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OPEN WORLD FORUM 11-13 OCTOBRE 2012 Le Premier Forum Open Source en Europe EOLE

Procuring software by mentioning brand names

Or: How to buy Microsoft/Oracle/SAP/Redhat etc.

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Introduction

Internet Society

- Mathieu Paapst LL.M.
  - Lecturer/researcher Faculty of Law
  - Teaching Internetlaw and IT governance
  - PhD research “how do open source and open standards policies work in government procurement”
  - I am interested in legal and sociological questions regarding the information society.

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July 27, 2012

- OpenForum Europe (OFE) has published a report on the European Union (EU) Member States' practice of referring to specific trademarks when procuring for computer software packages and information systems.
- It found that almost 1 in 5 notices included technical specifications with explicit references to trademarks or brandnames.

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June 26, 2012

- Free software advocates in Finland are warning that they will take the country's public administrations to court if they continue to break national and European rules when procuring IT solutions. The Free Software Foundation Europe (FSFE) is calling on public authorities to allow competition and to stop procuring specific brands or products.

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Leading by example

- In 2007 the Commission signed a €48m contract to update the Microsoft software on approximately 65,000 PCs. The Commission tendered specifically for Microsoft software, precluding competition from competing software publishers

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- 2011: The European Commission has been forced into extraordinary negotiations with Microsoft because it is locked in to using the vendor's software and standards.
- The negotiations, concerning the purchase of Microsoft's Windows 7 operating system for 36,000 computers at the commission and 41 other European agencies, are proceeding under an exceptional clause of competition law that allows the commission to exclude other software vendors from a chance of winning the business.

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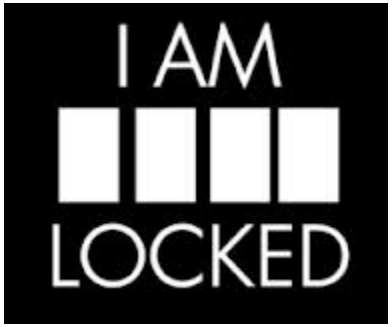
Question

- Does procurementlaw allow the use of brandnames if the contracting agency is being locked-in by a certain vendor or product?



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Definition

(Vendor) lock-in is the situation in which customers are dependent on a single manufacturer or supplier for some product or service and cannot move to another vendor without substantial costs and/or inconvenience.

- Definition by the Linux Information Project

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Sub-optimal situation

- Payment of a (relatively) high price
- To accept low quality
- To accept the late delivery of services
- To adapt company procedures in order to keep on working with the (updated) software.
- To be limited in future decisions.

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Superior alternative

- There needs to be a superior alternative. If there is no superior alternative, a customer will not “feel” that there is a lock-in, and has no incentive to want a new vendor or product.
- Superior can be anything: cheaper, faster, free and open code, better quality, better service etc.

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My own definition (work in progress)

(Vendor) lock-in is the *dominance of a sub-optimal situation* in which customers are dependent on a manufacturer or supplier for some product or service and cannot *move to a superior alternative* without substantial costs and/or inconvenience.

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Procurement law

- Article 2 Directive 2004/18: Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.
- Article 23 (2) emphasizes that equal access to the common market must be granted. Technical specifications may not create unjustified obstacles to the opening up of public procurement to competition.

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Definition

- Annex VI Directive 2004/18/EC:
- "technical specification", (…) means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, (etc.etc.) the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, (etc.etc.)

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Mentioning brandnames

- Art. 23 (8). Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract (…)is not possible;
- such reference shall be accompanied by the words ‘or equivalent’

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Equivalent?

- By using the magic phrase “or equivalent”, the contracting agency is obliged to check and explain whether any proposed alternative is indeed an equivalent alternative.
- Using the magic phrase is not by itself a justification to use a brandname.

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Also

- Mentioning brandnames is also allowed:
  - When it is necessary to describe the current architecture,
  - or to mention the products the new solution has to be compatible with.
  - Because all tenderers must be reasonably informed, the mere use of a brandname in these cases is not enough to conclude that there is a forbidden preference for a vendor.
  - This is only the case if the for compatibility needed technical specifications are not (publicly) available and usable without costs. (T-345/03).

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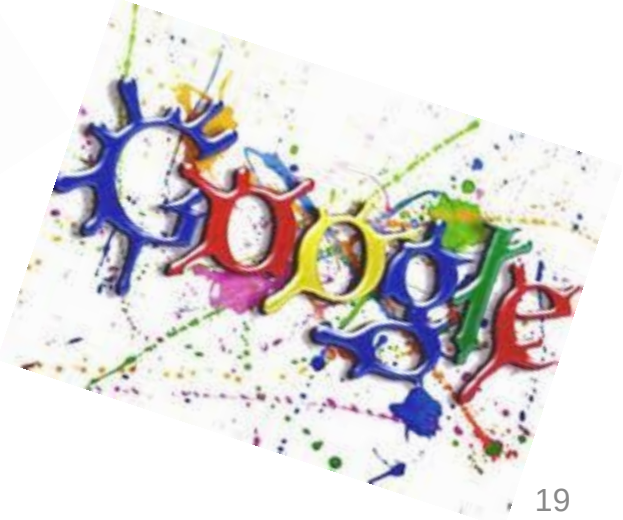
46000 licenses win7

- But wait… what about the EC ?
- 2007: asking for MS without the phrase “or equivalent”.
- 2011: exceptional procedure



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Possible exceptions

- Art. 31 describes the possibility to use a negotiated procedure with one vendor, without publication of a procurement notice
- 31 (2) additional deliveries that are subordinate to the original tender, where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. (XP to 7?)
- the length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years.
- Corresponding art. XV (1 d) GPA-treaty: This also applies to software.

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Art. 31 exceptions

- 31 (4) The negotiated procedure is also allowed when only a particular company can be entrusted with the contract due to intellectual property rights, or for technical reasons, and no reasonable alternative exists
- European Court of Justice: This requirement can be fulfilled only in the case of a market without any competition. C-328/92

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COM/2011/0896

- And the EC agrees with the court:
- Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on public procurement
- In the proposal the Commission mentions: “This exception only applies when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement”

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Alternatives

- The moment a contracting agency invites more than one vendor into the negotiations, the applicability of the art. 31 exception is null and void. In that case there obviously are alternatives or substitutes.
- IP and/or technical reasons can't be used as an exception outside the negotiated procedure.
- The burden of proof that there are no alternatives lies with the contracting agency that uses the art. 31 exception.
  - (See: C-337/98,C-328/92, C-57/94, C-385/02)

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Framework agreements

- The Directive defines a framework agreement as “an agreement with suppliers, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and quantity”.

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Framework agreements

- Art. 32 (2): For the purpose of concluding a framework agreement, contracting authorities shall follow the rules of procedure referred to in this Directive for all phases up to the award of contracts based on that framework agreement. (…) Contracting authorities may not use framework agreements improperly or in such a way as to prevent, restrict or distort competition.

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- This means: The same rules with regards to the mentioning of brandnames apply to framework agreements!
- Many bad/forbidden examples: eg. Tendering for a framework agreement with a Large Account Reseller Microsoft

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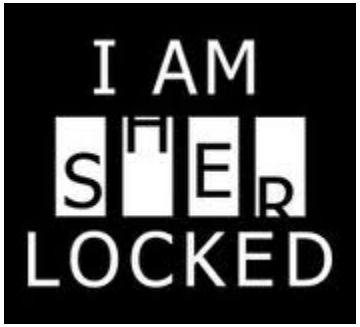
Conclusion



- Does procurementlaw allow the use of brandnames if the contracting agency is being locked-in by a certain vendor or product?
- if it is not possible to describe the wanted functionality, it is allowed together with the phrase “or equivalent” (art. 23)
- It is allowed to describe the current IT-architecture (all tenderers must be reasonably informed)
- It is allowed under the exceptions of art. 31. However, when there is a (superior) alternative, the procuring agency can’t use the Negotiated procedure exceptions of art. 31 (4).

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Thank You!

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- No facebook: I like my privacy.