

Mrs Françoise Le Bail
Deputy Director General
European Commission
Directorate General Enterprise and Industry
Rue de la Loi 200
B-1049 Brussels

Brussels, 10 October 2006

Re: draft FLOSS economic impact study by UNU-MERIT

Dear Mrs Le Bail,

I am writing on behalf of the "Initiative for Software Choice" in response to the results of the study commissioned by the European Commission, Directorate General Enterprise and Industry, and led by UNU-MERIT, the Netherlands, to identify the role of Free/Libre/Open Source Software (FLOSS) in the economy ("Study on the Economic Impact of Open Source Software on Innovation and the Competitiveness of the Information and Communication Technologies (ICT) Sectors in the EU", draft of 26 September 2006).

The "Initiative for Software Choice" (ISC, www.softwarechoice.org), is a global coalition of over 300 information and communications technology (ICT) firms and associations offering a wide range of hardware, software and services. Our purpose is to promote an open and competitive market where companies may do business without fear of discrimination.

The ISC applauds the Commission's initiative to carry out such a study – the more information we can gather on the dynamics of the market, particularly with respect to FLOSS, the more coherent and better understood the software ecosystem can become.

That noted, the limited window with which we and others have had to comment clearly has hampered a more comprehensive reply. While we believe the study does add more information to this complex issue, it does not holistically reflect the full dynamics now occurring in the vibrant software marketplace. To this end, we offer our expertise and stand ready to meet with the authors of this report to help them gain added insight into the narrow role governments play in promoting software development.

FLOSS has proved to be a successful business model

It must be reiterated that FLOSS is merely a business model for distributing software, just like many other software business models including hybrid and proprietary software. The FLOSS approach has shown significant market penetration and continues to expand daily.

As identified by the results of the report, open source software has been actively adopted by European firms over the last two years so that by the end of 2005 the overall share of companies using such systems amounted to 40 percent, with another 8 percent planning on piloting such systems in 2006. Moreover, the report predicts that the annual expansion of FLOSS participants will be around 20 percent per annum.

Furthermore, the study illustrates that Europe is leading the rest of the world in terms of FLOSS market penetration and development. Given the success of this FLOSS business model, the need for measures to develop further support for a model that is already flourishing on its own accord seems unnecessary.

This report ignores the positive existence of other, non-FLOSS models

The ISC is concerned that the report's approach fails to consider the achievements of various other forms of software licensing and business models. This is to some extent understandable since the report is a study primarily on the FLOSS model. Yet the FLOSS model cannot be extricated from the environment in which it exists – it is not an island unto itself. Where the report seemingly recognises this, it acknowledges other models in a denigrating manner, that they only contribute "headaches to FLOSS" instead of informing the competitive dynamic. Alternative software distribution models – such as proprietary, hybrid models – produced great products, but that success has been greatly obscured and distorted. Balance in this regard is missing, casting, we believe, aspersions on the overall findings, and making the study look more like a marketing document than a serious survey of this exceedingly complex and dynamic matter.

The software market that exists today works extremely well

The ISC would like to emphasise that proprietary and other forms of licensing, including permissive free software licenses, have delivered substantial innovative technological solutions. Such results cannot be shunned: the software market that exists today works extremely well in developing innovative solutions for all spheres of business and governmental operations.

The choice of business model is ultimately a market place decision. In practice the market so far has largely opted for the proprietary model, a choice which should not be ignored, regardless of the purported advantages that the FLOSS system offers.

Furthermore, the proprietary model is supported to a large extent by a complex system of rights (i.e. IPR) that has spawned from societal experiences to provide incentives for innovative technological progress. This system remains valid of its own right; it is an intricate and market-oriented stimulant of innovation that clearly works.

A choice of standards will ensure dynamic innovation

As emphasised by the report, the FLOSS model has developed a great deal of high quality products. We must not however, assume that this model has all the answers. A variety of different standards must be maintained so as to provide for the most efficient and workable technological solutions to be developed. At present a range of standards are currently in place throughout various government and business platforms, which have been developed to most efficiently meet the needs of specific operational requirements. More specifically, licensed and non-licensed (FLOSS-friendly) standards are employed throughout the marketplace. Any promotion of FLOSS-friendly standards (i.e., non-RAND standards) must take this into account. Taking action that could potentially dislodge such standards would significantly disrupt the entire software ecosystem.

Undermining the current IPR system could be disastrous

IPR has evolved over centuries of working knowledge and business practices. IPR fosters and protects innovation – that cannot be denied (the FLOSS model, too, depends on strong IPR to thrive). Such a fact calls for the utmost caution when considering any modifications. Venture capital levels throughout the EU are struggling to keep up with fierce paced global competition and many put this down to weak intellectual property right protection. Many of the proposed policy recommendations as identified within the report could further weaken IPR throughout Europe, potentially deflating venture capital levels and EU innovation.

The entire European R&D industry needs overall fiscal stimulus not just the FLOSS model

It is widely recognised that innovation needs further stimulus. Boosting investment into R&D has proven to be an effective method to promote innovation. Tax credits for R&D can be an invaluable tool to this end. The ISC suggests that government support for basic, pre-commercial R&D, in the form of tax-credits or procurement would significantly stimulate innovation in Europe, but only if applied in a technologically neutral and unbiased manner. Government support that rewards the most innovative and appropriate technological solution without discrimination between different models/standards is the most effective way to stimulate innovation.

The study recommendation for tax credits applicable uniquely for FLOSS development seems extreme. On top of causing significant distortionary implications for the market and technological development, it would also be tremendously difficult to enforce when considering how easy it would be for people to 'dump' code into the OSS community, regardless of quality with the sole intention of claiming tax credits. Furthermore, attesting both the time spent developing and value of a set of code would be practically impossible.

It must also be pointed out that as of 2005 more than half of all FLOSS developers earn income from their FLOSS activities. This is a fact that was placed in a footnote on page 75 of the report. This fact demonstrates that the market rewards the development of FLOSS that has a significant value and societal use. With this in mind it is hard to see the need for considering the development of FLOSS as a 'charitable donation to society', as suggested by the report.

A similar line of argumentation could be applied to default licensing regimes concerning offerings created from government-supported R&D. Society benefits when the choice of business models sees the fewest impediments – more developers come to the table to develop more robust solutions in the first place, and commercialization of the resulting R&D can more readily follow marketplace/practical trends. R&D licensing regimes – like the US “Bayh-Dole model” – allow those using public funds to make their own choice of how they want to license their innovations. This system possesses a proven track record, and has ably served technology transfer and societal interests as well. Using this model – one which allows the creator to choose, and is technologically and licensing-model neutral – we believe provides the greatest benefit without artificial marketplace distortions. Both the FLOSS and other licensing models may proliferate without exclusion to the other under this default schema.

Multi-stakeholder cooperation for training will ensure that appropriate e-skills are taught

As touched upon by the report, capacity building and training must be ensured with the objective of supporting an open mind when it comes to software platforms. With this point the ISC certainly agrees, but insists that so long as the public sector works in coordination with the private sector, and that this work remains ecumenical as to technological disciplines, market mechanisms will ensure that training schemes adapt to the natural evolution of the technological ecosystem.

The definition of what an ‘open standard’/‘FLOSS’ was barely discussed

The ISC was surprised that an academic study of this nature failed to address the lack of a universally agreed upon definition of ‘open standards’ or ‘FLOSS’. Furthermore, ISC was concerned that the IDABC definition of open standards was referred to in the study as a ‘reference point’, while the Commission has specifically noted that this definition is not official Commission policy. Due to the fact that the interpretation of FLOSS and open standards frames the entire discussion, this matter should have been addressed in far more depth.

An inclusive discussion of this issue must be entertained

The ISC would like to reiterate once again that the extremely short 10-day window in which to comment on the Commission’s report – one which is 256 pages in length, was crafted over a year of study by literally dozens of individuals and institutions – does not allow for fully thought out responses to be formulated. From this, one might surmise that the Commission is intolerant to opposing comments that do not fall in line with the Commission’s agenda, and thus a closed process has ensued which clearly limits the input from dissenting, or diverging points of view.

Having pursued these matters in this milieu for nearly five years, we perceive this ironic lack of transparency – i.e., open source but closed process – as becoming more widespread, not just with respect to this report. We fail to understand why this behaviour occurs when the success of the FLOSS model both stands on its own and is intimately connected to the software ecosystem, which is largely non-FLOSS-oriented.

To this end, we stand ready to help better inform this report with a more open consideration of the non-FLOSS side of the presented argumentaire.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'H. Lueders', with a stylized, cursive script.

Hugo LUEDERS
Director ISC Europe

copies:

Mr Michel Ayrall, Director, DG Enterprise, C/Regulatory Policy
Mr Petro Ortun, Director, DG Enterprise, I/IDABC
Mr David White, Director, DG Enterprise, D/Innovation