

# Requiring a specific Open Source Software in public contracts – best practices to adopt

## Practical Guide

Public operators may impose within public procurement the choice of Open Source Software insofar as the underlying development model induces practices that promote competition in the sense of European competition law. The benefit of this principle implies verifying the combination of specific legal, technical and governance factors.

## 1 The benefits of Open Source Software for the public sector

Open Source Software (also called Free Software)<sup>1</sup> is software whose use, study, modification and redistribution are allowed, both technically and legally, for the benefit of any holder's software copy.

They now take a prominent place in the information systems landscape in both the private and public sectors. The latter's specific features, with a significant potential for mutualization and a need for interoperability, have long led to policy initiatives that enable administrations to maximize the benefit of this development model.<sup>2</sup> Italy has thus imposed such a priority (Italian Law N° 134 August 7th of 2012), where the majority of Member States – such as France<sup>3</sup>, Portugal or the United Kingdom – have adopted policies to foster the use of Open Source Software. In 2018, the "Contribution policy to the State's free software" came to France to provide a technical framework strengthening this approach within the administration<sup>4</sup>.

The inherent characteristics of Open Source Software transform relationships between market players and their customers, which is directly reflected in the way public procurement is to be used when they specifically identify Open Source Software.

## 2 Benefits of Open Source Software for fair competition

As a matter of principle, the Open Source Software development model is based on the organization of a balanced relationship between all potential contributors to a project in order to promote the involvement of all by limiting the potential for re-appropriation by one of the stakeholders. To this end, all intellectual property rights holders grant a free concession of their rights world-wide, the entire duration those rights, for all uses and on all types of medium. In support of this license, known as the "Free License" (or "Open Source License"), is added a series of material resources made available to promote collaboration by ensuring that everyone can access, modify and distribute the source code at any time, including for commercial purposes. Such governance can be provided specifically or by relying on third-party pool organizations. The Linux Foundation or the Eclipse Foundation provide and ensure compliance with a set of legal and governance rules, ensuring the project remains open long-term.

- <sup>1</sup> *Stricto sensu*, Free Software corresponds to *Free Software Definition*, of the *Free Software Foundation*, and *Open Source Software* to the *Open Source Definition* de l'*Open Source Initiative* : in practice the vast majority of this software comply with both definitions
- <sup>2</sup> Tallin Declaration on eGovernment – European Commission – October 6<sup>th</sup> of 2017, notably « We call upon [...] the Commission to consider strengthening the requirements for use of open source solutions and standards when (re)building of ICT systems and solutions takes place with EU funding, including by an appropriate open licence policy – by 2020. »
- <sup>3</sup> Such as the Circular on guidelines for the use of free software within the administration (known as « Ayrault's Circular») in 2012 and the Digital Law of October 7<sup>th</sup> of 2016.
- <sup>4</sup> See Contribution policy to the State's free software (Politique de contribution de l'Etat aux logiciels libres) : <https://www.numerique.gouv.fr/publications/politique-logiciel-libre/>

In this context, fostering the emergence of Open Source Software is a way of creating an optimal environment for competition and innovation in public procurement, with significant benefits to prices, well-being and economic growth. This powerful link between Open Source Software and undistorted competition has been confirmed by several court decisions in the past decades<sup>5</sup>.

Thus, in the perspective of public procurement, a public purchaser who requires Open Source Software (specific or not) in the context of a service provision<sup>6</sup>, does not infringe upon the principle of non-discrimination imposed on him. This affirmation is still valid when the market is about a specific piece of Open Source Software: the latter being accessible to everyone under the same conditions, everyone is therefore free to formulate an offer in accordance with the expressed needs of the public purchaser, which finally contributes to free competition. This analysis was approved by the French State Council (*Conseil d'État*) in 2011<sup>7</sup>.

### 3 Best practices in requiring Open Source Software for a public contract

Within the framework of a public procurement, it is possible to impose the choice of Open Source Software while opening up to competition multiple stakeholders. It is also possible to impose on the latter some rules which ensure that specific development is contributed upstream – i.e. contributed back into the original Open Source Software in order to maintain a virtuous logic. The detailed rules for formulating such a requirement are set out in France in the "Public procurement guide : IT Acquisitions and Intellectual Property " published by the APIE<sup>8</sup> or the « Practical guide to Free Software implementation in public administrations » drafted by the DGI<sup>9</sup> as well as in Italy in the guidelines for the acquisition of software<sup>10</sup>.

When the public entity chooses to tender for a public contract (for a service provision) on specific Open Source Software, the administration must be able to prove by any means that this Software meets his needs, and that this choice does not contradict the general principle of non-discrimination within public tendering.

To that end, it is suggested to carry out upstream checks, making it possible to validate this choice from a legal, technical and economic standpoint as detailed in the table below.

As far as possible, these elements can be supplemented by a real strategic reflection from the viewpoint of the public procurement entity itself – development control, interoperability and independence from a specific supplier, etc. – as well as with third parties – in particular in terms of the prospects for pooling developments. Similarly, specific developments carried out on the basis of Open Source Software will have to be transferred in any case within the projects in order to benefit from a shared maintenance with other users.

Note that this verification will not be necessary when the purchaser is itself the publisher of the specific Open Source Software. Indeed, there can be no breach of the principle of free competition in such a case if any organization wishing to respond is guaranteed equal access to the software (source code, documentation, etc.). This

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5 For example in the United States (Wallace c./ International Business Machines Corp., United States Court of Appeals, 7th Circuit, November 9<sup>th</sup> of 2006, No 06-2454) or in Italy (Italy's Constitutional Court, March 23<sup>rd</sup> of 2010, 122/2010)

6 Note that it is also possible to buy intellectual property rights, notably for Open Source distribution by the administration, but without particular specificities linked to Open Source

7 Decision of the State Council (n°350431 September 30th of 2011, Région Picardie c. Kosmos and Itop companies). In this case, the Région Picardie had tendered a public contract related to the implementation, maintenance and hosting of Free Software « Lilie » a digital portal for schools. The companies contested the attribution of the contract to Logica, co-owner and co-designer of the software. The State Council judged that the Région Picardie hadn't broken anti-trust rules because Lilie is Free Software and for this reason every company can apply for the contract

8 APIE, « Guide de l'achat public : Achats informatiques et propriété intellectuelle » March 2019 : [https://www.economie.gouv.fr/files/files/directions\\_services/dae/doc/Guide\\_PII\\_web.pdf](https://www.economie.gouv.fr/files/files/directions_services/dae/doc/Guide_PII_web.pdf)

9 Thierry Aimé, Tax director – Ministry for Budget and Treasury, 2011, <http://www.marche-public.fr/>

10 Guidelines on the acquisition and reuse of software for public administrations, 2019, <https://docs.italia.it/italia/developers-italia/gl-acquisition-and-reuse-software-for-pa-docs/en/master/index.html>

does not exclude the possibility that some of the following clauses may need to be incorporated into the tender in order to provide guarantees to the purchaser.

Aspe	Objectives	Illustrations	Example of terms and conditions	
Legal	<p>The tender must require the use of standardized legal tools, which are usually written and maintained collectively :</p> <ul style="list-style-type: none"> <li>✓ The use of licenses complying with the <i>Free Software Definition</i> and the <i>Open Source Definition</i> is a prerequisite. An up to date list is on their respective websites.</li> <li>✓ When the application is based on standards implementing patents, it is necessary to ensure the access conditions to this technology conform with European criteria « <i>Fair, Reasonable, and Non-Discriminatory</i> » (FRAND).</li> <li>✓ A strong trademark policy is not incompatible with the concept of non-locking, as long as its management does not favor one market player over the others.</li> </ul> <p>In the case of third-party source code integration, it may be necessary to justify a formalized open source policy to ensure continuous license compliance in software development processes.</p>	<p>The most well-known licenses are GPL, MIT, Apache License, LGPL, BSD, EPL, MPL licenses. The SPDX project (<a href="https://spdx.org/">https://spdx.org/</a>) offers a unique identifier per license.</p> <p>As long as open source software is based on standards using patented technologies, the access conditions relating to them must comply with European FRAND « Fair, Reasonable, and Non-Discriminatory » criteria (FRAND)<sup>11</sup></p> <p>The most recent licenses (GPL-3.0, Apache-2.0, EPL-2.0 MPL-2.0 for example) contain strong patent commitments. Beyond that, Europe offers through standard contracts such as « <a href="#">Model contracts for licensing interoperability information</a> »</p> <p>It is common that the name of the software is registered as a trademark, owned by a single operator a federating operator, its use generally defined within a document called « trademark policy »</p> <p>In the case of third-party source code integration, it may be necessary to justify a formalized Open source policy that comply with industry standards in order to ensure continuous license compliance in software development processes. The OpenChain project specifications (<a href="https://www.openchainproject.org/">https://www.openchainproject.org/</a>) provide a useful reference for such compliance networking. It may be requested to transmit the public references of the service provider's Open Source compliance policy, or alternatively to justify the implementation of this policy by any means (in particular through the publication of internal media).</p> <p>You can also refer to the handbook "Advices on the drafting of intellectual property clauses for open source software development and maintenance contracts"<sup>12</sup>.</p>	<p>This service provision contract covers the XX Open Source Software used within the XX Administration. To that extent, any software provided with its source code and subject to a free license, i.e. certified as "Open Source" by the Open Source Initiative, or approved by the Free Software Foundation as listed on SPDX, constitutes Free Software.</p> <p>The service provider must ensure that the terms of the patent licenses associated with the technologies implemented by Free Software comply with French and European competition provisions (which results in a reasonable amount of royalties for all potential licensees and an absence of discrimination between users in a situation considered similar).</p> <p>The service provider using the trademark(s) related to the software must first inform the buyer in writing. If this trademark is governed by a specific policy, the service provider must comply.</p> <p>The service provider is committed to implementing the necessary processes to ensure compliance with the applicable licenses for the third-party components used throughout the development of the software and during their updates. These processes are defined and implemented in accordance with the specifications of the Open Chain project 2.0 (<a href="https://wiki.linuxfoundation.org/">https://wiki.linuxfoundation.org/</a>).</p> <p>These processes must be documented and made available to the bidder by the service provider. Failure to comply with this clause will constitute non-conformity of the development and may justify, if the service provider does not remedy it within a reasonable time, the termination of the contract.</p> <p>[Eventually : Acceptance will only be granted if the service provider has carried out an audit that demonstrates compliance with the licenses applicable to third-party components used within the Free Software(s).]</p>	
	Technical	<p>Technical access to the source code must be provided in a simple and standard way (on a public forge, with a standard version manager, such as git)</p> <p>It must be complemented by the sharing of other technical elements necessary for third party ownership of the project such as complete and up-to-date documentation.</p>	<p>The platforms used can be pooled such as Github (<a href="http://github.com/">http://github.com/</a>), GitLab (<a href="https://gitlab.com/">https://gitlab.com/</a>) or Eclipse (<a href="https://projects.eclipse.org">https://projects.eclipse.org</a>) or self-hosted.</p> <p>It is common practice to provide contribution and development guides in order to ensure optimal technical and material satisfaction for the benefit of all contributors.</p>	<p>The source code and documentation associated with the XX version software(s) are published online in order to be available to the public. They are in a suitable format for use and modification by anyone.</p>
		Governance	<p>It is important that the project's governance is shared in such a way that there is no disruption of competition, i.e. that any stakeholder can benefit and contribute to the solution.</p> <p>Thus, any stakeholder must be able to benefit from and contribute to the program under similar conditions to the other contributors to the project (i.e. without an "entry bonus" for historical contributors).</p> <p>Such governance can be ensured by the formalization of a project-specific contribution policy that will ideally be applied by a neutral third party organization that can manage the relationships between all contributors.</p>	<p>Clear governance must be formalized to ensure that decision-making is carried out according to objective factors such as the financial and human contribution to the project (by a third party body, such as the Linux Foundation or the Eclipse Foundation, or a specific organization).</p> <p>The adjudicator has ensured that the software is subject to governance that allows any organization to benefit from and contribute to the software(s). The governance associated with the software has been documented at this address: XX/ or although not documented, the governance rules are available at this address: XX.</p>

- 11 Licensing Terms of Standard Essential Patents, A Comprehensive Analysis of Cases, JRC Science for policy report, European Commission, 2017, <http://publications.jrc.ec.europa.eu>
- 12 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Setting out the UE approach to Standard Essentials Patents, European Commission, 2017, <https://eur-lex.europa.eu>
- 12 "Advices on the drafting of intellectual property clauses for open source software development and maintenance contracts", APIE, Ministry of Economy and Finance and Ministry of Culture, 2014, [https://www2.economie.gouv.fr/files/files/directions\\_services/apie/propriete\\_intellectuelle/publications/CCAG\\_TIC\\_2014.pdf](https://www2.economie.gouv.fr/files/files/directions_services/apie/propriete_intellectuelle/publications/CCAG_TIC_2014.pdf)