

“New EU Public Procurement Directives”
- Maintaining Neutrality in Software Procurement -

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legal note prepared by Linklaters De Bandt, Brussels
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Preface - The Initiative for Software Choice and EU Procurement Law

The international "Initiative for Software Choice" (ISC) is a coalition of software companies and associations comprised of over 300 members, including seven trade associations across the globe. In the European Union, the ISC has over 80 members, including national trade associations in Germany, Ireland, and Portugal. Since 2001, ISC seeks to advance a dynamic, competitive software market unimpeded by categorical preference, and to advise policymakers about the benefits of software choice and technology neutrality. The four key principles of the initiative are

- (i) Procuring software on merits, not regulatory preference,*
- (ii) Broad availability of government-funded research,*
- (iii) Interoperability through platform neutral standards, and*
- (iv) Maintaining intellectual property protection.*

The ISC supports the development and adoption of all kinds of software: be it commercial or non-commercial open source software, proprietary software, or a hybrid mix of both.

ISC also strongly supports the eEurope objectives, which have placed the use and widespread adoption of information and communication technology (ICT) high up the European policy agenda. As the EU struggles to fulfil the ambitious economic agenda outlined in Lisbon in 2000, it is clear that information technology has a key role to play in making the EU the most "dynamic and competitive knowledge-based economy in the world".

The increased focus on ICTs at the EU level is both a response to, and a driver for, increased uptake of information technologies at a Member State level. The increasingly dynamic market for public procurement of ICT hardware, software and services across Europe means that it is more important than ever for clarity regarding the procedures and principles of EU procurement legislation.

ISC welcomes the new EU Public Procurement Directives, which reconfirm the policy of technology neutrality in the EU. These directives require equal treatment and non-discrimination in procurement decisions by public authorities, and that tenders for ICT be based on functional requirements. This legal principle is very important to ICT vendors who rely on competition based on the merits of their products. In recent years, numerous public authorities across the EU have proposed laws or policies designed to favour specific categories of software, regardless of the actual functional ICT requirements of the authority. This paper discusses the application of the new EU Public Procurement Directive to such proposals.

Industry also supports the additional goals of the Procurement Directive, in particular the clarified rules regarding eProcurement. The European Commission has properly recognized how eProcurement can make significant contributions to the efforts of all public authorities to save money. The members of ISC look forward to working constructively with authorities in their efforts to choose and deploy the software that best meets their needs for such important purposes.

Information about ISC policies and membership can be found at www.softwarechoice.org.

1. Introduction

The new EU Public Procurement Directives Reconfirm the Rules of Technology Neutrality

European public procurement policy aims to create competitive, non-discriminatory public procurement markets in the European Union which will enable procurement sensitive goods and services to move freely, thus ensuring value for money for taxpayers and consumers of public services and fostering the competitiveness of European suppliers in domestic and world markets. The single market programme has widened and strengthened the public procurement regime in the EU by enlarging its scope to cover services and utilities, and by establishing specific procedures to guarantee that procurement contracts above a certain value are awarded in a competitive, transparent and non-discriminatory manner.

European law on public procurement is based upon the principles of equal treatment of economic operators, non-discrimination and transparency. These basic principles, which derive from the EU Treaty, have been repeated in numerous public procurement directives. They have also been applied and developed by the European Court of Justice. These developments have extended the scope of these principles far beyond the mere prevention of discriminations based on nationality (e.g. favouring local companies as opposed to companies located in another EU Member State)¹. Currently, the scope of these principles has been enlarged so as to also preclude discriminations based upon technical criteria set by the contracting authority.

The current rules applicable to public procurement in the EU have been restated in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (the "**EU Public Procurement Directive**"), which forms part of the so-called '2000 Legislative Package' on public procurement².

The EU Public Procurement Directive builds upon existing principles of European public procurement law. The principles of equal treatment and non-discrimination of economic operators have remained at the heart of the EU Public Procurement Directive. In order to ensure competition and best value for money, the EU Public Procurement Directive aims at allowing as many companies as possible to participate in a given tender.

¹ In that respect, it should be noted that the World Trade Organisation (WTO) has adopted on 23 April 2004 a decision pursuant to Article XXIX :6(a) of the Agreement on Government Procurement, which notes the enlargement of the European Union to 10 new Member States. Article III of the Agreement on Government Procurement provides for the principle of non-discrimination on the basis of nationality.

² *Official Journal, L 134 , 30/04/2004, p. 114 to 240.* The Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*Official Journal, L 134, 30/04/2004, p. 1 to 113*) is not examined in the present paper.

As mentioned in the preamble of the EU Public Procurement Directive, “*the award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency*”³. These core requirements are repeated in Article 2 of the EU Public Procurement Directive which provides that “*contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way*”.

Accordingly, in the framework of public procurement, contracting authorities may not, as a matter of principle, express a preference – whether directly or indirectly – for one particular type of software, such as Open Source Software (“OSS”) over proprietary software suppliers. In so doing, the contracting authorities would exclude proprietary software suppliers from the market, which would amount to an illegal distortion of competition⁴. Such preference would moreover prevent the utilisation by the contracting authorities of the full panoply of possible technical solutions and thereby be in contradiction with the Commission’s stated goal to ensure that the contract is awarded to the tender offering best value for money.

2. Preferential treatment of OSS and EU public procurement law

2.1 The Policy environment

In recent years, ICT policy has placed some emphasis on the need to explore all software alternatives, especially the possibilities offered by open source technologies. This has been a common theme in EU initiatives ranging from e-Government, to research (Information Society Technologies programme) and the Interchange of Data between Administrations (IDA) programme, to name but a few. Improving knowledge about the market and encouraging competition are worthy governmental goals. At times, however, some public authorities have attempted to influence the software market with the strong promotion of OSS in public procurement. In several EU Member States, initiatives have aimed at promoting or even imposing the use of OSS in the framework of public procurement. Such policy initiatives have at times been considered by agencies not responsible for public procurement law or not in conjunction with public procurement legislative processes.

³ EU Public Procurement Directive, Preamble, § 2.

⁴ EU Public Procurement Directive, Preamble, § 4.

Members of parliament in several EU Member States and/or their federal entities have filed formal legislative proposals to the effect that public administrations should *exclusively* use OSS⁵.

The reasons invoked to favour OSS in public administration include the following:

- (i) to prevent dependency of a public administration towards specific proprietary software suppliers (e.g. in case of bankruptcy of the supplier);
- (ii) to ensure the ability of citizens to access data provided by public administrations in electronic form;
- (iii) to reduce costs and/or allocate public money to the creation of employment in the service sector (development and maintenance of OSS) rather than to the payment of licence fees;
- (iv) to guarantee compatibility and interoperability with existing solutions;
- (v) to protect citizens against so-called 'hidden' functionalities of proprietary software.

While reflecting some important underlying objectives, often the exclusive focus on OSS has prevented consideration of all alternatives that can achieve such objectives. In other words, functional requirements have often not been defined, and automatic preferences for one type of solution have been stated.

Interestingly enough, some of the proposals referred to above explicitly state that the aim of resorting to OSS is to *exclude* proprietary software suppliers from the public procurement market. Such a reasoning, however, will not achieve the aim of improving competition in the information technology market. Rather, it will contribute in the distortion of competition by favouring certain market players and eliminating others.

In conjunction with ICT policy considerations, every policy in this area should be in conformity with EU public procurement law. From a legal point of view, the exclusion as a matter of principle of proprietary software from public procurement indeed appears to constitute a clear violation of EU competition and public procurement rules, as developed by the Court of Justice of the European Communities and currently in force in the EU.

In the following sections, this paper examines the issue of imposing OSS as part of the technical specifications of the contract or the performance of the contract. It will show that such a requirement is contrary to EU public procurement and competition law as it unduly aims at eliminating certain software companies from the market.

⁵ See e.g. Assemblée de la Commission communautaire française (Belgium), Proposition de Décret relatif à l'utilisation de logiciels libres dans les administrations de la Commission communautaire française [33 (2001-2002) n°1] ([http://www.accf.irisnet.be/SR_DocsParl/propproj/current/2001-2002/033%20\(2001-2002\)%20n%201.pdf](http://www.accf.irisnet.be/SR_DocsParl/propproj/current/2001-2002/033%20(2001-2002)%20n%201.pdf)); Belgian Senate, Proposition de loi relative à l'utilisation de logiciels libres dans les administrations fédérales, 9 April 2003, 1607/1 (<http://www.senate.be/www/?MIval=/Dossiers/DocsVanDos.html&LEG=2&NR=1607&LANG=fr>); French Senate, Proposition de loi tendant à généraliser dans l'administration l'usage d'Internet et de logiciels libres (<http://www.senat.fr/leg/pp102-032.html>).

2.2 'Open Source' is not a technical specification

Under the EU Public Procurement Directive, contracting authorities must define the so-called 'technical specifications' that the good(s) or service(s) for which they are contracting must comply with⁶. Article 23 of the EU Public Procurement Directive contains specific rules regarding the use and/or imposition of technical specifications.

The question arises whether the use of OSS is to be regarded as a technical specification within the meaning of Article 23 of the EU Public Procurement Directive and thus a valid requirement for contracting authorities to impose upon potential bidders.

The EU Public Procurement Directive, defines a technical specification, in the case of public supply or service contracts, as follows:

"A specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods and conformity assessment procedures".

It clearly follows from this definition that the business or licensing model chosen by the bidder in order to commercialise its software (proprietary vs. open source) does not qualify as a technical specifications which can be imposed by the contracting authority.

Technical specifications must indeed define the characteristics of the service and relate to functional performances and requirements of the good(s) and/or service(s). For example, in the field of information technology, specifications could relate to the type of hardware on which a software should be able to work.

Under the EU Public Procurement Directive⁷, indeed:

"The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it must be possible to draw up the technical specifications in terms of functional performance and requirements and, where reference is made to the European standard, or, in the absence thereof, to the national standard, tenders based on equivalent arrangements must be considered by contracting authorities".

Whether software is proprietary or open source does not impact on its performance or requirements. It does not constitute a *technical* specification but a mode of

⁶ EU Public Procurement Directive, Article 23.1.

⁷ EU Public Procurement Directive, Preamble, § 29.

development and commercialisation of this software. Accordingly, it is not a criterion which can be used by a contracting authority when defining the contract requirements.

This is confirmed by the fact that technical specifications can be expressed by reference to national or European standards. Such standards are typically aimed at setting minimum performance or functional requirements rather than defining the method of development or commercialisation of a product or service.

2.3 Imposing 'Open Source' as a principle in contract specifications is illegal

Even if the mode of development and commercialisation of a software (proprietary vs. open source) would be considered to constitute a 'technical specification' within the meaning of the EU Public Procurement Directive, such a specification would be illegal under European law if it would be imposed as a matter of principle.

The European law on public procurement aims at promoting competition. As such, it prevents contracting authorities from distorting competition and eliminating economic entities from the market. On this basis, the European Court of Justice has consistently opposed technical specifications which would prevent certain economic entities from participating to a tender.

In the *Dundalk* case⁸, the European Court of Justice opposed the insertion in contract documentation of a reference to an Irish standard. Such reference had the effect of limiting the companies which could tender as only those companies which were complying with that standard could propose an offer.

In the later *Unix* case⁹, the European Court of Justice had to examine the legality of a technical specification defined by reference to the Unix data processing system. In that case, the Court of Justice considered that the reference to a specific solution was illegal as it did not allow economic entities which could provide equivalent solution to participate in the tender.

As a result of this case-law, the theory of equivalence has been developed. Contracting authorities may refer to a specific standard or make, provided, however, that companies whose products or services do not comply with that standard but are equivalent to the standard are also able to participate in the tender.

This case-law, which aims at promoting competition in EU public procurement, remains valid today. It has been incorporated in the EU Public Procurement Directive which contains rather detailed provisions on technical specifications.

Article 23 of the EU Public Procurement Directive indeed provides as follows:

"Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition".

Imposing OSS in public procurement, however, would prevent the economic entities involved in the development and sale of proprietary software from participating in

⁸ ECJ, C-45/87, *Commission v. Ireland*, 22 September 1988, E.C.R., 1988, 4958.

⁹ ECJ, C-359/93, *Commission v. The Netherlands*, 24 January 1995, E.C.R., 1995, I, 168.

the tender. This would constitute an illegal obstacle to competition and reduce the number of companies entitled to participate to the tender.

Referring to a specific source or origin – as in the above-referred *Unix*-case – is also strictly regulated by the EU Public Procurement Directive. Article 23 § 8 of the EU Public Procurement Directive indeed provides as follows:

"Unless justified by the subject matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effects of favouring or eliminating certain undertakings or certain products".

The terms 'source' or 'origin' do not refer to the mode of development or commercialisation of the product but rather to indications of origin. For example, it would be illegal for a contracting authority to specify that a product must be made with materials originating from a specific country.

The use of OSS, however, is not among the criteria that can be defined by the contracting authority pursuant to Article 23 § 8. Under Article 23 § 8, reference to a specific make or origin, for example, must always allow a economic entity to propose an equivalent solution. As such, the reference to a make or process, for example, will serve as a benchmark and cannot prevent a company offering an equivalent solution from participating. Imposing the use of OSS would not allow 'proprietary' software supplier to participate to the tender. It is merely a criterion excluding certain companies from participating to the tender. Indeed, although the performance of their respective software could be identical or similar, the requirement that the software be made available through an 'open source' model would exclude proprietary software companies from participating. In other words, contract specifications can only refer to specific make, process or origin provided that equivalent solutions are possible, which is not the case here.

In addition, Article 28 § 3 makes it clear that references to a specific make or source must be justified by the subject matter of the contract and shall be permitted on an exceptional basis only. Again, even if one would consider that 'open source' could be a requirement that can legally be imposed by a contracting authority, it would be illegal to impose 'open source' as a principle. Rather, use of OSS should be clearly justified by the contracting authority. Such justifications should specifically relate to the subject matter of the contract. Accordingly, a contracting authority could not impose 'open source' as a matter of principle but would need to show that the contract can only be performed by supplying OSS to the contracting authority.

2.4 'Open Source' is not a legal condition for the performance of the contract

Article 26 of the EU Public Procurement Directive provides as follows:

"Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations".

At the outset, it is important to underline that the provisions concerning the performance of the contract cannot be used to impose, indirectly, new technical specifications. In this respect, the EU Commission stated very clearly:

*"Contract clauses may not be (disguised) technical specifications, selection criteria or award criteria. They relate merely to the execution of the contract itself. This means that all applicants, should they eventually be awarded the contract, must be in a position to execute these clauses. As a matter of transparency, they should be announced in advance to all applicants"*¹⁰

Moreover, the conditions for performance of contracts must be compatible with Community law. As such, they may not be directly or indirectly discriminatory and must be indicated in the contract documents¹¹.

With regard to the conditions for the performance of the contract, Article 26 of the EU Public Procurement Directive refers to social and environmental considerations. The European Commission has clarified the meaning of social and environmental considerations in two interpretative communications issued in 2001¹². Although these two interpretative communications have been issued before the adoption of the EU Public Procurement Directive, they can still be usefully relied upon today. Indeed, before the adoption of the EU Public Procurement Directive, it was already possible for a contracting authority to set certain conditions concerning social and/or environmental considerations provided that these conditions complied with European law. The EU Public Procurement Directive merely states this possibility expressly.

On the basis of the Interpretative Communications of the Commission and the EU Public Procurement Directive, social and environmental considerations cannot constitute a valid reason to impose OSS in public procurement.

Social considerations have two meanings under EU public procurement law. First, social considerations refer to characteristics which the product or service (which is the subject matter of the contract) must possess. For example, contracting authority may specify certain requirements to allow disabled persons to use the product or service which is the subject matter of the contract¹³. In the field of information technology, in particular, a contracting authority could specify that visually impaired persons should be able to use the software (e.g., through the use of magnifying tools). Second, social considerations may relate to conditions concerning the

¹⁰ Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM (2001) 274 final, p. 23 (http://europa.eu.int/comm/internal_market/publicprocurement/key-docs_en.htm).

¹¹ EU Public Procurement Directive, Preamble, § 33.

¹² Interpretative Communication 2001/C 333/08 of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement; Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM (2001) 274 final (http://europa.eu.int/comm/internal_market/publicprocurement/key-docs_en.htm).

¹³ ECJ, C-31/97, *Beentjes*, 20 September 1998, E.C.R., 1998, 4665. In the field of ITC, see the initiatives of the EU Commission with regard to e-Accessibility (http://europa.eu.int/information_society/topics/citizens/accessibility/index_en.htm).

performance of the contract. Among these conditions, reference can be made to measures aimed at ensuring that the contract will be performed in compliance with fundamental rights (e.g., equality of treatment between men and women) or that the company performing the contract will employ long-term unemployed workers to perform the contract (so-called 'preferential clauses'). Both proprietary and OSS can comply with social requirements linked to the software or its development. As such, no preference should be given, as a matter of principle, to OSS.

Environmental considerations may also refer to the characteristics of the product (e.g., the use of environmental friendly materials) or to the performance of the contract (e.g., environmental friendly process of production, packaging, etc.). In the field of information technology, however, it is clear that environmental concerns will not constitute a valid condition to promote the use of OSS. Indeed, both open source and proprietary software are neutral in terms of environmental impact.

It has recently been suggested¹⁴ that computers using OSS would have a longer working life than those running proprietary software. On the basis of this argument, economic and environmental benefits could derive from the use of OSS software since such use would allegedly reduce computer waste. This argument is based on the consideration that OSS requires less memory power than proprietary software for the same functionalities and that it is not the object of regular updates requiring an increase in computing capacity. Without taking a position on the validity of these arguments from a technical point of view, it should be noted that imposing criteria in relation to computer working life in the framework of a public tender for computer could raise legal issues under EU public procurement law. Indeed, such criteria could well be regarded as an indirect discrimination detrimental to proprietary software. Such criteria would therefore violate Article 23 § 2 of the EU Public Procurement Directive, which states that «*technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition*». It is moreover doubtful whether such criteria would be considered as a valid legal condition for the performance of a contract as set out in Article 26 of the EU Public Procurement Directive. Indeed, requirements regarding the working life of a computer are not conditions for the *performance* of a contract whose object is the supply of a computer program. Such criteria, however, could be taken into account in the global financial assessment of the offer of the tenderer. Indeed, the Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement states that "*all costs occurring after the purchase of the product, which will be borne by the contracting authority and thus will affect directly the economic aspects of the product, may be taken into account*"¹⁵. Accordingly, the cost of replacement of computer systems could be taken into account as part of the overall costs of the tender. These costs, related to proprietary software, would in any event have to be balanced with the costs of migration, training and updating related to OSS.

¹⁴ See Office of Government Commerce (OGC), "Open Source Software Trials in Government – Final Report", available at http://www.ogc.gov.uk/embedded_object.asp?docid=1002367.

¹⁵ See footnote 10, p. C 333/19.

Both social and environmental considerations (and other type of considerations which could be put forward by a contracting authority) which condition the performance of the contract must comply with Community law. As mentioned above, they may not be used to prevent certain companies from participating to the contract. They cannot be used either to re-incorporate in the contract conditions which could not legally form part of the technical condition for the performance of the contract.

On the basis of the EU Public Procurement Directive, the use of OSS cannot constitute a valid specification. Imposing the use of OSS at the stage of the performance of the contract would result, in fact, in excluding economic entities which are not based on an 'open source' business model.

2.5 The use of OSS is not a valid award criterion

Article 53 of the EU Public Procurement Directive provides that the contracting authority should award the public contracts either to the tender which is the most economically advantageous from the point of view of the contracting authority or to the tender which has the lowest price.

Under Article 53 of the EU Public Procurement Directive, "*when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion*" can be used.

When assessing the value of each tender using the most economically advantageous criteria in the field of information technology, however, a contracting authority cannot examine the mode of development or commercialisation of the software. As for technical specifications and conditions for the performance of the contract, the EU Public Procurement Directive obliges contracting authorities to ensure that the contract will be awarded on the basis of non-discrimination, equal treatment and effective competition¹⁶. Again, a contracting authority cannot use the mode of development of the software as a decisive criterion to award the contract. Such criteria would indeed run against the EU Public Procurement Directive requirement to assess tenders in conditions of effective competition.

3. Conclusion

The new Public Procurement Directive confirms that non-discriminatory technology neutrality is the law of the EU. Imposing OSS in the framework of public procurement directly excludes certain companies (namely, the companies developing proprietary software) from participating to a tender. As such, this exclusion is prohibited by the EU Public Procurement Directive.

¹⁶ EU Public Procurement Directive, Preamble, § 46.

More particularly, the EU Public Procurement Directive restricts the criteria which can be taken into account as (i) technical specifications, (ii) conditions for the performance of contract and (iii) criteria for awarding the contract.

In all cases, the EU Public Procurement Directive makes it clear that such criteria should not be discriminatory and should ensure effective competition. When technical requirements are defined in relation to a standard or make, contracting authorities may not exclude companies which can offer a technologically equivalent solution to ensure broad competition. Allowing a contracting authority to impose the mode of development or commercialisation (proprietary vs. open source) of a software at any stage of the tender process would run counter to the provisions and purposes of the EU Public Procurement Directive and, more generally, to European competition law.

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