



**EUROPEAN COMMISSION**

Internal Market and Services DG

PLANNING, ADMINISTRATIVE SUPPORT AND COMMUNICATION  
**Human and financial resources**

Brussels, 22/07/2009

MARKT/A1/Bud/BF/fm (2009) 204180

**LETTER OF INVITATION TO TENDER**

Dear Sir/Madam,

Subject: Open call for tenders n° **MARKT/2009/12/D**

Contract Notice in the Official Journal of the European Union **2009/S 138-200996** of **22/07/2009**.

**STUDY ON THE OVERALL FUNCTIONING OF THE TRADE MARK SYSTEM IN EUROPE**

Please find enclosed the call for tenders relating to the above-mentioned contract.

If you are interested in the possibility of providing services with regard to the present invitation, you are hereby invited to submit a tender in triplicate in one of the official languages of the European Union, following the indications and procedures laid down in this Invitation to Tender, with the Specifications and with all the related annexes, including the Terms of Reference.

Tenders must be:

- either sent by registered post or by private courier service, not later than **04/09/2009**, the postmark, the date of dispatch or the date of the receipt being taken as a proof, to the following address:

European Commission  
DG Internal Market and Services  
Unit A1/Budget  
Office: SPA2 – 01/39  
B - 1049 Brussels

- or delivered by hand (by the tenderer in person or by an authorised representative) to the following address:

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium.  
Telephone: direct line (32-2) 296 02 35. Fax: (32-2) 299 30 88.

E-mail: [ec-intmarket-contracts@ec.europa.eu](mailto:ec-intmarket-contracts@ec.europa.eu)

European Commission  
DG Internal Market and Services  
Unit A1/Budget  
Office: SPA2 - 01/39  
Avenue du Bourget, 1  
B - 1140 Brussels, (Evere)

not later than 16.00 on **04/09/2009**. In this case, a receipt must be obtained as proof of submission, signed and dated by the official in the Commission's central mail department who took delivery. The department is open from 08.00 to 17.00 Monday to Thursday, and from 8.00 to 16.00 on Fridays. It is closed on Saturdays, Sundays and Commission holidays.

Tenders must be placed inside two sealed envelopes. The inner envelope, addressed to the department indicated in the invitation to tender, should be marked as follows: **"Call for tender no. MARKT/2009/12/D Not to be opened by the Mail Department"**. If self-adhesive envelopes are used, they must be sealed with adhesive tape and the sender must sign across this tape.

The inner envelope must also contain two sealed envelopes, one containing the technical specifications and the other the financial bid. Each of these envelopes must clearly indicate the content ("Technical" and "Financial").

The specifications and the draft contract are attached. The specifications list all the documents that must be produced in order to tender, including supporting evidence of economic, financial, technical and professional capacity.

Tenders must be:

- signed by the tenderer or his duly authorised representative;
- Perfectly legible so that there can be no doubt as to words and figures;
- drawn up using the model reply forms in the specifications (Annexes III and IV).

Period of validity of the tender, during which the tenderer may not modify the terms of his tender in any respect: 9 months after the deadline for submission of tenders.

Submission of a tender implies acceptance of all the terms and conditions set out in this invitation to tender, in the specification and in the draft contract and, where appropriate, waiver of the tenderer's own general or specific terms and conditions. It is binding on the tenderer to whom the contract is awarded for the duration of the contract.

Tenders will be opened in public session at **15/09/2009 at 10:00** – Meeting room 01/SDR2 – Rue du Spa, n° 2 – BE-1049 BRUXELLES. One person representing the tenderer may be present at the opening session.

Contacts between the contracting department and tenderers are prohibited throughout the procedure save in exceptional circumstances and under the following conditions only:

- Before the final date for submission of tenders:
- \* At the request of the tenderer, the contracting department may provide additional information solely for the purpose of clarifying the nature of the contract.

Any requests for additional information must be made in writing only to e-mail address [ec-intmarket-contracts@ec.europa.eu](mailto:ec-intmarket-contracts@ec.europa.eu) or to fax number (+32)2.299.30.88

Such requests for clarification, together with the responses, will be published by the Commission under the heading corresponding to this call for tenders, at: [http://ec.europa.eu/dgs/internal\\_market/calls\\_en.htm](http://ec.europa.eu/dgs/internal_market/calls_en.htm)

Requests for additional information received less than five working days before the closing date for submission of tenders will not be processed (*for practical reasons*).

- \* The Commission may, on its own initiative, inform interested parties of any error, inaccuracy, omission or any other clerical error in the text of the call for tenders.

This information will be sent simultaneously to tenderers who have requested the specifications and will be published by the Commission under the heading corresponding to this call for tenders, at: [http://ec.europa.eu/dgs/internal\\_market/calls\\_en.htm](http://ec.europa.eu/dgs/internal_market/calls_en.htm)

- After the opening of tenders
- \* If clarification is required or if obvious clerical errors in the tender need to be corrected, the contracting department may contact the tenderer provided the terms of the tender are not modified as a result.

This invitation to tender is in no way binding on the Commission. The Commission's contractual obligation commences only upon signature of the contract with the successful tenderer.

Up to the point of signature, the contracting department may either withdraw from the contract or cancel the procurement procedure, without the candidates or tenderers being entitled to claim any compensation. This decision must be substantiated and the candidates or tenderers notified.

You will be informed whether or not your tender has been accepted.

The follow up of your response to the invitation to tender will require the recording and further processing of personal data (name, address, CV, for example). This data will be processed in accordance with the requirements of Regulation (CE) 45/2001 on the protection of individuals with regard to the processing of personal data by

Community institutions and bodies and on the free movement of such data. Except if mentioned otherwise, replies to questions and personal data requested are necessary for the purpose of assessing your tender according to the specifications of the invitation to tender and will only be processed by the European Commission for this purpose. You may, upon request, obtain the communication of your personal data and rectify any inaccurate or incomplete personal data. Should you have any queries concerning the processing of your personal data, please address them to the European Commission. As regards the processing of your personal data, you have a right to recourse at any time to the European Data Protection Supervisor.

I look forward to receiving your tender in response to these tender documents.

Yours sincerely,

Bernhard Friess  
Director Ressources  
(signed)

Enclosure: Specifications and annexes

***STUDY ON THE OVERALL FUNCTIONING OF  
THE TRADE MARK SYSTEM IN EUROPE***

**INVITATION TO TENDER  
MARKT/2009/12/D**

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## **TECHNICAL SPECIFICATIONS**

### **Invitation to tender n° MARKT/2009/12/D**

#### **STUDY ON THE OVERALL FUNCTIONING OF THE TRADE MARK SYSTEM IN EUROPE**

##### **1. OBJECT OF THE MARKET**

The European Commission's Directorate General for Internal Market and Services plans to conclude a contract for a comprehensive study on the overall functioning of the trade mark system in Europe. The study shall assess the current state of play of the Community trade mark system and the potential for improvement and future development. As the Community trade mark system is closely linked to national trade mark systems, the study shall also evaluate national systems and, in particular, the relation and interaction between the two systems, including the need for further harmonisation. The results shall in particular serve as basis for future review of the trade mark system as a whole and enhanced cooperation between the Office for Harmonization on the Internal Market ('OHIM') and the national trade mark offices of Member States.

##### **2. ELIGIBILITY**

This invitation to tender is open to tenderers from the Member States of the European Union and the European Economic Area, as well as States covered by the Public Procurement Agreement concluded within the World Trade Organisation, in accordance with the principle of reciprocity.

##### **3. COSTS**

Tenderers themselves will bear the costs of drawing up their tenders and the Commission will not be liable to pay any compensation if a tender is rejected or if it decides not to select any tender.

##### **4. LOTS**

Not applicable to the present invitation for tenders.

##### **5. SUB-CONTRACTING**

- Sub-contracting is permitted, provided that the value of the services to be sub-contracted does not exceed 50% of the value of the contract.
- All subcontracting must be approved by the Contracting Authority, either by accepting the Contractor's offer, or, if proposed by the Contractor after contract signature, by prior written approval, being requested and granted.
- The tenderer must indicate clearly in their methodology, which parts of the work will be sub-contracted, and the identity of all subcontractors. Full details of such subcontractors must also be provided in Annex III.

## **6. DOCUMENTATION AVAILABLE TO TENDERERS**

No specific documentation is made available.

## **7. VARIANTS**

Tenderers may not submit tenders for only part of the services required. Variants are not allowed.

## **8. VOLUME OF THE MARKET**

The estimated maximum amount is EUR 500.000 for the total completion of the work, including all travel and subsistence expenses. No contract offer above this amount will be considered.

## **9. PRICE**

The price must be expressed in euro. For information purposes, tenderers will provide a breakdown of costs following the table enclosed in Annex IV of the enclosed letter of submission of tender:

### **1) Overall price:**

Tenders will specify a fixed price for the various components of the cost of the study. That price should be the final price and will include all costs, i.e. fees, meetings, administrative expenses, overheads. No additional refund request in respect of the above mentioned costs will be accepted.

Different price options will not be accepted and will entail the refusal of the offer.

### **2) VAT**

As the Commission is exempt from all taxes and dues pursuant to the Protocol on the privileges and immunities of the European Communities annexed to the Treaty, signed in Brussels on 8 April 1965, establishing a Single Council and a Single Commission of the European Communities, value added tax (VAT) should not be included in the price tendered. The amount of VAT should be shown separately. Potential tenderers are informed that the Commission will take no account of VAT in examining the prices indicated in the various tenders.

## **10. PAYMENT MODALITIES**

Payments will be made following the provisions of the draft contract.

## **11. CONTRACTUAL CONDITIONS AND GUARANTEES**

All the conditions applicable as well as the possible guarantees requested are specified in the draft contract.



## **12. SELECTION OF CONTRACTOR AND AWARD OF A CONTRACT**

### **12.1. CASES FOR EXCLUSION**

In the case of consortia, the declaration and the request for evidence concerning the cases for exclusion will be applicable to all the members of the consortium.

- (1) Tenderers shall be excluded from participation in a procurement procedure if:
  - (a) they are bankrupt or being wound up, are having their affairs administered by the courts, have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
  - (b) they have been convicted of an offence concerning their professional conduct by a judgment which has the force of res judicata;
  - (c) they have been guilty of grave professional misconduct proven by any means which the Contracting Authority can justify;
  - (d) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the Contracting Authority or those of the country where the contract is to be performed;
  - (e) they have been the subject of a judgment which has the force of res judicata for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;
  - (f) following another procurement procedure or grant award procedure financed by the Community budget, they have been declared to be in serious breach of contract for failure to comply with their contractual obligations.
- (2) Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:
  - (a) are subject to a conflict of interest;
  - (b) are guilty of misrepresentation in supplying the information required by the Contracting Authority as a condition of participation in the tender procedure or fail to supply this information.
- (3) By completing and signing the form in Annex III, tenderers certify that they are not in one of the situations listed above.
- (4) Administrative or financial penalties may be imposed by the Contracting Authority on tenderers who are in one of the cases of exclusion provided for

above, in accordance with Articles 93, 94 & 96 of the Financial Regulation (Council Regulation 1605/2002 of 25/6/02) and Article 133 of the Implementing Regulation (Commission Regulation 2342/2002 of 23/12/02).

## **12.2. SELECTION CRITERIA**

The evaluation will be made in two stages: selection and award. Only the offers which fulfil the criteria detailed below will be selected for the award stage.

In the case of consortia, the selection criteria will be applicable to all the members of the consortium. The same principle will also be applied in the case that there are sub-contractors, in respect of the part of the work that they will perform.

The tenderer's capacity will be assessed on the basis of the following:

### **12.2.1. Economic and financial capacity**

Tenderers will provide sufficient information to satisfy the Commission of their financial standing and more particularly but without prejudice to the generality of the foregoing that they and any subcontractors do have the necessary resources and financial means to carry out the work that is subject of the tender.

The Commission shall have sole discretion to judge the adequacy of tenderers financial standing and where it considers this insufficient the right to reject any offer, to accept an offer subject to any advance or stage payments being deferred until the work has been completed or to ask the tenderers to provide a guarantee or performance guarantee as referred to elsewhere. Submission of a tender implies acceptance that the Commission's decision will be final and that it will not enter into negotiations with tenderers on this subject.

### **12.2.2. Technical capacity**

Tenderers will provide sufficient information to satisfy the Commission that they have the technical capacity and experience to perform the work that is subject of this invitation to tender.

Tenderers must satisfy all the criteria below:

- strong knowledge of trade mark law and practice, both within Europe and in an international dimension, including enforcement of industrial property rights;
- extensive economic and financial knowledge along with specific expertise in the economics of industrial property rights, preferably trade marks;
- strong record of independent and high-quality research in the field of industrial property, as demonstrated by publications, previous research or other activities carried out;
- management ability to carry out projects of this scale and scope, proven by previous projects of similar nature carried out on related topics.

Where the tenderer is a team, each member of the team shall fulfil at least one of the above criteria.

All the criteria must be verifiable with a proven level of experience and track record.

The capacity of tenderers and any subcontractors or correspondents will be assessed on the basis of the evidence detailed in Section 13.

### **12.3. AWARD CRITERIA**

The contract will be awarded in favour of the economically most advantageous offer on the basis of the following award criteria:

- Technical Quality Criteria (maximum 100 points)

(1) relevance, completeness and viability of the proposed methodology and manner in which the tasks of the study will be conducted (50 points)

(2) quality/qualification of the team proposed for conducting the study and the manner in which quality management is ensured (40 points)

(3) expertise to manage the project in full (10 points)

- Financial Criterion:

- the price

The evaluation committee will consider further only those tenders that have obtained at least a technical quality score of 70 points.

The evaluation committee will then proceed with the financial comparison of the tenders retained for further consideration according to the following procedure:

The retained tender with the lowest total price receives a financial score equal to the maximum score received for the technical quality award criteria. The other retained tenders are awarded points by means of the following formula:

Financial score = (lowest total price/total price of the tender being considered) x (maximum score received for the technical quality award criteria).

The most economically advantageous tender is established by means of the computation of a final score according to the following formula:

Final score = (Technical quality score x 60%) + (Financial Score x 40%).

## **13. CONTENTS OF TENDERS**

### **13.1. GENERAL REMARKS**

- Tenders may be drafted in any official language of the European Union.
- Tenderers must complete correctly Annexes III and IV to the Specifications, indicating all the information requested. In addition, tenders must include at least all the documents detailed in this Section 13.

- Tenders submitted by consortia will:
  - show clearly the role, qualifications and experience of each of the members of the proposed consortium;
  - include a letter signed by the authorised representatives of each of the other parties designating the company and/or the person who will represent the consortium for the signature of the contract and for all contacts with the Commission during the execution of the tasks.
- Other information to be included in the tender:
  - supporting evidence which is normally acceptable under their own law to demonstrate their registration at their business address; supporting evidence is not necessary for sub-Contractors;
  - where the tenderer is a natural person: a copy of the identity card, passport, driving license or any other document which can be used for officially for identification purposes;

### 13.2. ACCESS TO THE MARKET

Tenders will include the following documents

- Declaration of absence of conflict of interests duly signed by an authorised representative;
- proof that the tenderer is authorised to perform the contract under national law, as evidenced by inclusion in a trade or professional register, or a sworn declaration or certificate, membership of a specific organisation or express authorisation;
- entry in the VAT register (i.e. VAT registration number) or official proof of exemption;

### 13.3. EXCLUSION CRITERIA

	Documents to be provided
Evidence to demonstrate that tenderer is not in any of the situations detailed in points (a), (b), and (e), of paragraph (1) of Section 12.1.	A recent extract from the judicial record is required or, failing that, a recent equivalent document issued by a judicial or administrative authority in the country of origin or provenance showing that those requirements are satisfied. Where the tenderer is a legal person and the national legislation of the country in which the Tenderer is established does not allow the provision of such documents for legal persons, the documents should be provided for natural persons, such as the company directors or any person with powers of representation, decision-making or control in relation to the tenderer.
Evidence to demonstrate that tenderer is not in any of the situations detailed in point (d)	Recent certificates or letters issued by the competent authorities of the State concerned are required. These documents must provide evidence covering all taxes

of paragraph (1) of Section 12.1.	and social security contributions for which the tenderer is liable, including for example, VAT, income tax (natural persons only), company tax (legal persons only) and social security contributions.
	Where any document described above is not issued in the country concerned, it may be replaced by a sworn or, failing that, a solemn statement made by the interested party before a judicial or administrative authority, a notary or a qualified professional body in his country of origin or provenance.

#### 13.4. SELECTION CRITERIA

	Documents to be provided
Economic and financial capacity (Section 12.2.1.)	<p>Proof of economic and financial capacity may be furnished by one or more of the following documents:</p> <ol style="list-style-type: none"> <li>1) In the case of legal persons, and in respect of each of them when more than one: <ul style="list-style-type: none"> <li>➤ appropriate statements from banks or evidence of professional risk indemnity insurance;</li> <li>➤ the presentation of balance sheets or extracts from balance sheets for at least the last two years for which accounts have been closed, where publication of the balance sheet is required under the company law of the country in which the economic operator is established;</li> <li>➤ a statement of overall turnover and turnover concerning the services covered by the contract during a period which may be no more than the last three financial years.</li> </ul> </li> <li>2) In the case of natural persons: Appropriate statements from banks or evidence of professional risk indemnity insurance.</li> </ol>
Technical capacity (Section 12.2.2.)	<p>All the following evidence will be furnished:</p> <ol style="list-style-type: none"> <li>1) A detailed presentation of the tenderer namely focused on its experience concerning the subject of the present invitation to tender;</li> <li>2) a detailed curriculum vitae of each of the persons who participate in the conception and elaboration of the study specifying the different diplomas obtained (copies of which may be requested by the Commission where appropriate) and the expertise and experience relevant to the subject matter of the present invitation to tender.</li> <li>3) description of the measures employed to ensure the quality of services, and a description of the</li> </ol>

	tenderer's study and research facilities
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### 13.5. AWARD CRITERIA

For the appraisal of tenders on the basis of the Award Criteria set out in Section 12.3., tenders shall include a work programme containing a clear and detailed description of the following elements:

1. a detailed methodology;
2. the manner in which the research will be conducted;
3. the technical means to be used as well as of the resources in terms of time and personnel to be devoted to the various elements of the work.

Tenderers will also have to indicate how they envisage exercising the control over subcontractor(s), if any.

### 14. AWARD OF A CONTRACT

- The Commission will award the contract to the tenderer submitting the most advantageous offer, on the basis of the requirements set out in Specifications.
- The Contracting Authority shall not be liable for any compensation with respect to tenderers whose tenders have not been accepted. Nor shall it be so liable if it decides not to award the Contract.
- The corresponding contract will be based on the draft contract annexed to the present invitation to tender, completed on the basis of the data detailed in the selected tender.
- The Commission reserves the right not to select a contractor if the price of the offers proposed is in excess of the budget allocated to this project or if the tenders received are considered inappropriate and/or unacceptable by the Evaluation Committee.

### 15. DURATION

The contract to be awarded will be established on the basis of the enclosed draft. The duration of the tasks shall not exceed **12 months** from the date of signature of the contract by the last contracting party. Work will follow the timetable detailed in the terms of Reference.

### 16. PLACE OF WORK

The tasks are to be performed at the premises designated by the Contractor. A maximum of 8 co-ordination meetings with the Commission will be held in Brussels.

### 17. ANNEXES

The following documents are annexed to these Technical Specifications and form an integral part of them:

Annex I.: Objectives and monitoring

Annex II: Draft contract (for information)

Annex III: Letter of submission of tender (to be filled in and signed by the tenderer)

Annex IV: Financial offer (to be filled in and signed by the tenderer)

## **Annex I**

### **OBJECTIVES AND MONITORING**

#### **Invitation to tender n° MARKT/2009/12/D**

#### **STUDY ON THE OVERALL FUNCTIONING OF THE TRADE MARK SYSTEM IN EUROPE**

##### **1. AWARDING AUTHORITY**

European Commission  
Directorate General for Internal Market and Services  
B - 1049 BRUSSELS  
BELGIUM

Tel. (+32)-2.295.45.97; Fax: (+32)-2.299.30.88  
E-mail: ec.intmarket-contracts@ec.europa.eu

##### **2. BACKGROUND AND CONTEXT OF THE STUDY**

In a rapidly changing economic environment driven by increased globalisation and enhanced competitive pressures the significance of trade marks has steadily grown as well as their commercial value and number. Trade marks serve to distinguish the goods and services of undertakings and are therefore essential for a system of undistorted competition. They identify the commercial origin of products and guarantee their consistent quality. As prime advertising tool trade marks are of paramount importance in the marketing and commercialisation of goods and services both nationally and internationally. Effective and efficient trade mark protection is therefore vital for fostering innovation and competitiveness by encouraging the production and distribution of quality products.

In this context the increasing demands for trade mark registration systems to be of high quality, streamlined and speeded up but also more harmonised, user friendly, publicly accessible and technologically up-to-date have become a high priority. The same applies to the need for robust and efficient enforcement systems which can cope adequately with infringement of trade mark rights.

It is against this background that the trade mark regime in Europe as a whole has undergone a very significant and dynamic development over the last 20 years.

At the beginning of this process, national trade mark systems were harmonised by the First Council Directive No 89/104/EEC of 21 December 1988 ('TMD') (now codified as Directive 2008/95/EC). The aim of this Directive is to ensure that domestic trade marks registered with the Member States' Trade Mark Offices are subject to the same standards of registrability and enjoy the same protection under the laws of all the Member States. It does not undertake a full-scale approximation of laws but harmonises only those (substantive) provisions of national law that most directly affect the functioning of the internal market.



Alongside and linked to national systems, the Community trade mark ('CTM') system was established in 1994 by the Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark ('CTMR')(now codified as Regulation 207/2009). It allows for the first time to get in one single procedure - instead of a separate procedure in each Member State leading to a bundle of national trade mark rights conferring protection only in their respective territories - a unitary Community right which has equal effect throughout the Community. A link between national and Community trade marks exists following two mechanisms: "seniority" and "conversion".

On the basis of the CTMR the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ('OHIM') was set up to be responsible for registering and administering Community trade marks and designs. As regulatory agency of the EU it was given budgetary autonomy to the extent that it should not need a subsidy from the Community to balance its budget. The OHIM became operational on 1 April 1996.

Furthermore, by the EC acceding to the Madrid Protocol with effect as from 1 October 2004, the CTM system was linked to the Madrid System for the International Registration of Marks. This enables CTM applicants and holders to apply for international protection of their trade marks through the filing of an international application under the Madrid Protocol. Conversely, holders of international registrations under the Madrid Protocol are entitled to apply for protection of their trade marks under the CTM system.

Finally, as regards enforcement, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 harmonized the means of enforcing intellectual property ('IP') rights including trade marks, thus ensuring that intellectual property enjoys an equivalent level of protection in the Community.

The TMD has not been amended on substance since its adoption in 1988. The CTMR has been amended six times so far, the most substantial amendment being made on the basis of Council Regulation No 422/2004 of 19 February 2004. The absence of changes in case of the TMD, and the low number and the nature of the amendments to the CTMR could argue for the high quality of these two instruments.

With regard to the CTMR, in fact, the legislator recognized when adopting Regulation No 422/2004 that the CTM system had "generally fulfilled users' expectations satisfactorily" and "also had a positive effect on the effective achievement of the internal market". It further noted that the substance of the system had "proven itself to be perfectly valid with regard to the objectives set".

The statistics of the OHIM confirm the success of the CTM system. Since 1996 the demand for Community trade marks has been growing steadily and at times dramatically. The growth rate of Community trade mark applications during the last four years is 50% and, over the same period, the productivity of OHIM has risen by almost 60%. In terms of volumes 2007 experienced the highest ever number of trade mark applications (88,339) and 2008 the highest ever number of registrations (81,312). About two-thirds of applications came from the European Community area. In total OHIM has registered more than 500,000 trade marks to date on behalf of hundreds of thousands of companies from all over the world.

The fact that OHIM became self-financing from only its second year of operation (1997), and, hence, much earlier than foreseen, are further evidence of being successful in serving the European Single Market. Actually, as a result of the unexpectedly high application volumes going along with increased productivity and efficiency, as well as significant growth in E-Business, the OHIM has lately been generating very substantial surplus. Despite a significant reduction of fees, taking effect as from 1 October 2005, this situation has not changed. In fact, whereas by the end of 2004, the OHIM had accumulated cash reserves of around €105 million, the surplus by the end of 2008 will clearly exceed EUR 300 million.

On 22 December 2006, the Commission published a Communication on the Financial Perspectives of the OHIM proposing to introduce a method of automatic fee review and adjustment to guarantee a balanced budget. The Commission advocated closely linking such approach to an outstanding performance of the OHIM. It further highlighted the importance of joint partnerships between OHIM and national offices for the efficient performance of and the effective interaction between the Community and national trade mark systems.

On 21-22 of May 2007, the Competitiveness Council adopted conclusions on the Communication. It emphasised that the establishment of the OHIM had been a great success and that it had contributed substantially to strengthening the competitiveness of the EU. It underlined that the high quality of OHIM's work could not be taken for granted but required further efforts to preserve and even improve its performance. It recalled that the CTM system was designed to coexist with the national trade mark systems which continued to be necessary for those undertakings which did not want protection of their trade marks at Community level. It noted the importance of the "complementary" work of national trade mark offices of Member States and called on OHIM to enlarge its cooperation with national offices in the interest of the overall functioning of the CTM system. It asked the Commission, on the one hand to immediately propose a reduction of the main CTM fees, and, on the other, "to start work on a comprehensive study on the overall functioning of the Community trade mark system to be completed as a matter of priority".

On 19 July 2008, the Commission adopted the "Small Business Act" in which it committed itself to make the CTM system more accessible, in particular by significantly reducing CTM fees as part of a comprehensive solution to the financial perspectives of the OHIM.

On 16 July 2008, the Commission published a Communication on an Industrial Property Rights Strategy for Europe. In this Communication the Commission stressed its commitment to strong trade mark protection and to a high quality trade mark regime. It concluded that it was time for an overall evaluation, although the trade mark system showed clear successes. The Commission thus announced its intention to "evaluate the overall functioning of the Community and national trade mark systems". The respective study "could form a basis for future review of the Community trade mark system and enhanced cooperation between the OHIM and national offices."

At a Joint Meeting of the Administrative Board and the Budget Committee of the OHIM on 18-19 September 2008, Member States unanimously agreed to recommend to the Commission a number of basic elements that should be included in a package of budgetary measures aiming at ensuring a balanced OHIM budget in the future. The relevant package

includes the agreement to a substantial fee reduction and simplification of the fee structure. It further comprises the approval for distributing to the National Offices of the Member States an amount equivalent to 50% of the renewal fees. These funds should be used for the purposes closely related to the protection, promotion and enforcement of trade marks. The package also encompasses the agreement for allocating around €190 million to the Reserve Fund. The joint committee also proposed the creation of a Cooperation Fund of about €50 million which should finance projects related to the harmonisation and the protection, promotion and/or enforcement of trade marks and designs. Finally, Member States suggested using the remaining surplus in the interests of users and asked the Commission "to study this issue in consultation with users within the context of the overall evaluation of the trade mark system". The Commission is looking into how best to implement these recommendations. Some of them will require a modification of the CTMR and be part of the overall review of the trade mark system.

As first step in the overall evaluation of the trade mark system in Europe, the Commission launched on 29 October 2008 a trade mark related consultation of businesses using the European Business Test Panel ('EBTP'). The EBTP is an on-line tool allowing the Commission to obtain direct feedback from businesses on Commission legislative proposals or initiatives likely to have an impact on businesses.

On 31 March 2009 the Commission adopted Regulation (EC) No 355/2009 by which the fees for obtaining Community trade mark protection were lowered further substantially and the fees structure simplified. This Regulation entered into force on 1 May.

### **3. OBJECTIVES**

The purpose of this study is to provide the Commission with an in-depth assessment of the overall functioning of the trade mark system in Europe as a whole including both Community and national level. The aim is to identify potential areas for improvement, streamlining and future development of this overall system to the benefit of users and the society as a whole. In this context the study shall also establish the potential for an enhanced cooperation between the OHIM and the national offices and look into how best to implement Member States' recommendation of distributing a proportional part of the renewal fees of OHIM to national offices as remuneration for services rendered by them. The results of the study shall enable the Commission to propose amendments in the relevant legislation, involving not only the CTMR but possibly also the TMD.

### **4. TASKS**

In order to achieve the general purpose of this study, it will be necessary to simultaneously perform the following two interrelated tasks:

- 4.1 The first task relates to an **assessment of the links between the CTM system and the national trade mark systems**. Within this task the contractor should assess the level of harmonisation achieved and the need for further approximation of the national systems, the nature of the relation and the various links between these systems, the contributions of Member States to the overall functioning of the CTM system, in particular, their role including national offices in the enforcement of CTMs, and, the potential for enhanced cooperation between OHIM and national

offices with a view to increasing the effectiveness and efficiency of the trade mark system as a whole, including predictability and legal certainty, to the benefit of users.

- 4.2 The second task is related to a thorough **analysis of the functioning of the CTM regime including the OHIM**. In this context the contractor shall examine key areas of the CTM system and submit recommendations for improvements to increase the effectiveness, efficiency and added value of the system and to adapt it to the Internet age. It shall further identify potential for increasing the range and quality of the services rendered by the OHIM, including in particular consistency, predictability and legal certainty, in the interest of current and potential users. Particular consideration in this context should be given to business needs of SME's.

## **5. EVALUATION QUESTIONS**

In order to carry out the necessary analyses and assessments the contractor will have to provide answers to the following evaluation questions which are grouped according to the two tasks described above.

### **5.1 Links between the CTM system and national trade mark systems**

#### **(1) Harmonisation of national trade mark systems**

##### **(a) Achievement of the TMD objective**

- *To what extent has the Trade Mark Directive achieved the objective of creating a single market by removing barriers to free movement and competition?*

##### **(b) Need for further legislative harmonisation**

##### **(i) Within the scope of the TMD**

- *To what extent is there a need for further legislative approximation of Members States' national trade mark systems within the current scope of the TMD?*

The reply to this question should analyse whether there is a need for also harmonising elements which according to the TMD are left optional to the Member States, such as special absolute grounds for refusal or invalidity, or, grounds for refusal or invalidity concerning conflicts with earlier rights. The contractor should seek for specific evidence of problems and differences, i.e. establish what evidence is there that users of the trade mark system would benefit from further legislative approximation. This research should encompass literature review including case-law.

##### **(ii) Beyond the scope of the TMD**

- *To what extent is there a need for further legislative approximation of Members States' national trade mark systems beyond the current scope of the TMD?*

The reply to this question should analyse whether there is a need for harmonising elements which are not covered by the TMD, such as other substantive issues like assignments and other elements of trade marks as objects of property, as well as issues such as classification of goods and services (e.g. the use of class headings and the consequences this has for examination and resolution of conflicts between trade marks), procedural issues such as the process of examination, oppositions and cancellations, as well as any other aspect of trade mark law and practice that users perceive in need of harmonisation. The contractor should seek for specific evidence of problems and differences, i.e. establish what evidence is there that users of the trade mark system would benefit from further legislative approximation. This research should encompass literature review including case-law.

(c) Need for Trade Mark Offices' practices to become more consistent

- ***To what extent do stakeholders see a need for the Trade Mark Offices Practices becoming more consistent?***

The reply to this question should establish the main areas in respect of which the practices of the various Trade Mark Offices should be consistent and comparable within each of the Offices as well as the areas where the practices of the various Offices should be consistent and comparable with each other.

- ***How could the cooperation between the OHIM and National Trade Mark Offices be intensified to achieve a more transparent and consistent Office practice throughout the Community?***

The reply to this question should analyse ways as to how the OHIM and the National Trade Mark Offices could work closer together to contribute more to establishing consistent practices in Europe to the benefit of users (e.g. developing common tools, etc.).

(2) Relation between CTM system and national trade mark systems

(a) Nature of the relation

- ***How are the CTM system and national trade mark systems used by stakeholders?***

The reply to this question should in particular establish to what extent these interested parties see the nature of this relation characterised by complementarity and a (operational) notion of a balance.

(b) Future role and mission of National Offices

- ***What should be the role and mission of national offices in the future?***

The contractor should provide recommendations as to how the role and mission of national offices should be defined in the future. In this context it should establish to what extent these offices should perform additional tasks such as in particular in the field of enforcement (anti-counterfeiting). The upcoming Commission

Communication on enforcement will have to be taken into account in this connection. Moreover, the contractor should assess the importance of financial autonomy for national offices.

- (c) Linkages between the systems
- (i) Filing a CTMA at the central IP Office of a Member State

***To what extent is the option to file a CTM application at the central IP Office of a Member State still appropriate?***

- (ii) Requirement for a CTM to be used "in the Community"
  - ***To what extent is the territorial requirement for a CTM to be genuinely used "in the Community" (Art. 15 CTMR), as interpreted in the related Joint Statement by the Council and the Commission of 20 December 1993, still appropriate in view of a Community market now comprising 27 Member States?***
- (iii) Seniority claims
  - ***To what extent does the option of claiming seniority of a national trade mark still match the needs of users?***

The reply to the question should thoroughly establish the reasons for the low number of seniority claims filed and analyse the need for maintaining this option from a users' perspective.

- ***To what extent should seniority claims be verified by the OHIM in future?***

The reply should establish users' satisfaction with the current OHIM practice and provide information on users' preference as to the desired extent of examination of seniority claims (e.g. simple recording of such claims without any examination and with the applicant only having to identify the place of earlier registration and the relevant trade mark number, or, a full examination of the requirements laid down in Article 34 of the CTMR with the applicant having to substantiate his claim).

(3) Contributions of national offices to the overall functioning of the CTM system

- (a) Sort of contributions
  - ***To what extent are national offices contributing to the overall functioning of the CTM system?***
- (b) Compensation by financial contributions from OHIM
  - ***To what extent are the expenses related to these contributions made by national offices covered by payments received from the OHIM budget?***

The reply to this question should include a detailed insight and evaluation of the cooperation activities for which a financial contribution from the OHIM budget is available.

(4) Potential for enhanced cooperation between OHIM and national offices

- ***In what ways could national offices additionally and valuably contribute to the overall functioning of the CTM system to the benefit of current and potential users?***

The reply to this question should establish the potential for an enhanced cooperation between the OHIM and national offices by determining appropriate areas where from a stakeholders' point of view national offices could additionally contribute in an effective manner to the overall functioning of the CTM system, in particular, but not exclusively in the area of enforcement (anti-counterfeiting). This question is to a certain extent related to the above question no 2(b) on the future role of national offices.

(5) Impact of distributing an amount equal to 50% of OHIM's renewal fees to national offices

- ***What could be the benefits both for the OHIM and users of the CTM system to have the half of the renewal fees revenue going to Member States' national offices? What are possible disadvantages?***

(6) Accounting mechanisms

- ***How and to which extent could it be ensured that these transferred funds are available to Member States' national offices and really used for the trade mark related purposes concerned?***

The contractor should analyse the financial situation of national offices and, in particular, look for appropriate accounting mechanisms which could ensure that the funds transferred from OHIM to Member States' national offices are used for the trade mark related purposes concerned.

(7) Distribution key

- ***What would be an appropriate key for distributing 50% of OHIM's renewal fees to the individual Member States?***

## 5.2 Functioning of the CTM system including the OHIM

The reply should establish to which extent the CTM system is in need of amendment or improvement, as well as the extent to which OHIM should provide additional services, and should include the following examples, but may include anything else that in particular users of the system perceive to be in need of change.

(1) Definition of signs of which a trade mark may consist (Article 2 TMD, 4 CTMR)

- *To what extent is the required capability of being represented graphically still a relevant and appropriate requirement for a sign to qualify as a trade mark with regard to non traditional trade marks? What could be appropriate alternative requirements to establish instead of it?*
- (2) Rights conferred; sanctions (Article 5 TMD, Article 9 CTMR)
- *Does the definition of the rights conferred upon proprietors in case of infringements still satisfy current need?*
  - *Is there a need to align the customs seizure sanctions with the civil sanctions, in particular in case of import, export, and transit transactions?*
  - *Should the CTMR include the same sanctions, in accordance with the Directive 2004/84/EC on the enforcement of IP rights, as are made available for the infringement of national IP rights?*
- (3) Classification
- *To what extent does OHIM's practice of encouraging list of goods and services corresponding to the headings of the Nice classification system meet the business needs of applicants with a view to the objective of avoiding unnecessarily broad specifications of goods and services?*
- (4) Claiming priority (Article 30 CTMR)
- *To what extent should priority claims be verified by the OHIM in future?*
- The reply should define users' preference as to the treatment of priority claims. Like other IP Offices, OHIM could be allowed to simply record such claims without verification and with the applicant only having to identify the place of earlier registration and the relevant trade mark number. The claim could be challenged in adversarial proceedings. Alternatively, a full examination of the requirements could be foreseen with the applicant having to prove his priority right.
- (5) Examination of absolute grounds
- (a) Access to trade mark protection
- *To what extent are users satisfied with the granted level of access to trade mark protection?*
- The reply to this question should establish to what extent users are satisfied with the registration practice at EU level and to what extent they consider this practice either too liberal or too strict. The related results of the EBTP survey should be taken into account.
- (b) Quality of examination



- *To what extent does the examination practice of OHIM meet users' expectations of providing for certainty that the resulting CTM registrations are entitled to a presumption of validity?*

The reply to this question should not only establish the level of users' satisfaction on this point but also analyse the relevance and efficiency of pertinent quality standards and quality control mechanism established by the OHIM to ensure the required high quality.

- *To what extent does the examination practice of OHIM meet users' expectations of consistency in examination for formal deficiencies, such as classification, or in examination for absolute and relative grounds, at the various levels of OHIM activity (examination, opposition, cancellation, appeal)?*

(c) Territory of acquired distinctiveness (Article 7(3) CTMR)

- *Is there a need for clarifying the territorial scope in respect of which acquired distinctiveness must be shown and, if yes, what would be an appropriate solution?*

(d) Bad faith as additional absolute ground for refusal

- *Should bad faith be added to the list of absolute grounds for refusal?*

The reply should analyse the usefulness and added value of bad faith constituting also an absolute ground in the registration procedure.

(6) Use requirement (Article 15 CTMR)

- *To what extent has the current system with regard to the user requirement, including the 5 years grace period proved to be efficient and effective to reduce the total number of trade marks protected in the Community, and, consequently, the number of conflicts which arise between them?*

The reply to this question should establish to what extent users are satisfied with the current use requirement and its application in OHIM and Court practice. In this context the study shall investigate whether there is support from users to shorten the present 5 years grace period to 3 years, as well as regards any other measure that might be adopted in this context, such as requiring proof of use at the time of renewal or an "intent to use" at an earlier point in time.

(7) Searches (Article 39 CTMR)

(a) Optional search for national rights

- *To what extent has the recently introduced optional search system for national rights proved to be effective and efficient for users?*

The reply to this question should establish the degree of user satisfaction with the optional search system for national rights (including price).

(b) Mandatory search in the CTM Register

- ***To what extent has the mandatory search in the CTM Register proved to be effective and efficient for users?***

The reply to this question should establish the degree of user satisfaction with the mandatory search in the CTM Register and consult with users whether this search should become optional as well.

(c) Demand for additional or different services

- ***Would users like the OHIM to offer different or additional search services?***

The reply should establish to which extent (potential) users would be interested in being provided with other or additional services in the area of searching, such as, for example, pre-filing searches, or qualified search reports which do not only list possible conflicting earlier rights but also assess the relevance of these hints.

(8) Examination of relative grounds (Article 8 CTMR)

(a) No ex-officio examination

- ***To what extent has the examination of relative grounds only upon opposition, i.e. not ex officio, proved to be effective and efficient to deal with conflicting earlier trade mark rights?***

(b) Introduction of "accelerated registration" procedure

- ***To what extent is there support for introducing an option for requesting the accelerated registration of a CTM application against the payment of a higher fee and with opposition occurring thereafter?***

(9) Opposition procedure (Art. 42 CTMR)

(a) Pre-registration opposition system

- ***To what extent has in the users' view the providing of opposition proceedings before registration ('pre-registration opposition system') proved to be effective and efficient to best accommodate the interests of both CTM applicants and holders of earlier rights compared to a post-registration opposition system?***

(b) Well known and reputation marks (Art. 8(2)(c) and Art. 8(5) CTMR)

- ***Is there a need for clarifying the difference between or the common features of well-known trade marks and those with reputation?***

(c) Appropriate relative grounds

- ***To what extent have the relative grounds under Article 8(3) and (4) CTMR proved to be appropriate subject matter to be dealt with in opposition proceedings with a view to their legal and evidentiary complexity?***

(d) Opposition period

- ***To what extent does the period of three months to file an opposition still meet the interests of users?***

The contractor should analyse whether the procedure should be speeded up by shortening this period to two months.

(10) Appeal procedure

- ***To what extent does the providing of an additional two month period for filing the grounds of appeal still meet the needs and interests of users?***

The contractor should analyse whether the procedure should be speeded up by requiring that both the notice of appeal and the statement setting of grounds are to be filed within two months after the date of notification of the decision appealed from.

(11) E-Business

- ***To what extent are users satisfied with the e-Business tools offered by the OHIM and to what extent are they in favour of the OHIM performing the registration and administration of CTMs exclusively by electronic means in future?***

Apart from establishing the level of satisfaction with the e-Business tools offered the reply to the question should establish whether from a users' point of view the OHIM should admit only electronic communication in future or whether it should continue to also allow communication by traditional means such as post and fax, at least against payment of a higher fee. The related results from the EBTP survey are to be taken into account.

(12) Regime on costs

- ***To what extent has the current regime on costs proved to be effective and efficient?***

The reply to this question should as well not only analyse in this context the benefits of repealing Article 81 or of amending the cost regime to provide higher claimable amounts, e.g. in cases of pointless or frivolous oppositions, but should also look into other options to assist users such as for instance the possibility of providing legal aid to SME's.

(13) OHIM

(a) Role and mission

▪ ***How should the role and mission of OHIM be defined in future?***

The reply should analyse from a users' perspective the potential, appropriateness and added value of assigning additional tasks to the OHIM, such as particularly in the field of enforcement (anti-counterfeiting).

(b) Fees and fees structure

▪ ***To what extent is there a need for the adjustment of fees?***

The reply to this question should analyse the current fees structure and assess whether with a view to the recent substantial reduction of accession fees there is a need for adjustment of other main fees (in particular, opposition fee, fee for the application for revocation or for a declaration of invalidity, and appeal fee), taking into account the interests of earlier right holders.

▪ ***To what extent is there a need for changing and/or streamlining the fees structure?***

The reply should analyse the appropriateness of the introduction of a fee that is linked to the number of classes in the application rather than allowing the first three classes for one set fee. In this context the reply should also look at the experiences made in trade mark systems with an application fee linked to the number of classes applied for. Furthermore, the reply should establish the potential for further simplification of the fees structure in order to offer a better service to businesses.

## **6. INDICATIVE METHODOLOGY**

The contract should result in a global study, divided into two themes, based on fact finding and economic and legal analysis.

It is for the tenderer to decide on the optimal combination of methodologies to achieve the objectives specified above. The methodological approach should be described in detail in the tender with the account taken of the specifications made above and with a reasoned explanation of how the proposed methodology meets the required criteria. The final methodology may be fine-tuned as the study progresses, in consultation with the Commission. Tenderers may further revise and propose additional or more specific questions that the study should address in order to lay a basis for evaluating the main questions presented above, in consultation with the Commission.

The contractor will have to carry out desk research and literature review including analysis of legal acts and case law. The relevant stakeholders who should be consulted include but need not be confined to EU officials and other policy makers at EU-level, OHIM officials, officials of national offices and national enforcement bodies, professional associations and user groups, such as, in particular, ECTA, INTA, AIM, MARQUES and BUSINESSEUROPE, as well as legal experts in the

field of industrial property trade mark law. Furthermore, where and to the extent appropriate, the contractor shall carry out surveys of market participants using the Community trade mark system in order to establish their opinion.

## **7. ORGANISATION OF THE WORK**

### **7.1 Contact with the Commission**

The complexity of the subject implies a close co-operation between the contractor and DG MARKT. The contractor is therefore expected to maintain direct contact with the Commission officials responsible for the study, in order to deliver information on the work progress at regular intervals. These contacts should lead to a frequent exchange of information between the Commission and the contractor beyond formal deliverables, including, if necessary, the participation of supplementary meetings in the Commission's premises.

As described in the present document it will be necessary to conduct a number of interviews and surveys with various stakeholders, including market participants. List of persons to be interviewed, questionnaires, interview guides or any other documents structuring this type of fact finding should – prior to their utilisation – be discussed with and agreed to by the Commission.

### **7.2 Other meetings and consultations involving stakeholders**

Additional consultations of stakeholders (e.g. via workshops, conferences, ad-hoc meetings etc.) might be organised by the Commission and the attendance of the contractor might be required.

## **8. TECHNICAL REPORTS AND DELIVERABLES**

- Each deliverable will be submitted in 5 copies, in paper version and in electronic format compatible with Word in English and will be accompanied by an executive summary not exceeding 5 pages, in the same language and format.
- The contractor will have all deliverables verified by a person with a perfect knowledge of the English language.
- Where information that is not publicly available is provided by other institutions, associations or firms, the accuracy of this information, as expressed in the technical report, will have to be approved by those who have provided it to the Contractor.

### **8.1 INTERIM STUDY**

The interim study shall be submitted within **4 months** after the date of signature of the contract by the last of the contracting parties. The document must provide information on:

- the progress of the evaluation work: data collection, preliminary analyses, results and conclusions with respect to the above evaluation questions;
- any problems encountered in carrying out the study;
- any proposals to adapt the method or timetable which the contractor considers necessary (without extending the period within which the study is to be carried out);
- any other information that the contractor considers relevant at this stage of the study.

The Commission will comment on the document submitted within 45 days after the date of its reception. If the Commission does not react within this period, the interim study shall be deemed to have been approved.

## **8.2. FINAL STUDY**

The draft final study shall be submitted within **9 months** after the date of signature of the contract by the last of the contracting parties.

This document should explain the validity of the final findings, conclusions and recommendations. It must be written in a clear, unambiguous and comprehensive style. In particular it should allow identifying the following elements:

- (1) Introduction: a short description of the purpose, context and objectives of the study;
- (2) Explanation of the method used;
- (3) Presentation and analysis of the information used;
- (4) Conclusions: Answers to the evaluation questions specified in the terms of reference as well as to any other additional or supplementary question defined during the preparation of the study in consultation with the Commission. The answers to the evaluation questions should be duly reasoned on the basis of the evaluation work. The conclusive part of each question must follow directly from the analysis and include a reference to the judgment criterion and indicators. General conclusions that cut across the specific evaluation questions must also be provided if relevant.
- (5) Recommendations: In addition to the replies the individual evaluation questions, the draft final study should also include overall/cross-cutting conclusions. The recommendation should be presented in such a way, that for each problem identified in the conclusions, the corresponding recommendation includes feasible options for improvement, as well as information on the main

benefits, risks, problems, conditions and, if relevant, any further analysis that would be required for each option put forward.

The Commission will comment on the draft final study submitted within 45 days after the date of its reception. If the Commission does not react within this period, the draft final study shall be deemed to have been approved.

Within **12 months** from the date of signature of the contract by the last of the contracting parties, the Contractor will submit the final study in the definitive form, taking full account of these observations, either by following them precisely, or by explaining clearly why not.

The Commission will accept the final study in the definitive form or comment on it within 45 days of its reception. If the Commission does not react within this period, the final study shall be deemed to have been approved.

Should the Commission still not consider the final study acceptable, the Contractor will be invited to amend it until the Commission is satisfied. In this case, the corresponding liquidated damages will be applicable, following the provisions of Article II.16 of the Contract.

## 9. SPECIFIC TIMETABLE

Actions/Deliverables	Timetable
Signature of the contract	Reference date
Kick-off meeting	Ref. date + 5 days
First progress meeting	Ref. date + 1 month
Second progress meeting	Ref. date + 2 months
Third progress meeting	Ref. date + 3 months
<b>Interim study</b>	<b>Month A [ref. date + 4 months]</b>
Fourth progress meeting	Month A + 15 days
Commission's acceptance of interim study	Month A + 45 days
Fifth progress meeting	Month A + 2 months
Sixth progress meeting	Month A + 3,5 months
<b>Draft final study</b>	<b>Month B [ref. date + 9 months]</b>
Seventh progress meeting	Month B + 15 days
Commission's comments to draft final study	Month B + 45 days
<b>Definitive version of final report</b> <b>(benchmark for application of liquidated</b>	<b>reference date + 12 months</b>

<b>damages)</b>	
Commission's acceptance	Ref. date + 15 months + 45 days



## Annex II

### DRAFT CONTRACT

### SERVICE CONTRACT

CONTRACT NUMBER – [complete]

The European Community (hereinafter referred to as "the Community"), represented by the Commission of the European Communities (hereinafter referred to as "the Commission"), which is represented for the purposes of the signature of this contract by Mr. Bernhard Friess, Authorising Officer by sub-delegation, Directorate General for Internal Market of the one part,

and

[official name in full]

[*official legal form*]<sup>1</sup>

[*statutory registration number*]<sup>2</sup>

[official address in full]

[*VAT registration number*]

(hereinafter referred to as "the Contractor"<sup>3</sup>), [represented for the purposes of the signature of this contract by [name in full and function,]]

of the other part,

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<sup>1</sup> Delete if contractor is a natural person or a body governed by public law.

<sup>2</sup> Delete if contractor is a body governed by public law. For natural persons, indicate the number of their identity card or, failing that, of their passport or equivalent.

<sup>3</sup> In the case of a joint offer and provided the invitation to tender so specifies, the following clause should be added below the identification of the parties: "The parties identified above and hereinafter collectively referred to as 'the Contractor' shall be jointly and severally liable vis-à-vis the Commission for the performance of this contract".

HAVE AGREED

the **Special Conditions** and the **General Conditions** below and the following Annexes<sup>4</sup>:

**Annex I** – Tender Specifications (Invitation to Tender No MARKT/2009/12/D of [complete]) and Monitoring

**Annex II** – Contractor's Tender (No [complete] of [complete])

[Other Annexes]<sup>5</sup>

which form an integral part of this contract (hereinafter referred to as “the Contract”).

The terms set out in the Special Conditions shall take precedence over those in the other parts of the Contract. The terms set out in the General Conditions shall take precedence over those in the Annexes. The terms set out in the Tender Specifications (Annex I) shall take precedence over those in the Tender (Annex II).

Subject to the above, the several instruments forming part of the Contract are to be taken as mutually explanatory. Ambiguities or discrepancies within or between such parts shall be explained or rectified by a written instruction issued by the Commission, subject to the rights of the Contractor under Article I.7 should he dispute any such instruction.

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<sup>4</sup> Voluminous annexes may be replaced by a reference to the documents concerned, provided the content of such documents is not subject to challenge (by virtue of their public nature).

<sup>5</sup> Specific additional rules resulting from the specific requirements of the contract concerned or imposed by the applicable legislation.

## **I – SPECIAL CONDITIONS**

### **ARTICLE I.1 - SUBJECT**

- I.1.1.** The subject of the Contract is a study on the overall functioning of the Trade Mark System in Europe.
- I.1.2.** The Contractor shall execute the tasks assigned to him in accordance with the Tender Specifications annexed to the Contract (Annex I).

### **ARTICLE I.2 - DURATION**

- I.2.1.** The Contract shall enter into force on the date on which it is signed by the last contracting party.
- I.2.2.** Execution of the tasks may under no circumstances begin before the date on which the Contract enters into force.
- I.2.3.** The duration of the tasks shall not exceed **12 months**. This period and all other periods specified in the Contract are calculated in calendar days. Execution of the tasks shall start from date of entry into force of the Contract. The period of execution of the tasks may be extended only with the express written agreement of the parties before such period elapses.

The Commission is not obliged to react to any request for extension of the duration of the tasks received less than 1 month before expiry of the period of execution.

### **ARTICLE I.3 – CONTRACT PRICE**

The total amount to be paid by the Commission under the Contract shall be EUR [amount in figures and in words] covering all tasks executed.

### **ARTICLE I.4 – PAYMENT PERIODS AND FORMALITIES**

Payments under the Contract shall be made in accordance with Article II.4. Payments shall be executed only if the Contractor has fulfilled all his contractual obligations by the date on which the invoice is submitted.

- I.4.1** Interim payment:

Requests for interim payment by the Contractor shall be admissible if accompanied by :

- an interim study in accordance with the instructions laid down in Annex I
- the relevant invoices

provided the study has been approved by the Commission.

The Commission shall have forty-five (45) days from receipt to approve or reject the study, and the Contractor shall have thirty (30) days in which to submit additional information or a new study.

After the interim study is approved and within thirty (30) days from the date of receipt by the Commission of the relevant invoices, an interim payment corresponding to [EUR complete amount in figures and in words] equal to **30%** of the total amount referred to in Article I.3.1 shall be made.

#### **I.4.2 Payment of the balance:**

The request for payment of the balance of the Contractor shall be admissible if accompanied by:

- the final study in accordance with the instructions laid down in Annex I;
- the relevant invoices;

provided the study has been approved by the Commission.

The Commission shall have forty-five (45) days from receipt to approve or reject the study, and the Contractor shall have thirty (30) days in which to submit additional information or a new study.

After the final study is approved and within thirty (30) days from the date of receipt by the Commission of the relevant invoices, payment of the balance corresponding to [EUR complete amount in figures and in words] equal to **70%** of the total amount referred to in Article I.3.1 shall be made.

*[For Contractors established in Belgium, the provisions of the Contract constitute a request for VAT exemption No 450, provided the Contractor includes the following statement in his invoice(s): “Exonération de la TVA, article 42, paragraphe 3.3 du code de la TVA” or an equivalent statement in the Dutch or German language.]*

*[For Contractors established in Italy, the provisions of the Contract constitute a request for VAT exemption, provided the Contractor includes the following statement in his invoice(s): “Operazione non imponibile ai sensi dell’articolo 72, comma 3) paragrafo 3 del D.P.R. n. 633 del 26/10/1972 come modificato da ultimo dal D.L. n. 323 del 20/06/1996 convertito in Legge n. 425 dell’8/8/1996”.]*

## **ARTICLE I.5 – BANK ACCOUNT**

Payments shall be made to the Contractor's bank account denominated in euro, identified<sup>6</sup> as follows:

Name of bank: [complete]  
Address of branch in full: [complete]  
Exact designation of account holder: [complete]  
Full account number including codes: [complete]  
[IBAN<sup>7</sup> code: [complete]]

## **ARTICLE I.6 – GENERAL ADMINISTRATIVE PROVISIONS**

Any communication relating to the Contract shall be made in writing and shall bear the Contract number. Ordinary mail shall be deemed to have been received by the Commission on the date on which it is registered by the department responsible indicated below. Communications shall be sent to the following addresses:

### Commission:

European Commission  
Directorate-General Internal Market and Services  
Directorate D - Knowledge-based Economy  
Unit D/2 - Industrial property  
B-1049 Brussels

### Contractor:

Mr/Mrs/Ms [complete]  
[Function]  
[Company name]  
[Official address in full]

## **ARTICLE I.7– APPLICABLE LAW AND SETTLEMENT OF DISPUTES**

**I.7.1.** The Contract shall be governed by the national substantive law of the Kingdom of Belgium.

**I.7.2.** Any dispute between the parties resulting from the interpretation or application of the Contract which cannot be settled amicably shall be brought before the courts of Brussels.

## **ARTICLE I.8 – DATA PROTECTION**

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<sup>6</sup> By a document issued or certified by the bank.

<sup>7</sup> BIC or SWIFT code for countries with no IBAN code.

Any personal data included in the Contract shall be processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. It shall be processed solely for the purposes of the performance, management and follow-up of the Contract by the entity acting as data controller without prejudice to possible transmission to internal audit services, to the European Court of Auditors, to the Financial Irregularities Panel and/or to the European Anti-Fraud Office (OLAF) for the purposes of safeguarding the financial interests of the Community. The Contractor shall have the right of access to his personal data and the right to rectify any such data that is inaccurate or incomplete. Should the Contractor have any queries concerning the processing of his personal data, he shall address them to the Data Protection Officer for DG Internal Market. The Contractor shall have right of recourse at any time to the European Data Protection Supervisor.

#### **ARTICLE I.9 – TERMINATION BY EITHER CONTRACTING PARTY**

Either contracting party may, of its own volition and without being required to pay compensation, terminate the Contract by serving 30 days formal prior notice. Should the Commission terminate the Contract, the Contractor shall only be entitled to payment corresponding to part-performance of the Contract. On receipt of the letter terminating the Contract, the Contractor shall take all appropriate measures to minimise costs, prevent damage, and cancel or reduce his commitments. He shall draw up the documents required by the Special Conditions for the tasks executed up to the date on which termination takes effect, within a period not exceeding sixty days from that date.

#### **ARTICLE I.9a – CONTRACT CONCLUDED DURING STANDSTILL PERIOD**

In case this Contract was signed by both the Commission and the Contractor before the expiry of 14 calendar days from the day after simultaneous dispatch of information about the award decisions and decisions to reject<sup>8</sup>, this Contract shall be null and void.

#### **ARTICLE I.10 – OTHER SPECIAL CONDITIONS**

Wherever the Special Conditions refer to deliverables as being 'interim study' or 'final study', the terms 'interim technical report' and 'final technical report' in the General Conditions should be read as respectively 'interim study' and 'final study'.

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<sup>8</sup> Where the Contract is awarded pursuant to a negotiated procedure without prior publication of a contract notice, the text in brackets should read as follows: *[from the day after the contract award notice has been published in the Official Journal of the European Union]*.

## **II – GENERAL CONDITIONS**

### **ARTICLE II.1 – PERFORMANCE OF THE CONTRACT**

- II.1.1.** The Contractor shall perform the Contract to the highest professional standards. The Contractor shall have sole responsibility for complying with any legal obligations incumbent on him, notably those resulting from employment, tax and social legislation.
- II.1.2.** The Contractor shall have sole responsibility for taking the necessary steps to obtain any permit or licence required for performance of the Contract under the laws and regulations in force at the place where the tasks assigned to him are to be executed.
- II.1.3.** Without prejudice to Article II.3 any reference made to the Contractor's staff in the Contract shall relate exclusively to individuals involved in the performance of the Contract.
- II.1.4.** The Contractor must ensure that any staff performing the Contract have the professional qualifications and experience required for the execution of the tasks assigned to him.
- II.1.5.** The Contractor shall neither represent the Commission nor behave in any way that would give such an impression. The Contractor shall inform third parties that he does not belong to the European public service.
- II.1.6.** The Contractor shall have sole responsibility for the staff who execute the tasks assigned to him.

The Contractor shall make provision for the following employment or service relationships with his staff:

- staff executing the tasks assigned to the Contractor may not be given orders direct by the Commission;
  - the Commission may not under any circumstances be considered to be the staff's employer and the said staff shall undertake not to invoke in respect of the Commission any right arising from the contractual relationship between the Commission and the Contractor.
- II.1.7.** In the event of disruption resulting from the action of a member of the Contractor's staff working on Commission premises or in the event of the expertise of a member of the Contractor's staff failing to correspond to the profile required by the Contract, the Contractor shall replace him without delay. The Commission shall have the right to request the replacement of any such member of staff, stating its reasons for so doing. Replacement staff must have the necessary qualifications and be capable of

performing the Contract under the same contractual conditions. The Contractor shall be responsible for any delay in the execution of the tasks assigned to him resulting from the replacement of staff in accordance with this Article.

- II.1.8.** Should any unforeseen event, action or omission directly or indirectly hamper execution of the tasks, either partially or totally, the Contractor shall immediately and on his own initiative record it and report it to the Commission. The report shall include a description of the problem and an indication of the date on which it started and of the remedial action taken by the Contractor to ensure full compliance with his obligations under the Contract. In such event the Contractor shall give priority to solving the problem rather than determining liability.
- II.1.9.** Should the Contractor fail to perform his obligations under the Contract in accordance with the provisions laid down therein, the Commission may - without prejudice to its right to terminate the Contract - reduce or recover payments in proportion to the scale of the failure. In addition, the Commission may impose penalties or liquidated damages provided for in Article II.16.

## **ARTICLE II.2 – LIABILITY**

- II.2.1.** The Commission shall not be liable for damage sustained by the Contractor in performance of the Contract except in the event of wilful misconduct or gross negligence on the part of the Commission.
- II.2.2.** The Contractor shall be liable for any loss or damage caused by himself in performance of the Contract, including in the event of subcontracting under Article II.13. The Commission shall not be liable for any act or default on the part of the Contractor in performance of the Contract.
- II.2.3.** The Contractor shall provide compensation in the event of any action, claim or proceeding brought against the Commission by a third party as a result of damage caused by the Contractor in performance of the Contract.
- II.2.4.** In the event of any action brought by a third party against the Commission in connection with performance of the Contract, the Contractor shall assist the Commission. Expenditure incurred by the Contractor to this end may be borne by the Commission.
- II.2.5.** The Contractor shall take out insurance against risks and damage relating to performance of the Contract if required by the relevant applicable legislation. He shall take out supplementary insurance as reasonably required by standard practice in the industry. A copy of all the relevant insurance contracts shall be sent to the Commission should it so request.



## **ARTICLE II.3 - CONFLICT OF INTERESTS**

**II.3.1.** The Contractor shall take all necessary measures to prevent any situation that could compromise the impartial and objective performance of the Contract. Such conflict of interests could arise in particular as a result of economic interest, political or national affinity, family or emotional ties, or any other relevant connection or shared interest. Any conflict of interests which could arise during performance of the Contract must be notified to the Commission in writing without delay. In the event of such conflict, the Contractor shall immediately take all necessary steps to resolve it.

The Commission reserves the right to verify that such measures are adequate and may require additional measures to be taken, if necessary, within a time limit which it shall set. The Contractor shall ensure that his staff, board and directors are not placed in a situation which could give rise to conflict of interests. Without prejudice to Article II.1 the Contractor shall replace, immediately and without compensation from the Commission, any member of his staff exposed to such a situation.

**II.3.2.** The Contractor shall abstain from any contact likely to compromise his independence.

**II.3.3.** The Contractor declares:

- that he has not made and will not make any offer of any type whatsoever from which an advantage can be derived under the Contract,
- that he has not granted and will not grant, has not sought and will not seek, has not attempted and will not attempt to obtain, and has not accepted and will not accept, any advantage, financial or in kind, to or from any party whatsoever, where such advantage constitutes an illegal practice or involves corruption, either directly or indirectly, inasmuch as it is an incentive or reward relating to performance of the Contract.

**II.3.4.** The Contractor shall pass on all the relevant obligations in writing to his staff, board, and directors as well as to third parties involved in performance of the Contract. A copy of the instructions given and the undertakings made in this respect shall be sent to the Commission should it so request.

## **ARTICLE II.4 – PAYMENTS**

**II.4.1.** Pre-financing:

Where required by Article I.4.1, the Contractor shall provide a financial guarantee in the form of a bank guarantee or equivalent supplied by a bank or an authorised financial institution (guarantor) equal to the amount indicated in the same Article to cover pre-financing under the Contract. Such guarantee may be replaced by a joint and several guarantee by a third party.

The guarantor shall pay to the Commission at its request an amount corresponding to payments made by it to the Contractor which have not yet been covered by equivalent work on his part.

The guarantor shall stand as first-call guarantor and shall not require the Commission to have recourse against the principal debtor (the Contractor).

The guarantee shall specify that it enters into force at the latest on the date on which the Contractor receives the pre-financing. The Commission shall release the guarantor from its obligations as soon as the Contractor has demonstrated that any pre-financing has been covered by equivalent work. The guarantee shall be retained until the pre-financing has been deducted from interim payments or payment of the balance to the Contractor. It shall be released the following month. The cost of providing such guarantee shall be borne by the Contractor.

#### **II.4.2. Interim payment:**

At the end of each of the periods indicated in Annex I the Contractor shall submit to the Commission a formal request for payment accompanied by those of the following documents which are provided for in the Special Conditions:

- an interim technical report in accordance with the instructions laid down in Annex I;
- the relevant invoices indicating the reference number of the Contract to which they refer;
- statements of reimbursable expenses in accordance with Article II.7.

If the report is a condition for payment, on receipt the Commission shall have the period of time indicated in the Special Conditions in which:

- to approve it, with or without comments or reservations, or suspend such period and request additional information; or
- to reject it and request a new report.

If the Commission does not react within this period, the report shall be deemed to have been approved. Approval of the report does not imply recognition either of its regularity or of the authenticity, completeness or correctness of the declarations or information enclosed.

Where the Commission requests a new report because the one previously submitted has been rejected, this shall be submitted within the period of time indicated in the Special Conditions. The new report shall likewise be subject to the above provisions.

#### **II.4.3. Payment of the balance:**

Within sixty days of completion of the tasks referred to in Annex I the Contractor shall submit to the Commission a formal request for payment accompanied by those of the following documents which are provided for in the Special Conditions:

- a final technical report in accordance with the instructions laid down in Annex I;
- the relevant invoices indicating the reference number of the Contract to which they refer;
- statements of reimbursable expenses in accordance with Article II.7.

If the report is a condition for payment, on receipt the Commission shall have the period of time indicated in the Special Conditions in which:

- to approve it, with or without comments or reservations, or suspend such period and request additional information; or
- to reject it and request a new report.

If the Commission does not react within this period, the report shall be deemed to have been approved. Approval of the report does not imply recognition either of its regularity or of the authenticity, completeness or correctness of the declarations and information enclosed.

Where the Commission requests a new report because the one previously submitted has been rejected, this shall be submitted within the period of time indicated in the Special Conditions. The new report shall likewise be subject to the above provisions.

## **ARTICLE II.5 – GENERAL PROVISIONS CONCERNING PAYMENTS**

**II.5.1.** Payments shall be deemed to have been made on the date on which the Commission's account is debited.

**II.5.2.** The payment periods referred to in Article I.4 may be suspended by the Commission at any time if it informs the Contractor that his payment request is not admissible, either because the amount is not due or because the necessary supporting documents have not been properly produced. In case of doubt on the eligibility of the expenditure indicated in the payment request, the Commission may suspend the time limit for payment for the purpose of further verification, including an on-the-spot check, in order to ascertain, prior to payment, that the expenditure is eligible.

The Commission shall notify the Contractor accordingly and set out the reasons for the suspension by registered letter with acknowledgment of receipt or equivalent. Suspension shall take effect from the date of dispatch of the letter. The remainder of the period referred to in Article I.4 shall begin to run again once the suspension has been lifted.

**II.5.3.** In the event of late payment the Contractor shall be entitled to interest, provided the calculated interest exceeds EUR 200. In case interest does not exceed EUR 200, the Contractor may claim interest within two months of receiving the payment. Interest shall be calculated at the rate applied by the European Central Bank to its most recent main refinancing operations (*“the reference rate”*) plus seven percentage points (*“the margin”*). The reference rate in force on the first day of the month in which the payment is due shall apply. Such interest rate is published in the C series of the Official Journal of the European Union. Interest shall be payable for the period elapsing from the calendar day following expiry of the time limit for payment up to the day of payment. Suspension of payment by the Commission may not be deemed to constitute late payment.

## **ARTICLE II.6 – RECOVERY**

- II.6.1.** If total payments made exceed the amount actually due under the Contract or if recovery is justified in accordance with the terms of the Contract, the Contractor shall reimburse the appropriate amount in euro on receipt of the debit note, in the manner and within the time limits set by the Commission.
- II.6.2.** In the event of failure to pay by the deadline specified in the request for reimbursement, the sum due shall bear interest at the rate indicated in Article II.5.3. Interest shall be payable from the calendar day following the due date up to the calendar day on which the debt is repaid in full.
- II.6.3.** The Commission may, after informing the Contractor, recover amounts established as certain, of a fixed amount and due by offsetting, in cases where the Contractor also has a claim on the Communities that is certain, of a fixed amount and due. The Commission may also claim against the guarantee, where provided for.

## **ARTICLE II.7 - REIMBURSEMENTS**

- II.7.1.** Where provided by the Special Conditions or by Annex I, the Commission shall reimburse the expenses which are directly connected with execution of the tasks on production of original supporting documents, including receipts and used tickets.
- II.7.2.** Travel and subsistence expenses shall be reimbursed, where appropriate, on the basis of the shortest itinerary.
- II.7.3.** Travel expenses shall be reimbursed as follows:
- a) travel by air shall be reimbursed up to the maximum cost of an economy class ticket at the time of the reservation;
  - b) travel by boat or rail shall be reimbursed up to the maximum cost of a first class ticket;
  - c) travel by car shall be reimbursed at the rate of one first class rail ticket for the same journey and on the same day;
  - d) travel outside Community territory shall be reimbursed under the general conditions stated above provided the Commission has given its prior written agreement.
- II.7.4.** Subsistence expenses shall be reimbursed on the basis of a daily allowance as follows:
- a) for journeys of less than 200 km (return trip) no subsistence allowance shall be payable;

- b) daily subsistence allowance shall be payable only on receipt of a supporting document proving that the person concerned was present at the place of destination;
- c) daily subsistence allowance shall take the form of a flat-rate payment to cover all subsistence expenses, including accommodation, meals, local transport, insurance and sundries;
- d) daily subsistence allowance, where applicable, shall be reimbursed at the rate specified in Article I.3.3.

**II.7.5.** The cost of shipment of equipment or unaccompanied luggage shall be reimbursed provided the Commission has given prior written authorisation.

## **ARTICLE II.8 – OWNERSHIP OF THE RESULTS - INTELLECTUAL AND INDUSTRIAL PROPERTY**

Any results or rights thereon, including copyright and other intellectual or industrial property rights, obtained in performance of the Contract, shall be owned solely by the Community, which may use, publish, assign or transfer them as it sees fit, without geographical or other limitation, except where industrial or intellectual property rights exist prior to the Contract being entered into.

## **ARTICLE II.9 – CONFIDENTIALITY**

- II.9.1.** The Contractor undertakes to treat in the strictest confidence and not make use of or divulge to third parties any information or documents which are linked to performance of the Contract. The Contractor shall continue to be bound by this undertaking after completion of the tasks.
- II.9.2.** The Contractor shall obtain from each member of his staff, board and directors an undertaking that they will respect the confidentiality of any information which is linked, directly or indirectly, to execution of the tasks and that they will not divulge to third parties or use for their own benefit or that of any third party any document or information not available publicly, even after completion of the tasks.

## **ARTICLE II.10 - USE, DISTRIBUTION AND PUBLICATION OF INFORMATION**

- II.10.1.** The Contractor shall authorise the Commission to process, use, distribute and publish, for whatever purpose, by whatever means and on whatever medium, any data contained in or relating to the Contract, in particular the identity of the Contractor, the subject matter, the duration, the amount paid and the reports. Where personal data is concerned, Article I.8 shall apply.
- II.10.2.** Unless otherwise provided by the Special Conditions, the Commission shall not be required to distribute or publish documents or information supplied in performance of the Contract. If it decides not to publish the documents or information supplied, the Contractor may not have them distributed or published elsewhere without prior written authorisation from the Commission.
- II.10.3.** Any distribution or publication of information relating to the Contract by the Contractor shall require prior written authorisation from the Commission and shall mention the amount paid by the Community. It shall state that the opinions expressed are those of the Contractor only and do not represent the Commission's official position.
- II.10.4.** The use of information obtained by the Contractor in the course of the Contract for purposes other than its performance shall be forbidden, unless the Commission has specifically given prior written authorisation to the contrary.

## **ARTICLE II. 11 – TAXATION**

- II.11.1.** The Contractor shall have sole responsibility for compliance with the tax laws which apply to him. Failure to comply shall make the relevant invoices invalid.
- II.11.2.** The Contractor recognises that the Commission is, as a rule, exempt from all taxes and duties, including value added tax (VAT), pursuant to the provisions of Articles 3 and 4 of the Protocol on the Privileges and Immunities of the European Communities.
- II.11.3.** The Contractor shall accordingly complete the necessary formalities with the relevant authorities to ensure that the goods and services required for performance of the Contract are exempt from taxes and duties, including VAT.
- II.11.4.** Invoices presented by the Contractor shall indicate his place of taxation for VAT purposes and shall specify separately the amounts not including VAT and the amounts including VAT.

## **ARTICLE II.12 – FORCE MAJEURE**

- II.12.1.** Force majeure shall mean any unforeseeable and exceptional situation or event beyond the control of the contracting parties which prevents either of them from performing any of their obligations under the Contract, was not due to error or negligence on their part or on the part of a subcontractor, and could not have been avoided by the exercise of due diligence. Defects in equipment or material or delays in making it available, labour disputes, strikes or financial problems cannot be invoked as force majeure unless they stem directly from a relevant case of force majeure.
- II.12.2.** Without prejudice to the provisions of Article II.1.8, if either contracting party is faced with force majeure, it shall notify the other party without delay by registered letter with acknowledgment of receipt or equivalent, stating the nature, likely duration and foreseeable effects.
- II.12.3.** Neither contracting party shall be held in breach of its contractual obligations if it has been prevented from performing them by force majeure. Where the Contractor is unable to perform his contractual obligations owing to force majeure, he shall have the right to remuneration only for tasks actually executed.
- II.12.4.** The contracting parties shall take the necessary measures to reduce damage to a minimum.

## **ARTICLE II.13 – SUBCONTRACTING**

- II.13.1.** The Contractor shall not subcontract without prior written authorisation from the Commission nor cause the Contract to be performed in fact by third parties.
- II.13.2.** Even where the Commission authorises the Contractor to subcontract to third parties, he shall none the less remain bound by his obligations to the Commission under the Contract and shall bear exclusive liability for proper performance of the Contract.
- II.13.3.** The Contractor shall make sure that the subcontract does not affect rights and guarantees to which the Commission is entitled by virtue of the Contract, notably Article II.17.

## **ARTICLE II.14 – ASSIGNMENT**

- II.14.1.** The Contractor shall not assign the rights and obligations arising from the Contract, in whole or in part, without prior written authorisation from the Commission.
- II.14.2.** In the absence of the authorisation referred to in 1 above, or in the event of failure to observe the terms thereof, assignment by the Contractor shall not be enforceable against and shall have no effect on the Commission.

## **ARTICLE II.15 – TERMINATION BY THE COMMISSION**

**II.15.1.** The Commission may terminate the Contract in the following circumstances:

- (a) where the Contractor is being wound up, is having his affairs administered by the courts, has entered into an arrangement with creditors, has suspended business activities, is the subject of proceedings concerning those matters, or is in any analogous situation arising from a similar procedure provided for in national legislation or regulations;
- (b) where the Contractor has not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country applicable to the Contract or those of the country where the Contract is to be performed;
- (c) where the Commission has evidence or seriously suspects the Contractor or any related entity or person, of professional misconduct;
- (d) where the Commission has evidence or seriously suspects the Contractor or any related entity or person, of fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;
- (e) where the Commission has evidence or seriously suspects the Contractor or any related entity or person, of substantial errors, irregularities or fraud in the award procedure or the performance of the Contract;
- (f) where the Contractor is in breach of his obligations under Article II.3;
- (g) where the Contractor was guilty of misrepresentation in supplying the information required by the Commission as a condition of participation in the Contract procedure or failed to supply this information;
- (h) where a change in the Contractor's legal, financial, technical or organisational situation could, in the Commission's opinion, have a significant effect on the performance of the Contract;
- (i) where execution of the tasks has not actually commenced within three months of the date foreseen, and the new date proposed, if any, is considered unacceptable by the Commission;
- (j) where the Contractor is unable, through his own fault, to obtain any permit or licence required for performance of the Contract;
- (k) where the Contractor, after receiving formal notice in writing to comply, specifying the nature of the alleged failure, and after being given the opportunity to remedy the



failure within a reasonable period following receipt of the formal notice, remains in serious breach of his contractual obligations.

**II.15.2.** In case of force majeure, notified in accordance with Article II.12, either contracting party may terminate the Contract, where performance thereof cannot be ensured for a period corresponding to at least to one fifth of the period laid down in Article I.2.3.

**II.15.3.** Prior to termination under point c), d), e), h) or k), the Contractor shall be given the opportunity to submit his observations.

Termination shall take effect on the date on which a registered letter with acknowledgment of receipt terminating the Contract is received by the Contractor, or on any other date indicated in the letter of termination.

**II.15.4.** Consequences of termination:

In the event of the Commission terminating the Contract in accordance with this Article and without prejudice to any other measures provided for in the Contract, the Contractor shall waive any claim for consequential damages, including any loss of anticipated profits for uncompleted work. On receipt of the letter terminating the Contract, the Contractor shall take all appropriate measures to minimise costs, prevent damage, and cancel or reduce his commitments. He shall draw up the documents required by the Special Conditions for the tasks executed up to the date on which termination takes effect, within a period not exceeding sixty days from that date.

The Commission may claim compensation for any damage suffered and recover any sums paid to the Contractor under the Contract.

On termination the Commission may engage any other contractor to complete the services. The Commission shall be entitled to claim from the Contractor all extra costs incurred in making good and completing the services, without prejudice to any other rights or guarantees it has under the Contract.

#### **ARTICLE II.15a – SUBSTANTIAL ERRORS, IRREGULARITIES AND FRAUD ATTRIBUTABLE TO THE CONTRACTOR**

Where, after the award of the Contract, the award procedure or the performance of the Contract prove to have been subject to substantial errors, irregularities or fraud, and where such errors, irregularities or fraud are attributable to the Contractor, the Commission may refuse to make payments, may recover amounts already paid or may terminate all the contracts concluded with the Contractor, in proportion to the seriousness of the errors, irregularities or fraud.

#### **ARTICLE II.16 – LIQUIDATED DAMAGES**

Should the Contractor fail to perform his obligations under the Contract within the time limits set by the Contract, then, without prejudice to the Contractor's actual or potential liability incurred in relation to the Contract or to the Commission's right to terminate the Contract, the Commission may decide to impose liquidated damages of 0.2% of the amount specified in Article I.3.1 per calendar day of delay. The Contractor may submit arguments against this decision within thirty days of notification by registered letter with acknowledgement of receipt or equivalent. In the absence of reaction on his part or of written withdrawal by the Commission within thirty days of the receipt of such arguments, the decision imposing the liquidated damages shall become enforceable. These liquidated damages shall not be imposed where there is provision for interest for late completion. The Commission and the Contractor expressly acknowledge and agree that any sums payable under this Article are in the nature of liquidated damages and not penalties, and represent a reasonable estimate of fair compensation for the losses that may be reasonably anticipated from such failure to perform obligations.

#### **ARTICLE II.17 – CHECKS AND AUDITS**

- II.17.1.** Pursuant to Article 142 of the Financial Regulation applicable to the general budget of the European Communities, the European Court of Auditors shall be empowered to audit the documents held by the natural or legal persons receiving payments from the budget of the European Communities from signature of the Contract up to five years after payment of the balance.
- II.17.2.** The Commission or an outside body of its choice shall have the same rights as the European Court of Auditors for the purpose of checks and audits limited to compliance with contractual obligations from signature of the Contract up to five years after payment of the balance.
- II.17.3.** In addition, the European Anti Fraud Office may carry out on-the-spot checks and inspections in accordance with Council Regulation (Euratom, EC) No 2185/96 and Parliament and Council Regulation (EC) No 1073/1999 from signature of the Contract up to five years after payment of the balance.

#### **ARTICLE II.18 – AMENDMENTS**

Any amendment to the Contract shall be the subject of a written agreement concluded by the contracting parties. An oral agreement shall not be binding on the contracting parties.

## **ARTICLE II.19 – SUSPENSION OF THE CONTRACT**

Without prejudice to the Commission's right to terminate the Contract, the Commission may at any time and for any reason suspend execution of the tasks under the Contract or any part thereof. Suspension shall take effect on the day the Contractor receives notification by registered letter with acknowledgment of receipt or equivalent, or at a later date where the notification so provides. The Commission may at any time following suspension give notice to the Contractor to resume the work suspended. The Contractor shall not be entitled to claim compensation on account of suspension of the Contract or of part thereof.

### **SIGNATURES**

For the Contractor,  
[*Company name*/forename/surname/function]

For the Commission,  
Bernhard FRIESS Authorising Officer by  
Sub-delegation

signature[s]: \_\_\_\_\_

signature[s]: \_\_\_\_\_

Done at [Brussels], [date]

Done at [Brussels], [date]

In duplicate in English.

### Annex III

## LETTER OF SUBMISSION OF TENDER

Dear Sirs,

You will find enclosed the tender of [name of tenderer] in response to invitation to tender MARKT/2009/12/D for *Study on the overall functioning of the Trade Mark System in Europe*.

### SECTION 1. - IDENTIFICATION

#### 1.1. - Tenderer's identification<sup>9</sup>

Tenderers will fill in the Legal Entity form that can be attained from the following internet addresses: [http://ec.europa.eu/comm/budget/execution/legal\\_entities\\_fr.htm](http://ec.europa.eu/comm/budget/execution/legal_entities_fr.htm) or [http://ec.europa.eu/comm/dgs/internal\\_market/calls.htm](http://ec.europa.eu/comm/dgs/internal_market/calls.htm). (link)

#### 1.2. - Personal details<sup>10</sup>

##### 1.2.1.- Person authorized to sign the contract on behalf of the tenderer

<b>TITLE</b>	Mr/Ms/Dr/other.....(delete or complete as appropriate)
<b>NAME</b>	Surname (in capital letters):..... Forename:.....
<b>FUNCTION</b>	
<b>ADDRESS</b>	
<b>CONTACT DETAILS</b>	Direct telephone:..... Direct facsimile:..... E-mail address:.....

##### 1.2.2. - Contact person (if different from 1.)

<b>TITLE</b>	Mr/Ms/Dr/other.....(delete or complete as appropriate)
<b>NAME</b>	Surname (in capital letters):..... Forename:.....
<b>FUNCTION</b>	
<b>MAILING ADDRESS</b>	

<sup>9</sup> In the case of consortia this Section must be completed for each member of the consortium.

<sup>10</sup> In the case of consortia, only one person will be authorized to sign.

<b>CONTACT DETAILS</b>	Direct telephone:..... Direct facsimile:..... E-mail address:.....

<b>1.3. - Sub-contractor's details<sup>11</sup></b>	
<b>NAME</b>	
<b>ADDRESS</b>	
<b>CONTACT DETAILS</b>	Telephone:..... Facsimile:..... E-mail address:.....
<b>LEGAL FORM</b>	
<b>COMMERCIAL REGISTER , ETC. – REGISTRATION DETAILS</b>	Denomination of register:..... Date of registration:..... Country of registration:..... Registration number:.....
<b>FOR NATURAL PERSONS</b>	Identity Card [No + expiry date]..... Or Passport or other [No + expiry date].....
<b>VAT</b>	Registration number:..... or Statement of exemption issued by the national VAT authority dated.....enclosed under reference..... Issued by.....
<b>SHORT DESCRIPTION OF THE PART OF WORK SUB- CONTRACTED</b>	

<b>SECTION 2. - QUESTIONS RELATING TO EXCLUSION</b>
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By signing this form, I certify that the tenderer does not find himself in any of the following situations:

Is bankrupt or being wound up, is having his affairs administered by the courts, has entered into an arrangement with creditors, has suspended business activities, is the subject of
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<sup>11</sup> This section must be completed for each sub-contractor if any or if more than one

proceedings concerning those matters, or is in any analogous situation arising from a similar procedure provided for in national legislation or regulations
Has been convicted of an offence concerning his professional conduct by a judgment which has the force of <i>res judicata</i>
Has been guilty of grave professional misconduct proven by any means which the contracting authority can justify.
Has not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority or those of the country where the contract is to be performed.
Has been the subject of a judgment which has the force of <i>res judicata</i> for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests.
Following another procurement procedure or grant award procedure financed by the Community budget, has been declared to be in serious breach of contract for failure to comply with his contractual obligations

### SECTION 3. - QUESTIONS RELATING TO THE SELECTION OF TENDERER

<b>3.1. - Financial capacity</b>	
	<i>Annex/Page No</i>
Material provided to prove economic and financial capacity: 1) 2)	

<b>3.2. - Technical capacity</b>	
<b>CRITERIA</b>	<b>FULFILLED BY (NAME OF TEAM MEMBER )</b>
Criterion 1 (Description)	
Criterion 2 (Description)	
	<i>Annex/Page No</i>
Other material provided to prove technical capacity: 1) 2)	

#### SECTION 4. - BANK IDENTIFICATION

Tenderers will fill in the Bank Account form that can be attained from the following internet addresses: [http://ec.europa.eu/comm/budget/execution/ftiers\\_fr.htm](http://ec.europa.eu/comm/budget/execution/ftiers_fr.htm) or [http://ec.europa.eu/comm/dgs/internal\\_market/calls.htm](http://ec.europa.eu/comm/dgs/internal_market/calls.htm). (link)

.....  
(Signature of authorised representative<sup>12</sup>)

Forename:.....

Name:.....

Position.....

Date:.....

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<sup>12</sup> All the pages need also to be initialled by the authorised representative

Annex IV

**PRICE AND BREAKDOWN OF COSTS**

	<i>PARTIAL AMOUNTS</i>	<i>TOTALS</i>
<b>TOTAL PRICE OFFERED</b>		.....
<i>Broken down as follows:</i>		
Man/day fees	.....	
Total fees	.....	
Travel and subsistence [including 8 meetings with the Commission services in Brussels]	.....	
Administrative expenses	.....	
Overheads	.....	

.....  
(Signature of authorised representative<sup>13</sup>)

Forename:.....

Name:.....

Position.....

Date:.....

<sup>13</sup> All the pages need also to be initialled by the authorised representative