

# Legal context and milestones of the elaboration of the EUPL, consideration of internal and community law

EUPL Workshop  
25 January 2008

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# A long process

- **The origins of the EUPL**
- **The legal gestation of the EUPL**
  - **1st step: assessing the existing FOSS licenses**
  - **2d step: adapting an existing FOSS licence to EU regulatory framework ? NO**
  - **3d step: creating a new EU-oriented FOSS license**
  - **4th step: ensuring the compatibility of the EUPL**
  - **5th step: adapting the license to national laws and languages**
  - **6th step: revising the EUPL ?**
- **Beyond the law: the EUPL will have to be promoted and accepted by the FOSS community**

# The origins

- **EU Commission : IDABC** program (Interoperable Delivery of European eGovernment Services to public Administrations, Businesses and Citizens)
  - **Open Source Observatory (OSO)**
    - Promoting good practice in the use of open source software by public administrations
  - **IDABC develops software applications :**
    - **CIRCA** (Communication and Information Resource Centre Administrator) = Groupware for sharing information
    - **Elink** = middleware (ensuring communication and mediation between heterogeneous applications)
    - **IPM** (Interactive Policy Making) = Internet Based Tool allowing the administration to receive the citizen's feedbacks on policies, and to organize public consultations.



# The temptation of a FOSS License



- **Within the legal mission of IDABC**
- **Software developed by public funds and attractiveness of FOSS to public administrations**
- **Specific objectives**
  - On-going revision and development: sustainability
  - Interoperability
  - Open standards and common tools development
  - Access to source code: transparency, durability and adaptability
  - Security (sensitive information)
  - Non discrimination amongst users
  - Protection against appropriation by third parties
  - ...



# The temptation of a FOSS license



- **Principles of open source: Open source definition**
  - 1. Free Redistribution of the software
  - 2. Availability of Source Code
  - 3. Derived Works and modifications allowed
  - 4. Integrity of The Author's Source Code
  - 5. No Discrimination Against Persons or Groups
  - 6. No Discrimination Against Fields of Endeavor
  - 7. Distribution of License
  - 8. License Must Not Be Specific to a Product
  - 9. License Must Not Restrict Other Software
  - 10. License Must Be Technology-neutral



# The need of an EU FOSS license



- **Primary licensor = European Commission**
  - Compliance with EU-regulatory framework
  - Litigation under EU law and jurisdiction
  - Freedom to adapt the license to EU law (as a Public Authority)
- **Software used by public administration**
  - Compliance with national law
  - License written in national language



# 1st Step: assessing the existing licenses



- **Open Source Licensing of software developed by The European Commission: report of 16 December 2004 – *Unisys/CRID***
- **Analysis of the following licenses**
  - GPL 2.0 (+ LGPL)
  - BSD
  - OSL 1.1
  - Mozilla PL 2.1
  - Cecill: GPL-inspired French FOSS license (French law)

- International dimension of the licenses
  - Law applicable
    - Mostly: US law
    - Cecill: French law
    - OSL: law of the residence of the Licensor
    - EU principle: choice of law or closest connection with the contract (Rome) or consumer's residence
  - Conclusion
    - No real issue
    - When consumers are involved, choice of EU law will impose the application of consumer protection.



- International dimension of the licenses
  - Competent jurisdiction
    - Mostly: determined jurisdiction (US or Paris)
    - OSL: courts of the residence of the Licensor
    - EU principle: choice of jurisdiction or courts of the defendant's residence or closest connection with the contract / Consumer's residence
  - Conclusion
    - No real issue
    - Non-EU defendant: legal uncertainty
    - Attraction to EU courts and ECJ

- International dimension of the licenses
  - Terminology of the license
    - Mostly: US terminology and licensing style
  - Conclusion
    - No real issue for validity of the license
    - But possible adaptation to EU legal notions

- Intellectual property
  - Definition of the rights granted by the license
    - Mostly: US definitions
      - Reproduction, perform, display, « distribution »
      - Licences: copy, use, redistribute
    - EU software directive:
      - Reproduction, translation, adaptation, distribution, (communication to the public)
  - Conclusion
    - No issue of validity
    - Matter of interpretation: Which rights are effectively licensed ?

- Copyleft issues
  - Compatibility of licenses
    - Mostly licenses are incompatible
    - Sustainability of EUPL requires some compatibility
  - Outreach of copyleft
    - Application of license to derivative software
    - Depends on the notion of derivative works, either defined by copyright law, by the license itself
    - EU Law: exclusivity of copyright
  - Conclusion
    - Avoid an overbroad viral effect
    - Uncertainty of legal enforcement of the viral effect

- Liability and warranty
  - Most licenses
    - Exoneration of liability and warranty
  - EU law:
    - No harmonisation except when consumers are concerned or product liability
    - Validity will depend on the applicable national law
    - Entail the nullity of the license ?
  - Conclusion
    - No real issue: balance of contract (specific balance of FOSS licenses)
    - Need to comply with liability principles in national laws

- Acceptation of the contract
  - Most licenses
    - No need for acceptance (licence ≠ contract) based on exclusive copyright
    - Acceptation is induced by use of the software
  - EU law:
    - E-commerce directive: ensure the knowledge and acceptance of the contract
- Conclusion
  - Need to comply with some process to ascertain the acceptance of the license
  - Compliance with e-commerce directive when software made available on-line

# The approximate EU-compliance of existing licenses

- **GPL 2.0 was the most interesting for several reasons**
  - Covers more than 2/3 of the existing FLOSS
  - Copyleft license (required by the EC)
  - Widespread / strong developers community /...
- **However**
  - Drafted under the law of the USA
  - Unwanted effects / Legal uncertainties
  - No possibility to modify the license or adapt it to EU law
  - English only license (no official translations)

## 2d Step: adapting an existing license ?

- Pros
  - Already known and used license
  - Tailored to EU needs and requirements
- Cons
  - The adaptation of main FOSS licenses require the authorisation of their authors
  - Absence of a complete freedom to adapt / modify the license





# 3d Step: creating a new EU-oriented FOSS License



- **Pros**
  - Drafted under UE law
  - Customized to meet the Commission's needs
  - Total control on the license
    - Copyright in the license
    - Evolution and upgrades
    - Official translations (to every EU member states' official languages)
- **Cons**
  - Creating a new license = contributing to the « licenses proliferation » issue
  - Acceptation by the open source developers community
  - Compatibility issues



# The elaboration of an EU license



- Decision to create a EU license
- First skeleton in 2004 Report
- Comments on the First Discussion Draft EUPL v0.1 :  
PUBLIC Consultation
  - Draft submitted to an expert group, mainly composed of experts from the member states' administrations.
  - Main comment :
    - We indeed need a license that is drafted under EU law, (and this is also true for other software than the Commission's)
    - We need a **GPL compatible** license
  - Other comments on drafting or legal issues...  
(technological neutrality, gender neutrality,...)
- Presentation of the Draft License in June 2005
  - ⇒ [ Outcomes of the public consultation about EUPL – report of 30 nov. 2005 - *Unisys*]



**The EUPL is born !**



# Adoption of the EUPL V1.0



- **EUPL adopted on 9 Jan. 2007: Decision C(2006) 7108**
- **Released in 3 languages :**
  - French
  - English
  - German
- **CIRCA and IPM software released under EUPL V1.0 on Feb. 2007**



# 4th Step: Ensuring the compatibility of the EUPL



- **Report on compatibility issue and solutions (CRID - oct. 2006)**
- **Compatibility provision (added in EUPL V0.2 (**Draft Version**))**
- **Annex of compatible licenses (added in EUPL v1.0)**

# 5th Step: adapting the license to national laws and language

- **Translation** of the license into the 20 other official languages of the EU.
  - First translation made by the EC translation services
    - Reviewed by national experts
- **Process of national porting of the licenses**
  - Adaptation to national language
  - Adaptation to national laws



# National adaptation



- **Issue:**
  - **Homogeneity of the national versions v. Compliance with the national laws**
  - **Key questions => Modification of the generic license ? => new porting process**

## 6th Step: revising the EUPL ?

- Considering the **upgrading** of the license
- The translation work raised new issues about the drafting and some effects of the license under different national laws
- Updating the compatibility list (GPL3 ?)
- Addressing other specific issues (asp, version clause,...)

⇒ **CONCLUSION : ongoing process**



# Towards the adoption of the EUPL by the FOSS community

- **Growing-up after the in-vitro conception**
  - License conceived in a laboratory, but in dialogue with members of the FOSS community
  - License tailored for some software developed by the EU Commission
  - Next and indispensable step:
    - Acceptance and effective application by the FOSS community
  - Advantages: European dimension, multiple languages

**Becoming one FOSS license amongst others...  
And not only a legal curiosity**

**This is a completely different story**



# Thank you for your attention !



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