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COMMISSION DECISION

of 8.12.2021

on the open source licensing and reuse of Commission software

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 249 thereof,

Whereas:

(1) The Commission holds the intellectual property rights, including copyright, on behalf of the Union, in a large portfolio of computer programs.

(2) On 21 October 2020, the Commission adopted a new strategy on open source software[1], encouraging the use of open source software by the Commission, the Commission's contribution to third-party open source projects and the sharing of Commission software as open source. In that Communication, it was stated that, wherever possible and appropriate, the Commission would share the source code for any computer programs where it holds the intellectual property rights on behalf of the Union.

(3) Open source licensing has become an integral part of business models in the software industry and is largely used by public institutions in the EU and elsewhere. The Commission had already taken a number of initiatives in this area, such as adopting the European Union Public Licence (EUPL) in 2007, the current version of which was published in May 2017[2].

(4) This Decision should determine the conditions for sharing Commission software as open source, with the aims of facilitating the wider reuse of software, promoting software innovation and open source software, building on the Commission's policy of openness, and avoiding unnecessary administrative burden for those re-using the software and the Commission services alike.

(5) This Decision should not create any obligation for Commission services to share Commission software under an open source licence nor any right for third parties to require Commission software to be made available under an open source licence. The Commission should remain free to decide whether to share Commission software or to license it under a proprietary licence.

(6) This Decision should provide for exceptions to the possibility of sharing the software as open source, such as for software whose publication or sharing of source code could represent a security risk, or for software that should be considered confidential.

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[1] Communication to the Commission, Open Source Software Strategy 2020-2023, Think Open, 21.10.2020, C(2020) 7149 final.
[2] Commission Implementing Decision (EU) 2017/863 of 18 May 2017 updating the open source software licence EUPL to further facilitate the sharing and reuse of software developed by public administrations (OJ L 128, 19.5.2017, p. 59).

(7)   Commission Decision 2011/833/EU[3] concerns the reuse of Commission documents and does not apply to software.

(8)   Directive (EU) 2019/1024 of the European Parliament and of the Council[4] introduced a minimal harmonisation system regarding open data and the reuse of public sector information. Recital 30 of that Directive clarifies that, while 'document' as defined in Directive (EU) 2019/1024 is not intended to cover computer programs, Member States may extend the said Directive's application to computer programs.

(9)   In view of the move to make the Commission's activities more transparent and open, this Decision should apply, as a matter of priority, to (a) software which is relevant for or which was used in preparing a public policy initiative by the Commission, such as a legislative initiative or a research project by the Joint Research Centre, and (b) software which was used in implementing or monitoring such an initiative. In addition, this Decision should apply to software which was developed for the Commission's internal purposes, whenever sharing such software is considered to be appropriate.

(10)   This Decision should also apply to software whose development is under way at the date of its adoption. Subject to available resources, Commission services should also be allowed to choose to apply it to software whose development is complete at the date of adoption of this Decision.

(11)   The Commission should use a trusted repository as a single point of access, to facilitate access to and the reuse of Commission software.

(12)   Where models or artificial intelligence components developed by Commission services include software elements, this Decision should apply to those elements, without prejudice to the possible application of Decision 2011/833/EU to the other elements such as the accompanying data. The choice of the appropriate open licence in such cases should be made according to the nature and function of the relevant element(s).

(13)   An inter-service group should be set up to discuss issues of common concern and monitor the implementation of this Decision,

HAS DECIDED AS FOLLOWS:

Article 1

Subject matter

This Decision determines the conditions for the reuse and licensing of software produced by the Commission or on its behalf, and for which the Commission holds the intellectual property rights.

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[3]   Commission Decision of 12 December 2011 on the reuse of Commission documents (2011/833/EU) (OJ L 330, 14.12.2011, p. 39).
[4]   Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (OJ L 172, 26.6.2019, p. 56).

Article 2

Definitions

For the purposes of this Decision, the following definitions shall apply:

'*software*' means computer program within the meaning of Directive 2009/24/EC of the European Parliament and of the Council[5];

'*Commission software*' means (i) software for which the intellectual property rights are held by the Commission, on behalf of the Union, and (ii) software owned by a third party, available under an open source licence, and which has been modified by the Commission or by a third party at the Commission's request;

'*reuse*' means the use of software by natural or legal persons, for commercial or non-commercial purposes, including the right for those users to use, study, copy, share and modify the software;

'*EUPL*' means the European Union Public Licence, a standard open source license the current version of which (version 1.2) has been adopted by Commission Implementing Decision (EU) 2017/863, as well as any future versions of the licence;

'*licence*' means the granting of permission to reuse software under specified conditions;

'*open source licence*' means a licence whereby the reuse of software is permitted for all specified uses in a unilateral declaration by the rightholder, and where the source codes of the software are made available for users;

'*standard open source licence*' means an open source licence generally recognised as such by open source organisations;

'*repository*' means an online point of access to the source code of the software and related information such as build and install scripts, bill of materials, copyright, attribution, and licence documentation.

Article 3

General principle

The Commission services may choose to make Commission software available for reuse in accordance with this Decision. Such software shall be licensed under an open source licence selected in accordance with Article 5, and shall be made available via the repository referred to in Article 6, after the procedure described in Article 8 has been followed.

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[5] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16).

Article 4

Exceptions

This Decision shall not apply:

(a)   to software for which the Commission is not in a position to allow reuse due to the intellectual property rights of third parties;

(b)   to Commission software where the publication or sharing of its source code would be an actual or a potential risk to the security of the information systems or databases of the Commission or of another European institution, agency or body;

(c)   to Commission software that must be considered confidential in accordance with applicable rules or legislation, contractual obligations, or as a result of its nature or contents;

(d)   in cases where, due to one of the exceptions listed in Article 4 of Regulation (EC) 1049/2001[6], with the necessary modifications, the Commission software must be excluded from access or can only be made accessible to a party under specific rules governing privileged access;

(e)   to Commission software resulting from ongoing research projects conducted by the Commission or on its behalf, which are not published and where publication would (i) interfere with the validation of provisional research results or (ii) constitute a reason to refuse registration of industrial property rights in the Commission's favour, where such registration is deemed to be appropriate.

In those cases, the software shall not be made available under an open source licence.

Article 5

Choice of the appropriate open source licence

The choice of the appropriate open source licence in each case shall be made in accordance with the following rules, after verifying the intellectual property rights referred to in Article 8:

(a)   the open source licence granted by the Commission shall be the EUPL, except in the cases listed in points (b) and (c);

(b)   where the use of another open source licence is made obligatory due to reciprocal clauses ('copyleft') that apply to parts of the software originating from a third party, or where an alternative open source licence is deemed preferable to the EUPL for particular software, notably in order to facilitate its adoption by the community of users, that alternative open source licence may be used, provided it is a standard open source licence

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[6]   Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

(c)   where, as a result of the licence clauses applicable to parts of the software originating from a third party, a choice exists between several standard open licences, excluding the EUPL, preference shall be given to the open source licence granting the broadest rights of use to the users ('permissive licences').

Article 6

Repository

The Commission shall use a repository as a single point of access to Commission software to facilitate access to and reuse of said software.

Commission services may identify and progressively make available via the repository Commission software that was developed prior to the adoption of this Decision, if sharing is deemed to be of interest, following the internal procedure described in Article 8.

Commission services may also make available via this repository Commission software that was licensed under an open source licence prior to adoption of this Decision.

The repository may be made available for software for which other EU institutions, bodies, offices and agencies hold the intellectual property rights, at their request.

Article 7

Formats for Commission software available for reuse

1.   Commission software shall be made available electronically in the repository as human-readable source code and, when appropriate, in machine-readable form.

The necessary documentation shall, whenever appropriate, also be made available together with the Commission software.

2.   This Decision shall not require the Commission, in relation to Commission software made available via the repository, to:

(a)   adapt or update the software;

(b)   translate the software and related information into any language versions other than those already available in the repository;

(c)   continue the development or storage of the software or to preserve the software in a given format;

(d)   set up or support a community of users of the software.

Article 8

Procedure for the licensing of Commission software

The procedure for applying this Decision shall include: (i) a software identification process; (ii) the verification of the intellectual property rights for the software in accordance with implementation guidelines which shall be drafted by the Central IP Service; and (iii) a security verification.

Article 9

Contributions to external open source projects

Commission services shall be allowed to take part in and contribute to external open source projects deemed to be in the interests of the Union or of one of its policy objectives. If required by the rules applying to the project, ownership of the intellectual property rights on the contributed software may be transferred to the public or private entity in charge of those open source projects.

Article 10

Proprietary licences

By way of derogation from the general principle in Article 3, the Commission may decide that Commission software will be made available under the terms of a proprietary licence, to one or several selected licensees only, for instance for the provision of a service in the public interest or in cases which are objectively justified, for public policy interests, policy reasons or technology transfer considerations. The proprietary licence may be granted on an exclusive basis if needed, and may involve the payment of royalties.

In such cases, the delegation of powers in the field of intellectual property set out in (SEC(2001) 1397) shall be applicable and a Commission decision be adopted.

Article 11

Inter-service group

An inter-service group shall be set up, chaired by the Director-General responsible for the administrative execution of decisions related to intellectual property rights at the Commission. The group shall be composed of representatives of the Commission's Directorates-General and services. It shall discuss issues of common concern and, unless the chair deems it unnecessary to do so, shall draw up reports on the implementation of this Decision in accordance with Article 12.

Article 12

Review

This Decision shall be reviewed for the first time 3 years after its adoption and every 5 years thereafter.

Article 13

Publication

This Decision shall be published in the C series of the *Official Journal of the European Union.*

Done at Brussels, 8.12.2021

> *For the Commission*
> *Mariya GABRIEL*
> *Member of the Commission*