



OFE Monitoring Report:

Discrimination in Public Procurement Procedures for Computer Software in the EU Member States

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Summary

OFE has monitored public procurement notices for computer software published on Tenders Electronic Daily. 136 contact notices were scanned for trademarks in the period from February 1 to April 25, 2008. OFE's monitoring exercise shows that in 34 tender notices out of 136 (25 percent), trademarks were mentioned in procurement documents. In 17 cases (12.5 percent), tender notices mentioned Microsoft or one of Microsoft's products.

On this basis, it would seem that the use of trademarks in public procurement in the EU member states is widespread - almost a common practice. Clearly, the use of trademarks discriminates against other suppliers/contractors and is either directly prohibited by EU legislation or allowed only under very strict conditions. We invite the EU as well as the concerned Contracting Authorities (CA) to address non-compliance in the cases identified in this report.

EU and Member State procurement authorities should note that our data is likely to show only a tip of the iceberg. The present OFE study was limited in time and scope, and encountered significant linguistic barriers. Due to the multilingual nature of the EU, the full tender notices (especially supporting documentation) usually only exists in the national language.

A similar study carried out in Poland supports our findings.¹ There is enough evidence to argue that a comprehensive monitoring with a proper linguistic support, would prove that the discriminatory use of trade marks in public procurement has been a common practice the EU, at least in some of the Member States. We urge the EU to undertake such a study, to document the discrimination. It would seem that continuing to let non-compliance proliferate would undermine core objectives of the European internal market and its corresponding Directives and Regulations, notably Directive 2004/18/EC.

¹ The Polish business consultancy Ubik BC issued a report concerning public procurement based on analysis of procurement of office and system software, which covers the period: July 2006 - June 2007. In the framework of the monitoring, 170 tender notices have been analysed for compliance with the articles of the Polish public procurement law, which are to guarantee free competition and equal treatment of tenderers (tender participants).

Out of 170, in 150 cases a contract object was described only by providing a name of a specific application or its producer. This according to the report authors constitutes a clear and unquestionable breach of the legal requirements. Brand names were used 17 tender notices, however, using the phrase "or equivalent". Only in 3 tender notices, contracting authorities specified functional and technical requirements for the object of the contracts, without using brand names. However, in reality the authors argue, the tenders with the phrase "or equivalent" or with the functional description of an object of a tender, did not guarantee that free competition nor non-discrimination. Most of these included wording, which in an indirect way gave preference to specific products. The report is available from <http://ubikbc.pl/page/?id=78>

Introduction

Public procurement constitutes an important share of the market for companies in the EU. In 2002, the total EU procurement market (purchases of goods, services and public works by governments and public utilities) was worth €1.5 trillion or over 16% of EU GDP². It should be noted that these figures include procurement only in the EU of 15 Member States at that time. In addition, the value of public procurement contracts has been growing constantly. The total amount of public procurement in EU 15 increased by 31% from 1995 to 2002.

OFE and its members have a profound interest in the openness, transparency, and efficiency of the European software market. EU efforts in public eProcurement are proof the EU and its Member States share that concern³ Software procurement, a key enabler of eGovernment, is indeed both a private and a public sector concern.

Over the last few years, we have seen a number of notices in the Official Journal of the EU (OJEU) seeking offers by CAs for the purchase of IT related supplies and/or services, where the CAs use the name of a product to set out the technical, functional and other performance requirements of the supplies or services they require. Due to the lack of empirical evidence, the widespread nature of this practice has been missing from public debates to date.

Legal background

EU public procurement law has been built on two guiding principles of transparency and non-discrimination originating from the EC treaty. These principles are reflected in the EU directives on public procurement of March 2004 (Directive 2004/17/EC and Directive 2004/18/EC). The legal act that covers public procurement for computer software across the public sector is Directive 2004/18/EC, of which Art. 23 provides that technical specifications that mention goods of specific make or source or of a particular process or trademarks, patents, types or of a specific origin with the effect of favouring or eliminating certain undertakings or products are prohibited. In addition, the indication of trademarks shall be permitted on an exceptional basis where a sufficiently precise and intelligible description of the subject-matter of the contract by reference

² DG Internal Market: A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future, 2004.

³See http://ec.europa.eu/information_society/activities/egovernment/implementation/ict_psp/doc/eProcurement_Factsheet.pdf

to a national or international standard or in terms of performance or functional requirements is not possible. However, such reference should be accompanied by the words “or equivalent”.⁴

According to EU law, public authorities in the EU Member States falling under the remit of the directive are obliged to observe the above rules when publishing public tenders. The two public procurement directives had to be transposed into national legislations by January 31, 2006 at the latest; in other words, well before this monitoring was started.

Some purchases can be exempted from Community rules under certain conditions (ex: arms, munitions and war material, if this is necessary for the protection of the essential interests of security) and contracts of low monetary value (below thresholds set out below) must respect the principles of the Treaty only. Although they are not covered by the EU Directives on public procurement, it is well established that their award should nevertheless comply with the internal market principles of transparency and non-discrimination. The Commission's guidance, which is in the form of an “Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives” (2006/C 179/02), contains suggestions on how public authorities should comply with these principles. This can be best achieved in practice through: “Non-discriminatory description of the subject-matter of the contract: “The description of the characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production unless such a reference is justified by the subject-matter of the contract and accompanied by the words ‘or equivalent’. In any case, it would be preferable to use more general descriptions of performance or functions.”

Results

In the monitoring process, 136 tender notices were scanned for trademarks. In 34 tender notices out of 136, there were trademarks included (these 34 tender notices are listed at the end of this document). In 17 cases, the trademark was Microsoft or Microsoft’s products were specifically mentioned. According to the principles described in EU law as above and the national public procurement laws that should be observing these, the 34 contract notices constitute examples of

⁴ Article 23(8) provides that 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 refrain products or eliminating certain undertakings, or certain products. Such reference shall be permitted only on exceptional circumstances, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to Article 23(3) and (4) is not possible; In that case such reference must be accompanied by the words "or equivalent".

discriminatory public procurement practice. Hence, if this is confirmed by CAs themselves, they should re-issue such tenders. In 31 cases a trademark was used in contract notices available on the TED website, only in 3 cases a trademark was identified in the specifications or additional documents.

Tip of the iceberg

However, while this report clearly shows that discrimination in public procurement of software occurs, it is merely the tip of the iceberg. The limitations of the current study include (please find the methodology of the monitoring at the end of this document):

1. *The languages issue.* Monitoring tender documents in 23 official EU languages is a daunting task. This has been undoubtedly the most important factor limiting the scope and results of the monitoring. The project has been carried out with limited resources - one person monitoring the contract notices in all the EU 27 Member States. This resulted in the following limitations: firstly, given that Bulgarian and Greek use different symbols, contract notices in these two languages were “by definition” excluded from the monitoring, given the impossibility of identifying a trademark within a contract notice text;
Secondly, the monitoring consisted of a simple scanning of contract notices texts for trademarks, given only a cursory understanding of the full text, this may have resulted in omission of, as reiterated before, possible discriminatory wording of contract notices in general;
Thirdly, only in three cases, brands were identified in the specifications and additional documents received; this was due to the fact that most of the requests for additional information have been answered by contracting authorities; but the replies received included, in the majority of the cases, a link to the contracting authority's website in the original language, which made it impossible to navigate through it and detect a brand name;
2. *The EU threshold.* The monitoring covered only tenders above certain threshold which excludes a huge proportion of tenders at national levels; Eurostat calculates the proportion of total procurement that is published in the Official Journal and this has increased from 5.4 per cent in 1993 to 16.5 per cent in 2004. This means that in 2004, this monitoring would have excluded 83.5 per cent of public procurement contracts;

3. *Limiting the scope to trademarks.* The monitoring was only seeking to identify the appearance of trademarks only; other examples of possible discriminatory use of, as singled out in Directive 2004/18/EC, “patents, types or of a specific origin” were not screened for in the procurement monitoring and neither were legal, economic, financial and technical conditions in contract notices analysed for discriminatory use due to the linguistic and technical expertise limitations in the process;

Three case studies from Germany, Poland and Lithuania

Quantitative analysis has been followed by a closer look into examples of the contract notices with trademarks. We aim to explain how the discriminatory use of trademarks works in practice. The cases have been selected on the basis of the most explicit and visible use of (a) trademark(s) in tender documents, type of contracting authority (focus on educational bodies) and size of a given tender notice.

Case 1: Software procured by a Lithuanian ministry

On April 25, 2008, the Communications and Information Systems Service of the Ministry of National Defence of Lithuania published a contract notice for supply of computer hardware and software, using an open procedure. The total quantity of the contract order is 3,988 pieces of computer hardware and software of an estimated value (VAT excl.) of 11,157,400 LTL [which is around 3.2 mln euros].

Both in the contract notice available on the TED and in the tender’s additional documents received from the contracting authority, there are trademarks used in the contract object specification (mostly “Microsoft” but other brands singled out as well).

For example under the contract’s part no. 16, under short description of the contract object, it is specified “operation systems and other Microsoft products”. Further down the contract notice, the contracting authority gives specific products: “Microsoft Office Pro Win32 Lithuanian OLP or equivalent software”, “OPEN license for workstation operation system Windows XP or equivalent”, “OPEN licenses for Microsoft Windows Server 2008 64 bit Enterprise Edition”, “OPEN license for MS Exchange Standard, Microsoft Exchange Server 2007 Enterprise Edition or equivalent”

Some of these products are accompanied by words “or equivalent”. However, in the light of the legal background provided, the exceptional basis for indicating trademarks in these cases is strongly questionable, in particular given that the words “or equivalent” accompany only some of the trademarks used in the contract notice.

Case 2: Software procured by a university in Germany

On April 4, 2008 the Martin Luther University in Halle, Germany published contract notice for supplies of computers with software in an open procedure. Under a brief description, the order has been described as “new purchase of computer and media technology”. The contracting authority procures the following quantity: 1 laptop, 21 PC’s and monitors, 4 laser printers, 1 multifunction unit, 1 A3 printer, software, network accessories of estimated value excl. VAT of 38,000 euros. Tenders or requests to participate may be drawn up only in German.

The full version of the contract notice available on the TED website in German contains more details as for the contract object. It is divided into lots. Under lot no 9; the contracting authority procures for 22 licenses of “Microsoft software”.

Further down in the contract notice, the reference to Microsoft software has not been accompanied by reference to a standard or in terms of performance or functional requirements or by words “or equivalent”.

Additional documents and specifications were not received by the end of the monitoring period.

Case 3: Software procured by a Polish public agency.

The contract notice for computer equipment supplies was published by the Polish Agency for Enterprise Development on March 12, 2008. The contracting authority is a public legal body whose main activity is to support development of entrepreneurship.

Under a short description of the contract, the notice specifies “supply of computer hardware, i.e. laptops (along with software licenses), monitors, computers (along with software licenses), printers, multi-function appliances, a digital fax”.

In the full text of the contract notice in Polish available on the TED website, no trademark is mentioned.

However, upon receipt of the contract additional documents and specifications, the scanning of these documents identified an explicit use of trademarks (mostly Microsoft and Microsoft products).

The minimal technical and qualitative parameters of the order are specified as follows:

“Software

- *Operational system: MS Windows Vista Business PL – OEM, installed, with a CD (with an option to downgrade to Windows Xp Pro PL)*
- *Diagnostic software,*
- *Anti-virus software F-Secure Client Security, with a minimum annual subscription in the virus database,*
- *OEM software to serve the optical drive – recording of CD-R/RW, DVD+/-R/RW data carriers,”*

The above specification of Microsoft software is not accompanied by any reference to a standard or in terms of performance or functional requirements or by words “or equivalent”, not within the contract notice nor in the additional documents.

It should be mentioned as well that the order concerns a project co-financed from European Union funds and the Polish State budget.

Recommendations

We recommend that the EU:

- Address non-compliance in the three cases from Germany, Lithuania and Poland
- Consider acting on the the larger sample of 34 – or issuing a warning
- Undertake a comprehensive monitoring of the discriminatory use of trademarks in particular in public procurement. Our small-scale study has shown that proper linguistic support is essential
- Devotes increased resources to both checking on implementation of the existing EU legislation in the sector with national oversight authorities and on pursuing direct complaints
- Strengthen Council Decision 87/95 dealing with specifications in the IT and Telecommunication sectors

We recommend that the concerned national oversight bodies of Contracting Authorities:

- Issue strong guidance to Contracting Authorities in their jurisdiction on non-compliance

As a result of this report, OFE has recommended its members to engage with procurement authorities across the EU to ensure that: (a) no predatory behaviour occurs and (b) that they encourage public authorities to mandate that procurement follows open standards – which is the crucial issue for software interoperability. In this domain, industry and government should be aligned. Openness, transparency, and efficiency serves all eGovernment stakeholders.

Methodology

The report has been based on a weekly monitoring of public procurement notices published on the Tenders Electronic Daily website (TED)⁵ between February 1, 2008 and 25 April 2008.

TED gives online access to tender notices published in the Supplement to the Official Journal of the European Union (OJS). All public tenders above specific contract values must be published by the authorities of all of the EU Member States in the Supplement to the OJS. The specific threshold criteria are defined in the European directives on public procurement and were the following during the period monitored (values are expressed in EUR, excluding VAT):

Under contracts for supplies (the subject of the monitoring): 412 000 or 133 000 (the threshold relevant to contracts awarded by central government authorities);

The monitoring covered tender notices for computer software. Having in mind that TED includes all tender notices published in the EU member states this amounts to around 1000 notices per day, hence specific browsing criteria for computer software needed to be employed. For this purpose, common procurement vocabulary (CPV) code 30240000 was used. This proved to be a very effective criterion for browsing through numerous contract notices published on a daily basis in all the EU Member States as it showed notices for both software/software licenses supplies or services specifically and contract notices for software as part of the tenders for computer hardware.

The monitoring had 2 phases:

1. Scanning through tender notices available on the TED website (a brief synopsis in English and the extended version in the original language);

⁵See <http://ted.europa.eu/>

2. Sending requests for a tender notice's “specifications and additional documents” to contracting authorities (request translated into the original language) and, upon receipt, scanning through the additional documents.

ANNEX

The contract notices with trademarks identified in the framework of OFE's monitoring:

1. Lithuania, Vilnius: contract notice no. 2008/S 81-110074 for computer equipment supplies published on 25.04.2008; Microsoft Windows Server 2008 64 bit Enterprise Edition
2. Germany, Paderborn: contract notice no. 2008/S 80-108391 for software supplies published on 24.04.2008; Citrix licenses/licenses
3. Lithuania, Vilnius: contract notice no. 2008/S 78-105635 for computer equipment supplies published on 22.04.2008; Word, Excel, Outlook
4. Hungary, Budapest: contract notice no. 2008/S 77-104315 for software supplies published on 19.04.2008; MS Office (Word, Excel, Power Point, Outlook; 2003, 2007)
5. France, Valenciennes: contract notice no. 2008/S 77-104049 for software supplies published on 19.04.2008; "Autodesk 3ds Max v. Monoposte, Maya monoposte, Combustion, toxik"
6. Lithuania, Vilnius: contract notice no. 2008/S 75-101277 for computer equipment and supplies published on 17.04.2008; Oracle
7. Romania, Bucuresti: contract notice no. 2008/S 73-098603 for computer server supplies published on 15.04.2008; Oracle Database
8. Luxembourg, Luxembourg: contract notice no. 2008/S 73-098620 for computer terminals supplies published on 15.04.2008; Microsoft licenses
9. Slovakia, Banská Bystrica: contract notice no. 2008/S 71-095994 for software supplies published on 11.04.2008; Oracle , Oracle Fusion Middleware, Oracle Business Intelligence – Technology
10. Lithuania, Vilnius: contract notice no. 2008/S 70-094500 for personal computers supplies published on 10.04.2008; Ms Windows

11. Germany, Hanover: contract notice no. 2008/S 68-091867 for utilities software supplies published on 08.04.2008; Windows, Windows client, Windows Printserver
12. Germany, Halle: contract notice no. 2008/S 68-091749 for personal computers supplies published on 08.04.2008; Microsoft-Software, Adobe-Software
13. Poland, Katowice: contract notice no. 2008/S 67-090461 for anti-virus software supplies published on 05.04.2008; Windows 2000 / XP, Eset NOD32 Business Edition Suite
14. Czech Republic, Prague: contract notice no. 2008/S 67-090379 for software licenses supplies published on 05.04.2008; Adobe LiveCycle
15. Estonia, Tallinn: contract notice no. 2008/S 65-088119 for computer software supplies published on 03.04.2008; Microsoft, Microsoft Premium Partner Support
16. Poland, Gdansk: contract notice no. 2008/S 65-087882 for computer equipment and supplies published on 03.04.2008; Microsoft Windows Hardware Compatibility List, "status minimum Design for Windows XP x86 lub Microsoft Windows Vista x86"
17. Netherlands, Katwijk: contract notice no. 2008/S 65-087825 for software licenses supplies published on 03.04.2008; Microsoft licenses
18. Hungary, Budapest: contract notice no. 2008/S 64-086682 for software supplies published on 02.04.2008; GeoMedia 6.0 ; Intergraph Corporation GIPS/MGCP
19. Netherlands, Roermond: contract notice no. 2008/S 64-086950 for data-processing machines services published on 02.04.2008; PBS Software
20. Germany, Berlin: contract notice no. 2008/S 61-082600 for computer equipment and supplies published on 28.03.2008; Novell Cluster , VMWare ESX Server Farm
21. Poland, Warsaw: contract notice no. 2008/S 59-080257 for software licenses supplies published on 26.03.2008; Microsoft
22. Netherlands, Rotterdam: contract notice no. 2008/S 59-080404 for software services published on 26.03.2008; Oracle

23. Italy, Rome: contract notice no. 2008/S 58-078385 for servers supplies published on 22.03.2008; UNIX
24. France, Marseille: contract notice no. 2008/S 55-074852 for software packages services published on 19.03.2008; Oracle ebusiness suite (version 11.510.2)
25. Lithuania, Vilnius: contract notice no. 2008/S 55-074564 for software supplies published on 19.03.2008; Oracle Forms, Oracle Reports
26. Poland, Warsaw: contract notice no. 2008/S 50-068522 for computer equipment and supplies published on 12.03.2008; MS Windows Vista Business PL
27. France, Strasbourg: contract notice no. 2008/S 49-067625 for software services published on 11.03.2008; Microsoft
28. Romania, Bucuresti: contract notice no. 2008/S 42-058297 for network routers supplies published on 29.02.2008; Adobe
29. Poland, Szczecin: contract notice no. 2008/S 40-055604 for laptop personal computers supplies published on 27.02.2008; MapInfo Professional 9.0
30. Poland, Wrocław: contract notice no. 2008/S 39-053905 for computer equipment and supplies published on 26.02.2008; MS Office 2007 PL Professional, Nero Burning Rom 7.0, WinZip 8.0, PDF Transformer , Adobe Photoshop CS3, Corel Drive 11.0 PL
31. Hungary, Budapest: contract notice no. 2008/S 37-050991 for software licenses supplies published on 22.02.2008; SUN, EXFO, CISCO
32. Finland, Mikkeli: contract notice no.2008/S 27-036203 for software licenses supplies published on 08.02.2008; Microsoft
33. France, Marseille: contract notice no. 2008/S 24-031576 for software supplies published on 05.02.2008; Domino Notes, Tivoli Storage Manager
34. Poland, Warsaw: contract notice no. 2008/S 23-030443 for software products supplies published on 02.02.2008; Microsoft

OpenForum Europe

OpenForum Europe (OFE) was originally launched in London in 2002 to encourage and accelerate the use of Open Source Software in business. The mission of OFE has now developed to encourage 'open, competitive choice for the IT user'. In doing so OFE is an active supporter of Open Standards, of wider use of the Open Source /Free Software business model, and the avoidance of lock-in through 'Openness'.

OFE is not-for-profit, limited by guarantee, independent of any organisation, business focussed and nonevangelical. OFE operates across Europe both directly and via a network of partners – both national and community based. Based in London, but increasingly important it focusses its European parliamentary and governmental programmes from its Brussels office. OFE draws its membership from both the user and supply (software, hardware, services, integrator and consultancy) communities.

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