolvency-proof way and, if necessary, seek respected external expertise. By doing this they also rule out repeated (improper) use. The distributors presumably do this not only in the interest of their customers, but also in order to be equipped with all resources for producing judicial evidence in the event of an occurrence within the scope of their deed of release.

3.7. Requirements under public procurement law

Proof of performance

Art. R2142–13 Code de la commande publique

Art. 86 Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público

§§ 84 et seq., 255 Bundesvergabegesetz 2018

Under public procurement law, only the documents specified in § 46, Para. 3 of the German Ordinance on the Award of Public Contracts (Vergabeverordnung, VgV) may be required as proof of the required technical and professional capability of the candidate. This is to ensure that the contract is executed in an appropriate quality (§ 46, Para. 1 of the VgV). The object of the contract here is the purchase of the licences. If special declarations are required in advance of the tender in accordance with procurement law, these are **generally self-declarations** by the tenderer (see also § 35, Para. 2 of the German Regulations on Sub-Threshold Procurement (Unterschwellenvergabeordnung, UVgO)). Although the authority is in principle entitled to a margin of judgement and discretion, this does not apply with regard to legal issues.[48] Neither in general, related to the purchase of software licences from certain manufacturers such as Microsoft, nor in particular for its subsequent purchase as used licences does the requirement of a special proof of suitability arise. The highest judicial precedent from the European Court of Justice[49] and the German Federal Court of Justice[50] have not imposed any formal requirements on the person of the transferor or on the act of transfer.

Legal justification of the right of use, see Chapter 3.3.

With regard to the subject matter of the act, on the other hand, the above-mentioned conditions of exhaustion are of a purely factual nature, i. e. they only have to be actually present; a special form or special evidence is therefore not required for lawfully exercising the right of use.

48 See OLG Düsseldorf, 21.2.2005, cf. 91/04.
49 ECJ, judgement dated 3.7.2012, C-128/11.
50 BGH, judgement dated 17.7.2013, I ZR 129/08.

This raises the important question of whether a subsequent purchaser must obtain information and evidence, and, if so, what information and evidence. **In particular, the court never made the much-discussed demands for contract numbers, original contracts, original keys and a personal declaration of destruction to be given to the subsequent purchaser.**

In principle, based on the decision made by the ECJ, it must be noted that neither prior consent for the sale nor authorisation by the software manufacturer through the submission of certain documents is required. Ultimately, only a means that potentially entails court proceedings can serve to secure the established burden of proof for the purchaser. In

Milestones of the used software

2000 — BGH, judgement **06/07/2000** — I ZR 244/97 (OEM)

2006 — LG Hamburg, judgement **29/06/2006** — 315 O 343/06

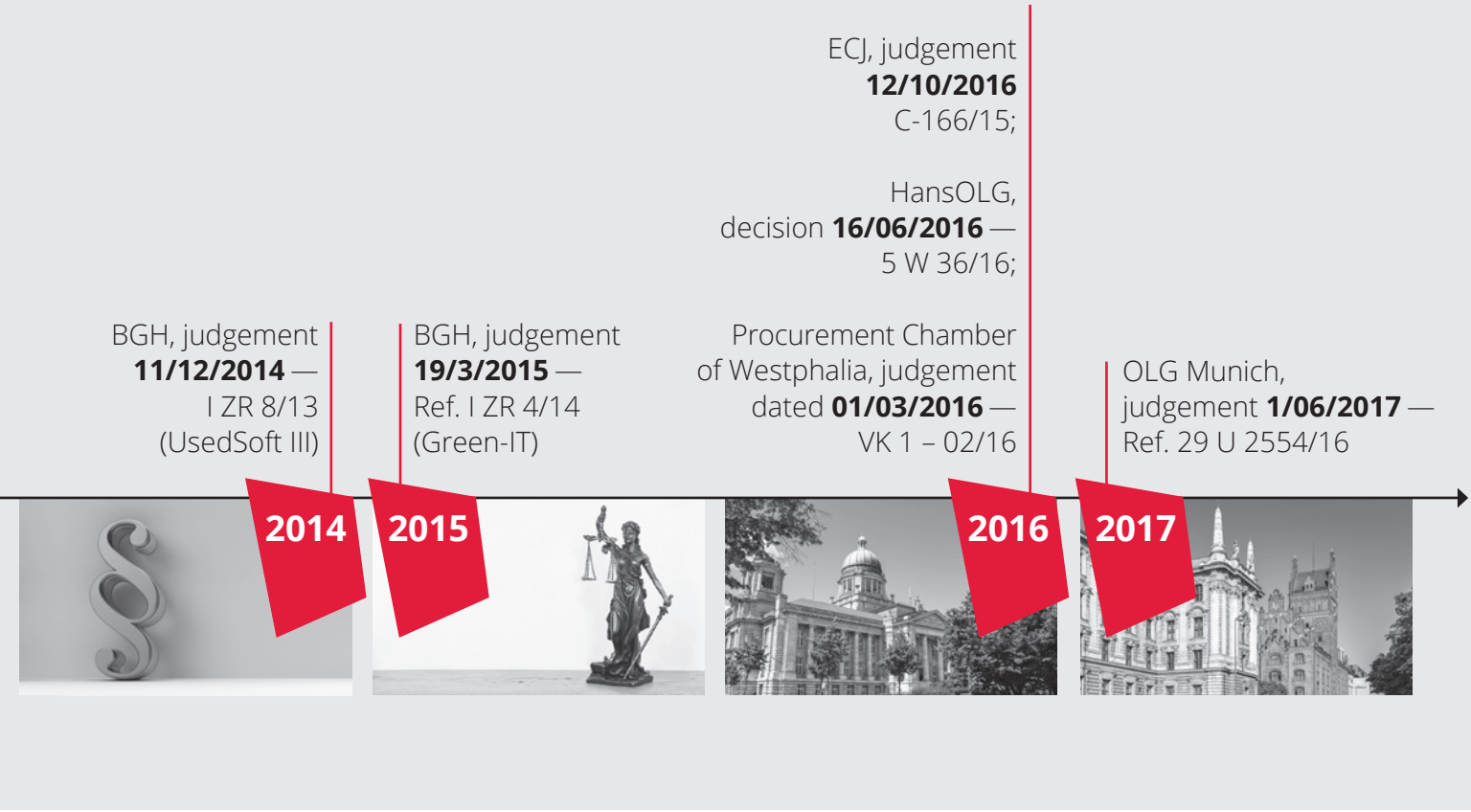
2012 — ECJ, judgement **03/07/2012** — C-128/11

2013 — BGH, judgement **17/07/2013** — I ZR 129/08 (UsedSoft II)

51 Procurement Chamber of Westphalia, decision dated 1.3.2016 — VK 1 – 02/16.

this context (as the Public Procurement Chamber of Westphalia[51] has pointed out) a **deed of release** tailored precisely to this case appears to be **suitable** in order to substantially avoid this financial burden.

Conversely, to use the buyer's (judicial) burden of proof as a justification for obtaining as many original documents as possible as evidence from the seller in order to then make them available to the manufacturer by return of post to avoid irritation, leads back to the beginning of the legal problematic described here and is not legally recognised.



4 Fundamental concepts of public procurement law in light of ECJ and BGH precedence

4.1 The role of software manufacturers — before, during and after procurement

A violation of public procurement law is present, when a private company (a manufacturer such as Microsoft) becomes involved in a public tender procedure concerning software. **Imperative to avoid conflicts of interest (§ 6 VgV).**

Because a manufacturer has a very close relationship to certain distributors, the distributors have a vested interest as meant by § 6 VgV, meaning a conflict of interest may arise if they are involved.

If it is found that a functioning market for used software exists, the involvement of a private company could also invoke anti-trust restrictions.

Companies that are dominant or strong in the market, manufacturers such as Microsoft are also not permitted to engage in restrictive practices.

In the context of so-called SAM projects, plausibility checks and/or audits, used software licences are sometimes not 'recognised' by the manufacturer partners or manufacturers.

However, as mentioned, this is also not required, and in no way means that the purchaser has acted unlawfully. **Under no circumstances should pressure from the manufacturer's appointed auditors lead to hasty actions**, such as re-licensing. Otherwise, the gains achieved by the discussed final precedent (BGH) would risk being lost.

Receiving impartial advice can assist in this respect.

Avoiding conflicts of interest

- Art. L2141–10 Code de la commande publique
- Art. 64 Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público
- § 26 of the Bundesvergabegesetz 2018

Author/product dependence promotes the digital dependence of the state.

Moreover, the level of dependency is now so high that politicians are already on alert. Meanwhile, product-neutral tendering has become the rare exception in many sectors. **In fact, we are in the midst of a battle for data supremacy and a frightening dependence on this kind of software/infrastructure (e. g. AWS).** Of course, this includes the state itself, whose digital sovereignty is under threat — as a recent study commissioned by the Ministry of the Interior has demonstrated [52]. Isolated attempts to rely on OpenSource software are only encouraging to a limited extent, in light of the progress and speed of digitalisation and mechanisation. Although, the initiatives seem to be increasing [53].

4.2 Used licences must be taken into account

For the public authorities, used licences must be taken into account today. Despite high savings potentials, the uncertainty that comes with tenders and the required documents is still huge for the purchaser, and this is quite understandable due to the judicial history. Nevertheless, the case law on public procurement has long been quite open-minded in this respect and keeps the sceptics in their place.

As early as 2008 [54] the Public Procurement Chamber at the Düsseldorf District Government held that used licences and corresponding distributors could only be rejected in principle, if it was certain with the necessary degree of certainty that intellectual property rights would be infringed by the tenderer who could therefore be sued for injunctive relief with a liklihood of success. However, the Public Procurement Chamber did already deny this at that time, despite the persistent and partially unanswered legal questions.

52 https://www.cio.bund.de/SharedDocs/Publikationen/DE/Aktuelles/20190919_strategische_marktanalyse.pdf?__blob=publicationFile (accessed on: 26.03.2021)
53 Jan Philipp Albrecht, https://ahrensburg-portal.de/landesregierung-will-microsoft-durch-open-source-software-ersetzen/. (accessed on: 26.03.2021)
54 Düsseldorf Public Procurement Chamber, judgement dated 23/5/2008 — Ref. VK-7/2008-L. (accessed on: 26.03.2021)

Most recently, the Westphalia Public Procurement Chamber[55] once again held that a fear of being sued for injunctive relief or damages by the software manufacturer (in this case Microsoft) is unfounded, when using second-hand licences from a non-authorised distributor, against the backdrop of the ECJ and BGH precedence. This also applies in particular with regard to volume licences. This confirmed the 'legality of the trade in used software in principle'.

The Procurement Chamber of Westphalia points out:

The reason for not acquiring a used licence due to the manufacturer's recourse claims no longer existed and could not be invoked to justify the deviation from the principle of § 8 EC, Para. 7 of the Regulation on the Award of Public Contracts A (Allgemeine Bestimmungen für die Vergabe von Leistungen, (VOL/A)).

The Public Procurement Chamber, is, therefore, clearly applies the highest judicial precedent to to public procurement law. In this regard, the decision followed the line[56] that used licences do not have an appearance of illegality.

The Public Procurement Chamber of Westphalia moreover ruled[57] that in a case involving the purchase of used Microsoft licences, the purchasers' **risk** of being held liable by the manufacturer is **practically non-existent.**

For this reason, it is sufficient for the public authority awarding body that wishes to acquire licences to ensure that the requirements of the highest judicial precedent on exhaustion are met — in particular with regard to rendering the copy of the previous purchaser unusable — for example, by agreeing to a deed of release in the contract with the tenderer.

55 See Procurement Chamber of Westphalia, judgement dated 1.3.2016 — VK 1 – 02/16.
56 See Düsseldorf Public Procurement Chamber, judgement dated 23.5.2008 — Ref. VK-7/2008-L.
57 See Procurement Chamber of Westphalia, judgement dated 1.3.2016 — VK 1 – 02/16.

The legal risk from the tendering authority feared by Microsoft as part of audits **that the legality of the use** of the second-hand **licences** would be **disputed** and that proof of exhaustion would therefore need to be proffered, **did not convince the Procurement Chamber of Westphalia**. In this respect, the court held there was **no** evidence from the outset of a property rights **infringement** by tenderers for used licences and therefore based on established controlling precedent a cumpulsory **claim by Microsoft** was to be expected.

Tip. See Chapter 5.3 Subject of agreement, performance description and lot allocation ▶

The Public Procurement Chamber[58] was correct in noting that the requirements for the existence of exhaustion were set very high by the BGH, but that it could nevertheless be comprehensively secured in a performance description accompanied by a demand to met certain requirements from the distributors. This kind of security would be justified in the light of the BGH.

Tip. See Chapter 5.4.4 ▶

In this way, the Procurement Chamber provided important clarification on how invitations to tender are to be presented, and in what way proof can be provided by the distributor. For example, this could be included in the contract being contemplated by means of a deed of release.[59]

The respondent's concern that it would bear the risk of insolvency of the tenderer in the event of an exemption is not reasonable against the backdrop of the clear jurisprudence since, as a result, the risk of a claim from Microsoft is practically non-existent.

Conclusion

Categorically omitting to consider used software licences is not permissible.

58 Procurement Chamber of Westphalia, judgement dated 1/3/2016 — VK 1 – 02/16.
59 Procurement Chamber of Westphalia, judgement dated 1/3/2016 — VK 1 – 02/16; see section 5.4.4 et seqq.

4.3 Needs-based software procurement under budgetary constraints

The needs-based procurement of software must be assessed in terms of budgetary law precisely and is characterised by the requirement of economic efficiency in terms of public procurement law. Only the objectively verifiable, actual need for software, or the associated outlook within the framework of the IT strategy, are decisive here.

With regard to standard software procurement, it is usually a matter of the immediate objective within the relevant period to maintain proper and efficient management in order to be able to fulfil the tasks of the state.

In order to assess the actual need, precise knowledge of the product, and therefore of the use rights, is crucial in order to map the use scenarios that are actually required in conformity with both the law, and the specific need. Often, supposed innovative functions of new software versions are neither needed nor even used, while still making use of the attendant 'down grade' right as their basis.

In this respect, it would be counter to actual need to the need to consider the latest version as necessary, even if it offers an objective added value, precisely because as this is not required, meaning costs go up excessively.

Therefore, used software should also be financially appealing, particularly for contracting authorities from the public sector. This can be envisaged when selling used licences, but most of all when procuring additional licences from software stocks that are often already in use.

In this respect, in the case of procurement, consideration must be given as to how the available public funds can be used as effectively as possible, i. e. in a cost-effective way. Since, in legal terms, software licences are rights of use, there is usually no other facts to be directly considered apart from the price.

Therefore, we advise that you exercise caution when additional services are brought in combination with the purchase of the software that are not directly related. Savings are also a legally required goal, particularly for the public sector, even if this entails that future budgets may be reduced as a result.

For more information, see also Chapter 5.3.2 Software Assurance ▶

5 Procuring used software licences in practice

5.1 Fundamental considerations

The history of the jurisdiction on second-hand licences explained above clearly shows that the fundamental legal questions have been clear for many years, and that the transferability of these kinds of licences cannot be disputed.

- However, it is also recognisable that the discussions in this context are often shifted to **questions of the burden of proof,** and therefore the **impression** is given that the purchaser of used licences **embroiled in litigation** and must name evidence.
- As the Public Procurement Chamber of Westphalia[60] has recently emphasised once again, this is **false**.
- There is no particular risk of being claimed against by the manufacturer. Practice **also shows** (to the author's knowledge) that **proceedings** against purchasers of second-hand software outside of product piracy or key reselling by the large standard software manufacturers **have not materialised.**
- However, if **there is no particular risk** of a legal dispute, it would also seem **wrong to talk** about (procedural) **evidence** and the presentation of such evidence to the software **manufacturer**? Rather, to encourage open trade, the **manufacturer** should not be able to **control** or **influence** the secondary trade in used software.

Therefore, the practical challenge is likely found in workable solutions for healthy trade.

60 Procurement Chamber of Westphalia, judgement dated 1.3.2016 — VK 1 – 02/16.

As the manner in which licences are to be transferred has not been clarified by the courts[61], it is not necessary to apply too high a standard here. This is exactly what the Procurement Chamber of Westphalia found against the backdrop of the very high requirements set out by the BGH.

In this respect, it seems appropriate to be open to the various offers.[62] Insofar as certain offers appearing to be more legally secure than others, this does not at all mean that this is the case. Rather, it is the submission of documents that requires a (legal) assessment that is not always simple.[63]

Tip.
See Chapter 3.4
Possibilities of
verification ▶

Even the manufacturer of the software cannot dispose of the legal requirements as to whether the exhaustion requirements were fulfilled in the individual case or not.

Insofar as doubts remain with regard to legal certainty, the Public Procurement Chamber has granted security options, but has also refused to impose further hurdles. This kind of security can be achieved, for example, with an exemption against claims of the manufacturer.[64]

The open approach requires, in terms of public procurement law, that options for action be offered without excluding certain ones. In this way, insofar as certain volume licensing agreements are open as a source of supply for needs-based procurement, this can be offered and product descriptions openly formulated. As far as the current use of an older software version is concerned, both a software licence with downgrade rights and an old version would be sufficient. Only an open approach paves the way for procurement may that is financially favourable.

Tip.
See Chapter 4.3 ▶

Mixed licensing models that lead to extended rights (including upgrade rights), such as Microsoft Software Assurance, can only be considered budget-conform if these rights are also required. This means that schematic solutions are out of the question.[65]

61 That is, by means of which explanations, with which content, etc.
62 At least as long as this has not been explicitly judged to be insufficient by the courts.
63 As already stated, it's not legally clear what exactly would have to be declared, by whom and in what form. In other respects, too, there are risks involved in checking documents yourself with regard to the legal requirements of exhaustion. The liability of the audit shall be borne by the person who requests special declarations/documents. This is because, as mentioned, failure to give notice of defects can lead to the loss of the buyer's rights in respect of defects. Whether these kinds of documents could be used as evidence in court seems very questionable (see above).
64 See Section 5.4.4.
65 See Chapter 4.3 as well as 5.3.1 and 5.3.2, among others

5.2 Limitation of the tendering procedure

In the past, some public contracting authorities were of the opinion that they had to purchase standard software from distributors who were 'approved' by the manufacturers on the basis of various federal/state framework agreements.

Framework agreements

Art. L2125–1 (1) Code de la commande publique

Art. 219et seqq. Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público

§ 39 of the Bundesvergabegesetz 2018

However, that is not the case.[66] The obligations arising from public procurement law and the requirements for the proper use of budget funds are decisive. Public procurement law also clearly stipulates that suppliers may only be excluded from the tendering process (invitation to tender) in cases permitted by law (see, among other things, § 123, 124 of the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB)). There is no reason not to consider second-hand distributors, particularly in the case of private contracts.

While framework agreements are specifically regulated under procurement law, volume licensing programs, such as Microsoft Select contracts, must not be confused with this.

Microsoft volume licensing agreements are not framework agreements as meant by public procurement law.

This is because, according to principle 4 in the holding from the judgement of the Düsseldorf Public Procurement Chamber[67], Microsoft Select contracts are not specifically framework contracts as meant by § 3 a, No. 4 VOL/A (and therefore as meant by § 4 VOL/A or § 15 UVgO / § 21 VgV), as those contracts are not concluded between the 'acceding party' and the service provider(s) being used or envisioned for the individual call-offs.

Rather, the Public Procurement Chamber of Westphalia[68] found that the invitation to tender for 'new licences' and 'registration for a Microsoft Select Plus contract' constituted an impermissible restriction of the group of tenderers and therefore a violation of the principle of the open procedure (§ 101, Para. 7 of the GWB). According to the judgement from the Düsseldorf Procurement Chamber[69], these kinds of closed distribution structures are not to be recognised, let alone protected in this regard.

In this respect, it should be noted that tenderers are only to be assessed according to their suitability with regard to the subject matter of the service. No direct contractual relationship with Microsoft is required to offer licences. The possibility of procurement from Select-Plus contracts

66 See Public Procurement Chamber at the Düsseldorf District Government, judgement dated 23.5.2008 — Ref. VK-7/2008-L.
67 See Public Procurement Chamber at the Düsseldorf District Government, judgement dated 23.5.2008 — Ref. VK-7/2008-L.
68 See Procurement Chamber of Westphalia, judgement dated 1/3/2016 — VK 1 – 02/16.
69 See Public Procurement Chamber at the Düsseldorf District Government, judgement dated 23.5.2008 — Ref. VK-7/2008-L.

can nevertheless be mentioned as such a possibility in a tender, in order to open correspondingly favourable conditions to distributors and, as such, to the public sector.

Furthermore, the Public Procurement Chamber of Westphalia[70] clarified that the further pled advantages of the BMI contract did not constitute factual reasons to deviate from the product-neutral description. The benefits, e. g. an online portal, comprehensive licence management, uniform licence keys, etc., were not features of the object of the procurement. The object of the tender itself, in this case the acquisition of software licences, may not be randomly supplemented by certain additional manufacturer-exclusive services and therefore, as a consequence, used licences may be excluded once more.

5.3 Subject of agreement, performance description and lot allocation

The imperative of economic efficiency must be observed.

5.3.1 Subject of agreement, performance description

According to § 23, Para. 1 of the UVgO and § 31of the VgV, read in conjunction with § 121 of the GWB, the performance must be described clearly and exhaustively in the performance description. Due to the budgetary focus of these regulations, the entire public procurement law essentially serves to avoid procurement that is not cost-effective due to imprecise, incorrect or too narrow requirements. According to § 31 Para. 2 of the VgV, this includes the precise description of the performance or functional requirements or a description of the task to be performed. Only in exceptional cases may certain brand/product names (§ 7 Para. 4 of the VOL /A71) be mentioned § 7 Para. 4 of the VOL /A[71].

Art. L2152–7 Code de la commande publique

Art. 1 No. 1 Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público

§ 20 (1) of the Bundesvergabegesetz 2018

◁ Refer back to Chapter 4.2 Consideration of used licences

It should be emphasised in particular that the service descriptions must be product and solution-neutral, as well as non-discriminatory. It follows from this principle that too narrow a performance description, which is not necessary for the intended purpose, is not permitted in any case.

Very often, older software versions of standard software continue to offer features that are completely in line with requirements for a longer period of time and have also had errors rectified. It is also quite conceivable that a large number of authorities will skip one or two versions before procuring standard software again.

70 Procurement Chamber of Westphalia, judgement dated 1.3.2016 — VK 1 – 02/16.
71 See § 31, Para. 6 of the VgV and § 23, Para. 5 of the UVgO

For example, it must be carefully examined whether including additional and lesser verified services, such as those covered by software assurance, is needed at all in conjunction with a product and, if so, how these services must be put out to tender.

In this context (but also in principle) the question of what may be purchased for possible future aims, as well as when and how, is important. If you choose a software assurance from Microsoft in order to buy future versions (indirectly via the SA fee), this must be viewed critically, at least in terms of budgetary and procurement law. It is almost impossible to predict the extent to which this software will fulfil certain technical requirements and demands of the contracting authority, despite the commitment. In any case, it is almost impossible to make valid financial calculations in this way — especially in terms of budgetary and procurement law.

This matter deals with the acquisition of standard software and the associated rights of use (licences). The aim of the purchase is acquiring the right to use the software as intended. This need is described by the procurement, based on the standard software solutions existing on the market and their respective metrics with the corresponding number. Depending on the manufacturer and model, these can be user licences, workplace licences or other technical references. In each case, the status of versions and, if applicable, further specifications typical for the contracting authority are to be referred to.

5.3.2 Special feature of software assurance

Tip.
Further info in
Chapter 4.3 ▶

Software Assurance from Microsoft offers certain benefits, which are said to include rights to new product versions and licence mobility, as well as support, and various technologies and services. Software assurance must be purchased in addition to the licence and paid for on a periodic basis.

However, software assurance, which boosts sales for Microsoft, is only worthwhile for the company if customers go for every upgrade of the software in question. It is obvious that Microsoft wants to exert clear pressure towards shorter usage times of individual versions in order to reduce the considerable costs for support and maintenance of the older software releases in the medium term.[72]

For public authorities and often also companies, on the other hand, rolling out new software versions often takes place only after the release of subsequent versions and after longer time intervals have passed.

72 See Neumann/Sonnenschein/Schuhmacher/Lange, Fünf Wege zu organischem Wachstum: Wie Unternehmen antizyklischen Erfolg programmieren können, 2003, p. 73.

This entials that, procuring software with software assurance carries the risk that the procurement is not in line with needs, i. e. it does not take into account the reality of user behaviour. This is why it must always be checked whether there will actually be usable added value through software assurance in order to be able to justify the higher costs.

◁ Refer back to Chapter 2.1 Basic Understanding

In this respect, a precise analysis is required in each individual case to determine whether services related to software assurance actually belong to the subject matter of the contract and are necessary. A blanket tendering of licences with software assurance, on the other hand, not only leads to the de facto exclusion of second-hand trade, but is often not in line with demand and favours the closed distribution of the manufacturer.

5.3.3 Breaking up into lots

According to § 30 of the VgV and § 22 of the UVgO, contracting authorities are obliged to break services up into quantities (partial lots) and separate them according to type or specialist area (specialist lots), and then regularly award the tenders for these in lots. After this, the contracting authority is obliged to divide the service into sub-services (partial lots) at the first stage, and to award the individual partial services in lots to individual tenderers at the second stage, if possible. In light of the great importance of breaking tenders up into lots for protecting SMEs, and also against the backdrop of the regulatory system and the intention of the legislator, breaking tenders up into lots is, however, the norm and an overall tender the exception.

Only if financial and technical reasons so require, the contracting authority may refrain from splitting or separating the contract according to § 97, Para. 4 of the GWB and § 22, Para. 1 of the UVgO. Economic reasons come into play for an overall tender if the uniform overall performance in accordance with the contract cannot be ensured in the case of breaking up the tender into lots, or can only be ensured at disproportionate expense. Technical reasons can may be found in time, logistical, construction or safety-related framework considerations as well as in system, manufacturing or cooperation-related structures. In this case, neither economic nor technical reasons can be considered to justify the tender without breaking it up into lots.

Allocation by lot

Art. L2113–10 Code de la commande publique

Art. 99 No. 3 Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público

§ 28 of the Bundesvergabegesetz 2018

Conversely, breaking tenders up into lots can address a larger group of applicants (SMEs) as meant by § 97, Para. 4 of the GWB, which themselves may be able to offer the licences at better rate. As the purchase of licences for standard software is a use right under copyright law, technical connections between different tendered products that could justify a joint tender do not exist.

5.4 Suggestions for selection and award criteria and evidence verfication

Some proposals are made below for the practical design of a call for tenders which should also take into account used standard software licences in conformity with the law, without claiming completeness and suitability in each individual case. In individual cases, it is advisable that the formulation and design of the procurement of (used) software be legally supported.

European Court of Justice, Luxembourg City

5.4.1 Requirements of the ECJ

First of all, concealing that used software is being considered is not recommended due to the previously presented case law. Otherwise, the structuring would be lost in this respect and confrontation during the tendering proceeding is obvious.

◁ Reference to Chapter 5.4.3 Previous owner and chain of rights

Therefore, in the case of offers of used software for the respective products put out to tender, specifications regarding the subject matter of the contract should be made in this respect.

These specifications must be given in compliance with the ECJ and BGH, potentially removing the legal hurdle of exhaustion in relation to the software offered.[73]

◁ Reference to Chapter 5.4.4 Warranty

As a precaution, a corresponding confirmation or assurance could be requested from the distributor, which could contain the following description:

Example.
Sample Self-declaration P. 48/49 ▶

Requirement for legally compliant purchase

The requirements for a legally compliant purchase of used software licences established by controlling judicial precedent are ensured in the present case with regard to the entire legal chain. This is because:

- the **licences** offered here were originally placed on in commerce in the **European Economic Area with the consent** of the manufacturer;
- a **fee** was paid in return for the licence;
- the right granted along with the purchased licence was granted **permanently** (for an unlimited period);
- in connection with the purchased software, the original purchaser has been entitled to use any **corrections and updates** to the software offered;
- and earlier purchasers have rendered any **software copies unusable**.

Granting **the right to use** the software offered in accordance with its **intended** purpose **is guaranteed**.

73 Alternatively, only a licence transfer with the consent of the manufacturer would be conceivable.

5.4.2 Intended use due to licence conditions

It is also clear from the controlling judicial precedent that you, as the purchaser of the software, must be informed of the content of the licence and its provisions, as the right of use for the intended purpose is derived from this.

Therefore, (as in the general case) it must be clear to you which respective licence conditions apply to the acquisition of the respective licence. Microsoft's licence terms include, in particular, the content of the licence agreement, the product list and the product usage rights or product terms.

For example, you may suggest the following declaration be agreed by the distributor:

The used licence rights listed above are used Microsoft volume licences which were placed on the market for the first time in the European Economic Area and for which the manufacturer's distribution right has been exhausted in accordance with the requirements of the controlling judicial precedent of the European Court of Justice (judgement of 3 July 2012 — C-128/11) and the German Federal Court of Justice (judgement of 11 December 20144 — I ZR 8/13).

Being aware of the intended use is important for purchasing a licence, which with repsect to Microsoft purchased software is found in the respective applicable product specifications.

5.4.3 Previous owner and chain of title

The person who is the original purchaser, for example, whether they belong to a special group of persons, as well as contract numbers are **of no decisive legal significance** for the relevant question of exhaustion and the right of use for the intended purpose, and being aware of these is **not legally required for exercising this right according to the current state of affairs, and therefore may not be cumpulsory.** Moreover, provisions of the licence agreement which limit the use of the software to a certain group of users or a certain purpose and, as such, restrict the free marketability of the computer program, which has occurred as a result of the exhaustion of the distribution right, do not regulate the intended use of the computer program.

If these contracts are not made available by the distributor on an extra-mandatory basis, it would be advisable to obtain an assurance from the distributor that they would make them available in the original, if necessary, for the purpose of securing evidence required by a tribunal.

All original documents, declarations, and receipts that relate to the chain of rights and the corresponding deliveries are filed, for example, with an auditor/trustee/solicitor/notary public in a tamper-proof and insolvency-proof way and can be presented (confidentially) if necessary in the eventthey are required by an official tribunal.

In the event that the distributor does not submit all (unredacted) purchase and origin documents due to the current legal situation, it would also be conceivable to (additionally) demand a confirmation of the chain of title from an expert third party in accordance with the controlling judicial precedent. This could be an IT expert or an auditor. The explanation of this would again have to refer to all the points mentioned in Chapter 5.4.1 and corresponding evidence.

Tip.
See Chapter 5.4.1 ▶

At most, in order to avoid discussion with such distributors who voluntarily want to 'disclose', and only in the case of the willingness of the contracting authority to carry out the careful check of the documents, it can be included for clarification that as an alternative to the filing (but in addition to the assurance of the requirements of the jurisdiction), submitting these would be possible.

5.4.4 Warranty and liability release

Tip. See Chapter 5.4.1 ▶

Tip. Chapter 3.4 Further questions regarding evidence ▶

Both the assurance of compliance with the requirements of the ECJ (Chapter 5.4.1) and the associated further questions regarding evidence (Chapter 3.4) entail, above all, the risk of unclarity regarding which and how formulated evidence/declarations are to be required and, at the same time, their demand can make the tendering procedure vulnerable to attack. Finally, the previously mentioned ambiguity has the effect that, as a result of the demand, warranty claims may be cut off at the same time in the event of failure to give notice of defects.

In this context, it can make sense, and should not be objectionable under public procurement law, to impose an additional obligation on the tenderer in the form of an exemption in the event of property right infringements as a result of the purchase of software as actual proof for security with the Public Procurement Chamber of Westphalia — despite the already existing basic statutory warranty obligations.

◁ Refer back to Chapter 4.2 Consideration of used licences

Despite the already unrecognised risk of a claim by the manufacturer, this offers in particular the advantage of not having to check documents, and not having to carry the supposed risk financially, and at the same time being able to use the financial advantages of used software. An additional audit cost for any external consultants might have removed this again.

Contrary to the nonsensical discussion about judicial evidence and the suitability of any disclosed documents for this purpose, the indemnification is tailored precisely to the (unlikely) case of judicial claim being brought and also makes the previously mentioned discussion moot as the authority will not face this hypothetical judicial situation.

Example of self-declaration: Compliance with jurisdiction, intended use, indemnification and chain of rights:

SoftWare
Used & new
SoftWare GmbH
Lange Straße 1
12345 Musterhausen, Germany
Phone: +49 1234 5678 99
Fax: +49 1234 9876 55

SoftWare GmbH – Langer Straße 1 – 12345 Musterhausen, Germany

Muster-Behörde
Vergabestelle
Am Rathaus 1
11111 Berlin
Germany

Measure: Contract no. 09876-54.321 (Delivery of Microsoft licences)

Self-declaration regarding appropriate proof of exhaustion requirements and deed of release for used software.

Dear Sir or Madam,

The used licence rights listed above and to be supplied by us are used Microsoft volume licences which were circulated via download in (month/year) in the European Economic Area, and for which the manufacturer's distribution right has been exhausted in accordance with the requirements of the controlling judicial precedent of the European Court of Justice (judgement of 3.7.2012 – C-128/11) and the Federal Court of Justice (judgement of 11/12/2014 – I ZR 8/13).

I - Assurance of the requirements of the controlling precendent

The requirements for a legally compliant purchase of used software licences established by the controlling judicial precedent are guaranteed in the present case with regard to all rights. This is because

- ☑ the licences offered in the present case were originally circulated in the European Economic Area;
- ☑ a fee was paid in return for the licence;
- ☑ the right granted along with the purchased licence was granted permanently (for an unlimited period);
- ☑ with the purchase of the software, the first purchaser has been entitled to use updates or supplements to the products, the pre-release code, additional functions;
- ☑ and earlier purchasers have rendered any software copies unusable.
- ☑ Granting the right to use the software offered in accordance with its intended purpose is guaranteed.

SoftWare
Used & new

SoftWare GmbH
Lange Straße 1
12345 Musterhausen, Germany
Phone: +49 1234 5678 99
Fax: +49 1234 9876 55

II - Information on intended purpose

- The basis for the purchase of the licence is a Microsoft licence agreement, which is supplied as an attachment when the licences are handed over and refers to the further provisions (Product Usage Rights, which as of 1/7/2015 are replaced by the Microsoft Product Provisions (month/year)) mentioned therein.

III - On top of the legal guidelines, we declare the following binding information to your authority:

1. Indemnification

- If you as the purchaser are accused in or out of court by the software manufacturer of infringement of property rights with regard to the legality of the chain of purchase, the supplier undertakes to hold harmless the purchaser of the licences offered here against claims of the software manufacturer. In return, the purchaser undertakes to reconcile all extra-judicial and judicial measures with the provider and to conduct the proceedings amicably. The provider is entitled to defend against attacks by third parties concerning infringements of property rights on behalf of the customer.

2. Assurance of the filing of the original documents and receipts relating to the chain of rights

- All original documents, declarations and receipts that relate to the chain of rights and their corresponding deliveries are filed with an auditor in a tamper-proof and insolvency-proof way and can be presented (confidentially) if necessary in the event of a judicial evidence situation. In the event that the provider becomes insolvent, the provider hereby assigns to the authority, subject to a condition precedent, the claim for surrender against the auditor.

Kind regards,

Sam Sample
Managing Director
SoftWare GmbH

Page **2** of **2**

◁ Refer back to Chapter 5.4.1 Requirements of the ECJ

5.4.5 Timing of the evidence

Finally, we need to address the question of when the submission of documents and evidence may be required. It appears inappropriate to require this in advance of awarding the contract.

This would likely be disproportionate for a company dealing with used software licences, and it would also be out of line with customary trading practice in used licences. This would force the distributor to purchase or stockpile licences in advance without knowing whether they would actually be needed, because it is necessarily unforeseeable that your own bid will be awarded the contract.

In other areas of public procurement, it is also common practice and customary for companies to purchase the materials or products necessary for implementing the contract only after the contract has been awarded, as these companies wish to ensure that they will actually be needed.

Moreover, when a tender proposal is submitted, it is not yet clear which part of the stock (which batch from the stock) will be delivered in the event a contract is awarded. Additionally, licences may be supplied that were not purchased until after the tender was submitted.

This is why it is not possible for the distributor to provide all the desired information when submitting an offer. Apart from this, the authority would have no advantages from advance notice and, moreover, bear additional auditing costs.

Tower of the Rotes Rathaus, Berlin

*Used software is almost predestined for public procurement. Although in practice often undermined, the principle of product neutrality with respect to used software can be offset to a certain degree by the combination of exacting cost-effectiveness and independence from direct influence of the manufacturer. This results in a benefit to digital sovereignty and recognition of the European principle of exhaustion.**

* Free translation of the original German text.

6 Conclusion

Both public contracting authorities and private companies can benefit considerably from the purchase of used licences. They are simultaneously addressing protectionist structures of market-dominant software manufacturers while indirectly investing back in market participants such as themselves.

It remains clear that, in particular, even the largest software producers must be protected by our legal system as their products have high value, and because of their digital nature, infringements may easily occur. Nevertheless, the trade in used software is not actually, or not essentially, about product piracy, regarding which there are many opposing opinions.

The legal system, even outside the framework outlined here, only aligns itself with actual digital situations to a limited extent. In the field of used software, jurisdiction has equated the digital copy with the physical copy without any restrictions.

Moreover, the private-sector practice of 'used software distributors' is presently compelled to dispute judgements, laws and evidence, and make special assurances with customers, and if necessary, carry the additional costs for notaries, auditors or experts.

In comparison with other commercial goods, this seems unfair legally unjustified to its present extent after so many years have passed since the ECJ´s initial decision. More importantly, these efforts of the distributor would ultimately reduce the savings potential to the end customer and stunt the development of the market.

This market is in any case limited by time in many areas, as manufacturers have long since switched to licensing models which (in favour of flexibility) deny customers the benefit of a perpetual right and therefore evade the legal protection concept under exhaustion.

Generally (and in the end decisively), we have shown that once again the ECJ has found quite fundamental and self-evident answers to important legal questions. The discussion about judicial evidence and anticipated evidence is therefore misguided. This 'perceived legal uncertainty' must not and cannot be the basis for decisions concerning procurement, but rather the legal issues of the past clarified by controlling precedent.

In the end, the discussion regarding evidence and proceedings should not distract from the fact that reputable distributors of used software should leave no doubt that they can be relied on by means of categorical guarantees to their customers regarding legality and ideminification against claims of manufacturers.

We hope that this document has contributed by bringing clarity to the discussion and encouraging people to avail themselves of our European freedoms with regard to software as well.

7 Checklist

- **Determining the need (object of procurement)**
  Which use rights of which software product are actually needed at the moment?
- **How does this need fit into the future IT strategy?**
  What software statuses will be in use until the purchase is ‘written off’?
- **Which award procedure is required (throughout Europe or nationally)?**
  Do exceptions apply to the open/public procurement procedure?
  What advantages may emerge in each case?
- **Are you preparing a call for tender?**
  Ensure that used software is not excluded.
- **Develop a call for tender! Positively state the conditions under which used software is taken into account.**
- **Secure the call for tender!**
  Submit a deed of release or similar declaration.
- **Exercise caution when taking advice on adaptation from manufacturers, distributors and third parties, and verfiy this advice in all respects, including conflict of interest. If in doubt, seek (legal) advice and weigh the risks.**

8 About the author

Dr Daniel Taraz LL.M.

At the time this practical handbook was being drafted, Dr Daniel Taraz LL.M. was an attorney-at-law and Managing Director at JENTZSCH IT Rechtsanwaltsgesellschaft mbH in Hamburg.

Here, Dr Taraz consulted on all aspects of IT compliance, particularly in connection with software licences, data transfers and software projects in complex infrastructures. In addition to legal advice, his portfolio included solutions for SAM and data protection compliance, which he played a leading role in developing.

Dr Taraz is highly specialised in IT law and is mainly focused on software licensing law with a special interest in IT procurement law and data protection law. Dr Taraz primarily advises international groups on large-scale projects and also provides expert opinions on complex IT compliance and procurement issues.

As part of every mandate assigned to the firm, he closely examined the technical fundamentals of the software and system architecture involved in each case and built his understanding of them thanks to his in-depth knowledge, as this is the only way to ensure that the correct legal conclusions are drawn.

Since May 2022, Dr Taraz has been working as an attorney-at-law at the Hamburg office of KPMG Law Rechtsanwaltsgesellschaft mbH, where he consults on all aspects of IT and data law.

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Measures that contradict various fundamental ideas of free trade as well as guiding principles of the European fundamental freedoms are rightly scrutinized by the highest judicial authority of the ECJ again and again.

The fact that numerous severe fines have been imposed by the EU Commission on market-dominating companies and the like show how consistently the fundamental concepts are defended, thereby encouraging consumers, authorities, and companies alike to exercise their rights.

Under certain circumstances, this document should serve to clarify and encourage people to avail themselves of our European freedoms even with regard to software.