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**Colloquium on government's software procurement policy
19 April 2011**

REPORT

The Free Market Foundation hosted a **colloquium on government's software procurement policy** from **09h00-12h00** on **Tuesday, 19 April 2011**, at the **Centre for Intellectual Property Law** (a joint initiative with Adams & Adams), Faculty of Law, **University of Pretoria**.

The colloquium's **objective** was to contribute to the formulation of a software procurement policy that secures the best possible outcomes. It was a **closed session** amongst a few experts brought together to exchange ideas and experiences and was held according to **Chatham House Rules**, which are that what is said may be quoted or passed on to roleplayers, but that nothing may be attributed to an individual source.

The in-depth discussion focussed on two aspects of government's software procurement policy:

- is it constitutional?
- does it make economic sense?

The following **documentation** was disseminated prior to the colloquium:

- *Policy on Free and Open Source Software use for South African Government (FOSS)*, Department of Public Service & Administration
- *Constitutionality and the South African state's software procurement "policy"*, by Robert Vivian
- *What should government's software procurement policy be?*, by Leon Louw
- *Choice in government software procurement: A winning strategy*, by McLean Sieverding
- *South Africa and FOSS: A mixed environment*, by Josh Lerner & Kerry Herman
- *The secret of commingled code*, by Josh Lerner

The following **documentation** was disseminated after to the colloquium:

- *Free/Libre & Open Source Software and Open Standards in South Africa*, National Advisory Council on Innovation Open Software Working Group

Programme

- 08h45-09h00 Arrival and registration
- 09h00-09h20 **Robert Vivian**, Professor of Finance and Insurance, School of Economic and Business Sciences, University of the Witwatersrand, *Constitutionality and the South African state's software procurement "policy"*
- 09h20-09h40 **Leon Louw**, Executive Director, Free Market Foundation, *What should government's software procurement policy be?*
- 09h40-10h00 Tea break
- 10h00-12h00 Discussion

Participants

Partner	Spoor & Fisher (patent attorneys)
Department of Procedural Law	University of Pretoria
Senior Consultant	Adams & Adams (patent attorneys)
Head: Procurement	University of the Witwatersrand
Chief Security Advisor	Microsoft South Africa
Executive Director	Free Market Foundation
Public Sector Director	Microsoft South Africa
Director: IP & Technology Transfer Office	University of KwaZulu-Natal
Researcher	Meraka Institute, Centre for Scientific and Industrial Research
Department of Mercantile Law	University of South Africa
Head: Science and Technology	Africa Institute of South Africa
Copyright specialist	Adams & Adams (patent attorneys)
Senior Director	DM Kisch Incorporated (patent attorneys)
Professor of Finance and Insurance	University of the Witwatersrand

Comments & thoughts (post-presentations; in no particular order)

FOSS policy

- Government's guiding principle when the FOSS policy was written was that South Africa is an emerging economy and that skills need to be developed.
- The context is about development.
- Is it not government's mandate to manage procurement for the public good by, for example, getting software at a lower price? What about preferences such as BEE? South Africa is in a pro-development space.
- Policy must balance issues such as BEE.
- Government's policy is essentially that if a department can use FOSS, it should, ie preference should be given to FOSS where it works.
- FOSS policy states that unless PSS is significantly superior, departments must favour FOSS; ie does not preclude PSS.
- Policy being interpreted as overwhelmingly pro-FOSS; FOSS is actively preferred by those in government, to the detriment of other players in the software space.
- Who enforces policy? Don't yet know cabinet status of policy; not yet formal, but some departments already trying to comply; no real enforcement.
- FOSS document is called "policy" as it was passed by cabinet; government officials will act on the document.

- Note: There is a second longer document that goes with it (disseminated after the colloquium).
- Longer document acknowledged that the policy is not about free software; the biggest cost of FOSS is maintenance and support.
- Policy says if Microsoft develops code for government, government must make it available as OSS. Contradicts commercialisation section?
- Use of terminology very fuzzy and uninterpretable; Government decisions must pass rationality test; Not actually free; Must buy support for OSS, then no longer free; Without tender, cannot tell how “free” ie actual cost; Government obliged to consider procurement on merits; This includes full cost including training, support, upgrading, etc; Open Source Software is not free!
- A strategy rather than official policy.
- Should not discuss merits of OSS vs PSS; should discuss quality of policy document.
- Even if document has no real meaning, it is still being policed. On what basis?
- Badly drafted document gives more problems during implementation.

IPR Act

- FOSS policy was adopted before IPR Act.
- IPR Act 2008: Any new development funded by government will be the state’s property. If they commercialise it, it is theirs.
- Examine implications of FOSS in line with IPR. IP law overrides any other statutory provision. Few companies will be willing to develop something for state and sign over their IP.
- Reality is a pro-development policy; FOSS is viewed as pro-development; Is it? IPR Act supersedes the FOSS policy document.
- IPR Act says IP owned by state must be commercialised ie not given away free.
- Any “transaction” by state must be commercial according to Act.
- Act is not about FOSS; policy document is.

Implementation

- Written reasons must be given for administrative decisions.
- Implementation and interpretation: Nothing wrong with policy if taken at face value ie if you can get FOSS, use it. Problem: Policy says FOSS is good and must be given preference. BUT when you have the platform and start developing it, it ceases to be FOSS.
- In government biggest difficulty with transition to FOSS, was technicians not wanting to reskill.
- Experience with speaking at government functions, all using PSS. Policy is bad and debatable, everyone ignoring.
- Guess 1: 90% of government departments still using PSS ie policy not being implemented. Is desire to get last 10% into PSS “greedy”?
- Guess 2: 50% of government departments are using OSS (or departments are using 50/50).
- In universities, for innovation reasons, science departments, for example, are using OSS for development and customization; Very mixed use in academia.
- FMF interested because bad idea to have government policy that you defend by saying it is not being implemented. Government should ideally have few policies, all taken seriously.
- Interrogate the “why?” re FOSS policy: economic and humanitarian agendas, etc; Diabolically opposed arguments: maximising social value vs. commercial value; Huge market exists re patent and IP trade ie trading in patents as opposed to software itself; *Burning the Ships* author talked about licensing those who add to existing patents; What is motivation? Do FOSS developers want a slice of this licensing option?

Customisation / ownership / commercialisation

- Note: You only own section of OSS you have changed / customised.
- Government not in business of selling software, so should be no problem in giving it your source.

- No existing OSS is suitable. It is used as a platform to develop further software for specific needs.
- Real issue with FOSS and maybe what was behind policy; Because FOSS is not commercial when government calls for tenders, it is not one of the options considered; Only commercial appears in tenders; Perhaps policy simply says bear FOSS in mind ie FOSS exists and should be considered too; As taxpayer want government to consider best possible options.
- Why spend taxpayer money and then give customisation away for free? Not free to taxpayer
- eg pebble bed reactor developed at taxpayer cost, given away and no-one benefited.
- Developers will refuse to develop for government because they no longer own the product developed especially for government; Funding is drying up for universities; Universities fall under government in terms of ownership re customisation.
- In private sector even customised work is still owned by developer not by client, unless there is a contract to the contrary.

International experience

- In other countries the state says departments *may* use FOSS; in South Africa the state says departments *must* use FOSS unless PSS overwhelmingly superior.

Innovation

- If South Africa wants to compete globally, it needs more code writers.
- Software development usually requires more than one developer; developers would prefer free access to existing code, but will pay to “close the gap”.
- Technical misconception, not about choosing one system over another; many existing PSS are built on OSS.
- OSS is a characteristic; even Microsoft has “shared source” which is OSS.
- Analogy: Buying a car with a bonnet sealed shut – can’t service it yourself, you may buy any car but demand the characteristic of an accessible bonnet.
- OSS is about innovation; when additions are done to code within government, who owns it? State would own it. Not highlighted by policy document.
- DTI wants South African based software companies to compete. How is this possible without patents / copyright / licences?

Tenders

- Tender process is prejudiced against FOSS; FOSS has no owner to tender; this community is not in commercial mindset therefore do not put in tender.
- FOSS is copyrighted! If FOSS community wants government to use FOSS, it must put in a bid – how else can government consider which option is best? ie Must tender, and must win the tender.
- How can you force someone to use a product they cannot consider and compare?
- Is FOSS prejudiced by tender process? If someone does not tender, that is their choice.
- Only implementation and support re FOSS goes on tender, not FOSS itself; ie only get offered FOSS with commercial factor, for example, hardware or consultation.
- PSS can’t win on probabilities or on merit; it must be overwhelmingly superior.
- What is total cost of ownership and what is risk? Can get locked into vendor, for example.
- Need a complete cost-benefit and risk analysis to make a real decision.

Constitutionality

- State cannot discriminate “unfairly”; preference must be shown after tender process.
- Policy document prejudices choice between FOSS and PSS, ie not neutral – this is unconstitutional.
- Not unconstitutional because there is a communicated preference; unconstitutional because forced by policy to opt for FOSS.
- Government can state preference, but this should happen after the tender process.

- Is document badly worded rather than unconstitutional?
- Can only decide if constitutional if can define terms clearly; Procurement requires terms that are justiciable.

Security

- Policy wants source code (whether free or not) to be examined by someone government trusts; Policy on track, but failed to define what FOSS means; All licenses vary, but are grouped under one banner.
- Government's real intention re FOSS was independence and security! Suspicious of Microsoft, for example, because perhaps want to send information to CIA! Microsoft says government can check source and tighten it up but not add to it. Microsoft not opposed to OSS, because good for development.
- Market wants to know who they can sue for problems. If South African government get OSS from Microsoft and gives it to China, market not happy.
- Cyber security policy not yet enacted; Bandwidth increasing; Global IT report: South African banks rated high, education rated very low.

Contradictions and questions

- Commercial companies can be penalised for offering free software, seen as anti-competitive.
- Question: What is the boundary of distribution by state?
- Software patents not recognised in South Africa?
- Deniability wanted within government departments if forced to take something they are not sure works.

Some conclusions

- FMF not biased for or against FOSS or PSS; Say only that government should not prefer one over another prior to tender process; FMF would argue against government policy even if it said PSS must be preferred.
- How do we balance FOSS and PSS? No need for government to favour one over another; let the market sort it out.
- How to embrace FOSS and PSS to grow software development and utilisation in South Africa?
- Perhaps the policy is a good idea, badly articulated / implemented.
- Need to go back to drawing board – what does the state really want to achieve and how?
- Whatever the solution, it must be fit for purpose.

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