UK Government Must Heed Dutch Audit Court Warning
Prior to Implementing 'Open' IT Procurement Action ©

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In the recent Guardian article entitled, *Government Takes Action on Open Technology*,[1] OpenForumEurope (OFE) president Graham Taylor revels in the UK Government's issuance of a January 2011 Procurement Policy Note that effectively reinstated, at least for the UK, the initial version of the European Interoperability Framework (EIFv1.0), despite its having been roundly rejected by the European Commission and Council of the European Union during December 2010 in favor of technology and business model neutrality.

OFE's IGOR

In alleging that the UK action had "shamed some other European countries", Mr. Taylor, however, shamelessly misrepresented how the UK Government hadn't been "open to lobbying pressure". This is a quite remarkable claim given the New York Times' revelation reported last year that the Brussels-based OFE has long served as a "lobbying front"/mask for *U.S.*-based industry members IBM, Google, Oracle and Red Hat - a/k/a/ 'IGOR' – which quietly but unsuccessfully endeavored to shape the European

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[1] See Graham Taylor, *Government takes action on open technology*, Guardian Professional (March 10, 2011) at: http://www.guardian.co.uk/government-computing-network/2011/mar/10/open-forum-europe-comment-government-it-policy.

Commission's EIF project to suit their own interests. It rings all the more hollow considering the OFE's effective lobbying thereafter of the UK coalition government which was reported to have quickly warmed to its FOSS-centric ideas.[2] Indeed, given the size of the UK government procurement market (£16.9bn spend) and its growing influence over *private* market behavior, it is no wonder that OFE's IGOR had worked diligently under cover of night within the UK Government's policy laboratory to align the parties' respective interests for purposes of ensuring that the UK government openly endorsed and expressed a clear preference for royalty-*free* open source software-based *e*Government platforms.

Mr. McCluggage's Baggage and the Call for 'Help'

Perhaps feeling vulnerable from the bright spotlight shone upon it by New York Times investigatory reporting, OFE's IGOR has continued to speak from the shadow behind the British Government's deputy chief information officer, Mr. Bill McCluggage.[3] Mr. McCluggage's ostensible role in OFE's campaign is to warn 'citizens' of the public policy dangers accompanying the UK Government's continued liaison with proprietary software vendors and to justify the UK Government's 'call for action'. Yet, he fails to identify the 'citizens' whose interests the government has in mind. Are they the men and women on the street – i.e., the UK 'user' and taxpayer communities', or the men and women operating UK-based SME software companies (many of which develop *proprietary* rather than or in addition to open source software products and interfaces?). Or, are they the men and women managing OFE's very large IGOR member companies? Similarly, Mr. McCluggage's justifications for government intervention are equally broad and obtuse: "[I]f the customer wants something then they have a choice";[4] "The government...is involving the citizen – opening up the data and getting the widest possible input"; "This would clearly ensure a level playing field for open source software";[5] "[T]he driver for me at the moment [is] to reduce the cost structure of information and communications technology in central government, while supporting technologies which increase *citizen* involvement, transparency and localization..."[6]

Notwithstanding these exhortations, readers and observers, in the end, are all but left with the less-than-serious impression that the UK Government has been called upon to protect its enfeebled citizenry from the menacing advance and the evil hand of the proprietary IT procurement industry – the big bad proprietary software bullies and their smaller certified application developer accomplices – by imposing interoperability mandates on government agencies that require the deployment of FOSS-compatible 'open standards' "wherever possible...made irrevocably available on a royalty-free basis".

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[2] See, e.g., *Cabinet Office Draft Structural Reform Plan*, UK Cabinet Office, Departmental Priorities #s 3 and 4 (June 2010) at: http://www.number10.gov.uk/wp-content/uploads/cabinet-office-srp.pdf .

[3] See Kevin O'Brien, *Technology Rivals Lobby to Break Microsoft's Hold*, New York Times (July 18, 2010) at: http://www.nytimes.com/2010/07/19/technology/19iht-eusoftwar19.html ; Florian Meuller, *OpenForum Europe: hypocrites lobby the EU but don't get their own houses in order* (FOSS Patent Blog (July 21, 2010) at: http://fosspatents.blogspot.com/2010/07/openforum-europe-hypocrites-lobby-eu.html. See also *About OFE – Our Members*, OpenForumEurope website at: http://www.openforumeurope.org/about/our-members .

[4] See Graham Taylor, *Government takes action on open technology*, Guardian Professional, supra quoting Bill McCluggage.

[5] Id.

[6] See Jack Clark, *Hundreds of government IT projects in firing line*, ZDNetUK, quoting Bill McCluggage (Sept. 22, 2010) at: http://www.zdnet.co.uk/news/it-strategy/2010/09/22/hundreds-of-government-it-projects-in-firing-line-40090211/

Another Questionable 'Reinventing Government' Program or a Trade War in the Making?

Eventually, Mr. McCluggage does get to the point; he claims that the UK government seeks not only to ensure citizen choice and to prevent feared vendor lock-in, but also aims to preserve scarce UK taxpayer resources. If it is true that Chancellor George Osborne's announcement of planned cutbacks in UK Government public spending will be dependent in part on bald "pledges to save £95m from IT budgets...a freeze on new IT projects worth more than £1m [i.e., "infrastructure spend controls"]...an increase [in] the involvement of [British small and medium-sized enterprises (SMEs)] in [government] IT projects, and [the]...broaden[ed] use of open-source software", [7] however, then British citizens may expect to receive far more than the UK Government is able to deliver – which appears to be either the equivalent of Al Gore's failed 'reinventing government' program[8] or another nascent European and/or international trade war.

While the UK Government's IT procurement program may be due for some refinements, as some commentators have recommended,[9] and government 'skunk-works' may potentially drive some major SME projects as other commentators have suggested,[10] at least one recent study has concluded that the UK coalition government's goal of delivering substantial taxpayer savings by pushing open source software on industry for all government IT projects, by splitting IT projects into smaller components more easily digestible by SMEs directly[11] and/or indirectly through integrators,[12] and by eventually placing up to 25% of government IT projects with SMEs, may likely prove fleeting if not impossible to achieve in the short term.[13] According to the study's authors, there are various significant barriers to immediate SME uptake of government IT projects, including, but not limited to: the "perceived risk of SMEs, [the high cost and] complexity of UK interpretations of EU procurement rules [and the disinclination and inability of financially and human resource-challenged SMEs to satisfy such rules], self-interest from gatekeepers to preserve lucrative status quos and an underlying belief that big is safe."[14]

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[7] Id.

[8] See Peter F. Drucker, *'Really' Reinventing Government*, The Atlantic Online (Feb. 1995) at: http://www.theatlantic.com/past/politics/polibig/reallyre.htm .

[9] See Ben Woods, *Government IT stuck in a 'vicious circle'*, report says, ZDNetUK (March 2, 2011) at: http://www.zdnet.co.uk/news/business-of-it/2011/03/02/government-it-stuck-in-a-vicious-circle-report-says-40091999/ .

[10] See Tom Espiner, *How skunkworks and SME will shift gov't IT*, ZDNetUK (April 1, 2011) at: http://www.zdnet.co.uk/news/business-of-it/2011/04/01/how-skunkworks-and-sme-will-shift-govt-it-40092366/

[11] See: *Cabinet Office pushes suppliers on open source*, Guardian (Feb. 25, 2011) at: http://www.guardian.co.uk/government-computing-network/2011/feb/25/mcluggage-open-source .

[12] See Kathleen Hall, *Exclusive interview: Deputy government CIO Bill McCluggage on the new government IT strategy*, ComputerWeekly.com (April 1, 2011) at: http://www.computerweekly.com/Articles/2011/04/01/246129/Exclusive-interview-Deputy-government-CIO-Bill-McCluggage-on-the-new-government-IT.htm .

[13] See David Chan, Martin Rice and John Riley, *How can Government implement the Coalition policy objective of placing 25% of Government IT External expenditure with SMEs*, Information Leadership Challenge Paper 2/2010 (2010) at: http://www.city.ac.uk/__data/assets/pdf_file/0010/79075/CIL_Challenge_SMEs.pdf .

[14] Id. at pp. 4-5.

In addition, possible "changes to EU procurement legislation [may also be] require[d]"[15] to ensure alignment between other EU Member States' interests and those of the UK coalition government (of which recent activities undertaken in Portugal are apparently a prime example),[16] and also to overcome any regional EU subsidiarity and disguised trade protectionism concerns that might exist.[17] And, notwithstanding the EU Commission's recent launch of an inspired Future Internet PPP ('FI-PPP'),[18] were such changes to British Government procurement rules actually to be made, said government would then also need to address any *extra*-European international trade tensions that are likely to arise as the result of that action,[19] including within the context of the 'special relationship'.

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[15] See David Chan, *How the government can award 25% of IT contracts to SMEs*, ComputerWeekly.com (Aug. 18, 2010) at: http://www.computerweekly.com/Articles/2010/08/18/242431/How-the-government-can-award-25-of-IT-contracts-to.htm .

[16] See Trond Arne Undheim, *Portugal's New Interoperability Law,* Trond's Opening Standard Blog (April 13, 2011) at: http://blogs.**oracle.com**/trond/2011/04/portugals_new_interoperability.html .

[17] See Lawrence A. Kogan, *UK's Promotion of Royalty-Free Government Procurement Standards - NOT AS REPORTED*, Mondaq (April 14, 2011) at: http://www.mondaq.com/article.asp?articleid=129510

[18] See Nellie Kroes, *Europe And The Internet Of The Future*, eGovmonitor (May 3, 2011) at: http://www.egovmonitor.com/node/41852 .

[19] See Lawrence A. Kogan, *The Complementarity of Patents and Standards*, presented as Part 1 - of the Panel on the Intersection of IP, Competition and International Trade, at The Inter-Pacific Bar Association 21st Annual Meeting & Conference (Kyoto, Japan April 24, 2011), Abridged Outline at pp. 17-23, available online at: http://www.itssd.org/The%20Complementarity%20of%20Patents%20and%20Standards%20-%20Abridged%20Outline.ppt , and Unabridged Outline at pp. 30-41, available online at: http://itssd.org/The%20Complementarity%20of%20Patents%20and%20Standards%20-%20Unabridged%20Outline.pdf .

The UK Should Not Overlook Dutch FOSS IT Procurement 'Lessons Learned'

Lastly, in gushing that "It will be for other governments to follow the UK's lead and develop their own practical procurement processes and frameworks", Mr. Graham gives due deference to the Netherlands as being one of only two EU Member States (Belgium being the other[20]) that "are already there."[21] In so doing, he indirectly refers to the Dutch Government's Open Standards and Open Source Software (OSOSS) Program[22] which, by 2007, had evolved into an affirmative procurement preference action plan that strongly urged all Dutch federal ministries and subsidiary government bodies to use open-source software based on open standards wherever possible in a national as well as "in a European context – [i.e.,] both, in preparing European policy and in introducing specifications for EU Commission eGovernment awards."[23] Is this what the OFE president now has in mind for the UK?

If so, it is highly recommended that both he and the UK Cabinet, before proceeding any further, prudently review and digest the 'lessons learned' by the Netherlands Court of Audit.[24] At the request of the Dutch House of Representatives, the Audit Court investigated during 2010 "whether the phasing out of closed standards and the introduction of open source software would improve the operation of market forces and save costs for the government."[25] The Audit Court released the results of its investigation on March 15, 2011, in a report entitled, *Open Standards and Open Source Software in Government*.[26] The report "concluded amongst other things that the potential savings the government could [realize] by making more use of open source software were limited", and that the "switch to open source software...does not necessarily... lead to cost savings" at all.[27] The Audit Court reasoned that although there are no *licensing* or

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[20] See Gijs Hillenius, *Belgium and Netherlands Join Forces on Open Standards and Open Source*, Open Source Software Observatory and Repository (April 30, 2009) at: http://www.osor.eu/news/belgium-and-netherlands-join-forces-on-openstandards-and-open-source .

[21] See Graham Taylor, *Government takes action on open technology*, Guardian Professional, supra.

[22] See *Dutch Manual on Open Standards and Open Source Software in the Procurement Process*, Synergy – the IADBC Quarterly No. 5 (Jan. 2006) at p. 12, at: http://ec.europa.eu/idabc/servlets/Doc?id=23833 ; http://ec.europa.eu/idabc/en/document/5244/5584 ;

[23] See *The Netherlands in Open Connection - An action plan for the use of Open Standards and Open Source Software in the public and semi-public sector*, Ministry of Economic Affairs, The Hague (Nov. 2007) at pp. 5, 21 at: http://www.whitehouse.gov/files/documents/ostp/opengov_inbox/nl-in-open-connection.pdf.

[24] See *What do we do?*, Netherlands Court of Audit website (English Translation) at: http://www.rekenkamer.nl/english/Organisation/What_do_we_do .

[25] See *Open Standards and Open Source Software in Central Government,* Report No. 2, from the Netherlands Court of Audit to the Netherlands House of Representatives (March 15, 2011) (English Translation) at http://www.rekenkamer.nl/Actueel/Onderzoeksrapporten/Bronnen/2011/03/Open_standaarden_en_opensourcesoftware_bij_de_rijksoverheid/Rapport_Open_standaarden_en_opensourcesoftware_bij_de_rijksoverheid ; http://www.rekenkamer.nl/Actueel/Onderzoeksrapporten/Introducties/2011/03/Open_standaarden_en_opensourcesoftware_bij_de_rijksoverheid .

[26] See *Open Standards and Open Source Software in Central Government - Background*, Netherlands Court of Audit News (March 15, 2011) (English Translation) at: http://www.courtofaudit.com/english/News/Audits/Introductions/2011/03/Open_standards_and_open_source_software_in_central_government .

[27] See *National Savings with open source software may be limited*, Netherlands Court of Audit Press Release (March 15, 2011) (English Translation) at:

acquisition fees generally associated with open source software, there are, nevertheless, other not insignificant and accumulative fees, such as those relating to software implementation, management updates and maintenance, that governments must incur to ensure the smooth and uninterrupted operation of open source eGovernment IT systems. Moreover, in some other instances, the switch to open source software may even lead to "destruction of capital because the kingdom has many current license agreements."[28]

The Bottom Line

The Dutch Audit Court has spoken and has issued a carefully worded warning that should not go unheeded. The UK coalition government should take note that the procurement of open source software buys neither governments nor taxpayers a cost- and indigestion-free lunch.[29]

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http://www.rekenkamer.nl/Actueel/Onderzoeksrapporten/Introducties/2011/03/Open_standaarden_en_opensourcesoftware_bij_d e_rijksoverheid?informatietype=persbericht .

[28] Id.

[29] Id.