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# **Are you Open Source compliant? Understanding OS licensing in preparation for the Internet of Things**

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## **1. Compatibility:**

Are there specific issues in your jurisdiction relating to the structure of OS licensing (e.g. problems relating to the fact that there is no consideration; possibility of binding counterparts to the adoption of license terms towards third parties, conflict with copyright laws, etc.)?

Although not tested in courts yet, certain issues have come up in terms of OSS licensing being compatible with the copyright and other laws. Such topics mainly involve the following:

### **1.1 Entry into a licence agreement**

In principle the licensor could, instead of entering into a licence agreement, give their OSS products into public domain. However, from the local law point of view it is not feasible since the law does not set out such a procedure. Furthermore, the waiver of moral rights of an author is not possible under the law. Thus, there would in any case have to be a licence agreement in place.

One of the issues raised is whether downloading OSS under a licence stipulating that anybody can download and use the software without accepting the licence terms constitutes an agreement complying with all the requirements set for an agreement under the law.

Under the Estonian Copyright Act a work may only be used by other persons upon the waiver by the author of his/her proprietary rights in such work or under a licence given by the author whereas a licence can be given under a licence agreement between the licensor and the licensee.

Therefore, it is necessary that the downloading of the product licensed on the condition that no acceptance of the licence is required must be eligible for treatment as a bilateral agreement between the licensor and the licensee.

Since under the Law of Obligations Act the consent to enter into an agreement can also be given indirectly by a certain act (rather than a direct expression of acceptance), generally the approach is taken that the offering of the downloadable OSS together with making available the licence terms that need not necessarily be accepted by the user should be considered to be an offer to conclude an agreement. Consequently, if a user downloads the software and starts using it an agreement is deemed concluded. It needs to be noted, however, that given the licence terms of most of such OSS products, such licence agreement only allows the user to use the software but not amend and/or distribute thereof (whereas amending and distribution are allowed given that the user has accepted the terms first).

### **1.2 Format of agreement and OSS**

Additionally to the issue addressed in the previous section, as a general rule under the Estonian Copyright Act an author's contract (incl. a licence agreement) must

be made in written form. As an exception the grant of a non-exclusive licence may also be made in a format that can be reproduced in writing. The latter means that a transaction can be entered into in a format enabling repeated written reproduction and must contain the names of the persons entering into the transaction, but need not contain hand-written signatures.

Furthermore, the law stipulates that unless otherwise provided by law or the objective of the formal requirement a transaction is void upon failure to comply with the format provided for a transaction by law.

Since the OSS licence agreements are generally not entered into in writing, the issue of validity of the OSS agreements is often raised (e.g. if the downloading of the OS-licensed products can be treated as an agreement made in the format that can be reproduced in writing provided that the licence does not generally specify the name of the licensee, etc.).

The Estonian Supreme Court has in its judgement No. 3-2-1-124-06 resolved that an author's contract in terms of the Copyright Act does not constitute an agreement that becomes void upon failure of the parties to comply with the requirement of the written format. The Supreme Court argues that the written form of an author's contract is foreseen by law for the purposes of protecting both parties to an author's contract creating greater clarity as to the parties' rights and obligations compared to a situation where the author's contract would be merely verbal. However, the Supreme Court goes on to state that considering an author's contract void due to the failure of the parties to comply with the requirement of the written form would harm the author's rights unjustly, i.e. it would deprive the author of the rights acquired under the contract and the other party would be released from obligation assumed by the same.

Therefore, typically the judgement of the Supreme Court is relied on when arguing that the OSS licence agreements are still valid irrespective of the lack of the required format.

### **1.3 Making reference to OSS in the public procurement documentation**

Often the OSS products are referred to in the technical specifications of the public procurement documents. Since under the law the technical specification must not contain reference to any specific product, trademark, etc., it is discussed how and in which procurement document should a reference to OSS be made.

The restriction to refer to OSS in the technical specification is not allowed since the OSS does not constitute product technical qualities, functionality or similar. Rather, it only differs from commercial software in terms of the rights obtained by the licensee and the openness of the source code.

Even if used together with the reference „or equivalent“ in the technical specification reference to OSS would prevent offering commercial software in

such procurement. Commercial software could not be equivalent to OSS as far as the core license terms are concerned.

However, in practice such obstacle is usually overcome by referring to a specific OSS product in the technical specification together with the reference „or equivalent“. In such case it is generally concluded that the „or equivalent“ could also mean any commercial software with similar functionality and technical qualities.

## **2. Enforceability:**

Is OS licensing fully enforceable in your jurisdiction?

If yes, is that feasible directly (contractually) or indirectly (through general principles of law, applicable copyright law, "moral suasion"/commercial reputation or otherwise?)

There has been no known litigation over OS licences in Estonia. Therefore the enforceability has not been tested in courts. As a general rule though (and provided that the issues related to the format of the OS licence agreement addressed in this report above do not prevent the parties from entering into a valid contract) the enforcement of OS licensing should be feasible on a contractual bases and based on copyright law.

## **3. Case law:**

Is there any case law in your jurisdiction on breach of OS license terms or, more broadly, on OS issues in general?

No significant case law in terms of judicial practice exists yet in Estonia concerning the open software issues.

The only court decision made concerns specific public procurement matters. Namely, the question under issue was whether the technical specification of the procurement documents may contain a condition that the technological platform of the information system being procured must have MySQL or PostgreSQL database engine as PHP or JAVA database. The contracting authority, the Public Procurement Appeals Committee and the court of first instance found that such requirement in the technical specification is allowed since it is a reasonable restriction in light of the technical solution used by the contracting authority. The challenged provision of the technical specification does not describe the procurable software but rather the underlying technical solutions. Further, they found that since the required products are freely available on the market to everybody, it does not discriminate any tenderer.

Pursuant to the PPA the technical specification must not refer to a specific purchase source, process, trademark, patent, type, origin or manner of production, which may give certain tenderers or products advantages over others or preclude

their participation. Such reference will be permitted if this is unavoidably necessary resulting from the object of the public contract due to the fact that preparation of technical specifications on the bases allowed by the law does not enable to sufficiently accurately or understandably describe the object of the public contract. Such reference must be accompanied by the words ‘or equivalent.’

Tallinn District Court as the court of second instance, however, resolved that since it is evident that mentioning PHP, JAVA, MySQL and PostgreSQL constitutes a reference to specific products, the said requirement is against the law by preventing the use of alternative products as a component of the object of procurement.

The contracting authority in the case further claimed that the requirements of a specific product in the technical specification should not be forbidden since the products in question are OSS products the acquisition of which is free of charge and the use of which is not restricted similarly to commercial software.

The District Court, however, went on to explain that it is not relevant in this context whether the products is based on open licence or not. If for any reason reference is made to a specific product or standard, the “or equivalent” reference is always to be used in order to prevent discrimination of other products, and consequently, other tenderers.

Additionally, the respondent in the case claimed that the reference to specific products was also made due to the issue of compatibility with its existing system. The court, however, overruled these arguments based on the same, above referred, obligation to use the “or equivalent” notation in the procurement documents.

#### **4. Compliance:**

Do you have any recommendation (to clients/your company) to ensure OS compliance?

Are you addressing the OS issue (or have you witnessed the same being addressed) in the subcontracting of software development and/or in the licensing of software that includes OS components?

Are specific clauses being adopted in the relevant contracts? Can you provide examples of such clauses?

If no contractual clauses are being included in the contracts, what are the measures adopted to ensure compliance?

It must be admitted that OS compliance services are not too well acknowledged in Estonia yet. As legal advisors, our tasks in relation thereto are generally limited to addressing the OS issues in course of conducting legal due diligence of technology M&A and other acquisitions. It is rather typical, though, that where we raise issues of potential incompatibility and the need for an in-depth look, the

clients are willing to take the risk of ignoring the matter (I dare to conclude that mainly due to cost saving reasons but also due to the lack of awareness of the topic, most likely the combination of the two). The general view is that since OSS is “open” or “free” no obligations arise from respective licences.

The software development, supply or licensing agreements do not generally contain clauses addressing the OS matters. Again, as legal advisors we tend to raise the subject, most frequently, that of the potential incompatibility and conflict of licences. Often, though, this is rejected by clients resulting in the lawyer’s disclaimer letter to the client being the only document addressing the matter. The software developers frequently tend to think they are more familiar with the licence terms and compatibility issues than they sometimes turn out to be. Lawyers views are too often disregarded on the same grounds.

We do occasionally refer clients to software compliance management service providers or similar, where we see that risks could potentially be high.

**5. OS in non IT-related industries:**

With specific reference to OS used in non-IT industries (e.g. "internet of things" or other products that contain electronic parts with OS components): Do you believe there is, broadly speaking, awareness of the diffusion of OS in traditional, non-IT industries? Is that an issue, from a legal perspective? If not, why?

The awareness is definitely not sufficient. Please see reply to the previous question.

**6. Do you have any practical OSS cases that you would like to share?**

Nothing too specific in addition to what is mentioned above.