European Ombudsman

Decision of the European Ombudsman closing his inquiry into complaint 438/2007/(TN)RT against the European Commission

Decision
Case 438/2007/(TN)RT - **Opened on** 27/02/2007 - **Decision on** 10/11/2010

The background to the complaint

1. The complainant is a private company based in Greece, specialising in information technology and communications.

2. In 1998, the European Commission awarded the complainant a contract for the implementation of an Internet-based groupware application called Communication and Information Resource Centre Administrator ('CIRCA'). CIRCA, an informatics tool which enabled the secure sharing of documents and resources was based on Open Source Software (OSS). This meant that it was free of licensing costs. CIRCA was used within the Commission, by several other EU institutions, and by national authorities in various EU Member States.

3. In 2002, the Commission launched a new call for tenders entitled " *Further development of the Collaborative Software CIRCA* " (2002/S 106-083279-LOT1). The complainant submitted an offer which was rejected. The complainant brought a case before the then Court of First Instance in 2002. The procedure ended with an out-of-court settlement between the complainant and the Commission.

4. After a second round of evaluation of tenders, the complainant was selected by the Commission as the successful tenderer, and it was invited to sign a framework contract. However, before the contract was signed, on 12 September 2003, the Commission decided to cancel the above call for tenders.

5. In April 2005, the Commission announced a new call for tenders in order to further develop CIRCA. Subsequently, this call for tenders was also cancelled.

6. Throughout this time, the Commission was conducting an internal survey of the OSS market, investigating the possibility of using new IT tools for CIRCA. As a result of the survey, the Commission decided to implement a new software system called X, in place of CIRCA.

7. On 23 January 2006, the complainant wrote to the Commission and complained that it had not been informed of the survey.

8. Subsequently, there was an exchange of correspondence between the complainant and the Commission, namely, the complainant's letters dated 10 April, 8 August and 25 October 2006, and the Commission's replies of 28 April, 7 August, 7 September, and, 8 November 2006, respectively.

9. On 1 February 2007, the complainant submitted a complaint to the Ombudsman.

The subject matter of the inquiry

10. In its original complaint, the complainant made the following allegation and claim which were included in the inquiry:

1) the Commission acted unlawfully and in a discriminatory manner by replacing CIRCA with X system;

The complainant therefore claimed that the Commission should:

2) freeze the process of replacing CIRCA with X system, provide full transparency, and proceed in full compliance with the applicable law.

11. In addition, when the Ombudsman opened the inquiry he asked the Commission to:

a) explain whether the X IT system was chosen without a procurement procedure and, if so, for what reason. He also asked the Commission to explain the legal basis for choosing X IT system without undertaking a procurement procedure; and

b) address the complainant's argument that the study on the basis of which it decided to use the X IT system was incomplete and partial.

12. In its observations on the Commission's opinion, the complainant submitted the following new allegation and new claim:

3) the Commission unlawfully continues to select the products of certain privileged vendors.

In this respect, the complainant argued that the company which assisted the Commission in obtaining the European Union Public Licence (EUPL) [1] , which is approved by the Open Source Initiative [2] (OSI), is the main partner of the supplier of X, and that it had obtained major contracts with the Commission.

4) (2) the Ombudsman should investigate the current negotiations concerning further

contractual relations between the Commission and the supplier of X system.

13. As regards the complainant's new allegation and claim, the Ombudsman considers that the complainant did not show that it had made the appropriate prior administrative approaches to the Commission as required by Article 2(4) of the European Ombudsman's Statute. For that reason, the new allegation and claim are inadmissible.

The inquiry

14. On 27 February 2007, the Ombudsman opened an inquiry and sent the complaint to the Commission with a request for an opinion. On 24 May 2007, the Commission sent its opinion, which was forwarded to the complainant with an invitation to submit observations before 31 July 2007. On 25 July 2007, the complainant asked for the deadline to submit its observations to be extended to 31 October 2007.

15. On 11 March 2008, the complainant sent the Ombudsman a further letter concerning its case.

16. The Ombudsman asked the Commission for further information regarding certain aspects of the case. The Commission replied to the Ombudsman's further inquiries on 16 April 2009.

17. On 26 May 2009, in accordance with Article 3 (2) of the Ombudsman's Statute [3] , the Ombudsman's services carried out an inspection of the relevant documents on the Commission's file. The Commission considered the inspected documents to be confidential [4] . This meant that the public and the complainant could not have access to them.

18. The Commission's reply to the Ombudsman's request for further information and the report on the inspection of the files were forwarded to the complainant, which submitted its observations on 29 June 2009.

The Ombudsman's analysis and conclusions

A. Allegation that the Commission acted unlawfully when replacing CIRCA with the X system

Arguments presented to the Ombudsman

19. In support of its allegation, the complainant argued that the Commission's decision to replace CIRCA with X system infringed the applicable EU procurement legislation and " *imposes the use of a specific product without any justification* ". The study conducted by the Commission did not take into account all the alternatives available to CIRCA, such as Y system, which the

complainant had developed. According to the complainant, Y system was a platform which was already being used by other European institutions, and it had a cost-free licence for its users.

20. The complainant stated that, " *as the creator of CIRCA* ", it should have been informed and consulted about the Commission's decision to conduct the study. It added that it should have been given the possibility to contribute its know-how to the Commission's process of switching to another platform so that technical obstacles could be avoided. The complainant considered that the Commission's decision was not taken in the latter's best interest, nor in that of other institutions.

21. The complainant further argued that the decision to replace CIRCA with X system should have been taken on the basis of a call for tenders, which the Commission failed to do. This constituted an infringement of the Financial Regulation [5] .

22. In its opinion, the Commission first explained that the first version of CIRCA was developed in the framework of a contract signed in 1995 between itself and a private company, which was not the complainant. The complainant was only the subcontractor of that company, and not the creator of CIRCA. All the copyrights and other rights of ownerships of CIRCA thus belonged to the Commission. Subsequently, the original version of CIRCA was developed and became the version currently used ('CIRCA 3.x'). The Commission acknowledged that it had entered into various contracts with the complainant in the development process which culminated in the creation of CIRCA 3.x. It did not consider, however, that this **entitled** the complainant to be involved in any further work on CIRCA.

23. In 2004, after a " *major informatics incident* ", the Commission decided to improve and redevelop CIRCA and enhance its performance. This platform was called 'CIRCABC'.

24. The Commission emphasised that " *given the need to distribute the new CIRCABC to a large range of EU public administrations, the new system would have to be built entirely using open standards and developed on OSS, in order to avoid imposing on external partners the acquisition of costly licences for additional products* ".

25. In order to define the best option for the future CIRCABC platform, the procedure followed by the Commission may be summarised as follows. The Commission first conducted a market survey based on internet research (*Technical audit of the CIRCA system - Task 4 - Open source technological survey*). An analysis was carried out of the existing OSS platforms which could serve as a basis for developing CIRCABC. The Commission shortlisted 22 OSS platforms. It presented its list to the CIRCABC Steering Committee ('the Committee') on 19 September 2005. In addition, on 7 March 2006, it presented a report to the Committee entitled " *Vision document for a common approach CIRCABC and IPM* ". This report led the Committee to define the main requirements for the new platform (for instance, that an open standard such as JSR-170 was required). On the basis of these requirements, the Commission conducted a **feasibility study** . The products identified as potential candidate platforms were installed, and their technical and functional criteria intensively tested. In parallel, the Commission carried out an extensive evaluation based on three " *proofs of concepts* " included in the Global Implementation Plan

approved by the Pan-European e-Government Services Committee (PEGSCO) [6] on 6 April 2006. The report on this evaluation was submitted to the Committee on 23 November 2006. The latter endorsed the report's recommendation to develop CIRCABC using X software as a basis. Subsequently, the Commission decided that X system was " *the best fit* " for the requirements of the new project for CIRCABC.

26. As regards Y system, which the complainant considered to be an alternative to X system, the Commission pointed out that the above market survey did not indicate that Y system had an active user or developer community. Moreover, there was no indication that Y system could support an open standard JSR-170, which was an essential requirement for the new CIRCA platform. For these reasons, Y system was not shortlisted.

27. The Commission also stated that there are two versions of X software: X Community and X Enterprise. It emphasised that the licence for X Community is cost-free, and the use of X Enterprise is subject to the acquisition of support services.

28. In reply to the Ombudsman's question as regards the legal basis for choosing X IT system without undertaking a procurement procedure, the Commission explained that the software acquisition contract with the company which produced X system for the new CIRCABC platform was not a public contract as defined by Article 88 (1) of the Financial Regulation [7] . Therefore, the Commission was not obliged to issue a " *procurement procedure in order to buy a cost-free product* ". On the other hand, the acquisition of support services meant that the Commission had to enter into a public contract, for which a call for tender was needed, which is what the Commission proceeded to organise. The Commission concluded that its decision to choose X system without launching a tender complied with Article 27 (1) of the Financial Regulation [8] . In order to comply with the provisions of this Article the Commission stated that it had to " *ensur* [e] *the high standard of sound financial management by selecting the best product available to meet the requirements for CIRCABC* ".

29. The Commission acknowledged that the development of CIRCAB on the basis of X system required a substantial investment in terms of support services. However, it insisted that these support services were procured, and would continue to be procured, following calls for tenders. In this respect, the Commission gave examples of framework contracts it had used to develop CIRCABC, such as Call for tender DIGIT/R2/PO72005/161 - SACHA, which the Commission used to acquire high level consultancy and support services relating to X system, " *which only the latter* [the supplier of X] *could provide.* " The support services were sub-contracted to the supplier of X. The Commission pointed out that if it had used another OSS product to build CIRCABC, such as Y system, a similar contractual framework would have been needed.

30. As regards the alleged breach of the principle of equal treatment, the Commission pointed out that it chose X system because it was the most suitable software for CIRCABC.

31. The Commission rejected the complainant's argument that X system is not an OSS. In the Commission's view, " *the discussion on the OSS licence used by X system is irrelevant* " since the Commission will build CIRCABC on the basis of X system, without changing or redistributing

any X system code. In any event, the supplier of X used to license its product under the "X Public Licence" ('XPL'), which was an adaptation of the "Mozilla Public Licence" ('MPL') [9] . Since February 2007, X Community system has been released under a General Public Licence ('GPL') [10] , which is approved by both the Open Source Initiative, [11] and the Free Software Foundation [12] .

32. In its observations, the complainant stated that the procedure used by the Commission to choose the platform for CIRCABC was unclear. It considered that if the procedure was not clear, the fairness of the entire exercise was compromised.

33. In addition, the Commission did not comply with professional standards as regards the market survey. The Commission should have consulted other parties and allowed them to express their position.

34. The complainant argued that the complexity of CIRCABC did not constitute a reason for the Commission to infringe the Financial Regulation by not launching a call for tenders.

35. In addition, the complainant argued that X system was not an OSS when the Commission selected it. In fact, from 2005 until February 2007, the X Public Licence was not recognised by the Open Source Initiative. Moreover, the complainant pointed out that X Enterprise system, which CIRCABC needs, is not cost-free software, since a licence fee has to be paid after a 30-day trial period.

36. In reply to the Ombudsman's further inquiries, the Commission supplemented its opinion.

37. It clarified that, in order to choose the best option for the CIRCABC platform, the Commission chose to adopt a standard IT project management approach, which includes the following steps: a market survey; a vision document; a feasibility study and a report on (three) proofs of concept. All these steps were undertaken in the present case by a Technical Committee, supervised by a Steering Committee.

38. The Commission also explained that the market survey was carried out on the basis of a specific contract concluded by the Directorate-General for Informatics ('DIGIT'). This specific contract was drawn up on the basis of a framework contract, which resulted from the call for tender entitled " *Provision of consultancy services and assistance regarding specific aspects of information technology* " which was organised by the Publications Office (OPOCE). Under that specific contract, " *a technical audit* " was carried out. It consisted of four work packages which focused on: (i) understanding the CIRCA building blocks; (ii) understanding the CIRCA database structure; (iii) understanding and assessment of CIRCA's components structure, and (iv) an OSS technological survey ('the market survey').

39. As regards the fact that the market survey was based only on " *publicly available information (mainly on the Internet)* ", the Commission first stated that " *in 2005 there were hundreds of OSS products and projects in the sector* ". The Commission thus decided to put a " *workable limit* " on the number of potential candidates worthy of close attention in order to

define a " *vision* " for the future CIRCABC platform. According to the Commission, software companies currently present their products on the Internet, providing detailed information, and often offering documentation. The availability of this information generates a substantial number of reviews, comparisons and reports, which are often available on internet. The Commission considered the quality and objectivity of this publicly available information as not always being satisfactory. Therefore, through a call for tender, the Commission selected a company capable of carrying out a professional assessment of the information publicly available on internet, so that a "workable size list" of potential candidates could be drawn up.

40. As regards the fact that only one product was used in the proof of concept phase, the Commission explained that, at the end of the feasibility study, the CIRCABC Technical Committee concluded that X system was the "best fit" for the project's requirements. However, the Commission decided to perform an additional extensive evaluation, based on proofs of concept, to ensure that X system would meet all of CIRCABC's requirements. The Commission wished to demonstrate that several essential aspects of the future CIRCABC concepts could be easily implemented through " *customisation and limited development on top of X system* ". The Commission stated that the outcome of the proofs of concept phase was favourable for X system.

41. It further stated that it decided to use X Enterprise system instead of X Community system because the former satisfied the requirements of the Commission's Data Centre production environment, which would host CIRCABC. Moreover, support services were available for X Enterprise system, but not for X Community system. Each version of the Commission's own instance of CIRCABC is based on X Enterprise. In parallel, the Commission released an identical version of CIRCABC, which is licensed under EUPL [13] . This licence was approved in early March 2009 as being compliant with the Open Source Initiative's definition of an "open source licence". The aforementioned identical version of CIRCABC is based on X Community system, which is licensed under GPL [14] . The Commission stated that it would not create "derivative work" which would force future users of CIRCABC to acquire X Enterprise system themselves. In conclusion, the Commission stated that the CIRCABC system would be "100% open source".

42. The Commission explained that the framework contracts through which consultancy and support services are provided for the use of X software for CIRCABC, "[provide] *user rights on non-exclusive and non-transferable licences of a large range of computer software products, provision of maintenance and informatics services and documentation thereto by means of a software acquisition channel* ". The Commission pointed out that, although the framework contracts focused on the acquisition of software licences and their maintenance through a single point of contact, they also cover other informatics services where there is a close link to the product itself [15] . These framework contracts were concluded following a call for tenders, in accordance with the provisions of the Financial Regulation. The Commission provided a list of specific contracts which were concluded on the basis of the above framework contracts, which covered informatics services related to the use of X system in connection with CIRCABC, hosted in the Commission's Data Centre. These specific contracts covered consultancy and support services. The consultancy services are targeted at developing CIRCABC using X

system, while the support services are targeted at assisting DIGIT to put CIRCABC into operation in the Data Centre under optimal conditions and at releasing CIRCABC on the most stable X Community version. On 27 June 2007, in order to define the precise scope of the support services, the Commission concluded a separate "Master Subscription Agreement" with X suplier. In accordance with that Master Subscription Agreement, the Commission would place orders for support services through W, another private company.

43. The Commission reiterated that X Community system could be downloaded and used without limit, free of charge. As regards X Enterprise system, the Commission admitted that, according to information available on the supplier of X's website, testing is limited to 30 days. However, it dismissed the complainant's argument that, after the 30-day trial period, licence fees have to be paid in order to use X Enterprise system. In the Commission's view, the references to "purchase of a licence" on X supplier's website refer to the acquisition of "additional" support services, and not to a fee to be paid in consideration for the software itself, which is free of charge. The Commission's above interpretation was confirmed by its contractor, the supplier of X, in an exchange of correspondence: " *the Commission obtained a subscription to X Enterprise, i.e., the support services delivered by the supplier of X and the right ("licence") to use the X Enterprise software. The subscription gives the Commission access to the source code of the Enterprise Version. As regards the X Enterprise version, the Commission was granted a perpetual licence as part of the subscription, i.e., if the Commission decides to stop the subscription, the Commission has the right to continue to use X Enterprise software but will just not get any support from the supplier of X anymore* ".

44. In its observations on the Commission's reply to the Ombudsman's further inquiries, the complainant first reiterated that when the Commission chose X system, the product was subject to an X Public Licence, which was not an OSS. It was only later that the supplier changed the XPL [16] licence to a GPL [17] and the Commission initiated its own EUPL licence, which was validated by the Open Source Institute in March 2009. The complainant reiterated that the process through which the Commission selected X system excluded all other interested suppliers. Moreover, even today, the Commission relies on the X Enterprise system, which is not an OSS, and not licence-free.

45. The complainant referred to the fact that the Commission does not use its framework contracts consistently. In this respect, the complainant pointed out that the Commission preferred to "bypass its own framework contracts" (including the one with the complainant), and use the framework contract of another office, namely OPOCE's, for the studies which led to X system being selected. Moreover, the complainant claimed that the Commission's biased approach had eliminated other available OSS products without any scientific evaluation being carried out. According to the Financial Regulation, all interested parties, and not only those falling within the "workable limits" [18] to which the Commission refers, are equally entitled to be considered. The complainant argued that the Commission asked an external consultant to rely solely on information available on the Internet for the evaluation, despite the fact that such information was not entirely satisfactory. According to the complainant, the Commission did not undertake " *an evaluation of the products available in the market, but of the marketing information that may or may not have been available over the Internet* ". Moreover, the

Commission relied on the ability of a single contractor to be able to produce a valid assessment of the "list of a workable size with all meaningful forerunners". Although this list was supposed to include only OSS products, it included X system, which was not an OSS product. The Commission selected X system before it tested any other candidate solution in a proof of concept.

46. The complainant also argued that the consultancy and support services which the Commission purchased in relation to the use of X system are not cost free. In this respect, it explained that, for the acquisition of similar IT services, the Commission normally uses a variety of contractors to support its applications, and not the suppliers of the products themselves. As regards X system, in order to obtain X Enterprise, the Commission had to purchase licences which also included X support services. The complainant took the view that this interpretation was confirmed by X supplier's exchange of correspondence with the Commission. It is irrelevant that the Commission had to pay only once for the licences in question, and that it has the right to continue using them on the basis of that payment. This proves that the product the Commission selected is not licence-free.

47. Finally, the fact that the Commission was not able to use independent service contractors to provide support services for X Community system, but had to purchase X Enterprise system, leads to the conclusion that anyone wishing to use the same product will have to purchase the same licences. This shows that the Commission privileged one product and its supplier in a discriminatory way.

The Ombudsman's assessment

48. First, the Ombudsman understands that the complainant's main argument concerns the failure by the Commission to (A) put a proper statement of reasons why it opted for X system and (B) apply the relevant provisions of EU procurement legislation. Since the Commission specified that these provisions are those of Article 88(1) of the Financial Regulation [19] and the complainant appeared to agree with this specification in his observations, the Ombudsman will examine whether the Commission's explanations, as to why it decided to replace CIRCA with X system and why it considered that the provisions of Article 88 of the Financial Regulation did not apply, were adequate and coherent. The Ombudsman will also need to assess whether the procedure applied by the Commission instead of the one foreseen in Article 88 (1) of the Financial Regulation was adequate in the given circumstances.

49. Against the above background, the Ombudsman first points out that the Commission enjoyed a discretionary power to establish the technical criteria of the software required for the development of CIRCABC. The main criterion was that the chosen product should be an OSS. In the Commission's view, a public tender is not required for acquiring an OSS.

50. The Commission then chose to apply a standard procedure to select IT products and it appears to have followed this procedure coherently. The Commission organised relevant studies to be conducted by a technical committee under the supervision of a steering

committee. Following a market survey which was carried out by a company selected through a call for tender, the Commission shortlisted 22 platforms, and submitted this list of suitable platforms to the Technical Committee. The latter specified which technical requirements the selected platform would be required to fulfil. These requirements were, namely, that the new platform should (i) be built on an OSS; (ii) support open standards for the OSS product selected, and (iii) have an active community of users and developers. On the basis of these requirements, the Commission conducted a feasibility study, after which the products identified as potential candidate platforms were installed, and technical and functional criteria intensively tested. In parallel, the Commission carried out an extensive evaluation based on three "proofs of concepts". At the end of the above procedure, the Commission concluded that X system best fitted its needs.

51. The complainant's assumption that because it had previously developed CIRCA 3.x, and that it would be in the Commission's interest to choose its product, Y system, is not a valid argument for challenging the correctness of the procedure. The Commission based its decision on objective technical requirements, such as the fact that the new platform would have to meet specific technical standards. It is reasonable for the Commission to consider that compliance with those standards is central to its interests.

52. The procedure the Commission followed would appear to be satisfactory if the following two conditions were met. First, if X system was an OSS at the relevant time, and second, if the OSS the Commission chose was indeed cost-free. If costs were incurred for the EU, Article 88(1) of the Financial Regulation [20] would apply. Article 88(1) of the Financial Regulation requires that products and services against payment must be acquired through procurement procedures. The Commission considers that X system was an OSS and that no costs were incurred through using X system. The complainant disagrees. The Ombudsman should in the first place take a position concerning these divergent positions.

53. In accordance with the definition provided by Open Source Initiative [21] , open source software refers mainly to the rights granted to recipients under a licence **to have access to the source code of the software in question, to modify and redistribute it** (Ombudsman's emphasis). Licences for open source software are approved by the Open Source Initiative or the Free Software Foundation and, in order to be considered as open source licences [22] , they have to fulfil certain conditions.

54. The complainant argued that when the Commission carried out its selection process for new open source software in 2005-2006, and decided to choose X system, the latter was not an OSS. According to the complainant, from 2005 to February 2007, X system software was made available under the XPL licence, which was not recognised by the Open Source Initiative. In this respect, the Ombudsman points out the weight of the views expressed by the Open Source Initiative which is a community-recognised body for reviewing and approving licences which comply with the requirements of the open source definition.

55. The Commission explained that the XPL licence was **an adaptation** of the open source Mozilla Public Licence, and **as from February 2007** , X Community was released under the

General Public Licence, which is a licence approved by both the Open Source Initiative and the Free Software Foundation.

56. The Commission did not indicate however, whether, in 2006, the XPL was recognised by the Open Source Initiative or the Free Software Foundation (and was thus listed on the websites of the above organisations) which was when the steering committee for CIRCABC endorsed the recommendation of the technical committee to develop the new platform on top of X software. In light of the above, the Ombudsman considers that there can be reasonable doubt as to whether X system was indeed distributed under an open source licence before 2007, as the complainant has argued.

57. Given that the Commission's objective was to select open source software with cost-free licences for the development of CIRCABC, as stated in paragraph 24 above, the Ombudsman understands that the list of potential candidates established as a result of the Commission's market survey, should have included only open source software. However, X system does not appear to have been an OSS at that time. The Ombudsman considers that the Commission's detailed opinion failed to explain why X system was preselected and chosen.

58. Nevertheless, even if X system had been an OSS at that time, the term 'open source software' is not necessarily synonymous with 'cost-free software'. Although open source software could be obtained without requiring each user to pay a licence fee, it could also involve other indispensable commercial aspects, namely the payment for certain services (subscription in order to get support/consultancy services).

59. In this respect, the Ombudsman understands that there are two versions of X system: (a) X Community and (b) X Enterprise, although it has not been made clear to him whether this "division" already existed in 2005. X Community could be downloaded and used for free, without paying any software licence fees. X Enterprise's software is free of charge, that is, there are no licence fees, but the additional support services are not cost-free. The Ombudsman notes in this respect X supplier's clarification in its letter to the Commission dated 12 March 2009, which the Ombudsman inspected, and to which the Commission referred in its opinion by quoting the relevant section: " *the Commission obtained a subscription to X Enterprise, ie the support services delivered by the supplier of X and* **the right ("licence") to use the X Enterprise software** *. The subscription gives the Commission* **access to the source code** *of the Enterprise Version.* "

60. In the Ombudsman's view, the documents inspected on the Commission's file do not contradict the conclusion that the acquisition of support services for X Enterprise cannot be dissociated from the licence, or the right to use the software. It therefore appears that the Commission would not have been able to access the source code of the software if it had not paid the subscription.

61. The Commission organised procurement procedures, in accordance with the provisions of the Financial Regulation, through which it acquired support services for X system, but it did not organise a procurement procedure to choose X system as a platform for CIRCABC. Moreover,

the Commission chose the supplier of X as the provider of such support services, or further had recourse to the said supplier's services as a sub-contractor because, as the Commission explained, such services could only be provided by the supplier of X (see point 29 above). If the supplier of X was the only company which could win the tender for the supporting services for its own platform (services which, moreover, as the complainant rightly pointed out, had to paid for after a 30-day trial period), the Ombudsman does not see why the Commission did not comply with the Financial Regulation from the outset and organise a procurement procedure to select software for its new CIRCABC platform, which would have included the support services.

62. The Commission did not prove that it would have obtained the right to use X Enterprise system without the above subscription, and that, therefore, the licence for the above software was cost-free.

63. In light of the foregoing, the Ombudsman concludes that there are reasonable doubts as to whether X system was an OSS at the time the Commission chose it. Even if it was an OSS, doubts remain as to whether X system was free of costs. The Commission's explanations were not convincing in this respect.

64. The Ombudsman recalls that the Financial Regulation defines a public contract for pecuniary interest by referring to the acquisition of products and services **against payment** . In accordance with the provisions of Article 88 of the Financial Regulation [23] , when the Commission acquires products and services against payment, it should do so **only** through procurement procedures. The Commission failed to put forward sufficiently convincing reasons why the contract with the supplier of X was not a public contract within the meaning of the Financial Regulation. This constitutes an instance of maladministration.

65. As regards the complainant's claim that the Commission should freeze the process of replacing CIRCAB with X system, the Ombudsman considers that the complainant did not put forward evidence to show that the Commission's choice of X system was vitiated by a manifest error of assessment. The Ombudsman has no reason to doubt the Commission's statement that X system best fitted its technical requirements for the new platform. In light of the above considerations, the complainant's claim cannot be sustained. The Ombudsman will thus close the case with a critical remark.

B. Allegation that the Commission acted in a discriminatory manner by replacing CIRCA with X system

The arguments of the parties

66. The complainant argued that the Commission's decision to replace CIRCA with X system infringed the principles of non-discrimination and transparency. It submitted the following arguments in support of its allegation. The Commission gave the supplier of X preferential treatment by choosing its software, given the latter was not an OSS when it was shortlisted to

replace CIRCA. In the complainant's view " *the Commission is sponsoring indirectly X... so as to impose the use of its products in an irreversible manner* ". In this respect, the Commission's choice will " *encourage candidates, employees and business partners to learn this ethnology, obtain certificates etc.* " Moreover, the study conducted by the Commission to chose a software for its new platform was " *not complete and impartial* ", and the complainant was discriminated against because its product, Y system, was not included in the list of potential platforms to be used for the development of CIRCABC.

67. The Commission stated that the X system was an OSS (see paragraph 31 above). Moreover, the Commission dismissed the complainant's argument that it intends to impose the use of X products in an irreversible manner. In this respect, the Commission pointed out that CIRCABC will be an entirely new product built on the basis of X software. The Commission will ensure that the developments made on the basis of X software can be " *ported to a new technology* ". The Commission also explained (see paragraph 26 above) that the complainant's software was not included in the list of potential candidates for developing CIRCABC because it did not fulfil the requirements of the new platform.

The Ombudsman assessment

68. Although the Ombudsman does not find convincing the Commission's explanation why X software was preselected and chosen (see paragraphs 56-57 above), he does not consider that the complainant proved that the Commission acted in a discriminatory manner when choosing the software for its new platform. The complainant did not submit enough evidence to show that it was deprived of the opportunity to be selected. Even if the complainant's product had been an OSS, and the X software had not been an OSS, it would still have had to comply with specific technical criteria, as stated by the Commission in its opinion. According to the Commission, it did not comply with those specific criteria.

69. In light of the above, the Ombudsman does not find an instance of maladministration in relation to the complainant's second allegation.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

The Commission failed to put forward sufficient convincing reasons why the contract with the supplier of X was not a public contract within the meaning of the Financial Regulation. It also failed to justify its decision for having selected the supplier of this software without conducting an appropriate call for tenders.

The complainant and the Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 10 November 2010

[1] The EUPL is the first European Free/Open Source Software.

[2] The Open Source Initiative is an organization dedicated to promoting open source software and approving licenses which comply with the open source definition (OSD).

[3] Article 3 (2) of the Ombudsman's Statute reads as follows: " *The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested from them and give him access to the files concerned. Access to classified information or documents, in particular to sensitive documents within the meaning of Article 9 of Regulation (EC) No 1049/2001, shall be subject to compliance with the rules on security of the Community institution or body concerned.* "

[4] The documents inspected were the following: (i) *Methodology followed by the Commission to define the best option for the CIRCABC platform. Deliverables for the various phases* ((a) A market survey. Document entitled "Technical audit of the CIRCA system. Open source Technological Survey"; (b) A vision document. Document entitled "CIRCABC- IPM architecture. Vision for a common approach. Note to the CIRCA steering and technical committee. Version 1.07"; (c) A feasibility study and deep internal tests. Document entitled "OSS Content Management Solutions as a Basis for CIRCA-BC"; (d) Proofs of concept. Document entitled "CIRCABC: Report on evaluation and Proofs of concept using X software"; (e) SWOT analysis. Document entitled "OSS Content management Solutions as a basis for CIRCABC", and (f) HA/LB technical Analysis, Document entitled "X-High availability and load balancing") (ii) *Contractual framework used to carry out the market survey* ((a) Framework Contract DI-04870-00 resulting from Call for Tenders No 6103 from OPOCE, and (b) Specific Contract No 1); (iii) *Guidelines for the market survey* ((a) Offre de service issued in the context of Framework Contract DI-04870-00); (iv) *Framework Contracts and Specific Contracts signed by the Commission in relation to the acquisition of consultancy and support services connected to the use of X Enterprise* ((a) Framework Contract DI-04310-00 (PUMAS Lot 1) including its amendments Nos 1 to 3; (b) Specific Contract No 727; (c) Specific Contract No 816; (d) Specific Contract No 851; (e) Framework Contract DI-05650-00 (SACHA), including its amendments Nos 1 to 13; (f) Specific Contract No 228; (g) Specific Contract No 240; (j) Specific Contract No 958; (i) Specific Contract No 1023; (k) Specific Contract No 1044; (j) Overview of Specific Contracts); (v) *Other documents related to the use by the Commission of X Enterprise* ((a) Master Subscription Agreement signed on 27 June 2007; (b) Letter from Commission to W dated 16 February 2009, and (c) Reply from W to the Commission dated 16 March 2009).

[5] The complainant referred to Article 27 (1) of the Financial Regulation, which reads as

follows: " *Budget appropriations shall be used in accordance with the principle of sound financial management, namely, in accordance with the principles of economy, efficiency and effectiveness.* "

[6] The EU Member States' Committee assists the Commission in implementing the IDABC Programme (' *Interoperable Delivery of European Government Services to public Administrations, Business and Citizens* ') and takes decisions on projects such as CIRCABC.

[7] Article 88 (1) FR reads as follows: "Public contracts are contracts for pecuniary interest concluded in writing by a contracting authority within the meaning of Articles 104 and 167, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services."

[8] See footnote 5.

[9] The Mozilla Public License (MPL) is a free and open source software licence, which was approved both as an Open Source software licence by the Open Source Initiative and as a Free Software licence by the Free Software Foundation.

[10] The General Public License (GPL) is a free, copyleft licence for software. According to the Open Source Initiative website: " *Everyone is permitted to copy and distribute verbatim copies of this license document, but changing it is not allowed* ".

[11] See footnote 2.

[12] The Free Software Foundation (FSF) is a non-profit corporation to support the free software movement as outlined in the Free Software Definition.

[13] See footnote 1.

[14] See footnote 10.

[15] The Commission referred for instance to the Tender Specifications for SACHA contract.

[16] See paragraph 31.

[17] See footnote 10.

[18] This term is explained in paragraph 39.

[19] See footnote 7.

[20] See footnote 7.

[21] The Open Source Definition provided by Open Source Initiative is available at the following

address: http://www.opensource.org/docs/osd [Link].

[22] These licences are listed at the following addresses: http://www.opensource.org/licenses/alphabetical [Link] and http://www.gnu.org/licenses/license-list.html [Link].

[23] See footnote 7.