isa

*Interoperability Solutions
for European Public Administrations*

STANDARD "SHARING AND RE-USING" CLAUSES FOR CONTRACTS

Contractual Clauses for Service Procurement

JOINING UP GOVERNMENTS

This report / paper was prepared for the ISA programme by:

TRASYS SA[1]
in the scope of the specific contract 007743 of framework contract DI/6772 in between
STRATIQO and DIGIT
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[1] TRASYS is a member of the STRATIQO consortium

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1. INTRODUCTION

1.1 AIM OF THE DOCUMENT

The aim of this document is to propose common "standard" clauses for contracts, which public administrations could use during procuring services.

Clauses could be useful and are developed both for contracts related to the :

1. the development of new IT tools that may be re-used and/or shared later,

2. re-use of already available IT tools possibly through customization.

1.2 CONTEXT

This document is deliverable D2.1 is produced in the scope of ISA Action 4.2.5. "Sharing and re-use Strategy" [1].

The aim of this ISA action is to develop a holistic approach to sharing and reuse across border and sectors with a view to helping public administrations all over Europe to share and reuse solutions related to public services delivery in an efficient and effective way. A common strategy is to be defined together with the governance, the processes and the instruments to optimise the potential of sharing and reuse activities and increase the savings they can bring to public administrations.

Task 2 of the action aims at identifying and implementing 'quick wins': actions which can be implemented with little effort and which can have a significant positive impact on better sharing and re-use of different assets. An initial number of such quick wins have already been identified by the Commission based on previous studies and experience, such as these standard clauses for contracts.

1.3 REFERENCES

[1]. http://ec.europa.eu/isa/actions/04-accompanying-measures/4-2-5action_en.htm
[2]. Guideline on public procurement of open source software, IDABC (R.A. Ghosh, P-E. Schmitz and al. – June 2010) https://joinup.ec.europa.eu/sites/default/files/studies/OSS-procurement-guideline-public-final-June2010-EUPL-FINAL.pdf
[3]. Guide for the procurement of standard-based ICT / Elements of Good Practice – (European Economics 23 March 2012) http://cordis.europa.eu/fp7/ict/ssai/docs/study-action23/d3-guidelines-finaldraft2012-03-22.pdf
[4]. IDA POSS Study (*P-E SCHMITZ, S. CASTIAUX,* 2002) http://ec.europa.eu/idabc/servlets/Doc740b.pdf?id=1977

[5]. "Experience of introducing the EUPL in ISTAT" (Carlo Vacari 2010) presentation slides (in Italian) : http://fr.slideshare.net/vaccaricarlo/introduzione-eupl-in-istat

[6]. EUPL - European Union Public License v1.1 available at http://joinup.ec.europa.eu/software/page/eupl/licence-eupl

[7]. Decision of the European Ombudsman closing his inquiry into complaint 438/2007/(TN)RT against the European Commission http://www.ombudsman.europa.eu/cases/decision.faces/en/5418/html.bookmark

[8]. Open Source Initiative website http://www.opensource.org/docs/definition.php

[9]. Free Software Foundation website http://www.gnu.org/philosophy/free-sw.html

[10]. European Interoperability Framework (European Commission, 2010) http://ec.europa.eu/isa/documents/isa_annex_ii_eif_en.pdf

[11]. Estonia – Software Framework (2009) http://www.riso.ee/en/pub/2009it/pdf/Yearbook_ENG.pdf , (page 38)

[12]. Spain – Royal Decree 4/2010 http://administracionelectronica.gob.es/recursos/pae_000002017.pdf

[13]. Malta - Government policy GMICT P 0097:2012 (April 2012) https://www.mita.gov.mt/MediaCenter/PDFs/1_GMICT_P_0097_Open_Source_Software_v2.0.pdf

[14]. NOiV Nederland Open in Verbinding https://www.ictu.nl/archief/noiv.nl/index.html

1.4 APPROACH

The approach for elaborating this deliverable is pragmatic and aims at providing concrete advice based on the various references in the area. The clauses and advice in this document have been developed in line with previous work; the aim is not to be innovative and original, but rather to provide a concrete synthesis of studies done so far.

Section 2 provides an introduction to sharing and re-use of public software.
Section 3 presents standard clauses for sharing and reuse meeting the following distribution requirements:

- The right to redistribute its own software (when written by or exclusively for the authority)
- Reusing third parties' IPR assets (integrating "received" open source software in the public authority solution)
- Reusing and distributing the documentation (and other "non-software" knowledge elements)
- "No Vendor Lock-in" clause: how to stay free to adopt a new solution and to contract with another provider, as the case may be.

For a more in depth view, it is recommended to read the following studies:

- Guideline on public procurement of open source software, - a study done for IDABC (R.A. Ghosh, P-E. Schmitz and al. - June2010), **Error! Reference source not found.**

- Guide for the procurement of standard-based ICT / Elements of Good Practice – (European Economics 23 March 2012) **Error! Reference source not found.**

1.5 DISCLAIMER

This document includes examples of text that could be used in tenders to achieve various aims. We emphasise that the examples provided are for illustrative purposes and that an adaptation to specific cases may be necessary. Readers of this document are therefore recommended to seek legal advice where needed.

2. PUBLIC SOFTWARE SHARING AND REUSE

Public sector develops software. Beyond the immediate need of the public authority, this software represents an asset that could be reused (i.e. by other public sector agencies, possibly located in other States).

Software reuse means "Distribution under a licence", because software is protected by copyright and without the authorisation of the copyright owner, any use (including modification, adaptation, and re-distribution) is copyright infringement.

As stated in the 2002 IDA POSS Study [4] defining the roadmap for the later OSOR.eu and JOINUP.eu, the open source model of licensing is especially convenient for Public sector releasing software:

> *"Why "Open source"? Because the software produced by or for administrations are usually not "industry packages" that can be proposed "as is" to other users with the idea of making profit. In particular, Europe is a territory of diversity (languages, regulations, cultures etc.), and a software developed in France for example, will not be usable as is in UK or in Sweden: the French administration's remit is to respond to the needs of its own citizens and not to make business with a generic product that can be sold "out-of-shelf" across the world. As a consequence, the reuse of such software is depending on the revision and the adaptation of its source code.*
> *From these two prerequisites, the supposed absence of commercial purpose regarding license fees and the necessity to deliver the software with his code in order to adapt it to local realities prior to implement and redistribute it, the idea to adopt the "open source model" comes naturally".[4]*

Allowing the reuse of software by third parties is not a unilateral "gift" in the sense of a "deprivation": on the contrary, increasing use and sharing of software has the effect of augmenting its value: more users means more developers, more experts, more potential for improvement, more need and interest for training, more service providers interested to become competent, technical alignment of other initiatives on the published solution (that become a reference), and reduction of cost to make it interoperable (i.e. between Member States at European level).

As explained by Carlo Vaccari [5] at the adoption of the EUPL licence by the Italian National Institute for Statistics (ISTAT), the relevant parliament commission concluded that:

- The action of sharing of public sector software under open source conditions (allowing reuse and improvement) is not a "cession" as there is no deprivation or loss of IPR assets;

- The general rule prohibiting to give away "for free" public assets to third parties is not applicable to open source sharing;
- On the contrary, the action of sharing correspond to general requirement of efficient management of public interest, as the administration may expect – at least potentially – a reduction of development cost and support (for free or at low cost) if an active community of third party developers contributes to the software;

All public sector software is not aimed for sharing and redistribution: some software is too specific in terms of business needs, or there could be security requirements not implemented (*Note*: Some security specialists consider that source code transparency and multiple eyes scrutiny provide better guarantee of quality than source code "obscurity"). Therefore the decision for sharing / allowing others to reuse and localise the source code is not an obligation and needs to be taken on a case by case basis by the relevant authority.

However, sharing or redistribution is very often "potential", in the future. In the European context where many National technical implementations are resulting from common directives or regulations, sharing and re-use should progressively become best practice.

There are two different cases:

1. Public sector produces software (i.e. for the management of hospitals, of drivers licences, of public libraries, of cemeteries etc.) and this software could be reused by other stakeholders (i.e. in another Member State)
2. Public sector uses existing available software (i.e. components found on Internet) to build its own solutions: by reusing the downloaded component "as is", by modifying it (i.e. localisation in national language), or by integrating it in a larger solution that combines several software components (i.e. a web server, a user authentication tool, a content management system, a search engine etc.)

In fact, the two cases are different in theory, but produce similar effects and issues in practice: when a public administration produce original software, it is often (all or part) written according to a service contract with a provider; it happens that the produced code is rarely 100% written from scratch, but that at least some parts are reused from previous developments.

If not foreseen by an appropriate contractual clause, it may be that software effectively purchased by administrations cannot be shared or re-distributed, for various reasons:

- The software providers' licence terms are proprietary (it contains limitations that restrict the number of users, the number or power of computers, the geographical area where it can be installed, the redistribution to third parties).

- The software providers' licence terms are open, but some of the standards[2] implemented in the software belong to third parties, are patented and their use is not royalty free (RF). The software provider has purchased some licence related to these standards, i.e. according to "fair, reasonable and non-discriminatory" (FRAND) conditions, and has therefore the permission to use it in the delivered solution, but this does not mean that the public administration has the same permission in case and when the solution is re-distributed. The open source distribution is – by nature – incompatible with managed royalties, because anyone can reuse and redistribute it. Therefore it is not compatible to apply open source terms to software as soon the use of it is submitted to managed royalties, even FRAND.

- Licence terms are open source, but the provided solution is made from various components and the provider has not paid attention to the licence compatibility of these components. The resulting solution can be used internally by the ordering authority, but it cannot be re-distributed to third parties, because of licence conflicts.

- Guarantee or maintenance terms, if any, are not compatible with sharing and reuse. Example: the provider states that any modification of the source by a third party (i.e. by adding a new module) is not allowed or will cancel the guarantee (even if there is no relationship between the new module and the discovered bug).

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[2] In this paper the term "standard " is used when referring either European standards pursuant to EU Directive 98/34 or global ICT standards established by ICT industry fora or consortia.

3. DISTRIBUTION REQUIREMENTS

3.1 THE RIGHT TO REDISTRIBUTE

3.1.1 Software distribution

Obtaining the full rights to re-use or redistribute the ICT assets procured, such as software, is an important consideration for public authorities in the interests of making the best use of public funds.

When an ICT application that is developed or put together to meet the needs of a public authority could be distributed, reused, improved, modified, translated in another language or localised for another country (at least potentially or in the future), public authorities should require from their ICT suppliers the licensing conditions allowing them to do so.

It is better that opportunities for re-use or sharing are identified before the procurement process. However, this is not always possible: the sharing opportunity (and the corresponding decision) may appear years after the initial launch of a call for tender, and after the developed software has demonstrated utility. The opportunity applies to sharing or re-using of both existing and future assets. It is recommended that the necessary ICT standards and licence conditions can be identified and incorporated into the procurement process.

In case the supplier does not write the whole application source code, but combines or adapts existing components covered by various copyright licences, the supplier should confirm that these licences are compatible with allowing the public authority to distribute the application for the above purpose. An example of how such licence conditions could be requested in tenders is provided as follows:

Clause 1:

> *"The supplier will grant that the purchasing authority has the right to distribute the delivered application under the European Union Public Licence (EUPLv1.1 or later) or any licence(s) providing the rights stated in the article 2 of the EUPL."*

The rights stated in the article 2 of the EUPL [6] are those corresponding to the "Open Source" definition. It is not recommended to request that the delivered application will be provided "under the EUPL" only, because it may be that the provider wants (or has to) to use another similar licence. It is not always recommended to request that the purchasing authority must have the right to "distribute it under the EUPL", because in case some part of the delivered application are already covered by "copyleft" or "share alike" licences (i.e. the GPL) there is an obligation to reuse this licence.

Therefore the above formulation "*or any licence(s) providing the rights stated in the article 2 of the EUPL* " is neutral regarding the outbound licence.

Why not a simple reference to "Open Source" or/and to "Free Software"?

A reference to "Open Source" or "Free Software" is often wrongly interpreted as "for free / gratis". It is vague[3] if it does not refer to the ten principles of the "Open Source Definition" (OSD) which are published by the Open Source Initiative (OSI) on their web site[8]. For philosophical reasons, another organisation, also based in the USA, the Free Software Foundation (FSF), proposes an alternative "Free Software" definition[9], based on four freedoms. These "competing" definitions (although compatible) are maintained by these relevant NGOs on their websites (that are published in the United States of America) and in English language only.

It may be possible to import and translate the OSI definition, or the Free Software Foundation definition (or both definitions, merged and adapted?) into the European legal framework, but – as long this is not done – the EUPL is the sole document that is published by the European Institutions, is under their control (will not be modified without their intervention), is compliant with both the OSD and Free Software definition and has already a working value in all EU languages. It is un-ambiguous and practical to use it as reference in all relevant cross-border procurement cases (i.e. a German administration dealing with French, Italian and Spanish providers).

The EUPL is compliant with the European copyright law and with other aspects of the EU legal framework (moral rights, warranty, liability, applicable law, venue) and is certified as 100% compliant with the "Open Source Definition" (by Open Source Initiative) and with the "Free Software" definition (by the Free Software Foundation).

The EUPL is part of the European Interoperability Framework [10], and is also part of some Member States' interoperability frameworks or policies:

- Estonia – Interoperability Framework (2009) requesting that software developments commissioned by the public sector should be freely used on the basis of the EUPL licence [11].
- Spain - Royal Decree 4/2010 stating that "*the EUPL will be procured, without prejudice of other licences that can guarantee the same rights*…"[12]
- Malta - Government policy GMICT P 0097 v2 stating that "*Government shall actively consider and pursue the adoption of Open Source Software (OSS) that is cost-effective and non-disruptive*" "*Government shall accept Open Source licences that are in line with the Open Source Definition of the Open Source Initiative (OSI) and that are already approved by OSI. The EUPL, […] licences are deemed to conform to the OSD* »* [13].
- The Netherlands – NOiV the former organisation supporting the government in "implementing the open source and open standards policy" - provided a licence wizard recommending the EUPL for software owned by government. [14]

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[3] This was recently illustrated by a decision of the European Ombudsman about the procurement process (without public tender) of a new platform for CIRCABC. The Commission said that this component was "Open Source", but the complainant stated that it was not "for free" and that the XPL licence obtained at procurement time was not "approved by the OSI". Therefore, the Ombudsman concluded that there were doubts that the component was "Open Source" (which is indeed an OSI trade mark!). It does not appear from the Ombudsman decision (point 56 & 57) [7] that the effective compliance of the XPL licence with the ten OSD conditions was checked.

Clause 1 above, which refers to the EUPL, is simpler that the alternative formulation (which is recommended in the OSS-Procurement Guidelines [2] - page 52):

> *The ownership of the supplied software, including all associated intellectual property rights, is to be transferred to the contracting agency with no restrictions on what the contracting agency may do with it; OR, the software is to be supplied to the contracting agency under the following terms and conditions:*
>
> 1. *the software may be used by the agency for any purpose the agency sees fit*
>
> 2. *the contractor will provide the complete source code and documentation for the software so that the software can be studied by the contracting agency or any third party or parties of its choice*
>
> 3. *the software may be modified by the contracting agency or any third party or parties of its choice*
>
> 4. *the contracting agency may distribute the software, with source code and modifications, to any party of its choice, under terms and conditions allowing such parties the same freedoms retained by the contracting agency, as described above, to use, study, modify and redistribute the software.*

3.1.2 Maintenance of Open Source Communities

Especially in case the decision to distribute the software under open source licensing conditions (i.e. under the EUPL, the GPL or similar) is taken from scratch or at early stage (and not only as a "could be" in the future), the Contracting authority should complement licensing by facilitating an efficient open source "ecosystem" which must be based on an active community of contributors who will continue to support the software and to bring evolutions to it once developed. This support may be organised via contributors agreements (contracts between the project owner and developers), but is still in most cases based on volunteer work, accepted leadership, meritocracy and the simple pleasure to realise something nice together, working better than the "big software industry" and – possibly, eventually – earning some money through services later.

The support to developers communities is partly provided by making available efficient technical platforms (Joinup.eu, SourceForge etc.), but this also is a very little part of the global effort: project management, hours communicating and exchanging mails, organising meetings, discussion forums, presence in events like the FOSDEM for recruiting contributors etc.

A frequent reproach to public sector when releasing OSS is the lack of experience and care for community building.

It may be an illusion to believe that any "hard obligation list" to create and maintain a supporting developers' community could be "imposed" to a contractor alone. The supporting community must be organised between at least three categories of actors:
- Users and developers from the public administration itself;
- Developers from the initial contractors (the first experts);

- Third party volunteers and new comers who desire to become contributors (sometimes to gain experience allowing them to propose services later).

As long imposing a very precise list of obligations is not opportune or possible and realistic (because it is depending on the case, scope and common interest for the developed solutions), call for tenders should request from contractors a roadmap and a proposal for supporting a developers community after the initial development and – depending on the requested duration of support – after the planned guarantee period.

Therefore, while receiving open source conditions - meaning the right to redistribute the software without restrictions, and for receiving later support, the awarding authority must ensure a specific budget (i.e. – the amount that could be dedicated to corrective and evolutive maintenance) for community support.

A "soft / flexible obligation" will be created by requesting from the original contractor to detail its own contribution to the community in the contractual proposal. The quality of the proposed approach will highlight the contractor experience and facilitate selection.

Clause 2:

"In its proposal, the supplier will detail how it will:
- *Organise, animate and support a long term developers community in order to bring new developments, corrections and improvements to the delivered software or solution;*
- *Encourage contributions (to the software or solution) from the public authority itself, from its own staff and from third parties;*
- *Organise technically and legally the collaborative work of the community;*
- *Combine its own software guarantee – if any – with the work provided by this developers community;*

"Organise technically" covers for example the technical platform (the forge), the repository (for example Joinup.eu) and other ICT infrastructure.

"Organise legally" covers for example a contributor agreement that will be implemented between the project owner and contributors, in case it would be necessary

3.2 REUSING THIRD PARTIES IPR ASSETS

It is important to ensure that the way in which suppliers licence the intellectual property rights (IPR) embedded in the solutions they offer meets the needs of the procuring organisation. This includes potential patents and in particular the IPR of the standards and specifications used.

Because different solutions will include different IPR licensing models (based on the type of standards and components used) public authorities should be aware that requesting certain licence conditions that meet their needs may limit the range of solutions that can be offered. For example, requesting the ability to re-use software may restrict solutions incorporating proprietary standards or non-open source software.

Licensing models relating to individual standards should also be checked, and the licensing of the standard will affect its use under different business models. As an example, FRAND

licensed standards are not compatible with the Open Source licensing model, as soon as the standard copyright owner requests to manage royalties (i.e. a fee per copy). Therefore it is essential that the authority checks that the standards they request will not unintentionally limit the legal regime of solutions that can be provided – in this case, the open source solutions.

3.2.1 General provision covering IPR assets

The contracting authority should be aware of the IPR relating to all other parts of the solution provided by the supplier, in order to ensure that the authority can use the results of the contract as it wishes. An example of text that could be used in tender documents to specify ownership of IPR is provided as follows:

<u>Clause 3:</u>

The ownership of all copyright, trademarks, trade names, patents, and all other intellectual property rights ("IPR") specifically developed and implemented in the provided system or solution: graphics, website layout, surface content, logos and devices, and the rights to the domain name(s), manuals, training materials or presentations, shall be transferred and remain vested to the contracting authority.

At the sole exception of IPR licensed to the contracting authority under licence(s) providing the rights stated in the article 2 of the EUPL, the contracting authority, as the acknowledged owner, shall be and remain the sole owners of all IPR in all data, material, documentation or information inputted, loaded or placed onto the provided system or solution in any manner, reports generated by or from the system, material or documentation placed on the system, outputs, and end-products.

The successful tenderer will be required to indemnify the contracting authority against third party claims relating to the awarding authority use, re-use, re-distribution or licensing of any part of the provided system or solution (software, hardware or intellectual property).

It was important to leave some exception for licensed assets (for example, if the supplier uses a content management system like "Drupal" or any other existing solution that could not be transferred exclusively to the contracting authority), provide the authority receives full rights to reuse, modify, distribute etc.

3.2.2 Specific provision on standards

It is important that standards which are named in the functional specifications have been screened beforehand for their openness attributes prior to the tender procedure. This may have been done at the European, national, regional or local level (some Interoperability Frameworks publish a list of accepted standards), or by the procuring agency itself[4].

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[4] For example using the CAMSS methodology, see https://webgate.ec.europa.eu/fpfis/mwikis/idabc-camss/index.php/Main_Page

By "standards", we include also semantic assets like meta-data, taxonomies aimed to categorize information or thesauri (hierarchic tree of concepts related to a specific domain, highlighting relationships between these concepts)[5]. It is important that these assets can be freely adapted to the needs (while some copyright owner restricts any modification/extension of their semantic assets) and redistributed.

If only named standards are being allowed for use, there is no need for the tender to include requirements specifying the openness of standards. The named standards have been assumed to meet any procurement requirements.

However, if interfaces, protocols or formats are defined in functional terms in the technical specifications, and if specific standards are not expressly mentioned as described above, openness requirements may need to be included in the tender in order to ensure the openness of any implementation.

As the distribution making open source terms possible ("*providing the rights stated in the article 2 of the EUPL*") is not compatible with the management of royalties, the standards must be royalty free in case the contracting agency decides for sharing or re-distribution.

This does not exclude the payment of an initial lump sum covering such rights. As it is the case for software, dual licensing of the same standard is possible: FRAND for proprietary implementation and RF for free/open source implementations. Indeed, the idea that, for being non-discriminatory, licensing must be the same for everyone does not mean that open source implementations cannot be granted a royalty free licence unless everyone is. This is because free software is not a group of persons (even if various communities, FSF, OSI etc. exist), it is not a technology, not a product. As this was confirmed by the constitutional court in a Member State[6], it is a legal regime: anyone can implement it and attaching specific conditions to it is not discrimination.

Clause 4:

> *The supplied solution may implement a number of standards, interfaces, protocols, formats or semantic assets (i.e taxonomies, thesauri), each of which,*
>
> 1) **In case the standards are functionally described in the specifications:**
>
> > *- Are referred to in the Technical Specifications as Standards #1 [#2, #3 etc].*
>
> 2) **In all cases:**
>
> > *- As implemented in the supplied software, must have the following properties:*

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[5] The Joinup published semantic project ADMS, aimed for software project description and categorisation included 9 taxonomies provided with multilingual labels in 7 languages (Intended Audience, Natural Language, Operating System, Programming Language, Licence Type, Status, Topic, User Interface / Graphical Environment, Publisher Type)

[6] The Italian constitutional court - 22 March 2010, in a case where the procurement law of a specific Italian Region was giving explicit preference to open source

1. *It is implementable by all potential providers of equivalent technologies.*
2. *The past and future development of the standard is open and transparent.*
3. *It can be reused without restrictions and royalty free in the framework of a distribution providing the rights stated in the article 2 of the EUPL v1.1 or later.*

3.3 DOCUMENTATION

It is important that the tender documents include provision for knowledge handover at the end of the contract period. This is a way to avoid lock-in with regard to documentation and services that are provided.

Clause 5:

> *All documentation needed in order to provide full support for the supplied solution must be made available to any subsequent provider. Any costs for preparing such documentation shall be borne by the supplier of the supplied solution.*

3.4 "NO VENDOR LOCK-IN" CLAUSE

It is important that procurement decisions do not lead to organisations being unintentionally tied to certain products or suppliers (**"Vendor lock-in")**. The ability to change products or suppliers should be incorporated into one of the procurement options (as this requirement may have cost implications for the solutions procured).

This is particularly important for contracts for ICT services (e.g. for the development and/or maintenance of IT systems). Suppliers, such as system integrators, who develop and manage custom-made systems have the possibility to retain most of the information about the system and make it very difficult to migrate to another supplier in the future to maintain or upgrade the system.

The recommendation is to avoid where possible, commissioning excessively bespoke and complex solutions as these are both very costly and increase the risk of supplier lock-in.

This clause is similar to clause Nr. 4 (4 or 6 can be used, it is not necessary to use both).

Clause 6:

All standards, interfaces, protocols, formats or semantic assets implemented by the supplied solution and required for the full use of all data created or maintained using the supplied solution during the lifetime must be made available to providers of equivalent technologies who may be awarded a subsequent contract, with no additional costs.

Any costs resulting from the lack of availability, licence restrictions or royalties related to these standards, interfaces, protocols, formats or semantic assets shall be borne by the provider of the supplied solution.

Such costs may be minimized by ensuring that the supplied solution uses only standards, interfaces, protocols or formats that:

1. *are implementable by all potential providers of equivalent technologies;*
2. *are developed through an open and transparent process;*
3. *can be reused without restrictions and royalty free in the framework of a distribution providing the rights stated in the article 2 of the EUPL.*