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Legal aspects of free and open source software in procurement

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Published in:

Legal aspects of free and open source software

Publication date:

2013

Document Version

le PDF de l'éditeur

[Link to publication](#)

Citation for pulished version (HARVARD):

Laurent, P 2013, Legal aspects of free and open source software in procurement: national case studies. dans *Legal aspects of free and open source software: European Parliament, JURI workshop, 9 July 2013, Compilation of briefing notes*. European Parliament, Brussels, pp. 68-88.

<<http://www.europarl.europa.eu/document/activities/cont/201307/20130702ATT68998/20130702ATT68998EN.pdf>>

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Legal aspects of free and open source software in procurement: national case studies

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ABSTRACT

Member States' public authorities are increasingly interested in the advantages of procuring free and open source software. Some of them have already adopted different strategies to raise awareness, to level the playing field or even to establish positive discrimination for such permissively licensed software. This briefing paper aims at illustrating the current political and legislative trends by observing cases from the Netherlands, Italy, Spain, the United Kingdom, Belgium and France

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EXECUTIVE SUMMARY

Background

Free and open source software (hereinafter referred to as "FOSS") is software licensed under permissive terms, which enable the licensee to use, reproduce, modify and re-distribute the software and its modifications at will.

This peculiar licensing scheme harmoniously fits the general public procurement principles of transparency, flexibility, independence, interoperability, sustainability and cost-effectiveness. Nonetheless, it has been observed that public procurement practices often tend to disadvantage the adoption of FOSS. Some policy makers have therefore elaborated diverse strategies to fix the problem, such as:

- the Dutch government with its NOIV action plan,
- the Piedmont Regional Council with its Act on software pluralism in the administration,
- the Spanish lawmaker with its National Interoperability Framework,
- the UK government with its ICT Government Strategy,
- Walloon municipalities with the creation of an IT public company called IMIO, and
- the French Prime Minister with his Circular on the use of FOSS in administrations.

Aims

This briefing paper aims at illustrating how Member States' public administrations (hereinafter 'PAs') at different administrative levels have implemented government strategies and legislative texts to raise awareness, to level the playing field or even to establish positive discrimination for such permissively licensed software in procurement contexts.

It also aims at comparing these initiatives so as to identify some lessons that can be drawn from the different experiences.

KEY FINDINGS

- The different initiatives analysed are not at the same stage of development and are very diverse in terms of scope, scale, means and ambitions, which renders precise comparison difficult.
- All the policy makers behind the analysed strategies were aware of the potential and advantages of FOSS. Software reuse and costs reduction seem however to be the two main incentives that generally triggered the initiatives.
- The degree of success of the different initiatives is very variable.
- The current public procurement regulatory framework as such does not seem to constitute a hindrance to the adoption of FOSS by administrations. It provides ways to develop practices aimed at levelling the playing field or granting preference to the procurement of FOSS.
- Contracting authorities seem however to show different degrees of resistance, which is motivated by multiple factors that tend to be overlooked.

1. BACKGROUND

Public services have become increasingly and irreversibly dependent upon information and communication technologies. Many if not all administrations, at any level, have more or less incorporated ICT into their operations. Whereas some of them mainly use simple mainstream systems such as word processors, spreadsheets applications, emails, Internet browsers, etc., other public services use complex – and usually highly if not totally customised – database systems and information systems. Software represents a qualitatively and quantitatively essential part of such systems. Accordingly, software procurement has become a key element in the general administration governance, which has a direct influence on the quality and effectiveness of its services.

The law regulates public tendering in order to ensure that economic operators are equally treated and in order to safeguard the financial, economical and operational interests of the contracting authority, which can be associated with the public interest¹⁰⁴. Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts¹⁰⁵ provides only for a general legal framework establishing global principles such as transparency and non-discrimination. National and local lawmakers and public administrations therefore benefit from a significant leeway and may take important decisions as regards public ICT and software procurement policies.

¹⁰⁴ D. DE ROY, "L'irruption du logiciel libre dans le secteur public. A la découverte d'une actualité fort ancienne", in *Les logiciels libres face au droit*, Bruxelles, Bruylant, 2005, p.200.

¹⁰⁵ 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, *OJ L 134*, 30 April 2004, pp. 114–240.

Procurement practices have often been criticised for discriminating against FOSS or excluding it from competition. Such exclusion does not always happen voluntarily, but often results from misunderstanding or ignorance of the FOSS licences mechanisms and the associated business models. For instance, besides the all too common requirements of, or references to, proprietary trademarks or technologies, award criteria requiring the bidder to be the owner of the copyrights or referring to the "purchase" of software licences are equally detrimental to FOSS-based bids¹⁰⁶.

Understanding FOSS and the business models which have been developed around it is the first prerequisite to improve procurement practices. Traditional "proprietary software"¹⁰⁷ business models are usually based on the exclusive exploitation of intellectual property and the "sale" of licences limiting the scale and extent of software usage. FOSS is, on the contrary, based upon a permissive licensing system coupled with an unrestricted access to the source code, which enables the licensee to use, reproduce, modify and re-distribute the software (and its modifications) at will¹⁰⁸. In addition to being very permissive, FOSS licences are royalty-free: licensors are not remunerated in exchange of the given authorisation.

FOSS licensing uses intellectual property (normally copyright) in a versatile way, not to monopolise technology and reap royalties, but to foster creation on an open and collaborative basis. This very peculiar licensing scheme is sometimes described as a way to reconstruct virtual commons¹⁰⁹, namely open to all and non-exclusive resources. Such peculiar licensing scheme has challenged the traditional business logic and has given birth to alternative models, which are generally more focussed on the provision of services (around the shared resources) than the selling of products (created on the basis of monopolistic rights on the resource).

Like the European Union¹¹⁰, many Member States and administrations at national, regional or local level are receptive towards the potential and advantages of FOSS, which fit the general public procurement principles of transparency, flexibility, independence, interoperability, sustainability and cost-effectiveness¹¹¹. Accordingly, some national and local governments have taken very diverse measures in order to promote the use of FOSS in the administrations and to better adapt their procurement policies so as to take into account FOSS specificities and to open the competition to FOSS-oriented bids.

The Legal Affairs Committee of the European Parliament has decided to hold a workshop on the legal aspects of the use of FOSS, in which the legal aspects of procurement will also be outlined. In this context, the Committee requested an *ad hoc* briefing paper identifying and summarising relevant national experiences at different levels (national, regional or local) to illustrate the current trends regarding the procurement and use of FOSS by public administrations within the EU.

¹⁰⁶ "For instance, a call for tenders for the purchase of software licences "discriminates" against businesses that do not offer software as a product paid for at the time of purchase through licensing". IDABC, Guideline on public procurement of Open Source Software, available at <https://joinup.ec.europa.eu/sites/default/files/studies/OSS-procurement-guideline-public-final-June2010-EUPL-FINAL.pdf>.

¹⁰⁷ It is common to use the term "proprietary" software to refer to software that is not licensed under a FOSS licence but governed by restrictive terms, and the use of which requires the payment of royalties.

¹⁰⁸ See "The Free Software Definition", available on the FSF official website, <http://www.gnu.org/philosophy/free-sw.html> and "The Open Source Definition", available on the OSI official website, <http://opensource.org/docs/osd>.

¹⁰⁹ PH. LAURENT, "Free and Open Source Software Licensing: A reference for the reconstruction of "virtual commons?" to be published in the proceedings of the Conference for the 30th Anniversary of the CRID, which took place in Namur from the 20th to the 22th of January 2010, available at <http://www.crid.be/pdf/public/7133.pdf>.

¹¹⁰ In recent years, the European Union has paid increasing attention to the potential of free and open source software. Already in its 2002 Communication "eEurope 2005: An information society for all," [COM(2002) 263 final, 28.5.2002], the European Commission stated that it intended to promote the use of open standards and of open source software. As from 2006, the IDABC and ISA programmes of the European Commission are actively promoting the use of FOSS. The European Commission even created and stewards the OSI certified European Union Public Licence (EUPL). Interest in free and open source software has again increased after the European Commission published, in September 2012, the Communication "Unleashing the potential of cloud computing in Europe"[COM(2012) 529 final, 27.9.2012].

¹¹¹ IDABC, "Guideline on public procurement of Open Source Software", March 2010 (revised June 2010), available at <https://joinup.ec.europa.eu/sites/default/files/studies/OSS-procurement-guideline-public-final-June2010-EUPL-FINAL.pdf>.

2. METHODOLOGY

This paper reports on a selection, analysis and comparison of different national and local initiatives that have been implemented in order to improve procurement practices and to invite administrations to better consider FOSS in software procurements.

This paper is far from being exhaustive and aims exclusively at illustrating some of the many approaches adopted at different administrative levels in order to give a first insight into the problems confronted and/or the results achieved. The selection has also been made considering the direct accessibility of information and the purposes and limits of this briefing paper.

In order to facilitate the observation of the different initiatives, some comparison points have been identified.

The administrative level (national, regional or local) where the decision has been taken and implemented is the first element of comparison.

The initiatives are classified into two categories, depending on their nature: legislation (law or decree) or policy (programme, action or any other initiative from an executive body).

For each case, the relevant legal background has been globally analysed. The paper describes the fixed objectives and how FOSS is being dealt with in such a legal framework to reach these objectives.

Three types (or levels) of objectives are identified and serve also as a general comparison point: raising awareness on FOSS, ensuring non-discriminatory treatment, and actively encouraging or preferring FOSS procurement. If this third objective is upheld, and where possible, the question whether or not the initiative addresses the issue of the selection and assessment of awarding criteria is briefly tackled.

Where possible, information on the reception and effectiveness of the analysed solutions has also been gathered and assessed with regard to the following questions, where relevant: how effective different solutions have proven to be in practice in enabling FOSS procurement, how they have been applied by administrations and/or the courts (some of these initiatives have been challenged before court), and what types of licences are involved.

One must finally note that, although open standards and FOSS are close concepts that are usually addressed jointly to elaborate effective procurement strategies, this briefing paper only focuses on the procurement of FOSS.

3. EXPERIENCES

3.1 Netherlands: NOIV action plan (2007-2011)

3.1.1 General presentation

The NOIV programme was an action plan¹¹² that aimed at accelerating the use of open standards and open source software¹¹³ within the national government, subsidiary government bodies and the public and semi-public sector.

It had been adopted by the Dutch Government and had been implemented during the governmental session (from 2007 to 2011) by a subdivision of ICTU (ICT-Uitvoeringsorganisatie), an organisation established by the Ministry of the Interior and Kingdom Relations, and the Association of Municipalities.

The main objectives of this action plan were:

¹¹² Available in English at https://www.ictu.nl/archief/noiv.nl/files/2009/12/Action_plan_english.pdf.

¹¹³ "Open source software" is defined by reference to the OSI definition. See "De stand van zaken van het open source software beleid van de Rijksoverheid", available at <http://www.ictu.nl/archief/noiv.nl/documenten-en-publicaties/doc/het-open-source-beleid-van-de-rijksoverheid/index.html#more-7119>.

- to increase interoperability by accelerating the use of open standards,
- to reduce supplier-dependence through a faster introduction of open source software and open standards, and
- to promote a level playing field in the software market, by promoting innovation and the economy by forceful stimulation of the use of open source software, and by giving preference to open source software during the process of IT acquisition.

Accordingly, three procurement principles were upheld by NOIV:

- Open source is not mandatory, but its use should be strongly encouraged,
- Open source software should be preferred if it is equally suitable, and
- Providers of open source software should have the same opportunities as providers of closed source software.

In order to foster the use of FOSS by administrations at any level, some action lines had to be followed. Some of them can be summarised as follows:

- A programme office within ICTU had been set up to support actively the action lines. The office provided guidance, result-oriented advices and customised practical support to the administrations. It also conducted measurements to monitor the progress of the actions. A ranking has been maintained and prizes were offered annually for the Most Open Public Organisation.
- At national level, meetings with businesses, suppliers and various government target groups were organised to explain the plans and to reach practical agreements for their implementation.
- Any administration had to develop an implementation strategy for tendering, purchasing and using open source software. A fixed deadline (January 2009) was adopted for the ministries.
- The Government was also to encourage the use of open source software in a European context.
- The Government also intended to investigate to what extent all software under its control or developed on its order could in principle be released under an open source software licence. To that end, it showed specific marks of interest towards the European Union Public Licence (EURL). The Government realised that such objective could mean that it would have to make tenders for development of software conditional on its obtaining of the intellectual property for the software developed.

NOIV was therefore a general framework set up at national level to foster the development and adoption of pro-FOSS procurement strategies in any Dutch administration.

NOIV clearly stated that the procurement rules are not applicable when freely downloading FOSS. It noted, however, that administrations should select downloadable FOSS with care and according to strict procedures. Notwithstanding this, the procurement of services around such selected software (such as deployment, maintenance, customisation or support services) must be done conforming to the classical rules, bearing in mind that "open source software is provider-independent"¹¹⁴.

Amongst the documents issued by the NOIV, a guideline has been published that provides examples of award criteria to be added in the calls for tender¹¹⁵ and which can be summarised as follows:

¹¹⁴ « Download open source software », available at <https://www.ictu.nl/archief/wiki.noiv.nl/xwiki/bin/view/NOiV/Downloaden%2Bvan%2BOpen%2BSource%2Bsoftware.html>.

¹¹⁵ "Modelteksten voor open voorkeur in een (Europese) aanbesteding", NOIV – November 2010, available at http://www.ictu.nl/archief/noiv.nl/files/2010/11/NOiV_Modelteksten_voor_open_voorkeur_in_een_aanbesteding.pdf.

- the involvement of the bidder in a FOSS development community (the criterion is the number of developers who are members of the community);
- the participation of the bidder in the development of the provided software (the criterion is the percentage of code that has been sent by the bidder as contribution(s) to the project);
- the adoption by the bidder of a procedure ensuring the origin of the source code that he provides;
- the bidder's experience with W3C¹¹⁶ web content guidelines;
- the adherence of the bidder to a "open providers manifest" (issued by NOIV);
- the database independence of the software;
- the platform independence of a user interface;
- whether there is a large number of maintenance service providers available;
- the granting of rights (by way of a licence) to modify, to further develop and to redistribute at will the source code of the software;
- the existence of an independent and freely accessible community of developers who are involved in the development of the software (and of future versions thereof);
- whether the applications can be deployed on a diversity of different hardware and operating systems; and
- the priority given to open standards.

As regards custom made code, the guideline explains that, instead of requiring the transfer of IP, the call could provide that the code is delivered under the EUPL or another OSI certified licence.

3.1.2 Results

The NOIV office has yearly monitored the progress in open standards and FOSS adoption, and released interesting and very detailed reports¹¹⁷. In general, open standards adoption seems a higher priority than FOSS adoption.

Conforming to what was expected from them in the action lines, all the ministries reported having adopted a procurement strategy. NOIV noticed, however, that the ministries did not seem to discriminate in favour of open source but neutrally aimed at "procuring the best software". It further noticed that awareness seemed to have been raised, but that the procurement practices could nonetheless be improved¹¹⁸.

Mathieu Paapst (ex-member of the NOIV office) is even more pessimistic about the results of the programme after a survey conducted on 80 Dutch calls for tender published between January and June 2010. To the question whether a policy like the action plan NOIV influences behaviour regarding the practice of public tenders, he answers that *"despite the desired affirmative action for Free/Libre and Open Source Software, in almost half (47.5%) of the tenders there is [according to the way the terms are drafted] a preference for closed source vendors or products. Because of this preference vendors of FLOSS products are not given a fair chance to win the bid. There is no level playing field in the software market and government buyers arguably do not act according to the EU treaty principles of equal treatment, non-discrimination and transparency"*¹¹⁹. Mathieu Paapst noticed that 22 tenders out of 80 mentioned a preference for FOSS, out of which 15 only provided that such preference would actually result in a reward of extra points under the weightings applied to the award criteria.

¹¹⁶ The W3C is the main international standards organization for the World Wide Web.

¹¹⁷ The more recent monitoring report that we found is the "Monitor NOIV 2010" of January/February 2011, which is available at <http://www.ictu.nl/archief/noiv.nl/files/2011/06/NOiVmonitor2011.pdf>.

¹¹⁸ "De stand van zaken van het open source software beleid van de Rijksoverheid", *op. cit.*

¹¹⁹ M. PAAPST, "Affirmative action in procurement for open standards and FLOSS", *IFOSSLR*, 2010, vol.2, issue 2, available at <http://www.ifossilr.org/ifossilr/article/view/41/76>.

3.1.3 Features

- NATURE: Policy (official programme of the government)
- DECISION LEVEL: National (Dutch government)
- ACTION LEVEL: Any level (central government, provinces, local authorities)
Any governmental institution (education, healthcare, social security)
- OBJECTIVES: Raising awareness of FOSS
Promoting a level playing field
Giving preference to open source software, if equally suitable
- MEASURES TAKEN: Promotion of FOSS
Creation of a support office (which issued many guidelines)
Guidance and support
Guidelines on award criteria
- LICENSING: Procured software should be under an open source licence as defined by the OSI
The EUPL is considered when an administration contemplates to license its own software
- EFFECTIVENESS: Awareness has increased.
As regards the objective to level the playing field, practices do not seem to have been satisfactorily improved.
Positive discrimination has in general not been adopted.
A minority of administrations has, however, adopted FOSS oriented awarding criteria.

3.2 Italy: Piedmont Region's Act of 2009 and beyond

3.2.1 General presentation

Italy is an unitary state, organised in such a way that many matters are reserved to the State, but regions can nonetheless adopt specific laws on their own internal functioning. In 2009, the main national law that governed software procurement was neutral as regards the nature of the procured software, FOSS being an option amongst others¹²⁰.

As regions have the power to adopt more detailed rules with regard to public procurement, the Piedmont Regional Council passed, on 26 March 2009, an Act establishing "*rules on software pluralism, on the adoption and the diffusion of free software and on the portability of digital documents in the public administration*"¹²¹.

The aim of the region was to give priority to FOSS.

This is clearly reflected in the far reaching provisions of the adopted law, which provides, amongst others, the following:

- The region uses software applications whose source code is available and which it can freely modify to adapt them to its needs.
- Except for software already in use, the region must preferentially procure Free Software and software whose source code is verifiable by end users.
- When procuring software, the region must carry out a technical and economic comparative assessment among the different solutions available on the market. In

¹²⁰ C. PIANA, "Italian Constitutional Court gives way to Free-Software friendly laws", *IFOSSLR*, 2010, vol.2, issue 1, available at <http://www.ifosslr.org/ifosslr/article/view/38>.

¹²¹ Legge regionale n. 9 del 26 marzo 2009, Norme in materia di pluralismo informatico, sull'adozione e la diffusione del software libero e sulla portabilità dei documenti informatici nella pubblica amministrazione, (B.U. 02 Aprile 2009, n. 13), available at <http://arianna.consiglioregionale.piemonte.it/ariaint/TESTO%3FLAYOUT=PRESENTAZIONE&TIPODOC=LEGGI&LEGGE=9&LEGGEANNO=2009>

doing so, the region takes into account the total cost of ownership of each solution, the exit costs, but also the potential interest that other administrations could see in reusing the software and its interoperability potentials.

- If the region decides to use proprietary software, it must justify the reasons for such a choice.
- The region makes available - as free software - the computer programs that are developed on the basis of its own specifications and that are entirely financed by public funds.

3.2.2 Results

This initiative was acclaimed by FOSS advocates, not however by the national government. Indeed, the Italian government deemed that by adopting such law, the Piedmont region had exceeded its authority. The national government therefore lodged a claim before the Constitutional Court, raising two main grounds for annulment. The Constitutional Court issued a decision on 23 March 2010¹²².

The first ground for annulment, based on the fact that copyright law is a matter that is reserved to the central state, was upheld by the court. The corresponding illegal provision was declared illegal.

The second ground for annulment was more specifically aiming at the pro-FOSS provisions of the regional law. The Italian government alleged that any provision favouring FOSS adoption would be in conflict with the national laws on competition, as it would discriminate against the proprietary software industry¹²³.

This argument was not upheld by the Constitutional Court, which answered the argument as follows:

"The choice is not an exclusive one, but just preferential and requires a comparative evaluation, as is confirmed by the reference to the possibility to use proprietary formats [...] under the condition that in such case the Region shall provide motives of its choice [...]."

Finally, it must be once more reminded that the concepts of free software and software with inspectable code are not notions concerning a given technology, brand or product, instead they express a legal characteristic. At the end of the day, what discriminates between free and proprietary software is the different legal arrangement of interest (licence) upon which the right of using the program is based; and the choice concerning the adoption of one or the other contractual regime belongs to the will of the user.

It follows that the damage to competition feared by the counsel of the State with regard to the law in question, is not envisaged"¹²⁴.

Marco Ciurcina, who was at that time president of the ASSOLI (Associazione per il Software Libero), assessed that the Constitutional Court's decision, which was welcomed by the Association¹²⁵, would make it easier for other administrations to adopt similar laws¹²⁶.

This premonition proved to be right, as in 2012, the national Digital Administration Code (Codice dell'amministrazione digitale¹²⁷) was modified twice in order to establish a preference for FOSS in the public administrations.

¹²² Sentenza 122/2010, Corte Costituzionale della Repubblica Italiana, available at <http://www.cortecostituzionale.it/actionPronuncia.do>.

¹²³ According to Roberto Di Cosmo, this argument would have been inspired by proprietary software lobby. See R. DI COSMO, "Constitutional Court in Italy rules out anti-free-software lobbyist arguments...", 30 March 2010, available at <http://www.dicosmo.org/MyOpinions/index.php/2010/03/30/100-constitutional-court-in-italy-rules-out-anti-free-software-lobbyist-arguments>.

¹²⁴ As translated by C. PIANA in "Italian Constitutional Court gives way to Free-Software friendly laws", *op. cit.*

¹²⁵ "A landmark decision of the Italian Constitutional Court: granting preference to free software is lawful", available at http://www.softwarelibero.it/corte-costituzionale-favorisce-softwarelibero_en.

¹²⁶ Joinup News of 30 March 2010, "IT: Constitutional court says administrations can favour open source", available at <https://joinup.ec.europa.eu/news/it-constitutional-court-says-administrations-can-favour-open-source>.

Article 68, part 1 and 2 of the Code read as follows:

"1) In accordance with the principles of economy and efficiency, return on investment, reuse and technological neutrality, public administrations must procure computer programs or parts thereof as a result of a comparative assessment of technical and economic aspects between the following solutions available on the market:

- a) develop a solution internally;*
- b) reuse a solution developed internally or by another public administration;*
- c) adopt a free/open source solution;*
- d) use a cloud computing service;*
- e) obtain a proprietary license of use;*
- f) a combination of the above.*

1-bis) For this purpose, before procuring, the public administration (in accordance with the procedures set out in the Legislative Decree 12 April 2006, n. 163) makes a comparative assessment of the available solutions, based on the following criteria:

- a) total cost of the program or solution (such as acquisition price, implementation, maintenance and support);*
- b) level of use of data formats, open interfaces and open standards which are capable of ensuring the interoperability and technical cooperation between the various information systems within the public administration;*
- c) the supplier's guarantees on security levels, on compliance with the rules on personal data protection, on service levels [,] taking into account the type of software obtained.*

1-ter) In the event that the comparative assessment of technical and economic aspects, in accordance with these criteria of paragraph 1-bis, demonstrates the impossibility to adopt an already available solution, or a free/open source solution, as well as to meet the requirements, the procurement of paid-for proprietary software products is allowed. The assessment referred to in this subparagraph shall be made according to the procedures and the criteria set out by the Agenzia per l'Italia Digitale, which, when requested by interested parties, also expresses opinions about the compliance with them.

2) In the preparation or acquisition of computer programs, public administrations, whenever possible, must adopt solutions which are: modular; based on functional systems disclosed as stated by Article 70; able to ensure the interoperability and technical cooperation; able to allow the representation of data and documents in multiple formats, including at least one open-ended (unless there are justifiable and exceptional needs).

2-bis) The public administrations shall promptly notify the Agenzia per l'Italia digitale the adoption of any computer applications and technological and organizational practices they adopted, providing all relevant information for the full of the solutions and the obtained results, in order to favour the reuse and the wider dissemination of best practices"¹²⁸.

Even though the provisions of § 1-bis are not unambiguous and need interpretation, and although the role of the *Agenzia per l'Italia digitale* could have been further detailed, it is clear from § 1-ter that the procurement of FOSS must be preferred to proprietary software. Not only would procuring FOSS comply with the order of priority as established in the law, but it would also allow administrations to reuse and share software amongst them, which seems to be the final goal of the Italian lawmaker.

¹²⁷ Available at <http://www.digitpa.gov.it/amministrazione-digitale/CAD-testo-vigente>.

¹²⁸ As translated by S. ALIPRANDI & C. PIANA in "FOSS in the Italian public administration: fundamental law principles", *IFOSSLR*, 2012, vol.5, issue 1, available at <http://www.ifossilr.org/ifossilr/article/view/84>.

According to Simone Aliprandi and Carlo Piana, "*The decision was made in a dire situation of the national economy and inspired by practical reasons (spending review) rather than idealistic ones. It seems however a new direction that can hardly be changed. Only it can be made less compelling by a slack implementation, if not outright non compliance. Vigilance is therefore required*"¹²⁹.

3.2.3 Features of the Piedmont Region's Act

- ACTION: Legislation
- DECISION LEVEL: Local (Piedmont region)
- ACTION LEVEL: Local (Piedmont region)
- OBJECTIVE: Favouring the procurement, sharing and re-use of FOSS by the administrations
- MEASURES TAKEN: Adoption of a law establishing procurement rules
- LICENSING: Not specified (reference to free software)
- EFFECTIVENESS: The initiative has been successful and survived a challenge before the Constitutional Court.

A couple of years after the Constitutional Court's decision, at national level, the Code for the Digital Administration has been modified to favour FOSS and promote sharing and re-use of software. How the amended code will be concretely applied remains uncertain.

3.3. Spain: National Interoperability Framework

3.3.1 General presentation

The Spanish Citizens Electronic Access to Public Services Act (eGov Law 11/2007)¹³⁰ grants citizens the right to interact with the public administration by electronic means. The law regulates the basic aspects of IT use, but also the cooperation between administrations and the reuse and transfer of applications amongst them (articles 45 and 46).

In application of article 42 of the Law, the Royal Decree 4/2010¹³¹ implements the Spanish National Interoperability Framework, and contains several provisions (articles 16 and 17) aiming at fostering the use of FOSS in the public sector.

Article 45 of the Law provides that when public administrations are owners of IP rights on their applications, they may¹³² make them available to any other public administration without compensation and without the need of an agreement. These applications can be declared "open source" when this allows a better transparency in the functioning of the public administration or when this fosters the incorporation of the citizens in the information society.

Article 16 of the Royal Decree does not oblige public administrations to redistribute their applications to other administrations and citizens, but if they do, they must take into account that the aim is to allow the use and the reuse of the software, as well as the protection against its exclusive appropriation by a third party. The transferor must however protect itself from liability, support and warranty obligations. The provision details the licensing conditions, which must ensure that

- the software can be executed for any purpose,
- the source code is available,

¹²⁹ *Idem*.

¹³⁰ Ley 11/2007, de 22 de junio, de acceso electrónico de los ciudadanos a los Servicios Públicos, available at <https://www.boe.es/buscar/doc.php?id=BOE-A-2007-12352>.

¹³¹ Real Decreto 4/2010, de 8 de enero, por el que se regula el Esquema Nacional de Interoperabilidad en el ámbito de la Administración Electrónica, available at <http://www.boe.es/buscar/doc.php?id=BOE-A-2010-1331>.

¹³² The provision reads as follows: "*Las administraciones titulares de los derechos de propiedad intelectual de aplicaciones, desarrolladas por sus servicios o cuyo desarrollo haya sido objeto de contratación, podrán ponerlas a disposición de cualquier Administración sin contraprestación y sin necesidad de convenio*".

- the software can be modified or improved, and
- the software can be redistributed to other users with or without changes, on the condition that the derived work keeps these four “guarantees”.

The last condition entails the use of a copyleft licence, namely a licence which provides a specific clause that, generally speaking, obliges anyone who redistributes the software, with or without changes, to redistribute it under the same licence¹³³.

Outstandingly, the last paragraph of article 16 provides that

*“To this end, the application of the European Union Public Licence will be sought, without prejudice of other licences that can guarantee the same rights stated in the [previous] paragraphs [...]”*¹³⁴.

The EUPL is therefore set by law as the licence “by default”¹³⁵ to be required in procurements, and which has been pre-validated by the lawmaker as being compliant with the 4 conditions set forth above. If the public administration wants to use another licence, it has to check whether the contemplated licence meets the same conditions.

Article 46 of the Law provides that public administrations must keep updated registries of applications for free reuse, in cooperation with a Technology Transfer Centre that is set up and run by the General State Administration, and conforming to the principles provided by the National Interoperability Framework. Article 17 of the Royal Decree further provides that public administrations have to take into account the solutions freely reusable available in those registries and which could meet (totally or partially) the requirements of the new systems and services, and consider the improvement and update of the solutions already implemented. In order to optimise the sharing and collaborative process, the ongoing development should be published in the registries at an early stage, without waiting for the code to be finalised.

“Reuse” is therefore the catchword in Spain as regards ICT public procurement, and FOSS seems to be perceived as a key element for achieving this goal. However, the Royal Decree does not establish any preference for the acquisition of software products based on FOSS.

3.3.2 Results

The Technology Transfer Centre has been created¹³⁶. It keeps and maintains the repository of reusable software, which is connected to several forges¹³⁷ operated by autonomous communities (Andalusia, Catalonia and Extremadura) and to the European JOINUP platform (operated by the ISA programme)¹³⁸.

The Centre is functioning hands in hands with the CENATIC (*Centro Nacional de Referencia de Aplicación de las TIC basadas en fuentes abiertas*), which is a very active centre created by the Spanish Government and which raises awareness on and promotes the usage of FOSS in any sector, with a special focus on, amongst others, the public administrations. CENATIC organises a national observatory of free software¹³⁹, which has released the

¹³³ The GPL is the most famous copyleft licence. There are however many types of “copyleft effects” which cannot be further described in the present briefing paper. See for instance PH. LAURENT, “Free and Open Source Software Licensing: A reference for the reconstruction of “virtual commons?”, *op. cit.*

¹³⁴ The provision reads as follows: “*Para este fin se procurará la aplicación de la Licencia Pública de la Unión Europea, sin perjuicio de otras licencias que garanticen los mismos derechos expuestos en los apartados 1 y 2*”.

¹³⁵ See P.E. SCHMITZ, « Impact of the Spanish Royal Decree 4/2010 of 8 January 2010 », available at <http://joinup.ec.europa.eu/community/eupl/news/impact-spanish-royal-decree-4/2010-8-january-2010>.

¹³⁶ Information on the Technology Transfer Center is available at http://administracionelectronica.gob.es/?_nfpb=true&_pageLabel=P803124061272300995675&langPae=es.

¹³⁷ A forge is a software repository allowing the collaborative development of software over the Internet.

¹³⁸ Dirección General para el Impulso de la Administración Electrónica del Ministerio de Hacienda y Administración Pública, *Reutilización de activos y aplicaciones en la Administración*, August 2012, available at <http://www.cenatic.es/publicaciones/divulgativas?download=135%3Areutilizacion-de-activos-y-aplicaciones-en-la-administracion>.

¹³⁹ More information available at <http://observatorio.cenatic.es>.

results of a survey aiming at assessing the use of FOSS in the Spanish Government in 2010¹⁴⁰. The findings of the survey can be summarised as follows:

- The majority of the organisms of the national administration (nine out of ten) are using some FOSS. From a quantitative point of view, 40% of server technologies and 15% of desktop technologies are FOSS.
- Outstandingly, 68% of the surveyed organisms acquired FOSS by simply downloading it from a repository or a forge, and 46% of them have developed software based on FOSS (server software).
- One third of the surveyed organisms have procured FOSS (14,7% having required FOSS solutions if possible, and 21,7 % valorising the fact that the proposed solution be FOSS based). However 38,5% have confirmed that they do not adopt any specification in their tenders on that respect.
- 27% of the surveyed organisms confirm having reused FOSS solutions developed by other public administrations.

However, the surveyed administrations also let know that their IT departments needed more personnel specialised in FOSS and that more training was needed. 86% of them deemed necessary to improve the knowledge in FOSS.

This legislative initiative has been confirmed and further extended at national level by the Act 18/2011 regulating the Use of ICT in the Administration of Justice¹⁴¹, which restates¹⁴² the rules regarding the reuse of software via FOSS licensing as adopted in the eGov law and the Royal Decree.

This general legal framework has also inspired the administrations of the autonomous communities. Indeed, the Basque Country has, in turn, adopted a decree to establish a general principle of openness which is not limited to the eGov applications but applies to any software owned by the public administration¹⁴³.

3.3.3 Features

- ACTION: Legislation
- DECISION LEVEL: National
- ACTION LEVEL: Any level
- OBJECTIVES: To foster reuse of administration software by promoting and explicitly authorising the application of FOSS licences
- MEASURES TAKEN: Legal authorisation to redistribute software free of charge under a FOSS licence
Creation of a technology transfer centre listing and hosting the reusable software
Legal obligation to consider the existing reusable software when procuring software.
- LICENSING: The EUPL is the "default" licence, but other copyleft licences are valid alternatives

¹⁴⁰ *El Software Libre en los Organismos Públicos de Ámbito Estatal*, Cenatic, December 2011, available at <http://www.cenatic.es/publicaciones/onsfa?download=117%3Ael-software-libre-en-los-organismos-publicos-de-ambito-estatal>.

¹⁴¹ Ley 18/2011, de 5 de julio, reguladora del uso de las tecnologías de la información y la comunicación en la Administración de Justicia, available at <http://www.boe.es/buscar/doc.php?id=BOE-A-2011-11605>.

¹⁴² Article 55 et seq.

¹⁴³ Decreto 159/2012, de 24 de julio, por el que se regula la apertura y reutilización de las aplicaciones informáticas de la administración pública de la Comunidad Autónoma de Euskadi, available at http://www.euskadi.net/cgi-bin/k54/ver_c?CMD=VERDOC&BASE=B03A&DOCN=000111019&CONF=/config/k54/bopv_c.cnf

- **EFFECTIVENESS:** Public Administrations seem globally informed on FOSS. Administration software has been reused. Positive discrimination has sometimes been adopted. There is no clear information about whether the playing field is actively levelled.

3.4. United Kingdom: Government ICT Strategy

3.4.1 General presentation

In March 2011, the United Kingdom's Cabinet Office issued a document officialising the adoption of a new Government ICT Strategy¹⁴⁴. Cutting costs serves as a leitmotiv¹⁴⁵ and sharing software as a means to an end. The document states that its global aim is openness towards people, the organisations that use its services, and towards any provider regardless of size. The strategy stresses the need to let SME's access the market, to recentre in-house capacities and to avoid oversized, and thus very costly, projects¹⁴⁶. The government deems it also important to streamline and centralise the procurement practices. To do so, it has planned to develop a new operating model for departments and a new procurement system.

The Government ICT Strategy also aims at fostering the reuse and adaptation of systems which are available 'off the shelf' or have already been procured by another part of the government. Paragraph 15 of the Strategy explicitly states that the different departments will reuse and share ICT solutions and contracts, rather than purchasing new or bespoke solutions and that the government will not commission new solutions where something similar already exists. To identify reusable applications, equipment and resources, the government builds up a cross-government asset register and also plans to create an online Applications Store.

In the same line of reasoning, the government has decided to impose compulsory open standards and to create a level playing field for open source software. Paragraph 16 of the Strategy provides that *"where appropriate, government will procure open source solutions. When used in conjunction with compulsory open standards, open source presents significant opportunities for the design and delivery of interoperable solutions"*.

To create the level playing field for the use of innovative ICT solutions, the government has published a toolkit for procurers on best practices to evaluate the use of open source solutions¹⁴⁷, and which encompasses, amongst others, a general document explaining what open source is¹⁴⁸, an open source applications reference list detailing applications that can be contemplated as options for the administration¹⁴⁹ and guidelines on FOSS procurement¹⁵⁰. The latter only provide high level advice on how to ensure that open source software is fairly considered when procuring an ICT solution. They underline the inherent flexibility of Open Source as regards several requirements that should always be considered when procuring software, such as the scalability of licence, the transferability of software or the compliance with open standards.

The guidelines also explain that *"where the software is free to use 'gratis' software and all associated products are free for the whole of life use then there is no requirement to tender the requirement for the licenses"*. However, *"(a) purchase of support and maintenance procured separately from licenses will need to be tendered where it is expected that the cost of support meets the EU thresholds and in accordance with any standing financial instructions"*.

¹⁴⁴ Available at <http://www.cabinetoffice.gov.uk/content/government-ict-strategy>

¹⁴⁵ This is confirmed by Linda Humphries on the Government's blog, "Are open standards a closed barrier?", 12 avril 2012, available at <http://digital.cabinetoffice.gov.uk/2012/04/12/are-open-standards-a-closed-barrier/>

¹⁴⁶ The Government sets a presumption against government ICT projects valued at over £100 million.

¹⁴⁷ Available at <https://www.gov.uk/government/publications/open-source-procurement-toolkit>.

¹⁴⁸ "All about open source: an introduction to Open Source software for Government IT", version 2, April 2012, available at the same address.

¹⁴⁹ "Open Source Software Options for Government", version 2, April 2012, available at the same address.

¹⁵⁰ "ICT Advice Note - Procurement of Open Source", October 2011, available at the same address.

The Strategy also includes the establishment of an Open Source Implementation Group, a System Integrator Forum¹⁵¹ and an Open Source Advisory Panel¹⁵² to assist with the deployment of agile¹⁵³ solutions using open source technology and to educate, promote and facilitate the technical and cultural change needed to increase the use of open source across the government. It also envisages the creation of a 'virtual' centre of excellence across the government and the private sector which can enable fast start-up and mobilisation for such agile projects.

3.4.2 Results

Open source advocates such as the Open Forum Europe welcomed the UK Government's "*determination to move the public sector in the UK away from being locked in to large scale single supplier proprietary software solutions*"¹⁵⁴. Criticising the reluctance that governments showed until then to consider open alternatives, the Open Forum Europe expressed its yearning to observe concrete results: "*it is in procurement that the Strategy will either come alive or wither.*"

In its report¹⁵⁵ of May 2012, the government sets out the progresses achieved over one year of implementation. As far as open source is concerned, the report only refers to the publication of the procurement toolkit and confirms the establishment of the Open Source Advisory Panel. An e-petition site, which has been built in 8 weeks on open source software and using open standards, is reported as a success story. No other figure or example is provided.

In its assessment of June 2012, the Institute for Government (an independent charity helping to improve government effectiveness) does not report much more on concrete results in open source adoption¹⁵⁶. On the contrary, it stresses the ICT leaders' view that the focus should be on enabling the government to perform more effectively and not on implementing the ICT strategy "in a tick box fashion".

The press reported that the Strategy is largely lobbied against¹⁵⁷, and that during a round table event organised by the Cabinet Office, open standards opponents easily dominated a meeting motion against the government's open standards policy¹⁵⁸. The definition of the "open standard" concept is the crux of the tension. Reporting on the event, a representative of the government observed that "*the consensus was that the definition and proposed policy would be detrimental to competition and innovation*"¹⁵⁹.

This battle around open standards questions the sustainability of the Strategy in general and seems therefore to also have a detrimental effect on open source adoption.

3.4.3 Features

- ACTION: Policy (Governmental Strategy)
- DECISION LEVEL: National
- ACTION LEVEL: National

¹⁵¹ See <http://www.computerweekly.com/blogs/public-sector/2011/02/24/open-source-si-forum.pdf>.

¹⁵² A list of the members of the Open Source Advisory Panel has been communicated in the framework of a parliamentary question, available at <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpubadm/writev/goodgovit/it65.htm>.

¹⁵³ Agile software development is a software development method where requirements and solutions evolve flexibly through collaboration between self-organizing, cross-functional teams.

¹⁵⁴ See the OFE's press release of 30 March 2011, <http://www.openforumeurope.org/press-room/press-releases/openforum-europe-welcomes-the-publication-of-the-uk-governments-ict-strategy>.

¹⁵⁵ "One year on : Implementing the Government ICT Strategy", May 2012, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61950/One-Year-On-ICT-Strategy-Progress.pdf.

¹⁵⁶ "System upgrade? The first year of the Government's ICT strategy Features", June 2012, available at <http://www.instituteforgovernment.org.uk/sites/default/files/publications/System%20Upgrade.pdf>.

¹⁵⁷ G. Moody, « UK Government Open Standards : the great betrayal of 2012 », Computer World UK, 22 December 2011, available at <http://blogs.computerworlduk.com/open-enterprise/2011/12/uk-government-open-standards-the-great-betrayal-of-2012/index.htm>.

¹⁵⁸ "Proprietary lobby triumphs in first open standards showdown", Computer Weekly, 13 April 2012, available at http://www.computerweekly.com/cgi-bin/mt-search.cgi?blog_id=102&tag=BCS%20Open%20Source%20Specialist%20Group&limit=20.

¹⁵⁹ "Are open standards a closed barrier?", *op. cit.*

- OBJECTIVES: To foster the reuse of software across the administration.
To level the playing field for open source solutions.
- MEASURES TAKEN: Publication of a toolkit (set of guides)
Setting up expert panels and forums
Maintaining an asset register and an applications store
Operating a 'virtual' centre of excellence across government
- LICENSING: Not specified ("open source" is the term used).
- EFFECTIVENESS: There does not seem to be any important achievement so far, but it seems also too early to draw conclusions.
Lobbies are actively opposing the adopted open standard strategy, and the government seems open to reconsidering its position. This situation also negatively impacts FOSS adoption.

3.5. Belgium: IMIO (inter-municipal company)

3.5.1 General presentation

IMIO (*Intercommunale de Mutualisation Informatique et Organisationnelle*) is a government owned inter-municipal company that has been incorporated on 28 November 2011 (under the form of a limited liability cooperative company) by a partnership of ten Walloon municipalities with the blessing and support of the Walloon Region¹⁶⁰, which is the supervisory and approving authority¹⁶¹ of the Walloon municipalities.

IMIO has not been created from scratch, as it is based on the previous "CommunesPlone" project¹⁶², a collaborative "bottom up" approach which gathered many Walloon municipalities aiming at gaining independence from IT services providers by developing, essentially by themselves and in a cooperative manner, applications and websites for their own use as well as for their citizens. The CommunesPlone community was composed to a large extent of IT workers employed by the municipalities involved or by the SME's providing the services to the latter and to the public company. IMIO has taken over the CommunesPlone project and pushed it further by providing an official, logistical and incorporated structure.

The statute of the company provides that its statutory objectives are to promote and foster the mutualising of organisational solutions and of IT products and services for the local authorities of Wallonia. To do so, IMIO must either act as a central procurement agency which will procure software via public tenders, or develop internally software applications which are mutualised and distributed under a free licence. In the latter case, IMIO is expected to manage a free software patrimony which must be coherent and robust and which belongs to the public administrations. IMIO must ensure that it has internally the technical control of the software, and that the latter will evolve, remain sustainable and be distributed in compliance with the applicable free licence. The statutes further specify that the company produces and mutualises, amongst others, Plone-based open source software (Plone being a Content Management System licensed under the GPLv2).

The three main activities of IMIO are¹⁶³:

- Producing (procuring, developing or procuring the development of) open source software to meet the needs of local authorities (IMIO works also with a network of open source SMEs)¹⁶⁴;

¹⁶⁰ In its Regional Policy Declaration of 2009-2014, the Walloon government has set as one of its objective to promote the use of free software. See "Projet de Déclaration de politique communautaire 2009-2014", available at http://www.awt.be/content/tel/awt/declaration_politique_regionale_2009_2014.pdf.

¹⁶¹ "Autorité de tutelle".

¹⁶² See the IDABC study « Networks effects : Plone for Belgium and Beyond », available at <https://joinup.ec.europa.eu/elibrary/case/networks-effects-plone-belgium-and-beyond-0>.

¹⁶³ More information is available at <http://www.imio.be/presentation>.

¹⁶⁴ See the Joinup news "Walloon communities sharing software as an alternative to procurement" available at <http://joinup.ec.europa.eu/news/walloon-communities-sharing-software-alternative-procurement>.

- Buying proprietary solutions in purchasing centres to provide solutions at lower costs and a support service; and
- Formalising work processes for the local government.

IMIO provides its software and services to any municipality of the Walloon region, which can become member of the project. Currently, it is partly financed by subsidies of the Walloon region, and partly by the prices paid by the members for each "product". These prices are linked to the number of inhabitants of the municipality. The solutions proposed by IMIO can be deployed on the infrastructures of their members or made available in "SaaS Software as a Service" from IMIO's infrastructure.

3.5.2 Results

IMIO has currently more than 180 members, amongst which more than half of the Walloon municipalities (150 out of 262 – the 30 remaining members being other types of public services such as public social action centres).

IMIO benefits from Walloon Region subsidies (1.2 Million Euro at its launch), but has already reached a turnover of about 1 Million Euro in 2012. It is expected to become fully sustainable within a few years.

According to Joël Lambilotte (co-founder of CommunesPlone and employee of IMIO) *"the IMIO initiative is successful and the results are better than what was predicted in the business plan. The success comes from the "official" status of the organisation as a publicly owned entity. A second success factor is certainly the experience gathered from the field with the CommunesPlone project, whose debut dates back to 2005. The partnership with many technological SME's has also provided an undeniable advantage comparing to other solutions available on the Market. These elements bring a very hands-on and bottom-up approach to the global strategy"*.

3.5.3 Features

- ACTION: Policy (joint action of several local PA)
- DECISION LEVEL: Local (Walloon region & municipalities)
- ACTION LEVEL: Local (Walloon municipalities)
- OBJECTIVE: To foster the mutualising of local administration software
- MEASURES TAKEN: Creation of a public company which procures, develops, maintains, supports and mutualises software for the local municipalities.
- LICENSING: Open source software (GPL is mainly involved)
- EFFECTIVENESS: The initiative seems successful and reaching its objectives. It is too early to assess its sustainability.

3.6. France: Circular on the use of open source in the administration

3.6.1 General presentation

On 19 September 2012, the French Prime Minister Jean-Marc Ayrault addressed a circular to all the French ministers inviting them to implement the guidelines on the use of free software in the administration¹⁶⁵ prepared by the DISIC (*Direction Interministérielle des Systèmes d'Information et de Communication*).

The guidelines start from the statement that *"from now on, in order to meet business needs, Free Software must be considered on equal footing with other solutions"*. After some introductory explanations on the basic features of FOSS and its licensing scheme, its model based on services and its advantages in different contexts, the guidelines broadly describe

¹⁶⁵ "Usage du logiciel libre dans l'administration", annexed to the circulaire 56/SG of 19 september 2012, available at http://circulaire.legifrance.gouv.fr/pdf/2012/09/cir_35837.pdf. An english translation made by the APRIL is available at <http://www.april.org/en/french-prime-minister-instructions-usage-free-software-french-administration>.

eight inter-ministerial action lines aiming at facilitating the use of Free Software solutions in the administration's choices and at levelling the playing field, while at the same time achieving maximum economic efficiency and quality:

- Instituting an effective convergence on certain Free Software projects. A convergence framework is established, which aims at selecting and focussing some relevant FOSS that can be developed and reused in State information systems. Each ministry must participate in its updating and progressive reinforcing.
- Activating networks of experts, which gather specialists from the different ministries and aim at sharing expertises and competences. This includes the organisation of inter-ministerial workgroups and public workshops and conferences.
- Improving Free Software support in a controlled economic context. The objective is to centralise and to mutualise support and maintenance services amongst the ministries.
- Contributing in a coordinated way to chosen free software projects. The government plans to financially endorse Free Software development by systematically re-injecting from 5 to 10 percent of the avoided licensing costs in the development process.
- Keeping in contact with the large communities. *"Just as software editors maintain regular contact with all ministries, to update knowledge of their products, be able to anticipate their changes, and even assess needs, it is essential to have links to large communities such as the Mozilla Foundation or the Document Foundation. However, as these foundations do not have a commercial approach, the logic is reversed. It is the administration that must regularly contact them"*, the document explains.
- Deploying credible and operational alternatives to the large software editors' solutions. The aim is to identify and focus on credible alternatives and foster their adoption.
- Mapping out use of FOSS and its impacts. Annual analyses on FOSS adoption should be carried out and published.
- Developing a culture of use of Free Software licenses in the development of public information systems. This last point acknowledges and aims at addressing the "complex management of code ownership". It provides that *"the State must safeguard its ability to release code in a manner that maximizes its own benefit, regardless of which provider did the development. The State must therefore make use, or prepare the use, of Free Software licenses, be they permissive or not, depending on the context. It must also ensure that this freedom prevails vis-à-vis its suppliers in every context that could lead to reuse, unless explicit additional costs are generated"*.

To achieve all these results, some concrete action lines are planned:

- a network of experts is established among lawyers/purchasers involved in the drafting of specifications and administrative clauses;
- specific training courses are set up within ministries: fast-track ones for project managers and developers, more in-depth ones for lawyers and buyers;
- provider liability clauses and obligations must also be added when said providers use or develop Free Software code, and
- licence management must be one of the components of the explicit IT governance within each ministry.

It is noticeable that, in order to add legitimacy to the guidelines, reference is made to the Council of State's decision of 30 September 2011¹⁶⁶, which confirmed that a public

¹⁶⁶ Conseil d'Etat, Decision n°350431 of 30 September 2011, available at <http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=192208&fonds=DCE&item=1>.

administration can freely select a Free Software which is inherently « freely accessible, free of charge and modifiable by any service provider » and procure customisation, installation and maintenance services in relation to that particular software.

3.6.2 Results

Benjamin Jean (free software specialist and advocate)¹⁶⁷ welcomes and appreciates the relevance and clear-sightedness of the circular, but regrets the absence of the local administrations, which could have also been involved in the sharing and mutualising process.

The circular has been welcomed by the APRIL (French association for the promotion and defence of free software) as good news, but the association underlines that this decision from the French State is just a first step which needs to be further implemented. The association notices that the document provides only high level guidelines that must be further detailed and implemented by taking many concrete measures¹⁶⁸.

3.6.3 Features

- ACTION: Policy (ministerial circular)
- DECISION LEVEL: National
- ACTION LEVEL: National
- OBJECTIVES: Levelling the playing field
Fostering the use and mutualisation of free software
- MEASURES TAKEN: Selection of a set of credible free software alternatives
Creation of expert networks
Free software monitoring
Contributing to Free Software development
Developing a culture of FOSS use
- LICENSING: Reference to “free software”
- EFFECTIVENESS: It is too early to assess the concrete results of the initiative, which consist of high level guidelines.
The initiative requires an important implementation work that remains to be determined and carried out.

4. OBSERVATIONS

What first strikes the observer when comparing the different cases described in this briefing paper is the diversity of the initiatives. Whereas the logic lying behind them is usually evolving around the same concerns and objectives, the adopted strategies and concrete actions are very diverse in terms of scope, scale, means and ambitions. Furthermore, they are not at the same stage of development and implementation. This, in addition to the cultural and state structure differences, renders any meaningful comparison difficult.

All the initiatives aim at improving the public procurement practices and stem from the observation that even though FOSS presents inherent characteristics that correspond to good ICT governance principles, the option is not considered enough when choices are

¹⁶⁷ B. JEAN, « Synthèse sur la publication par le Premier Ministre Jean-Marc Ayrault de la circulaire du 19 septembre 2012 présentant des orientations et des recommandations sur le bon usage des logiciels libres dans l'administration française », 27 septembre 2012, available at <http://blog.vvlibri.org/index.php?post/2012/09/27/Synth%C3%A8se-sur-la-publication-par-le-Premier-Ministre-Jean-Marc-Ayrault-de-la-circulaire-du-19-septembre-2012-pr%C3%A9sentant-des-orientations-et-des-recommandations-sur-le-bon-usage-des-logiciels-libres-dans-l-administration-fran%C3%A7aise>.

¹⁶⁸ « Analyse détaillée de la circulaire Ayrault sur le bon usage des logiciels libres dans les administrations », APRIL, 8 novembre 2012, available at <http://www.april.org/analyse-detaill%C3%A9e-circulaire-ayrault-sur-le-bon-usage-des-logiciels-libres-dans-les-administrations>.

made. Raising awareness seems to be the first (explicit or implicit) objective, and effect, in all cases.

The guidelines attached to the French Ayrault Circular are particularly interesting on that aspect as they stress that one of the main causes of the lack of awareness of FOSS is the fact that, contrary to proprietary software, FOSS is usually not the subject of ongoing marketing and promotion practices. Therefore, FOSS and their communities should indeed be actively monitored by the administrations' procurement officers, and preferably by dedicated open source experts. The importance of the active participation of the administration IT staff in the community is also illustrated by the Belgian IMIO project, which has been created on the top of a community of developers (CommunesPlone) composed to a large extent of IT workers employed by the municipalities involved or by the SME's providing the services to the latter and to the public company. IMIO is therefore entirely integrated in the community and is one of its main actors.

Part of IMIO's success is also due to its bottom-up organisation, which embraces the "traditional" open source ways¹⁶⁹. It has been created by the municipalities for the municipalities, on the basis of a general observation: on the one hand, each one of them disposes of very limited budgets and resources to procure or develop specific management tools, CMS, websites, e-Gov platforms; on the other hand, they all share the same needs. The municipalities realised that pooling resources to develop a pool of common software was therefore the natural way to address the issue.

This approach is very different from the NOIV program, the French Circular, the UK strategy or the legislative approaches, which are typical of top down governance. In such type of initiatives, any factor of resistance to change must be carefully analysed and integrated in the strategy. A good strategy should include an awareness phase and, according to Paapst, a subsequent persuasion phase with four dimensions: a legal dimension, a technical dimension, a financial dimension and a subjective "knowledge/experience" dimension. Within this subsequent phase different elements influence the degree of willingness to adopt and use a new strategic IT policy in any of the four identified dimensions. According to Paapst, a reason why the NOIV has not been as successful as expected is that *"for instance the mere use of the legal instrument (e.g. the European procurement guidelines) is not enough to change behaviour and to counterbalance negative influences coming from within the technical dimension and the experience/knowledge dimension"*¹⁷⁰. By welcoming the Italian initiative with caution, Piana & Aliprandi confirm Paapst's theory: purely financial reasons are equally not enough to ensure a successful migration to FOSS¹⁷¹.

Once a public administration is aware and convinced that FOSS is good for its ICT, it can draw many teachings from the experiences analysed in this briefing paper.

Even before considering a call for tender, there is a consensus amongst the authorities involved that downloading FOSS free of any charge or compulsory fee can be a valid means of acquiring software without the requirement of a competitive bidding¹⁷². Once the FOSS is selected and downloaded, paid services and support for such software can be acquired via the traditional public contract process. Such method has been validated by the French Council of State.

In the framework of a call for tenders, the Italian Constitutional Court teaches that the concept of FOSS is independent of any given technology, brand or product but refers to a contractual regime that can be preferred without damaging competition. References to the concept of free and open source software are therefore always legal (contrary to the use of

¹⁶⁹ E. RAYMOND's "The Cathedral and the Bazaar" describes the bottom-up software design approach of the Linux community. It is available at <http://www.catb.org/esr/writings/homesteading/>.

¹⁷⁰ M. PAAPST, *Barrières en doorwerking : Een onderzoek naar de invloed van het open source en open standaarden beleid op de Nederlandse aanbestedingspraktijk*, PhD thesis defended on 10 January 2013, available at <http://irs.ub.rug.nl/ppn/353037710>.

¹⁷¹ *Idem*.

¹⁷² This is also confirmed in the European Commission's IDABC programme's "Guideline on public procurement of Open Source Software" of March 2010, available at <http://joinup.ec.europa.eu/sites/default/files/OSS-procurement-guideline%20-final.pdf>.

trademarks or specific technologies that should be, as a general rule, banned).

The NOIV's examples of award criteria are a good source of inspiration, as they make use of terms, concepts and objectives that are as neutral as possible. In contrast, it is interesting to note that the explicit reference to the EUPL by the Spanish interoperability framework has been source of discomfort for FOSS-based IT providers, given that a vast majority of open source applications are available under other licences (mainly of the GPL family) that do not allow relicensing under EUPL. Fortunately, the law explicitly allows the use of other licences, and one must hope that Spanish administrations carefully and wisely assess the necessity to specifically require the EUPL¹⁷³.

The current public procurement regulatory framework seems therefore not to constitute, as such, a hindrance to the adoption of FOSS by administrations. It provides ways to develop practices that aim at levelling the playing field or preferring the procurement of FOSS, if there is a will to go in that direction. The analysed cases illustrate that this last condition is probably the one that requires the most attention: whereas the policy shapers are aware of the advantages of FOSS, policy takers show different degrees of resistance, which is motivated by multiple factors that must be duly analysed and taken into consideration, and that are sometimes overlooked.

Passing laws could be contemplated as a means to override the resistance effect thanks to the compulsory nature of the instrument used. The Spanish and Italian experiences illustrate, however, that such exercise is complex, as the adopted law is likely to interfere with copyright, competition or procurement laws and principles. The law must therefore be cautiously drafted and should not damage competition nor result in a technological stagnation.

The Spanish law is quite astonishing as it is drafted in a way that it *allows* administrations to share software using FOSS licences. Besides the symbolic aspect of this explicit authorisation, one would tend to wonder what concrete change is brought by such law to the general regulatory framework: would such FOSS licensing practice not have been legal anyway without such positive statement? Furthermore, a devil's advocate would even argue that the Spanish law restricts FOSS licensing practices in administrations as it seems to impose the use of copyleft licences. On the one hand, such requirement restricts the spectrum of possible scenarios (as copyleft can generate compatibility problems in heterogeneously licensed developments)¹⁷⁴, whereas on the other hand, it implies the use of licences that must be handled with more care (as copyleft usually entails more obligations to comply with). In contrast, the Italian law considers FOSS as a self-justifying criterion (whereas the choice of proprietary solution must be specifically explained) but it does not further require a specific type of FOSS licence.

¹⁷³ On this regards, see the ISA programme's "Standard "sharing and re-using" clauses for contracts", https://joinup.ec.europa.eu/sites/default/files/ISA_Share_Reuse_D_2%201%20Standard%20Sharing%20and%20re-using%20clauses%20for%20contracts_final%20version.pdf.

¹⁷⁴ PH. LAURENT, "Free and Open Source Software Licensing: A reference for the reconstruction of "virtual commons?", *op. cit.*

ANNEX: COMPARISON TABLE

	Dutch NOIV	Piedmont Region's Act	Spanish NIF	UK Government ICT Strategy	Walloon IMIO	French Ayrault Circular
Action	Policy	Legislation	Legislation	Policy	Policy	Policy
Decision level	National	Local	National	National	Local	National
Action level	Any level	Local	Any level	National	Local	National
Objectives	Awareness Level playing field Preference	Preference	Reuse of software	Reuse of software Level playing field	Software mutualisation	Use and mutualisation of FOSS Level playing field
Measures Taken	Promotion Support office Guidance & Support Guidelines on award criteria	Law establishing procurement rules	Authorisation to use FOSS licences Obligation to reuse Technology transfer centre	Toolkit (guidelines) Expert panels Asset registers & app. store Centre of excellence	Creation of an inter-municipal public company	Selection of credible free software alternatives Expert networks Free software monitoring Contribution to FOSS development "Culture" of FOSS use
Licensing	Open Source EUPL considered	Free Software	EUPL (default licence) Other copyleft licences	Open Source	Open Source GPL mainly involved	Free Software
Effectiveness	Objectives not reached	Law application in Court validation	Awareness Reuse Some positive discrimination	The strategy is lobbied against Too early to draw conclusions	Objectives reached so far	Too early to draw conclusions

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