

The commercial use of public information (CUPI)

December 2006

OFT861

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1 EXECUTIVE SUMMARY

- 1.1 When you look at a map, listen to a weather forecast, check the details of a public company or even trace your family tree you are probably using Public Sector Information (PSI). Often this information will be supplied directly by the Public Sector Information Holder (PSIH), such as Ordnance Survey, the Met Office or The National Archives. In other cases, it may be supplied to you by a business using PSI sourced from the PSIH such as a television channel using Met Office data or a publisher using UK Hydrographic Office information to produce navigation charts for small yachts.
- 1.2 Many of the products/services developed by businesses will involve adding value to the original PSI, such as an in-car navigation system. In almost all cases the PSIH will be the only source for the original information and in many cases it may itself be in competition with these other businesses in providing products with added value to end users.
- 1.3 This study looks at the markets for PSI and how well the supply of PSI is working for customers, particularly:
- what PSI is made available for re-use, at what price and on what terms
 - whether businesses can compete with PSIHs in the supply of products/services to which value has been added.
- 1.4 We have concluded that improvements can be made. We estimate that, with these improvements, the sector could double in terms of the value it contributes to the UK economy to a figure of £1 billion annually.¹ This would mean the production of a wider range of competitively priced goods and services for consumers and the generation of wider-spread productivity improvements across the economy.

¹ Net economic value - see Annexe G

Public sector bodies as sole sources for information

- 1.5 PSIHs are usually the only source of the basic information they hold. There are good reasons why this is the case, such as: high fixed collection costs, government funding for collection and privileged access, perhaps through statutory collection powers. We refer to this basic information, which cannot be substituted directly from other sources, as **unrefined information**. Once a PSIH does something with the unrefined information which could also be performed by another organisation, such as a private business, if it were given access to that unrefined information, it becomes **refined information**.
- 1.6 For the sector to work well and grow to its full potential, access to unrefined PSI needs to improve. Where a PSIH is a sole supplier of information and is also engaged in making refined information products, there is a danger that it will restrict access to its unrefined information and treat its own refined information operations more favourably than competing businesses. Consequently, it is essential that access to the monopoly element of their business, the unrefined information, is maximised and that it is provided in a fair and non-discriminatory manner to other businesses seeking to use it to provide products or services to the public.
- 1.7 There are examples of good practice in allowing access to unrefined information, such as the British Geological Survey making its core samples and field notebooks (unrefined information) available to businesses. There are also some examples of PSIHs treating businesses on an equal footing to their own refined information operations. For example, the Met Office ensures that it charges the same price for weather observations to competing businesses as to its own weather forecasting operations.
- 1.8 These cases are, however, not typical, and looking across the range of PSIHs, improvements are needed to ensure that the PSI sector grows to contribute as much as it should to the UK economy.

Common issues

1.9 Over a third of respondents to our business survey reported problems with PSIHs and over two thirds of these said that they were serious.² In our case studies and in our consultations we have explored these issues further. We have concluded that there are a number of problems with access to unrefined information and with some PSIHs appearing to take advantage of their privileged position. These include the following:

Inadequate availability of unrefined information

- Often businesses do not know what information PSIHs hold. Despite PSIHs being required to produce a list of main documents available for re-use, most surveyed have not done so.
- Many businesses report they are unable to obtain PSI in a sufficiently unrefined form and on appropriate licensing terms to make their products and services financially viable (only more expensive and sophisticated products are available).
- Most PSIHs do not distinguish adequately between the information for which they are the sole supplier (unrefined) and their information products and services to which they have added value (refined), which could also be provided by the private sector if they had access to the unrefined data on suitable terms. This has a knock-on effect for pricing.

Overly-restrictive licensing policies

- In one specific instance we found a PSIH which has an explicit licensing exception policy that prevents businesses from competing with the current value-added products of the PSIH itself or with any it intends to market.

² Ref Annexe B, *Businesses that use PSI*

- Businesses have been unable to gain licences of sufficient length to allow them to tender for a major government contract in competition with the PSIH from whom they need the licences.

Inadequate quality of service

- PSIHs are not always as customer-focussed as businesses need them to be to enable the businesses, in turn, to serve their own customers properly. A particular issue highlighted in our business survey was delay in receiving information.

Unduly high prices

- There are very few PSIHs that separate their unrefined and refined information operations, even at an accounting level. Costs are therefore not always allocated between the unrefined and refined information operations of PSIHs. This means that PSIHs cannot ensure that the prices charged for unrefined and refined information reflect the relevant costs of their provision. It also means that it is not possible to determine whether the prices of unrefined information, for businesses producing refined information products, are consistent with those charged internally within a PSIH which produces refined information products.

Existing controls on PSIHs' activities

1.10 HM Treasury's (HMT) *Cross-cutting Review of the Knowledge Economy (Review of Government Information)* in 2000 recognised the central importance of this sector to the economy and its potential for growth. The Cross-cutting Review reached many similar conclusions to this study. Among other things it concluded that:

- more could be done to improve access to government information
- the government could more clearly define its role in the PSI sector
- there needed to be price transparency

- licensing should be made easier
- there should be a complaints procedure with real and credible remedies
- PSIHs should have comprehensive Information Asset Registers listing what PSI is available for re-use.

1.11 There have been a number of positive steps towards implementing these recommendations. These include: reinforcing HM Stationery Office's position (HMSO) and later establishing the Office of Public Sector Information (OPSI) to advise on and regulate the operation of the re-use of PSI;³ the establishment of the Advisory Panel on Public Sector Information; and making the licensing of some PSI easier (the Click-Use Licence).

1.12 Our assessment, however, is that these steps have not been sufficient to address the issues identified in the Review and that the regulatory framework appears not to be very effective in remedying the problems of the sector.

1.13 OPSI enforces the Re-use Regulations,⁴ which set out principles for when and how PSIHs should make PSI available for re-use. These include making PSI available on fair, consistent and non-discriminatory terms, with transparent pricing and licensing, in a timely manner and with the establishment of a quick and easily accessible complaints procedure.

1.14 OPSI also runs the Information Fair Trader Scheme which aims to promote best practice through onsite verification of information trading

³ OPSI was established in 2005 to help implement the Re-use of Public Sector Information Directive 2003. The HMSO is now a separate legal entity within OPSI.

⁴ Where there are competition issues these may be referred to the OFT by OPSI under a Memorandum of Understanding of 28 July 2005. This can be found in Annexe H, *The Legal Framework*.

activities, measuring standards of openness, fairness and transparency amongst PSIHs who are accredited. Although, in principle, a voluntary scheme, if a PSIH wants to have delegated authority to license Crown copyright material themselves, for example, in order to determine its own prices, it must gain accreditation.

- 1.15 However, OPSI's powers and resources are extremely limited and insufficient to meet the objectives we believe are required to be a fully effective regulator. As a result, it is not able to monitor adequately the large number of PSIHs to ensure that pricing and licensing terms are not discriminatory.
- 1.16 OPSI's sanctions are relatively weak and not legally binding, so it is unable to force a PSI to comply with its recommendations. The sanctions it does have are strongest with regard to Crown copyright material and for those PSIHs who are voluntary members of the Information Fair Trader Scheme (IFTS). However, there are many PSIHs which are not Crown bodies and are not members of the IFTS. Over a quarter of the 400 larger PSIHs and a huge proportion of the total 100,000 public sector bodies in the UK fall into this category. In comparison to other regulators, even taking into account the present size and value of the sector, and ignoring its potential for growth, it is significantly under-resourced.

Remedies

- 1.17 In the light of this, we have assessed the options to address these problems and, in particular, to ensure equal access to re-users of information. If nothing is done, the PSI sector will not fulfil its potential.
- 1.18 One way to address the problems identified would be to require PSIHs to divest themselves of their refined information operations. In principle, this removes the issue of not allowing equal access because, with no refined information operations of their own, the issue would not emerge. As such it could be argued that this is a straightforward answer to the problem which has the benefit of not requiring much subsequent regulatory intervention.

- 1.19 However, the argument is not so clear-cut. An independent body, much like a regulator, would still be needed to ensure that the line between the unrefined and the refined information activities was drawn in the right place for the divestment. There would also be a need for such an organisation to have an ongoing role to ensure that the PSIH did not start engaging in refined activities at a later date and that its pricing policies were fair and transparent.
- 1.20 Some businesses have said that there are certain refined activities they would be unlikely to undertake themselves because it would not be financially attractive to do so. Divestment of all refined products would mean that these products did not reach the market.
- 1.21 Further, our study found that there are examples of good practice amongst PSIHs, showing that it is possible for PSIHs, with refined information operations, to act in a fair and transparent manner.
- 1.22 As such, we do not think divestment is merited across the board at present. However, we do envisage situations where requiring divestment of refined activities should be recommended as the ultimate sanction for PSIHs which persist in acting in an unfair and non-transparent manner.
- 1.23 Another, arguably even more radical, approach is to require PSIHs to charge nothing for the re-use of unrefined PSI.⁵ Many have argued for this on the basis that public information should, as a matter of principle, be freely available to all.
- 1.24 Our remit is, however, confined to an assessment of competition within PSI markets. On this basis, it could be argued that providing information free of charge would solve competition problems concerning unequal access to unrefined information because it would be open to all to use or re-use as they wished. It would also provide businesses with increased incentives to invest in new products and services which may not have

⁵ Alternatively, PSIHs could charge only the marginal costs of dissemination. In fact, a large amount of PSI is already made available at no charge.

been viable otherwise. We need, however, to consider other factors. The major PSIHs are largely dependent on the income from re-use to finance their operations. If they were unable to raise money in this way, then the level of public funding they receive would need to be increased.

- 1.25 Our first approach has, therefore, been to look for solutions for the competition issues identified that do not have substantial Exchequer implications. A fuller assessment of whether PSI should be provided free is best carried out by Central Government. HMT's Cross-cutting Review recognised that further work should be undertaken by HMT and the DTI on the economics of information pricing with a view to developing further the evidence base and to inform future policy decisions. Many policy-setting bodies, PSIHs themselves and their business customers have told us that this work is necessary to arrive at the most efficient policy for PSI.
- 1.26 The various possibilities for charging, such as allowing re-use at no charge, charging only for the marginal costs of dissemination and charging to cover all or a proportion of the costs of collection of the data have very different implications. The implications are different for the economy as a whole and for who pays for, and who benefits from, the collection of PSI. To date, HMT and the DTI have not produced further research on the subject.
- 1.27 We have consequently looked for a solution that is proportionate and builds on the existing regulatory framework to make it more effective. The framework needs to ensure:

- that businesses have access to PSI at the earliest point in its refinement that it is useful to them and on an equal basis to any refined information operations of the PSIH itself⁶
- where PSIHs are engaged in significant refined activities they need to ensure that they are not favouring their own refined operations over the private sector. This requires the use of cost-reflective pricing and accounting separation of PSIHs' unrefined and refined operations.

1.28 In looking for a proportionate but effective solution, we make a number of recommendations that can be implemented without primary legislation (see Chapter 8). These aim to improve the monitoring of the PSIHs that gain a substantial income from commercially exploiting PSI.

- We are working with HMT to set out clear guidance on the key principles we want to see and on a suitable cost allocation framework.
- We want to see OPSI ensuring that these principles are followed by PSIHs.
- We would like to see more rigorous testing by the existing Information Fair Trader Scheme to ensure equal access.
- We would also like to see an expectation that all PSIHs with an income of over £100,000 per annum from the supply of PSI gain full accreditation.

1.29 We envisage that the accreditation scheme will put the onus on PSIHs to prove that they are making PSI available at the earliest point it is usable by businesses and that they are acting in a fair and transparent manner.

⁶ The Re-use Regulations encourage but do not require public sector bodies to make certain information available for commercial use/re-use. However, where a public sector body is using its monopoly information commercially itself, the presumption should be that it also allows businesses to do the same. See 3.17 and 8.16 for further details.

- 1.30 This package of measures requires some additional resources for OPSI but, particularly compared to the option of making PSI available at no charge, it does not have nearly as great an impact on government finances. The cost of these resources would be minimal compared to the untapped potential value to the economy from PSI. Even doubling OPSI's £700,000 budget for the regulation of PSI would only represent around a quarter of a per cent of the potential value of PSI.
- 1.31 We appreciate that there are substantial differences between PSIHs, such as whether information-collection is their main activity or whether it is a by-product; whether they are required to make a return on capital employed to HMT; whether they can charge for registration of information; whether the information is Crown copyright and what business model is used.
- 1.32 Despite all of this, we have developed our principles to work across all PSIHs. Broadly, they follow on from existing principles enshrined in OPSI and HMT guidance but we have looked for ways to ensure that the principles are followed in practice. We know that this is feasible because some PSIHs already adhere to these principles and are able to combine making an income from the supply of PSI with allowing access to unrefined information on the same terms as they offer to their own refined operations.
- 1.33 Clearly, a solution that does not require additional legislation is preferable. Nonetheless, there is the possibility that this approach will not fully address the problems we have identified. Given the potential importance of the sector to the economy, we propose to evaluate the impact of these recommendations in two to three years time. If we do not see that our recommendations are taking effect amongst PSIHs, we would need to consider again the case for further action including the possibility of increasing the regulatory powers affecting the sector.

A joined-up policy for PSI

- 1.34 A further important factor contributing to the sector not reaching its full potential is a lack of clarity about the government's policy on PSI (which

could be better informed by a proper assessment of whether PSI should be provided for free). On the one hand, the Re-use of Public Sector Information Regulations 2005, the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and the Transformational Government initiative aim to make as much PSI available as widely and cheaply as possible. On the other hand, the Trading Funds' requirement to fulfil income-generating targets and the Wider Markets Initiative (WMI) encourage PSIHS to earn an income from selling or licensing PSI.

- 1.35 As indicated above, PSIHS earning an income from PSI is not incompatible with growth in the PSI sector but the incentives behind the Trading Fund model and the WMI can aggravate a situation where a monopoly supplier of PSI also engages in refined information activities, with insufficient scrutiny of their approach to equal access.
- 1.36 At a more practical level, the lack of clarity in PSI policy is reflected in lack of clarity in guidance documents. There is a range of guidance that emphasises different goals and which does not indicate which document should take precedence in particular circumstances. This makes it very difficult for PSIHS to know what course of action to follow; whether to charge for PSI or not; who to charge and how much to charge. Therefore, a consistent policy on PSI, with corresponding clear guidance would help to ensure that the PSI sector can reach its full potential.

2 INTRODUCTION

Aim of the Study

- 2.1 The market study on the Commercial Use of Public Information (CUPI) was launched on 28 July 2005 under the OFT's function contained in section 5 of the Enterprise Act 2002. Its aim was to examine whether the way in which Public Sector Information Holders (PSIHs) supply information works well for businesses, to the best advantage for consumers. PSIHs are public bodies such as Ordnance Survey, the Met Office, the Environment Agency, local authorities or The National Archives, which hold information on a wide range of issues. This information may be re-used by businesses on a commercial basis to make new products and services such as in-car satellite navigation or used in internal decision-making.
- 2.2 The study was prompted by a number of factors:
- one of the OFT's priority themes (from 2005 to 2007) concerns the interaction between government and markets and specifically the impact the public sector can have on the way markets work through legislation, regulation and purchasing decisions
 - the value of public sector information within the economy, and
 - the OFT's previous market study on the commercial use of public sector information in relation to property searches which found that improvements could be made in the sector.
- 2.3 Broadly we have examined whether the sector has been working as well as it should be. In particular:
- how the raw information that PSIHs collect is turned into value-added products and services
 - how the access to and pricing of raw information affects competition between PSIHs and businesses selling value-added products

- PSIHs' engagement in value-added activities, and
- the effectiveness of the existing regulatory and legal framework.

Scope of the Study

- 2.4 There are thousands of public sector bodies in the UK. They range from larger organisations like most Trading Funds, executive agencies, non-departmental bodies, self-financing public corporations and emergency services to smaller-scale organisations like schools and ad hoc committees (see Chapter 3). We decided to focus primarily, but not exclusively, on central government PSIHs, particularly the 400 bodies with an annual expenditure of £500,000 or more.
- 2.5 We excluded public sector broadcasters from the scope of the study. Broadcasters are very different organisations to the majority of PSIHs in that they are generally not the only suppliers of the information they hold (see Chapter 5 on market positioning for the relevance of this). Competition and consumer issues related to public sector broadcasters are sector-specific and, therefore, best dealt with by the independent regulator for communication markets, OFCOM.⁷
- 2.6 In response to requests from stakeholders we included a limited sample of local authorities⁸ and also of NHS bodies.

Methodology

- 2.7 Full descriptions of our methodology and the results of all formal pieces of research can be found in the annexes. This research consisted of:

⁷ OFCOM has duties under the Communications Act 2003. It also has powers to enforce the Competition Act 1998 within the communications sector.

⁸ We did not include local authorities in our original scoping because the OFT had recently published its property search market study report which focussed on local authorities. We changed our view on this because local authorities hold many other types of PSI and are the only bodies able to create addresses.

- survey of 400 PSIHS
 - survey of 300 businesses which buy/license PSI from PSIHS
 - UK case studies on:
 - British Geological Survey
 - Companies House
 - Environment Agency
 - HM's Court Service
 - Met Office
 - Ordnance Survey
 - UK Hydrographic Office
 - small sample of local authorities
 - small sample of NHS bodies
 - international case studies on:
 - general policy
 - company registers
 - mapping data
 - meteorological data
- in:
- Australia
 - Sweden
 - USA
- Economic modelling work to estimate the value of PSI in the UK.

2.8 We also consulted with stakeholders in a variety of ways. A list of consultees is provided in Annexe J.

3 WHAT IS PUBLIC SECTOR INFORMATION AND HOW IS IT SUPPLIED?

Introduction

- 3.1 PSIHs collect and produce a rich and diverse range of information in the course of their activities. Much of this public sector information (PSI) is made available to consumers and businesses and is used as a source of information, a decision-making tool and as an input for the development of new products, that is, for commercial re-use. Some PSIHs also produce their own products from PSI such as maps, training material, books and DVDs.
- 3.2 Our survey of public bodies indicates that the income to PSIHs derived from all forms of supply, sale and licensing of this information was in the region of £400m during 2004-05. There are also significant wider benefits for businesses and consumers from the development and use of PSI in addition to this figure, which we estimate to be at least £190m. Our estimation work indicates that the total value has the potential to grow to be much greater and could double in size. This demonstrates the significance of PSI to the wider UK economy.
- 3.3 This chapter looks at the different methods by which PSI is collected and the types of information PSIHs produce. It goes on to look at how third parties use this information commercially and examines the supply chain from PSIH to the production of commercial products.

PSI suppliers

- 3.4 The sector examined in this report is extremely complex and diverse. The Department for Constitutional Affairs estimates that there are some 100,000 public bodies in the UK, ranging from hospitals and local authorities to central government, all of which generate, to a lesser or greater extent, PSI. These public bodies undertake a vast range of functions and vary in their structure, size, activities and business model. We focussed on the larger central government PSIHs but also looked at a small sample of local authorities and NHS bodies.

- 3.5 Public sector information therefore deals with many different subjects and exists in many forms, such as training material, forecasts, predictions and projections, technical standards, databases, designs, images, and reports as well as in its more obvious forms such as raw and processed data. Moreover, it is delivered using many different media such as publications, via the internet, as electronic files, as paper copy, and even as messages to mobile phones.
- 3.6 From our survey, sent to over 400 of the largest PSIHS, we estimate that, inclusive of these many variations, there are around 120 public sector bodies currently earning some income from the supply of PSI. Some of these bodies merely make a charge to cover the marginal costs of dissemination, that is, the cost of providing that particular piece of information, and many other bodies do not charge at all for the re-use of their information.
- 3.7 In 2004-05, the income generated by these approximately 120 PSIHS from the supply of information was nearly £400m.⁹ About three-quarters of this income was generated by just five public bodies – Ordnance Survey (OS), the Met Office, the UK Hydrographic Office (UKHO), HM Land Registry and Companies House. Table 3.1 shows the top eight PSIHS, from responses to our survey, in terms of income generated from the supply of information.

⁹ Para 3.6, Annex A, *Survey of Public Information Holders*.

Table 3.1 – Top PSIHs in terms of income from the supply of information

PSIH	Reported income from supply of information (£m)
Ordnance Survey	£100m
The Met Office	£90m
UK Hydrographic Office	£57.2m
HM Land Registry	£29.4m ¹⁰
Companies House	£14.2m
The Coal Authority	£9.3m
Ordnance Survey of Northern Ireland	£7.4m
Registers of Scotland	£6.2m

Survey of Public Sector Information Holders, OFT 2006.

3.8 The proportion of overall income obtained from the supply, sale and licensing of information varies considerably between different PSIHs. Bodies like Ordnance Survey and the UK Hydrographic Office obtain all, or very nearly all, of their income from the sale and licensing of information. Income from the supply of information also makes a substantial contribution to the overall funding for bodies like the Met Office (55 per cent) and Companies House (25 per cent). For two important PSIHs, Companies House and HM Land Registry, considerable amounts of income are obtained from registration fees for company records and accounts, and land and property ownership respectively.

3.9 However, for many public bodies such as the Environment Agency and the Driver and Vehicle Licensing Agency income from the supply, sale and licensing of information constitutes a small part of their overall funding; instead, these bodies rely to a large extent on other sources of funding such as from the Exchequer, statutory services such as the issuing of licences and enforcement activity.

3.10 Our survey of PSIHs found that approximately half of the total income of £400m in 2004-05 came from businesses, 45 per cent came from other

¹⁰ Most of this income (£29.1m) derives from the supply of PSI chiefly for conveyancing services where prices are set by statute.

public sector bodies and the remaining five per cent from the general public.

The production of PSI

- 3.11 PSiHs collect and generate information for a number of reasons. For some PSiHs, this is because their statutory duty, public task or main activity involves the ongoing collection and/or production of information for the purposes of informing government, businesses or consumers. For example, the role of the Met Office is 'to provide forecasts and information which allow the public, Government and business to make informed decisions about how best to capitalise on, or mitigate, the impacts of the weather.'¹¹ In order to achieve this, and to fulfil its obligations under the World Meteorological Organisation, the Met Office is required to actively collect a wide range of data.¹²
- 3.12 Similarly, OS is responsible for the official, definitive surveying and topographic mapping of Great Britain¹³ and so collects and distributes mapping information in a variety of formats. The UKHO and Office for National Statistics (ONS) also fall into this category of collecting information proactively.¹⁴
- 3.13 Other PSiHs undertake a registration function, collecting data from businesses or individuals, often being paid a fee to do so. Examples include Companies House which has a duty to store company information delivered under the Companies Act 1985 and related

¹¹ <http://www.metoffice.gov.uk/corporate/annualreport0405/introduction/index.html>

¹² For more information on the Met Office's role, see Annexe C, *UK Case Studies*, DotEcon Ltd, May 2006.

¹³ Para 1.1, *Framework Document*, Ordnance Survey, 2004.

¹⁴ In some cases, PSiHs contract out all or part of the collecting function to one or more private companies.

legislation,¹⁵ and the Driver and Vehicle Licensing Agency whose primary aims are to facilitate road safety and general law enforcement by maintaining registers of drivers and vehicles and by use of the registers to collect vehicle excise duty.¹⁶

- 3.14 Information can also be collected as a by-product of PSIHs undertaking an activity, that is, information is collected which is ancillary to the main purpose of that activity. An example is an NHS body which amasses information on the numbers and types of medicines being used, as a by-product of keeping records of the prescriptions it dispenses.

Types of PSI

- 3.15 The range of PSI produced in the UK is considerable, covering everything from geographic, environmental and hydrographic data to social statistics, trademarks and museum material. The information can be categorised broadly under a number of headings:¹⁷

- **Economic and Business** – includes financial information, company information and economics statistics, such as those on inflation and unemployment
- **Social** – includes demographic information, attitude surveys, data on health and illnesses and census data
- **Legal** – includes figures on crimes, convictions and judgements as well as information on legislation etc

¹⁵ Companies House website, www.companieshouse.gov.uk

¹⁶ Driver and Vehicle Licensing Agency website, www.dvla.gov.uk

¹⁷ These categories have been derived from those used by the PIRA report (*Commercial Exploitation of Europe's Public Sector Information*, PIRA International Ltd, 2000) and the MEPSIR study (Measuring European Public Sector Information Resources, www.mepsir.org), with some additions considered appropriate for the market study.

- **Geographic** – includes address information, topographic data, aerial photographs and hydrological information
- **Meteorological** – includes weather forecasts and climatological data
- **Scientific** – includes information produced within publicly-funded research and medical institutes, patents and research carried out within government departments
- **Transport** – includes public transport information, traffic congestion, road safety statistics and vehicle registration information
- **Environmental, agricultural and fisheries** – includes land use information, environmental quality data, farm incomes and use of resources, fish harvests and fish farming information
- **Cultural** – includes materials within museums and art galleries as well as library resources
- **Political** – includes government press releases, proceedings of local and national governments, as well as green papers.

The supply of PSI

3.16 PSIHs are subject to a range of provisions which aim to ensure proper accountability, including parliamentary regularity and propriety, when supplying and charging for information. These are set out in more detail in Chapter 8, *The Regulatory Framework and Securing Compliance* and Annexe H, *The Legal Framework*.

3.17 A major recent piece of legislation governing the supply of PSI for re-use is the Re-use of Public Sector Information Regulations 2005¹⁸ (the Re-use Regulations)¹⁹ which implements the European Directive of 2003

¹⁸ SI 2005/1515.

¹⁹ The Re-use Regulations do not apply to the use of a document by a public sector body for the purpose of carrying out its own public task or that of another body.

(the Re-use Directive).²⁰ While PSIHS are not obliged to make information available for re-use,²¹ and some types of PSIHS fall outside their remit,²² the Re-use Regulations encourage the wide distribution of PSI. They also set out what is considered PSI²³ for the purpose of the Re-use Regulations, what PSIHS can charge for information and the fair terms on which access should be given. In addition, the Re-use Regulations require that PSIHS have an internal complaints procedure. Where complaints are not resolved under this process, complainants can refer their complaint to the Office for Public Sector Information (OPSI), the body which regulates the PSI sector.²⁴

- 3.18 Of the PSIHS who supply information for re-use, some PSIHS do so for a one-off charge (or, in some cases, for no charge) to third parties who are then allowed to use/re-use the information. However, these PSIHS do not sell the intellectual property rights (IPR) to the data and they maintain restrictions on the subsequent use/re-use.
- 3.19 Other PSIHS charge third parties an annual fee which must be paid for as long as the user wishes to have access to the information. Some PSIHS also charge royalties to re-use the information; for example, on a per-unit basis, meaning the total charge is dependent on a business's sales levels of the product developed using the PSI. In some cases, charges for the

²⁰ European Directive 2003/98/EC OJ [2003] L 354/90.

²¹ European Directive 2003/98/EC, Recital 9 and Article 1(15); Re-use of Public Sector Information Regulations 2005 (SI 2005/1515), Reg 7. See also Chapter 8, para 8.16.

²² The Re-use Regulations broadly exclude documents held by public service broadcasters, educational and research establishments and archive and cultural establishments.

²³ The Re-use Regulations refer to information as 'documents' which is defined as including any content whether in writing, electronic form, or in a sound, visual or audio-visual recording (other than a computer program).

²⁴ The role of OPSI is examined in detail in Chapter 8, *The Regulatory Framework and Securing Compliance*.

supply of certain information are set by statutory instruments and the PSIH does not enjoy any discretion about these charges.

- 3.20 PSIHs that are Crown bodies supply their information for re-use through one of two routes. The vast majority of these use the Click-Use Licence system run by OPSI.²⁵ This allows PSIHs to leave the practical administration of licensing their information to OPSI. This simple online system provides third parties with a licence entitling them to re-use 'core Crown copyright information', 'Parliamentary copyright information' and 'value-added Crown copyright information'.
- 3.21 Licences for the first two categories of information are provided free but there may be a charge for a value-added licence depending on the type and amount of information being re-used.²⁶ OPSI returns any monies received as part of the Click-Use scheme to the PSIHs that provided the information as appropriate.
- 3.22 A small number of other PSIHs that are Crown bodies license information directly to re-users, for example, the Met Office and the Driving Standards Agency.²⁷ In order to be allowed to manage their own licensing activity, the body must have been given delegated authority by the Controller of HMSO and have undergone full accreditation of the Information Fair Trader Scheme (IFTS), operated by OPSI.²⁸ This means that the PSIH has been verified by OPSI as meeting the criteria for

²⁵ Responsibility for the management of Crown copyright sits with Her Majesty's Stationery Office (HMSO) which operates from within OPSI.

²⁶ See OPSI website: <http://www.opsi.gov.uk/click-use/index.htm>

²⁷ As of October 2006, there were 12 Crown bodies with full IFTS accreditation and delegated authority. In addition, while they are non-Crown bodies and are therefore able to license their own information without delegated authority, the British Geological Survey and the Environment Agency have also chosen to undergo full IFTS accreditation. For a complete list see the OPSI website at: <http://www.opsi.gov.uk/ifts/ifts-members.htm>

²⁸ Chapter 8, *The Regulatory Framework and Securing Compliance*, contains details on the IFTS scheme and licensing process.

supplying information under the five principles of the IFTS - openness, transparency, fairness, compliance and challenge.²⁹

- 3.23 This route is more appropriate to PSIHs who produce and supply a large amount of information for re-use and therefore have the resources to deal with the required processes in-house. As a result, the majority of PSIHs who hold delegated authority and are accredited under the IFTS are Trading Funds for whom the licensing of information accounts for a significant proportion of their income.
- 3.24 In addition, nine other government departments that have responsibility for specialised forms of licensing activity have been granted limited delegation.³⁰ Generally, these are departments that hold information in the form of photographs, films, drawings and other images;³¹ for example, the Forestry Commission's picture library and Historic Scotland's photographic library.
- 3.25 PSIHs that are not Crown bodies may own the IPR in some or all of the information they hold. Therefore, should the information have any commercial uses, these bodies are able to control sales and licensing directly. In some cases, for example a set of photographs, copyright may be held by a third party rather than the PSIH. In such cases, the PSIH may be unable to grant permission to re-use the photographs. Permission will, instead, need to be sought from the third party where identifiable, unless the PSIH has been granted the rights to allow the re-use on the copyright holder's behalf.
- 3.26 Most PSIHs are the sole suppliers of information they have gathered. This information may be sold directly to consumers and businesses on a

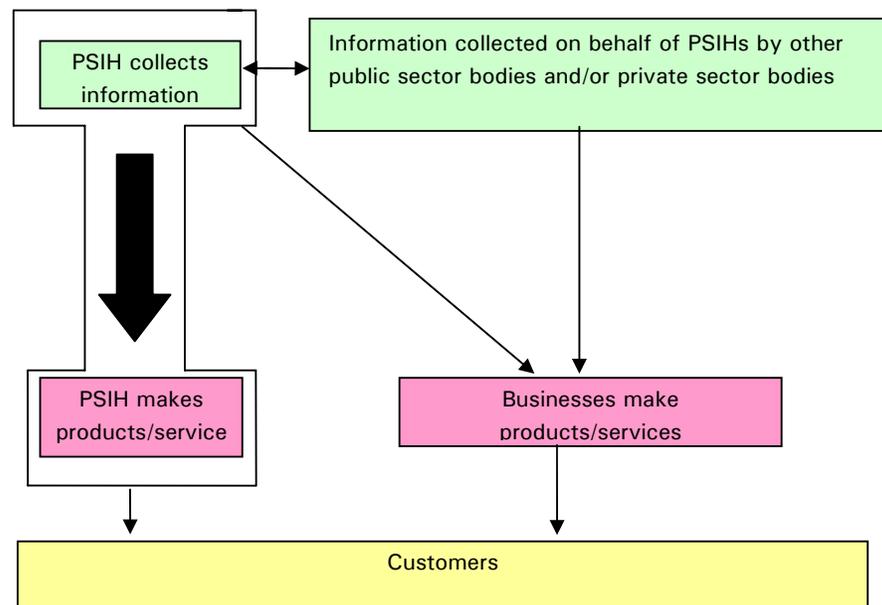
²⁹ See OPSI website: <http://www.opsi.gov.uk/ifts/ifts-principles.htm>

³⁰ Bodies that have limited delegation are monitored under IFTS Online. See the OPSI website for more details <http://www.opsi.gov.uk/ifts/assessment/index.htm>

³¹ A full list of these PSIHs can be found on the OPSI website at <http://www.opsi.gov.uk/ifts/ifts-members.htm>

retail basis (or provided at no charge on websites), to businesses as wholesale products or to other public sector organisations. Some PSIHs also use the information to develop products and services of their own (sometimes using PSI obtained from other PSIHs) which are then sold on, often in competition with the private sector. This is illustrated below but is discussed further in Chapter 5.

Figure 3.1 – The supply chain



Commercial use of PSI

3.27 While the original purpose of the collection and dissemination of PSI by a public body may not be for commercial use, the potential value of the information means businesses are often keen to access and use it for a wide variety of purposes.

3.28 Our survey³² found that businesses' use of PSI could be broken down into three broad categories; 39 per cent of respondents to our survey

³² See Annexe B, *Businesses That Use PSI*.

said they use PSI for their own business purposes, 28 per cent use it to produce products for consumers and 44 per cent use it as an input to produce products for industry.³³

- 3.29 'Own business use' could include large supermarkets and other retailers who have sophisticated 'just-in-time' ordering systems allowing them to adapt rapidly to changes in demand.
- 3.30 A key factor in the demand for certain products is the weather; sales of ice-cream, barbecues and other summer goods can rise dramatically during spells of good weather. As a result, retailers use weather data from the Met Office to assist them in predicting short-term demand patterns, thereby maximising their sales.
- 3.31 Suppliers of goods or services which appeal to particular age groups, for example older people, may make use of population and social trend statistics from ONS to estimate demand over the long-term. Banks and building societies use County Court Judgments to determine the credit-worthiness of consumers looking to take out a loan.
- 3.32 Businesses also use PSI as an input into products developed for industry, with 44 per cent of businesses in our survey claiming to do so. For instance, companies purchase licences to reproduce and sell reproductions of maritime data from the UKHO (and, often, from other international hydrographic offices) and use it to produce a range of naval navigation products ranging from radars to autopilot systems for the commercial shipping industry. The Health and Safety Executive's information is widely used by consultants who use it to produce training materials and courses for firms to ensure they meet their legal duty to protect the health and safety of their employees.
- 3.33 Although consumers may not be aware of the fact, businesses also produce a huge range of products and services, aimed at the consumer

³³ These uses are not mutually exclusive and, as a result of some businesses using information for more than one purpose, these results add up to more than one hundred.

market, that are derived in whole or part from PSI. Twenty eight per cent of respondents to our business survey are involved in developing such products and services. These include in-car satellite navigation devices, countryside walking maps, weather reports delivered to mobile phones and manuals to help pass your driving test. Another rapidly growing area is the use of census data to provide on-line genealogy services for people looking to trace their family history. Box 3.1 provides an outline on how access to PSI has benefited consumers.

Box 3.1 – Genealogy services

Tracing ancestors and building a family tree has long been a popular hobby in the UK. With the advent of the internet, participation has boomed and genealogy is now one of the top uses of the World Wide Web.

A decade ago, amateur genealogists were limited in the scale and scope of information they could uncover, both by the amount of time and money they could dedicate to their hobby. Researching births, marriages and deaths records required either visiting one or many records offices or the inconvenience of long waits and the frustration of the lack of progress while the information was posted. Travelling to records offices was also not an option for many people and even for those that did, the research could involve a long and laborious trawl through possibly hundreds of records.

The rapid and widespread use of the internet has transformed this once time-consuming pursuit into a mass-market hobby. It is estimated that nearly 13 per cent of UK internet users access family history websites,³⁴ with the number of individual visits to these websites having almost doubled between 2004 and 2006 to more than 4 million.³⁵

Many early genealogy websites specialised in a particular type of information, for example, of a local area or the names of people who served in the armed forces. While this information was easily obtained from parish registers, libraries and other local records, it was also relatively limited. The real growth was sparked by the release and subsequent digitisation of public sector information (PSI), namely UK government census data.

In January 2002, the Public Records Office - now The National Archives (TNA) - made the 1901 census data available online via QinetiQ, the company who won the Public Finance Initiative contract to digitise the data. Demand on launch was so great that at its peak, the website received 1.2 million 'hits' over a 24 hour period which overwhelmed the service and led to its temporary closure. Since then, information from all the open censuses from 1841 to 1901 is available online and TNA is working towards releasing the 1911 data, as well as several other types of genealogical records. TNA estimate that online use of its data now outweighs onsite use (that is, visits to its records offices) by 100 to one.

The success of genealogy websites has resulted in a myriad of companies providing online services based on PSI. From a beginning of small, independent family history websites, online genealogy is becoming big business. In 2005 Genes Reunited (part of the Friends Reunited Group) acquired the data and website rights from QinetiQ for £3.3m. The Group was purchased by ITV in the same year for £120m. It is now the UK's largest family tree, genealogy and ancestry site with over 5 million members.

³⁴ ComScore Europe 2005

³⁵ Ibid

- 3.34 Our survey of businesses found that, for many respondents, PSI is of considerable importance to their activities. Among businesses generating products from PSI, almost all (98 per cent) considered that the PSI was an important or a very important input to their products. Three out of four businesses who produce products consider they would not be able to continue production in the absence of the availability of the PSI.

The value of PSI

- 3.35 The available evidence on growth in the sector for PSI is limited. In 1998-99, HM Treasury's *Cross-cutting Review of the Knowledge Economy* estimated that total income from publishing Crown copyright information, including information under licensing arrangements, was around £340m. This compares with our estimate of £397m for a wider selection of public bodies,³⁶ of which again roughly £340m is accounted for by Crown bodies.
- 3.36 While we do not have data over the period 1998 to 2005 to illustrate whether prices of PSI increased or decreased overall and therefore to make firm conclusions about whether there was market growth or not, we believe there is potential for PSI markets to grow significantly. Work commissioned as part of the CUPI market study³⁷ estimated that the current value of PSI to the UK economy was approximately £590 million and this could double to generate around £1.1 billion per year.

³⁶ See Annexe A, *Survey of PSIHs*

³⁷ See Annexe G, *Economic Value and Detriment Analysis*

4 POLICY AND GUIDANCE ISSUES

4.1 Before looking at the potential issues and our evidence base, it is important to have an understanding of the policy framework within which PSIAs are operating and the guidance documents which set out policy. This chapter describes that framework and some of the issues arising from it. There is further discussion of the regulatory framework and securing compliance in Chapter 8. In this chapter we also introduce the concepts of 'unrefined' and 'refined' PSI to aid understanding of our analysis and recommendations in relation to that information which is only available from PSIAs.

HMT's Cross-cutting Review of the Knowledge Economy 2000

4.2 In 2000 HMT undertook a review of the knowledge economy as part of that year's Spending Review. This was driven by a desire to boost the knowledge economy by improving the way government information could be acquired and reused by publishing and internet businesses. The review focussed primarily on how the supply and licensing of, and the use or re-use of Crown copyright information, was operating at that time. In particular, three key issues were examined:

- whether the way in which the government priced PSI was creating a barrier to re-use
- whether licences used by departments were preventing information users from accessing information effectively and whether licensing could be simplified, and
- how to overcome departmental inertia which was viewed as a major hindrance to open access for commercial exploitation of government information. The review stated that there was little proactive dissemination and, despite particular initiatives, this type of open access was far removed from the core business of most departments and agencies.

4.3 In its conclusions, the review recognised the value of PSI to the knowledge economy and its potential for growth. It also recognised that more could be done to improve access to government information and that government needed to raise its profile in the area by defining and explaining its role in the sector more clearly, setting out new and stretching service standards and abiding by them.

4.4 It identified several key areas to address including:

- there needed to be price transparency (see section below for policy on pricing)
- licensing should be made easier, including the promotion of a class licence to create a click-use pay environment
- standards-setting and a new complaints procedure with real and credible remedies for genuine problems, and
- PSIHs should have comprehensive Information Asset Registers (listing what PSI is available for re-use).

4.5 Some action has been taken on and after these recommendations. This includes: the establishment of the Office of Public Sector Information (OPSI) (around the existing HMSO) to advise on and regulate the operation of the re-use of PSI; the establishment of the Advisory Panel on Public Sector Information; and making the licensing of some PSI easier (the Click-Use Licence).

4.6 However, we have found that progress has been less rapid in areas such as equal access and the creation of Information Asset Registers and that the regulatory structure appears inadequate to address the problems of the sector. This is discussed further in the following chapters.

Pricing policies as proposed in the Review

4.7 The Review discussed the pros and cons of different approaches to pricing. It recognised that normal government policy for the generality of charging is that services should recover full costs except where

Ministers have agreed to recover less or where the service is provided in competition with the private sector when prices charged should approximate to the market price. However, in relation to information, it thought that this policy led to necessarily more complex licences and thereby contributed to departmental inertia. It stated that average cost pricing³⁸ created a significant barrier to the re-use of information because it required parts of government, where this is not core business, to make assessments and attributions of relevant costs and negotiate individual contracts in an area in which many departments and agencies are ill-placed to operate.

- 4.8 Therefore, the review considered implementing a policy of marginal cost pricing for all government information but found that this was not without its problems. The review noted that because the marginal cost of making information available is low and the fixed costs of production are high, marginal cost pricing would shift the burden of covering fixed costs from consumers to taxpayers. Raising taxation to meet these costs would create further distortions in the economy.
- 4.9 It concluded that the benefits to the economy of a marginal cost pricing policy were not certain and 'that further work should be undertaken by the Treasury and the DTI on the economics of information pricing with a view to developing further the evidence base and to inform future policy decisions.'
- 4.10 Many policy-setting bodies, PSIHs themselves and their business customers have told us that this work is necessary to arrive at the most efficient policy for PSI. To date HMT and the DTI have not produced further research on the subject.
- 4.11 In the mean time, the Cross-cutting Review argued that the case for marginal cost pricing was weakest for government Trading Funds but

³⁸ Average cost is where the full costs are divided equally among the products produced. Pricing on this basis ensures each product recovers the average cost and, overall, the full costs are recovered.

that they should improve their pricing and dissemination policies. However, it proposed that bodies other than Trading Funds should move immediately to a policy of marginal cost pricing for what they term 'raw' PSI. Where the information was 'value-added' it advocated market pricing.

4.12 The Review does not define 'market pricing' but HMT's *Fees and Charges Guide* states that where there is or may be competition from the private sector, an average real return on capital employed should be set to reflect market pricing:

'The exact rate should take into account:

- market prices,
- the level of risk associated with the activityand the cost of capital experienced by private sector competitors in the relevant market, and
- past performance and any known specific issues, which may be expected to affect future performance.'³⁹

4.13 It does not state explicitly how to assess the level of market prices. (In one example a PSIH interprets this to mean staff phoning businesses, pretending to be a potential customer and asking for prices.) Nor does it give guidance on how to define the relevant market.

4.14 With regard to Trading Funds, the Review states that Trading Funds need to have more transparent accounting, with clearer separation of activity surrounding the production of 'raw statistics' from that surrounding the value-added businesses of Trading Funds. It then recommends 'a policy of price differentiation through product differentiation is appropriate. This would see fixed costs recovered equally between users of the same services but on a variable basis

³⁹ Para 7.3.4, draft *Fees and Charges Guide*, HMT, March 2004

between services according to the type of service.⁴⁰ This applies to 'raw' data, while a policy of market pricing is again recommended for 'value-added' PSI.

- 4.15 We understand that this policy does not advocate price discrimination between users of the same product (which would contravene the Re-use legislation brought in subsequently).⁴¹
- 4.16 The main pricing principles advocated by the Review have been incorporated in HMT's guidance on *Charges for Information: When and How* but this guidance does not specify the need for the majority of Trading Funds, particularly those who trade in information, to distinguish between 'raw' and 'value-added' PSI. Without doing this PSIHS are unable to show that they are allowing equal access to the same 'raw' information as may be used by their own 'value-added' operations.
- 4.17 It also creates the further danger that Trading Funds attempt to use market pricing for 'raw' information but fail to find an appropriate comparator because any market would be for 'value-added' products due to the monopoly status of PSIHS in collecting and disseminating 'raw' information. Indeed, the Introduction states: [sic] 'Departments and agencies value-added information, and trading funds information, will raise licence fees reflecting the market price for the relevant information product or service as appropriate.' There is no recognition in this statement that some Trading Funds' information will not be 'value-added' and will not be available from other sources and therefore will not be open to competition. In such situations, it would not be possible to determine a market price accurately.

⁴⁰ Para 5.19, *Cross-cutting Review of the Knowledge Economy: Review of Government Information*, HMT, December 2000.

⁴¹ Regulation 13 prohibiting discrimination between users for similar purposes. The Re-use of Public Sector Information Regulations 2005 also state that any charge for re-use must not exceed the sum of the cost of collection and a reasonable rate of return on investment.

Potential tension between government policies

- 4.18 It is not the OFT's role to decide who should fund the collection of PSI but we are concerned about the lack of clarity around the objectives of government policy for PSI. On the one hand, the Re-use Regulations 2005, the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and many government initiatives such as Transformational Government promote the widest possible access, generally at the cheapest possible price or for no charge. On the other hand, the aims of initiatives and policy drivers such as the Trading Fund business model and the Wider Markets Initiative (WMI) encourage PSIHs to earn an income from supplying PSI. PSIHs themselves have told us that they feel subject to conflicting policies.
- 4.19 The policy behind the Re-use Regulations is to allow re-use of PSI wherever possible. The Re-use Directive encourages PSIHs to make PSI available at no more than the marginal cost of reproduction and dissemination.⁴² However, in recognition of the activities of organisations like Trading Funds, both the Re-use Regulations and the Re-use Directive make provision for anything up to recovery of the cost of collection, production, reproduction and dissemination plus a reasonable rate of return.⁴³
- 4.20 The Freedom of Information Act and the Environmental Information Regulations aim to make public sector information more accessible. Where charges for access are made they cover no more than the marginal costs of disseminating that information (though this does not necessarily confer a right to commercial re-use).

⁴² Recital 14

⁴³ Regulation 15 and Article 6

- 4.21 The Transformational Government⁴⁴ initiative brings technology and business functions together to transform government in three key ways. It requires that public services, including PSI, must be designed around the citizen or business, not the provider and provided through modern, co-ordinated channels. There is a clear desire to provide information about government as cost-efficiently as possible, to as many people as possible and designed around the users needs.
- 4.22 In contrast, it has been argued that quasi-commercial activities like those of Trading Funds and the WMI militate against the widest and most cost-effective dissemination of PSI. We have considered this issue carefully. We have come to the conclusion that if the competition issues, discussed in the following chapters, are addressed, it should be possible to increase the commercial use of PSI, to the ultimate benefit of consumers, whether the PSIH is a Trading Fund and/or engages in the Wider Markets Initiative or not.
- 4.23 There are, however, some features of the Trading Fund model and one aspect of the WMI which need to be controlled to ensure that competition is encouraged. These are discussed briefly below and further in Chapter 5.
- 4.24 Trading Funds are required to achieve agreed financial targets. They have to pay a return, in the form of interest, on the loan capital, and dividends on the public dividend capital and reserves which were used to establish them.
- 4.25 The targets are set with regard to a number of factors. Where a Trading Fund provides a low risk commercial service and there is no competition (and no likelihood of competition) it is suggested that it earns an average real rate of return of (currently) 3.5 per cent on that service, particularly if it is incidental to the Trading Fund's mainstream activities.⁴⁵ However,

⁴⁴ *Transformational Government, Enabled by Technology*, November 2005

⁴⁵ *Guide to the Establishment and Operation of Trading Funds*, HMT, paragraph 12.7.2. See also DAO(GEN)13/03 (15 September 2003).

where there is, or may be, competition the average real rate of return on capital employed should be set to reflect market prices (and will normally be expected to be at least two per cent higher than the minimum required).

- 4.26 If a Trading Fund does not meet its target, the parent department discusses with HMT whether this is a temporary situation which can be rectified by, for example, increasing charges, or whether it is a more fundamental problem. If it consistently and significantly exceeds its targets where there is no competition, it 'should take steps'⁴⁶ to lower its charges. Otherwise, it can use surplus receipts to cover any planned losses in the following year or to finance capital expenditure, subject to agreement from the parent department.
- 4.27 The concern has been raised that Trading Funds, which are monopoly providers of unrefined information, are able to meet their targets merely by increasing prices of unrefined information (rather than being more efficient) and that they lack incentives to remain competitive once their financial target is reached. Providing our concerns about competition are addressed, the mechanisms described above should go some way to prevent this undesirable behaviour. Additionally, parent departments and HMT Spending Teams can impose efficiency targets to address this. This is discussed further in Chapter 7.
- 4.28 Whereas Trading Funds normally make a return on capital to the Exchequer, the WMI allows government departments, agencies and NDPBs to retain such income.⁴⁷ The aim of the WMI is to make the most of under-utilised public sector assets, including information assets. The key incentive is the ability to use income to offset administration cost

⁴⁶ Ibid, paragraph 12.7.4

⁴⁷ The ability for public bodies to retain income from wider markets activities is subject to certain rules as explained in HMT's *Consolidated Budgeting Guidance*. See http://www.hm-treasury.gov.uk/documents/public_spending_and_services/consolidated_budgeting_guidance_for_2006-07.cfm

expenditure and meet efficiency targets. According to HMT's *Selling into Wider Markets: A Policy Note for Public Bodies*,⁴⁸ activity must be financed from within existing resource and administration cost limits. The case for any new assets needs to be based on delivering core departmental objectives and any substantial investment should normally be undertaken by the private sector.

4.29 The Note recognises that there should be some limits to the applicability of the WMI and that special safeguards are needed where the asset is a monopoly asset. It states that the WMI is generally not appropriate where activities, 'rely solely on selling information which was collected, created or commissioned as a core activity by Crown bodies (other than Trading Funds)'. Beyond this (that is Trading Funds, non-Crown bodies and Crown bodies when providing value-added services), where the public sector body is in a monopoly or dominant market position, the Note states that charges should be clearly related to the cost base. These charges should be set to meet the financial target of full cost recovery (including a return on capital of 3.5 per cent, contrasting with the expected rate of between 5.5 and 15 per cent in competitive markets). If, however, there is a degree of competition, or the activity is high risk, or full cost recovery does not leave sufficient incentive for potential competitors to enter the market, or where the public asset is in naturally scarce supply, a higher rate should be used.

4.30 It is in the scenario where the asset is a monopoly asset, as is the case with much PSI, that competition distortions are of greatest concern. Again, however, if our recommendations on equal access (see following chapters) are implemented, together with the safeguards described above, WMI activities should be compatible with competition in the commercial re-use of PSI.

⁴⁸ Note that this has been updated by the new GSI website on the Wider Markets Initiative. See http://www.hm-treasury.gsi.gov.uk/wider_markets/index.htm

Guidance documents

- 4.31 The lack of clarity on policy has resulted in a range of complex guidance documents emphasising different goals, without an indication of their precedence and without sufficient detail on certain points. There is insufficient emphasis on allocating costs so as to separate monopoly activities from non-monopoly activities and a lack of practical guidance for PSIHs on how to undertake and implement the necessary cost allocation processes. This has left much open to interpretation with particular implications for competition as described in the following chapters. It also makes it very difficult for PSIHs to know whether to charge for PSI, how much to charge and who to charge.
- 4.32 Moreover, most of the guidance at issue, which is mainly HMT guidance, is not legally-binding. In extreme cases, where PSIHs are resistant to adhering to HMT guidance, this can cause problems. If the non-compliance comes to light, the Accounting Officer of the PSIH could be called before the relevant Parliamentary Select Committee and asked why it had deviated from the guidance. However, HMT does not have the same sort of monitoring role as OPSI with regard to specific legislation.
- 4.33 We have identified five main documents that provide advice and guidance to PSIHs that supply information for re-use.⁴⁹ Three contain general guidance on setting fees and charges. These are HMT's *Fees and Charges Guide*; *Selling into Wider Markets: a Policy Note for Public Bodies* and *Guide to the Establishment and Operation of Trading Funds*.⁵⁰ Guidance specific to the supply of information is provided in the two documents *Charges for Information; When and How*⁵¹ and *The Re-use of*

⁴⁹ The devolved administrations and many PSIHs have also produced their own guidance documents for use within their organisations.

⁵⁰ The latter two documents are available on the HMT website at www.hm-treasury.gov.uk.

⁵¹ *Ibid.*

*Public Sector Information: a Guide to the Regulations and Best Practice.*⁵² Table 4.1 provides a summary of the five documents.

⁵² The document is available on the OPSI website at <http://www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance/guide-to-psi-regulations-and-best-practice.doc>

Table 4.1 – Summary of guidance documents

Document	Produced by and date	Specific to information?	Content
<i>Fees and Charges Guide</i>	HMT - 1992 ⁵³	No	Covers the purpose and benefits of charging, cost recovery policy, forecasting and accounting, legal considerations and public sector bodies' responsibilities in terms of their financial objectives and defining services.
<i>Charges for Information: When and How</i>	HMT – 2001	Yes	Sets out how PSIHS should improve access to their information, provides guidance on charging policy and licensing issues, defines raw data and value-added information.
<i>The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice</i>	OPSI - 2005	Yes	Outlines the coverage and exclusions of the Re-use Regulations, PSIHS' obligations to allow and provide information for re-use, the required complaints handling system. Also contains a guide to best practice and links to other relevant UK legislation.
<i>Selling Into Wider Markets: A Policy Note for Public Bodies</i>	HMT - 2002	No	Sets out the policy of public sector bodies to make better use of their assets by selling services into commercial markets. Covers calculating costs, setting prices, the retention of income, consultation with HMT and the use of public-private partnerships.
<i>Guide to the Establishment and Operation of Trading Funds</i>	HMT - 2004	No	Covers the process of becoming a Trading Fund and its subsequent operation, including fees and charges, accountability and participation in joint ventures.

Source: HMT and OPSI guidance

⁵³ HMT subsequently updated this guidance, producing a final draft version in March 2004. However, while a copy can be found on the website of the Accountability and Accountancy Service Division (www.aasdni.gov.uk), a division of the Department of Finance and Personnel (a government department of the Northern Ireland Executive), the draft has not yet received Ministerial approval. Neither this nor the 1992 version is, or has ever been, made available on HMT's website.

Issues with the guidance documents

- 4.34 Consultation with stakeholders and evidence from our survey of PSIHs reveals that the guidance documents are not being used universally by those PSIHs that have delegated authority to authorise the re-use of information directly. For example, when asked to provide the names of guidance documents used to guide the sale of information, only six out of the 18 PSIHs that have delegated authority mentioned the *Fees and Charges Guide* in their response, and just two mentioned the *Charges for Information, When and How* document.
- 4.35 Those that do refer to guidance have mixed views on how useful they find it. Some PSIHs consider it too prescriptive while others feel it is too general and non-specific, leading them to experience difficulties in applying the guidance in their particular circumstances. Some stakeholders also commented that it could be difficult to use the guidance in specific situations that were not covered explicitly in the guidance. It is possible that this is contributing to the inconsistency of the supply, pricing and licensing practices among PSIHs as discussed in Chapter 6.
- 4.36 Our review of the guidance documents found a number of factors that are adding to the challenges faced by some PSIHs. Particular difficulties are:
- there is no single reference source as the guidance is spread across a number of documents
 - there are difficulties in the interpretation of some key terms used in the guidance documents
 - insufficient emphasis is given to the principles we consider key to ensuring the PSI sector works well, particularly separation of monopoly and competitive information activities and the allocation of costs between these

- the key document⁵⁴ specific to supplying information is out-of-date, and
- the documents containing guidance on pricing policy are not laid out in a practical, user-friendly format and do not recognise the difficulties some PSIHs have in putting some key principles into practice.

4.37 These factors not only make it difficult for PSIHs to make decisions but allow scope to interpret the guidance in a variety of ways. Some of the interpretations, for example concerning whether particular information constitutes 'raw information', have significant consequences for businesses and ultimately for consumers. It can mean that businesses are completely unable to access some PSI or that the price of the PSI is too expensive for them.⁵⁵

No single reference source

4.38 The guidance in question is currently spread across a number of individual documents. While some of these cross-refer to principles set out in other documents, it means the charging policy can be difficult to follow, particularly for PSIHs with limited experience in supplying information. It would be easier and more convenient if there was a single source of reference for PSIHs. This would provide an opportunity for the guidance to be presented in a more coherent, logical fashion, making reference to all relevant documents, thereby reducing the possibility for confusion and misinterpretation.

4.39 The documents were drafted independently of one another and based around the principles set out in different government policies. In places, this means the guidance can look contradictory, even if it is not in practice. There is no obvious 'starting point' when looking for guidance

⁵⁴ *Charges for Information: When and How*, HMT, 2001

⁵⁵ The consequences of this are discussed further in Chapter 6.

on specific issues and it is not always clear which document takes precedence in a given situation. Providing a document which shows clearly which option a PSIH should follow would reduce the risk of PSIHs making 'incorrect' decisions, for example when setting prices.

Difficulties in applying definitions

- 4.40 The guidance on charging for information is based on the concept of raw and value-added information. However, the distinction between the two categories is not clear-cut and determining whether information is either raw or value-added can be difficult in practice. Businesses who re-use PSI have commented that the lack of clarity in the guidance makes it difficult to challenge a PSIH, where the businesses believe the line (between what is raw and value-added information) has been drawn in the wrong place.
- 4.41 As an example of the difficulties PSIHs face when determining how to categorise their information, the following is a section of text, intended to provide clarification on the definition of 'raw data', taken from the guidance document *Charges for Information*:

'The use of the term 'raw data' is not synonymous with raw material or with unchecked data. The term 'raw data' was used for information central to Government's core responsibilities to distinguish the underlying material from typographical format.....The raw material in value-added services, may, or may not, be raw data. Examples of raw material which is not 'raw data' are where material has been commissioned especially to help the public but is not needed for government policy;.....'Material' is used in the HMSO Class Licence as an alternative name for raw data. But there too it should not be confused with references to material in its more generic sense....'⁵⁶

⁵⁶ Annex 5, *Supplementary Guidance on Definition of Raw Data of Charges for Information: When and How*.

- 4.42 It is clear that the definition above provides considerable scope for interpretation. Indeed, we found that the term 'raw data' has been applied both to upstream collected data and downstream extracted data, where the latter is largely unmanipulated.
- 4.43 Pricing and licensing decisions are based on PSIHS' interpretations of these definitions with the result that the inconsistent application of the definitions can lead to very different decisions. If PSI is priced at a prohibitively high level as a result, it could have a negative impact on those businesses that wished to purchase the information to develop new products.
- 4.44 Additionally, other terms such as 'statutory function', 'core task' and 'public task' are used in several guidance documents, apparently interchangeably, but it is unclear whether they refer to identical activities. While 'public task' is referred to explicitly in the Re-use Regulations, it is not defined. Some PSIHS have commented they do not have a clear statement of their own public task. For example, our survey of PSIHS found that only two out of the 18 PSIHS with delegated authority have a standard definition of their public task that exists as a single document.
- 4.45 While some PSIHS have published sets of aims and objectives, they are unclear whether these would suffice to determine their 'public task' well enough to be operative or useful in relation to the Re-use Regulations. 'Statutory functions', where they exist, can also be drawn very widely.⁵⁷
- 4.46 Again, the scope for different interpretations could have an impact on businesses as it affects what information a PSIHS supplies under the terms of the Regulations, which then affects their pricing decisions.

⁵⁷ For example, under the provisions of the Environment Act 1995, the Environment Agency 'may do anything which, in its opinion, is calculated to facilitate, or is conducive or incidental to, the carrying out of its functions' (s37.(1)(a)). One of the Agency's objectives in its 'Statutory Guidance' is to, 'collect data of appropriate quality and prepare and disseminate information in a timely fashion for monitoring and reporting on all areas of Agency responsibility.' (4.1(j)).

Using consistent terminology throughout the guidance would help to reduce this impact.

Lack of guidance on key principles

- 4.47 In Chapter 7 we describe a number of principles that we consider essential for PSIHs to follow in order for the markets for PSI to operate competitively, efficiently and fairly. These principles include ensuring there is access to information on equal terms and conditions, ensuring charges are cost reflective, with cost allocation systems to differentiate between the monopoly (unrefined information) and competitive (refined information) activities. While these points are covered briefly in some of the guidance documents, there is little to indicate to PSIHs that these are key principles that are necessary to make the sector work well for businesses and consumers.
- 4.48 As noted earlier, the *Charges for Information* guidance does not specify the need for Trading Funds to distinguish between 'raw' and 'value-added' PSI. It does not include any detail on the importance of PSIHs supplying 'raw' information to their internal 'value-added' information operations and businesses on the same terms and conditions, including prices. *The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice* does make this clearer. In reference to Trading Funds it states: 'They must ensure that the information produced as part of their public task which is then re-used for their own commercial services is available to others on the same terms and conditions.'⁵⁸ As discussed in Chapter 7, this is vital to ensure that private sector businesses are not disadvantaged in comparison with PSIHs.
- 4.49 Similarly, the section dealing with commercial services in the *Fees and Charges Guide* only briefly mentions consideration of whether a public sector body's behaviour can be considered anti-competitive as a result of

⁵⁸ Para 3.11, *The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice*, June 2005, Office of Public Sector Information.

not allocating costs appropriately between its wholesale and retail services.

- 4.50 Much greater emphasis is needed in the guidance to describe the practical details of these key principles and to reflect our recommendations in these areas.

Out of date documents

- 4.51 The only document specific to supplying information – *Charges for Information 2001* - is out of date, having been written prior to the implementation of the Freedom of Information Act, the Re-use Regulations and the establishment of OPSI. While the basic principles in the guidance are still relevant, the document itself has the potential to cause further confusion, particularly for those PSIHs less experienced in the supply and pricing of information.
- 4.52 In addition, the current *Fees and Charges Guide* was last updated in 1992. While HMT produced a revised draft version in March 2004, the document did not receive formal approval from Ministers.⁵⁹ It is envisaged that the guidance documents will be brought together in the Modernisation of Government Accounting,⁶⁰ due for completion in 2007 but the extent to which the documents will be revised remains unclear.

Lack of user-friendly documents

- 4.53 While calculating a market price and allocating costs of PSI may appear straightforward, some PSIHs have expressed concern about the difficulties in applying the principles in practice. There are particular challenges to applying the guidance surrounding allocating costs and, as

⁵⁹ A copy of the 2004 draft guidance can be viewed on the Northern Ireland Accountability and Accountancy Services Department's website at www.aasdni.gov.uk

⁶⁰ See HMT website for details: <http://www.hm-treasury.gov.uk/media/89D/7E/dao0406.pdf>

discussed above, in determining whether information is raw or value-added.

- 4.54 Much of this can be attributed to the lack of detailed advice and practical examples and unclear layout in some of the guidance documents. Due to the variety of PSIHs, and sheer range of PSI, it would not be possible to provide in-depth guidance that would cover all examples and situations experienced by every individual PSIH. Indeed, we recognise that HMT do not wish to be overly prescriptive and that elements of the guidance are drafted deliberately widely in order to allow PSIHs a degree of flexibility in their decisions.
- 4.55 However, the current format and content of the documents has the potential to cause issues with the interpretation of, and adherence to, the guidance principles. Stakeholders have suggested that the use of flow charts and decision trees and the inclusion of a comprehensive glossary would go some way to improving the clarity and usability of the guidance.

Action to address issues with guidance documents

- 4.56 A combination of out-dated information, unclear layouts, lack of practical examples and the need to refer to multiple documents, means it is not inconceivable that, while seeking to follow the guidance, some PSIHs may be misinterpreting guidance and be supplying information on terms and at prices which may be to the detriment of businesses and of competition in the market.⁶¹
- 4.57 To address these issues with the guidance we are participating in HMT's Modernisation of Government Accounting. HMT announced the plans in

⁶¹ See Chapters 5 and 6 for a detailed discussion of this.

April 2006, stating the aim is 'to articulate the high level principles clearly and concisely, and in a reasonably timeless way.'⁶²

4.58 The review will include the content of existing documents such as those mentioned in Table 4.1. It will take into account a range of issues that have changed over time. These include:

- the introduction of FOI legislation and the Environmental Information Regulations
- the implementation of the Re-use Regulations
- changes in the cost of capital, and
- any other issues that become relevant during the course of the review, for example, the proposed INSPIRE Directive.⁶³

4.59 The expected outcome is a concise document of high level principles plus detailed annexes of information and guidance for practitioners. We will work closely with HMT on this project, providing input on competition and economic issues to ensure the new document provides greater clarity on the guidance to PSIHs and, crucially, reflects the relevant recommendations made as a result of this market study.

⁶² HMT letter, ref DAO(GEN) 04/06, from Paula Diggle, Treasury Officer of Accounts to Accounting Officers on 11 April 2006.

⁶³ Infrastructure for Spatial Information in Europe is an initiative launched by the European Commission during 2002 and developed in collaboration with Member States and accession countries. It aims at making available relevant, harmonised and quality geographic information to support formulation, implementation, monitoring and evaluation of Community policies.

Source: Association of Geographic Information website:

http://www.agi.org.uk/POOLED/ARTICLES/BF_TECHART/VIEW.ASP?Q=BF_TECHART_161090

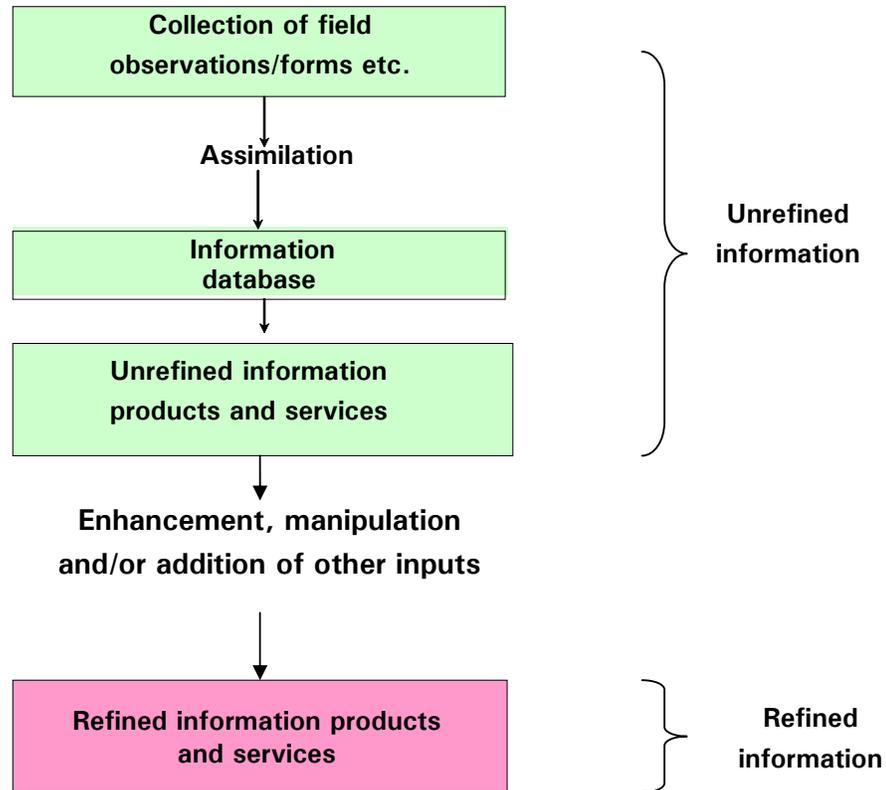
Introducing our concepts of unrefined and refined information

- 4.60 As explained above the terms 'raw' and 'value-added', 'core/public task' and 'statutory duty' are likely to be interpreted in different ways by different people. Moreover, **none of the guidance documents adequately identify the distinction which is important to our analysis and recommendations, that is, separating the activities of a PSIH where it is a monopoly supplier (unrefined information) from those where there is scope for competition in supply (refined information).**⁶⁴ Unrefined information is that which cannot be substituted directly from other sources and relates to a PSIHs' monopoly activities, where competition is very unlikely. Once a PSIH adds value to this information, beyond that which makes it useable initially, this becomes refined information. Producing refined information could involve enhancements or further manipulation, possibly with the addition of other inputs or information. This can be performed viably in a commercial market by the private sector, provided businesses have access to the unrefined data.
- 4.61 The precise point at which this distinction is made will vary between both PSIHs and the different types of PSI. In addition, this may also change with advances in technology that make it economically viable for businesses to accept data in a less refined form than previously.⁶⁵ This does not mean that where to draw the line is a matter of interpretation, just that it is different for different bodies and at different times. Figure 4.1 illustrates where in the collection and supply process the two definitions apply.

⁶⁴ The term 'unrefined' was first used in our report *Property Searches*, OFT 810, September 2005.

⁶⁵ It is not possible however within the scope of this report to provide details of where this distinction will be made for individual PSIHs.

Figure 4.1 - The distinction between unrefined and refined information



Funding the costs of collection of Public Sector Information

4.62 Since the 1990s there has been debate about the different ways to fund the collection of public sector information. Much of this debate focuses on two pieces of work, first, a paper written by Peter Weiss, from the National Oceanic and Atmospheric Administration in the USA.⁶⁶ Second, the work undertaken by PIRA International in 2000 for the European

⁶⁶ *Borders in Cyberspace: Conflicting Public Sector Information Policies and their Economic Impacts*, Peter Weiss (US National Oceanic and Atmospheric Administration) 1996

Commission.⁶⁷ Both of these describe the benefits of providing PSI for commercial use/re-use at little⁶⁸ or no cost and funding through taxation. In Annexe G we provide more detail on the work undertaken by PIRA International, and our consideration of the methodology used to reach their result.

- 4.63 Given the value of the PSI sector as estimated by DotEcon in Annexe G, and from our consideration of this issue, we think that the arguments about the best way to fund PSI are far from clear cut. This section presents some of the arguments regarding the two main options considered for funding PSI: taxation funding and provision for no/low charge or funding by charging those that use and re-use information. We also present evidence from our international case studies on how PSI is funded in other countries and some of the apparent consequences.
- 4.64 While this section will give some indication of the consequences of the two options for how to fund PSI, it was not within the scope of this study to analyse all the fiscal implications of these options and determine the best option for economic efficiency. Our remit is confined to an assessment of competition within PSI markets and not to advise government on the funding of PSI.
- 4.65 It is important to remember the distinctions between the different types of uses and users of PSI. At one level there are individual citizens who, under FOI legislation, have the right to access much PSI. This is generally provided at no charge or, at most, the cost of retrieval and dissemination of the particular information. However, gaining access confers no rights of commercial re-use of the information.
- 4.66 Then there are businesses who want to obtain PSI to help their business decisions, for example, credit providers deciding whether to lend to particular individuals. Use of this information helps them to make better

⁶⁷ *Commercial Exploitation of Europe's Public Sector Information*, PIRA International, 2000

⁶⁸ To cover the cost of providing an additional copy of the information

decisions and therefore improves their profitability. Finally, there are businesses who wish to re-use PSI to produce new products and services. All these businesses will benefit from use or re-use and therefore anything up to full cost pricing could probably be justified depending on circumstances.

International case study evidence

Overview

- 4.67 Our international case studies (Annexe F) highlight the overall framework for PSI in the three countries we chose to study: the USA, Australia and Sweden. The main differences relevant to this section are between the UK (where user charges are frequently made), and the USA, where more PSI is funded through taxation.
- 4.68 In the USA, particularly at federal level, the collection of much PSI is funded by taxpayers and PSIHs do not generally engage in value-added activities. It is likely that this enables the private sector to have a greater role in the PSI sector with possible consequent benefits to the economy and higher receipts from corporation tax to the government. Businesses would have increased incentives to invest in new products and services which may not have been viable otherwise. However, it is only a subset of all taxpayers who will buy the products derived from PSI and therefore benefit directly from paying the higher personal taxes required to fund collection of PSI.
- 4.69 In the cases where local authorities in the USA had imposed charges for PSI, these revenue-generating models were not typically successful, with implementation expenses higher than the revenue generated, partly due to high legal costs.
- 4.70 In contrast, in Australia, when the government reduced the price of basic (unrefined) PSI to encourage widespread distribution and greater

competition, revenue from selling PSI still increased.⁶⁹ This is likely to be the result of more basic PSI being made available for re-use but there are many factors which may be relevant to explain this phenomenon.

4.71 We now look at three specific issues relating to the funding of PSI from our international case studies:

- Intellectual Property Rights
- Quality Issues
- Competition concerns

Intellectual Property Rights

4.72 The USA appears to be unusual in that, generally at federal level, PSI is not protected by copyright legislation. Elsewhere, including in the UK, there is debate about whether PSI should continue to be subject to copyright or alternatively whether to waive all Crown copyright charges (and possibly other copyright charges where the PSIH itself owns the IPR).

4.73 UK Trading Funds (and some other PSIHs) make an income from PSI by exploiting the IPR in the data. This involves running a licensing system and charging one or both of an upfront fee and royalties. Some PSIHs waive their IPR/copyright fees.

4.74 IPR exist to encourage innovation where it is unlikely to occur without such protection. It is also argued that IPR, such as Crown copyright, is a means of retaining quality control over PSI and the way it is used. Of course, retaining the IPR for quality purposes can be separated from charging for licensing of the PSI. So even if the government decided not to charge for PSI this would not necessarily require abolition of Crown copyright.

⁶⁹ Over a five year period.

- 4.75 Arguably, where there are no IPR it is easier for businesses to develop products and services, especially where these may be re-incorporated in yet other products by other businesses. The licensing model required to exploit IPR can add costs and hamper innovation in the private sector but this may depend on how the model is implemented (see Chapter 6). It can also hinder and/or make some public functions more costly but, again, this may have more to do with how licensing is implemented. For example, we have been informed of implications for the efficient running of the population census and the holding of historical information on databases at a reasonable cost.
- 4.76 Overall, we have concluded that our recommendations in Chapters 7 and 8 will improve the commercial use of public sector information without the need to abolish Crown copyright or other IPR. In fact, the existence of Crown copyright is a key part of the control mechanisms⁷⁰ which we want to build on to ensure that PSIHs act in a fair and transparent manner.

Quality issues

- 4.77 The general reliance on government subsidy for USA PSI at federal level, and the lack of revenue providing for investment, means that the quality of some of their PSI may be inferior to countries that charge directly for PSI. In particular, much of it is not updated very frequently. In certain cases the government also relies on legislation which puts the onus on those submitting information to ensure that it is complete and accurate. For example, the Securities and Exchange Commission (which maintains a register of public companies in the USA) runs a website where companies can register their details and this appears immediately for anyone to re-use. It is a civil offence to file incomplete or inaccurate data, or a criminal offence if it is deliberate, but until such matters come to light the data is not checked. Although the UK's Companies House does not make extensive checks on the accuracy of data submitted to it,

⁷⁰ Through the requirement to obtain IFTS accreditation to be able to have delegated authority for licensing Crown copyright PSI.

it does ensure that all required fields on the forms are completed before disseminating the information.

- 4.78 In the USA, where technology has made it financially viable to collect data which was previously exclusively collected by PSIHs (and there are no legal constraints), such as mapping (through laser-based surveys and satellites), the private sector has overtaken the public sector in terms of quality. For example, the USA government's defence agencies now buy their mapping data from the private sector. This raises the question of whether the public sector needs to continue as a provider of mapping data.⁷¹ However, each PSIH needs to be considered individually because there may be efficiency arguments to avoiding duplication of costs in collecting unrefined PSI.⁷²

Competition concerns

- 4.79 Many competition concerns could be resolved if PSIHs did not charge for unrefined data and did not engage in value-added activities. In the USA and Australia PSIHs are largely kept out of value-added activities. Their competition authorities have not received any complaints from private businesses about the behaviour of PSIHs over the last five years. In contrast, our Swedish case study identifies similar problems to those we identified in the UK because some Swedish PSIHs charge for unrefined PSI and are engaging in downstream value-added activities.
- 4.80 Problems with downstream access conditions and transparent wholesale pricing were identified with regard to the Swedish national mapping agency and the Swedish meteorological and hydrological institute. The Swedish Agency for Public Management (Statskontoret)⁷³ found that

⁷¹ An attempt has been made in the USA to withdraw any public sector involvement.

⁷² To ensure that less commercially-attractive areas (for example, remote country) are mapped there would need to be obligations in private sector contracts for this to happen.

⁷³ See Annexe F for details

private companies had difficulty entering the market for processed geographic and meteorological information because of difficulties in accessing data from the two PSIHs. The mapping agency was deemed to be a monopolist in several downstream markets. Private businesses said that the lack of well-defined boundaries between data production and data processing was a factor impeding competition.

- 4.81 The Statskontoret recommended that the commercial arms of these two PSIHs should be privatised and that the data-producing arms provide equal access to its data for all market players. It also called for standardisation regarding access to PSI and specifications on when PSI must be offered on a non-profit basis and when it can be sold commercially.
- 4.82 One potential competition problem with a reliance on government subsidy which appears to have arisen in the US, is pressure for PSIHs to agree exclusive arrangements with the private sector to subsidise investment; for example, using exclusive agreements as a way to fund digitisation of paper or microfiche records. Contracts must be tendered for openly and competitively and the digitised data must be made available to competing businesses (this can be for a charge). Otherwise there is a danger of transferring the monopoly from the public to the private sector.

Taxation funding and free provision

- 4.83 Supporters of this framework consider that much information is already funded through taxation, as PSIHs often receive direct government funding for some of their activities, and therefore where such information is funded by the taxpayer, the expectation is that this should be available for commercial use and re-use for no more than the costs of dissemination. In addition, in the UK, about half of PSIHs' income from the supply of PSI derives from supplying other public sector bodies (around £200m). Some argue that payments between public bodies are unnecessary and that these payments should be replaced with taxation funding. The proponents of such arguments often consider that such changes would lead to more vibrant markets in PSI, with wider

involvement of private sector firms. If this occurs it would lead to the PSI sector making a greater contribution to the economy, as well as producing more innovative products for consumers.

- 4.84 In addition, proponents note that information may be considered to be a good where there are wider benefits for the economy from people consuming and using PSI, which could argue that this should be provided at a price less than the costs of producing it.
- 4.85 For these arguments to be true, the benefit from the wider use of PSI would need to offset the distortion to the economy from increased taxation to fund the PSIHs. As several large PSIHs in the UK receive little or no taxation funding,⁷⁴ the implications for the Exchequer and the taxpayer would not be negligible.

Charging users for PSI

- 4.86 The alternative system is that currently used in the UK for much PSI, that is, users seeking commercial use or re-use of PSI pay to cover the costs or part of the costs of the production of PSI. Charging users typically has benefits concerning the efficient allocation of resources, as the price disciplines customers into considering how much PSI they need and the value they place on this. Such benefits are lost in a system where PSI is provided free at the point of use. However, in the case of PSI, these arguments are slightly weaker than for other products, as the costs of producing extra copies of information are low. Nevertheless, there are costs of providing extra units of information products, particularly when larger variations in output are considered.
- 4.87 There is also the consideration that businesses benefit from the use and re-use of PSI and therefore some proportion of taxation used to fund PSI will be providing profits for private businesses.

⁷⁴ See table 5.2 for further details.

Summary

4.88 The aim of this brief discussion is not to reach a conclusion on the best method to fund PSI but to highlight the issues surrounding this debate. As the above section has illustrated, there are many different factors to consider in an assessment of funding methods and any result achieved is likely to be very sensitive to these factors and the assumptions made. As Annexe G discusses, even measuring the current value of this sector accurately is a difficult task, and therefore it is likely to be even more difficult to compare the value of the two different funding regimes outlined above for any country.

5 MARKET POSITION OF PUBLIC SECTOR INFORMATION HOLDERS

Introduction

5.1 This chapter describes the position of PSIHs in the markets in which they operate. In many cases, PSIHs are the only suppliers of unrefined information, but they face competition in the supply of refined information.

Sole suppliers of unrefined information

5.2 For many businesses, PSI is a key input for a wide range of different information based products and services they produce. Among businesses that used information to produce products for others, our business survey found that if PSI was not available, 35 per cent of respondents could not make their existing product/service at all and 40 per cent could only produce a partial version of their current product/service. This reliance on PSIHs was highest for customers of the DVLA, Registers of Scotland, Driving Standards Agency and the UK Hydrographic Office.⁷⁵

5.3 Most PSIHs have a unique position in the collection and assimilation of PSI, so there are few good substitutes for the information they supply. PSIHs such as the Environment Agency, HM Court Service (HMCS) and Companies House hold respectively, key information on environmental, legal, and business subjects. As our business survey showed, in most cases, there are few alternative sources of information to the relevant PSIH.

5.4 Most PSIHs are sole providers of unrefined information for one or more of the following reasons:

⁷⁵ Annexe B, *Businesses that use PSI*

- some PSIHs have privileged access to information, including through statutory powers
- there are significant sunk costs in the collection of information⁷⁶
- some PSIHs receive direct government funding
- some PSIHs have a strong reputation for quality of information.

5.5 Each reason is explained in detail in the following sections.

Privileged access to information

5.6 Many PSIHs have privileged access to their unrefined information. In some cases, the role of a PSIH as an official source is sufficient to gain the co-operation of third parties from whom information may be gathered, with potential competitors being unlikely to gain the same level of co-operation. In other cases, PSIHs have statutory powers to collect information. Statutory powers can either be direct or indirect.

5.7 For example, Companies House has a direct statutory power requiring limited companies in the UK to file information with it. While other private sector businesses could attempt to collect the same information, unlike Companies House, there is nothing to compel companies to provide them with this data.

5.8 HMCS represents an example where the statutory power is related indirectly to its information activities. HMCS is subject to a statutory requirement to hold a Register of Judgments⁷⁷ as part of its existing statutory role as the provider of court services in England and Wales. Its central role is not the dissemination of information on court judgments

⁷⁶ Sunk costs are those which must be incurred to compete in a market but, crucially, are not recoverable on exiting the market.

⁷⁷ Since April 2006 the Registry of County Court Judgments has been expanded into the Registry of Judgments Orders and Fines.

and this dissemination is undertaken as a separate activity. The information contained in these judgments is sold on at cost to credit reference agencies, a range of commercial interests and the general public. It can be used to reduce the risk in lending decisions made by banks and other financial institutions who obtain the information either directly from Registry Trust Ltd (RTL)⁷⁸ or (more usually) through a credit reference agency. However, while HMCS is the sole provider of court judgments, there are other sources of information regarding credit-worthiness. In this case therefore, there is a limit to the advantage HMCS has through its indirect power and in the information it licenses.

- 5.9 Sometimes, PSIHs have privileges derived from statutory obligations on others to provide them with information. For example, the British Geological Survey (BGS) relies on statutory obligations on those undertaking exploration for mineral and water resources to provide borehole records to fulfil its functions. A third party trying to replicate the BGS's activities would not have this benefit.⁷⁹
- 5.10 Some PSIHs have obligations and, as a result of these, are able to obtain data from third parties. For example, as the national hydrographic office, the UK Hydrographic Office (UKHO) produces nautical charts and publications which discharges one of the UK's obligations under the International Convention for the Safety of Life at Sea (SOLAS).⁸⁰ Many commercial vessels are required by SOLAS to carry shipping charts from a registered hydrographic office. In preparing its charts and ensuring that they are up-to-date, the UKHO receives information from a variety of third parties, including the Maritime and Coastguard Agency (MCA). It has reciprocal relationships for sharing information with foreign hydrographic offices and/or national charting authorities. It also receives

⁷⁸ HM Court Service currently outsources its information provision to a not-for-profit organisation Registry Trust Ltd (RTL).

⁷⁹ Annexe C, *UK case studies*

⁸⁰ The UK's obligation under SOLAS applies only to UK territorial waters.

information from vessels themselves, both those registered in the UK and overseas. This status, combined with the historical significance of the UK in the development of charting of the seas, means that many foreign vessels choose to update the UKHO with new information, rather than update the hydrographic office in their own country. Consequently, potential competitors could have difficulty in obtaining similar information. Many sources would consider it appropriate to provide information for the UKHO's charts, as the UKHO is among the most commonly used source of charts.

- 5.11 Related to the examples above, where there is no direct statutory power to obtain information, part of the reason information is only held by a particular PSIH is because many PSIHs have extensive historical databases. They have been undertaking similar activities for many years, such that potential competitors would find it difficult to replicate the knowledge history and expertise of these PSIHs. For example, building and maintaining comprehensive geographic or hydrographic information for the UK would be costly to duplicate from scratch. OS and the UKHO rely to a large extent on regular updates which have evolved from their historical data (see table below for other examples of historical databases held by PSIHs).⁸¹ In such cases, once a PSIH is undertaking its established role, strong scale economies may make a full-scale duplication of its activities uneconomic and inefficient.

⁸¹ Annexe C, *UK case studies*

Table 5.1: Examples of PSIHs with historical databases of PSI

PSIH	Historical database
Environment Agency	Volume of historical environmental information inherited from predecessor organisations.
Ordnance Survey	OS has been undertaking mapping for over 200 years. ⁸²
Met Office	Holds the official historical records of documentation of weather conditions since 1854.
Companies House	Holds company filings since 1844. ⁸³
Her Majesty's Court Service	Hold data on County Court Judgments, the register of which was established in 1852.
UK Hydrographic Office	UKHO's records begin at around 1860 with the data being subject to continuous revision. Electronic databases date back to around 1970.
British Geological Survey	Principal custodian of geo-scientific data and samples, with most information dating back to 1835

Source: Annexes C, D and E

The cost structure of collecting information

5.12 It is typically the case that the collection of PSI is very costly, particularly for those PSIHs that collect information on a detailed basis across the UK. In such cases, partial information is not always of much use or value. In many cases there is also a high ratio of fixed to variable costs in the collection of PSI. Furthermore, much of the fixed costs may be considered to be sunk costs, as much of the infrastructure, resources, specialist knowledge, technology and machinery will have been designed specifically for the collection of a certain type of PSI and as such would be likely to have limited alternative uses outside the market.

5.13 When fixed costs are high and a significant proportion of those are sunk costs, this can act as a significant barrier to entry for private businesses considering supplying unrefined information. If the business failed, the

⁸² Landmark Information Group Ltd has developed as a joint venture with OS a database of historical mapping information.

⁸³ Filings of dissolved companies are destroyed 20 years after dissolution; therefore Companies House does not hold a complete set of all company records since 1844.

initial investment could not be recovered in full. This is one of the reasons that private businesses rarely choose to compete with a PSIH in the collection of unrefined information.

- 5.14 For example with OS, one would expect its data collection costs to be fixed, and to represent a substantial proportion of its total costs. Of these costs, one might expect a reasonable proportion of both the data collection and assimilation costs to be sunk, including equipment that would have little use outside the extensive surveying and interpretation work undertaken by or for OS. Other examples of substantial fixed costs that are likely to be sunk include costs of meteorological satellites and the provision of a supercomputer used by the Met Office (such costs are included in the overall annual cost of the Met Office), and the magnetic field monitoring equipment used by the BGS.
- 5.15 Given the high fixed costs in information supply, there are likely to be scale economies in the production of much of the unrefined information PSIHs hold, such that some PSIHs and their unrefined information operations could be natural monopolies.

Direct government funding

- 5.16 Some PSIHs receive direct funding from government. This typically covers some of the large costs of information collection, such that any potential competitors would have a cost disadvantage compared to the PSIH. Some PSIHs may receive direct funding from government as the information collected may exhibit some characteristics of a public good.⁸⁴ In such cases, there is an argument for some government funding to serve the wider public interest and this may be an efficient outcome. Examples of PSIHs that receive direct government funding include the Environment Agency and HMCS.

⁶ Public goods are those with the following characteristics: It is difficult to prevent consumption of the product or service, whether or not a consumer has paid for that product or service, for example, a street light. In addition, the costs of providing the product or service are not related to the number of consumers that use it.

Strong reputation

5.17 As public bodies, many PSIHs have a reputation for providing accurate official data of high quality. For example, comments made by respondents in our business survey included the following:⁸⁵

- **Reputation** – cited as a reason to use the Met Office information
- **Credibility/wanting the official source/more authoritative** – cited as reasons to use Office of National Statistics and OS information.

5.18 Another example of a PSIH having a strong brand is the Environment Agency. It is keen to safeguard what it sees as its customers' perceptions of it as a trusted provider of quality, unrefined information and the consequent power and value its brand has as a result.

⁸⁵ Annexe B, *Businesses that use PSI*

Table 5.2: Summary of why major PSIHs are sole providers of unrefined information

PSIH	Key information held	High fixed collection costs	Government Funding	Statutory collection powers	Privileged access to data
Environment Agency	Environmental	Network of local offices. Staff to collect data on a national scale.	Received direct funding for 58 per cent of its budget in 2003/04.	The Environment Agency's core statutory function is very widely drawn. It has powers of collection of information, as well as obligations on others to provide it with information to allow it to monitor the environment. ⁸⁶	
Ordnance Survey	Mapping	Technology and machinery. Experts to carry out large scale survey observations.	Receives funding from National Interest Mapping Services Agreement (NIMSA). This was 13 per cent of its total income in 2004/2005. ⁸⁷		

⁸⁶ See Chapter 4 for details of the Environment Agency's statutory function.

⁸⁷ The NIMSA funding for OS is expected to cease at the end of 2006, see: <http://www.communities.gov.uk/index.asp?id=1144581>

Met Office	Worldwide weather	Satellite technology, Supercomputer.	Receives a subsidy from government as part of the National Meteorological Programme. This represented 45 per cent of its total income in the most recent reporting year.		Collects and stores numerical information on atmospheric phenomena. This information is collected to fulfil its statutory requirement to provide basic weather forecasts. Also able to swap information with other Meteorological Offices in other countries.
Companies House	Details of all limited companies in the UK			Required by statute to file information as the official UK Registrar of company information.	
Her Majesty's Court Service	County Court Judgments		Funded by the Department for Constitutional Affairs Departmental Expenditure.	Has a statutory requirement to hold a Register of Judgments.	
UK Hydrographic Office	Shipping charts	Hydrographic skills and knowledge of the sea area chart.			Receives information from the Maritime Coastguards Agency, the Ministry of Defence, international hydrographic offices and mariners.

					Businesses may be able to replicate such arrangements.
British Geological Survey	Earth science	Geologists carrying out fieldwork. Magnetic field monitoring equipment. Chemical analysis equipment.	Funding from government's science budget which covered 54 per cent of its total income in the most recent reporting year.		Legal requirements upon others carrying out various different types of activities to provide the BGS with samples.

Source: Annexes C, D and E

Competing suppliers of refined information

- 5.19 In addition to producing unrefined information, many PSIHs use the unrefined information themselves. This involves adding value with additions and modifications to sell refined information products and services to businesses, public bodies and end users. There is a large range of refined information products from basic to integrated and sophisticated ones.
- 5.20 Refined information products and services can also be produced by private sector businesses using unrefined PSI from the relevant PSIH(s). There is much greater scope for competition in the supply of refined information products/services than unrefined, provided businesses have access to the unrefined PSI.
- 5.21 Many PSIHs' refined information activities face competition from businesses (although to varying degrees). While there is scope for competition in refined information markets for all PSIHs, the extent to which this is occurring in practice will depend substantially on the current availability of unrefined information. For example, OS avoids competing with its licensed partners and relies on its licence exception policy (see Chapter 7 for more details) to do this. OS has stated that this policy is the basis on which it can permit new uses of its data at prices that are appropriate. Therefore, while it will have several partners that license information from it, it is unlikely that OS would face substantial competition for its own particular range of mapping products. OS stated that the above applies to its 'partner channel' and not its 'distribution channel'. It noted that it does permit many of its products to be distributed on terms under which distributors are able to compete with Ordnance Survey's direct product offering.
- 5.22 The Met Office however, does not limit its licences in this way and competes with several different companies in the provision of weather services across various sectors of the economy. These competitors include PA WeatherCentre, Metra, WNI Weathernews, WSI, Fugro GEOS, WeatherCommerce and Planalytics. In the supply of environmental information, the Environment Agency faces competition

from a small number of companies. These include Landmark and Groundsure with regard to the provision of environmental and property risk assessment reports.⁸⁸ The UKHO provides its own mapping products, as well as providing information for use and re-use by a range of competitors.

- 5.23 The fact that many PSIHs produce both unrefined and refined information means that they are vertically integrated, that is they are active in more than one part of the supply chain, both at the unrefined and refined information levels. This situation is represented in figure 3.1 in Chapter 3.
- 5.24 Some vertically integrated PSIHs may achieve cost and efficiency savings. This can enable PSIHs to sell products that private sector businesses choose not to produce. In addition, given the potential efficiency of this structure, their presence in refined information markets can benefit competition, particularly in situations where they exert a strong competitive constraint on businesses, improving the efficiency of the market.
- 5.25 However, there can also be negative consequences of this structure, as PSIHs may have an incentive to try to extend their sole supplier position for unrefined information into the refined information market. They may try to charge higher prices to external customers of unrefined information, than to their own refined information operations, profit margins for refined information competitors could be squeezed by the PSIH and they could use other practices that restrict competition in refined information markets. The evidence on this issue is presented in Chapter 6.
- 5.26 The government's policy on the Wider Markets Initiative (WMI) to some extent promotes PSIH involvement in markets for refined information. The WMI is designed to encourage the more intensive use of public assets such as land, buildings, people and intellectual property, through

⁸⁸ Annexe D, *Environment Agency*

the development of new, non-statutory goods and services which are sold on a commercial basis. Public bodies using assets in this way are able to retain the income they earn.⁸⁹

5.27 In many cases this can mean using information assets to produce refined information products/services as well as unrefined information. However, the WMI is targeted at a wider range of public bodies than those licensing information. Consequently, while the WMI can be considered effective and desirable overall, as with any such initiative, it is beneficial where this operates within a broadly competitive environment.

5.28 In practice, it is likely that many PSIHs supply unrefined and refined information, and our PSIH survey indicated that 78 per cent of information provided is in 'analysed form' which would be likely to be refined information. There are several examples of good practice where PSIHs that produce refined information themselves also allow use and re-use of their unrefined information. Two examples are:

- BGS which provides access to its physical sample library and field notebooks and produces value-added products and bespoke services for UK and international clients
- The Met Office provides basic weather information as well as a range of bespoke services which may involve detailed weather forecasts of varying length and covering different geographical regions. Large customers of weather information include the Ministry of Defence, the Civil Aviation Authority and Defra.

5.29 There are also examples of PSIHs that do not currently produce refined information products/services themselves, including HMCS and NHS organisations. Local authorities supply refined (compiled) information for property search information but otherwise mainly supply unrefined PSI.

⁸⁹ Government departments, agencies and NDPBs are encouraged to make better use of assets, both physical, such as land, and non-physical, such as intellectual property, by engaging in commercial services. See Chapter 4 for more details.

Conclusions on market position

- 5.30 Many of the markets for unrefined information comprise a sole supplier, the PSIH, which has that sole supplier status for a number of reasons. These reasons suggest that it would be difficult or expensive for businesses to replicate the unrefined information produced by PSIHs and that, in many cases, such replication may be neither efficient nor desirable. The involvement of PSIHs in producing refined information products raises questions regarding market power and the degree of competition in refined information markets.
- 5.31 For refined information, PSIHs have a privileged position, given their access to the unrefined information from within the same organisation. This means that they can have an advantage over businesses through efficiency. If the advantage is because of efficiency then the presence of a PSIH in the refined information market may be desirable. Alternatively, an advantage could be gained through the exercise of control over the refined information market, (for example, by restricting access to the unrefined information). In this case, the advantage could be to the detriment of competition in refined information markets and, ultimately, of consumers.

6 COMPETITION CONCERNS

Introduction

6.1 This chapter examines the concerns that could arise from the structure of PSIHs as set out in Chapter 5. We present the evidence collected on particular PSIHs, on whether these concerns are borne out in practice and draw conclusions regarding the significance of concerns and the implications of the evidence we have collected. Finally, we estimate the current value of the PSI sector and consider the benefits of addressing the supply problems identified.

Implications of PSIHs' status

6.2 As discussed in Chapter 5, PSIHs are often both:

- sole suppliers of unrefined information, and
- suppliers of refined information products derived from their unrefined information.

6.3 The sole supplier status of PSIHs could reduce incentives to provide a high quality, efficient and customer focused service to businesses. This may mean that PSIHs are not providing value for money from the standard of service customers receive.

6.4 The integration of unrefined and refined information operations within a PSIH also mean they have an incentive to favour their own refined information operations over their business customers that purchase unrefined information to develop their own refined information products.

6.5 The combination of these two incentives could give rise to the following concerns:

- inadequate availability of unrefined information
- overly restrictive licensing conditions for businesses using unrefined information

- inadequate quality of service provided to customers
- unduly high prices.

6.6 If realised in practice, these concerns would make it difficult for businesses to develop refined information products, thus restricting competition to PSIHs in refined information and preventing innovative new products from being produced.

6.7 Our business survey indicated that concerns of the nature outlined above were relatively commonplace. In particular, 111 out of 289 businesses reported problems with PSIHs over the past three years, with 50 reporting problems as numerous and 78 reporting problems as being serious. These figures relate to a general question about problems experienced. The survey then asked further questions about which PSIHs businesses reported having problems with. The following table shows these figures which relate to the 756 business relationships between PSIHs and businesses (as opposed to the 289 businesses in the survey). Often businesses receive information from more than one PSIH and we considered these arrangements separately for the purposes of the following table.

Table 6.1 Proportion of business arrangements experiencing problems with PSIHs that supply data⁹⁰

Public sector information holder	Proportion reporting problems
UK Hydrographic Office	37%
Driver and Vehicle Licensing Agency	33%
Ordnance Survey	31%
Driving Standards Agency	27%
The Met Office	24%
OPSI Click-Use Licences (value-added users)	23%
Environment Agency	20%
Registry Trust Ltd (HM Court Service information)	20%
Ordnance Survey of Northern Ireland	17%
Local Authorities	14%
HM Land Registry	13%
Office for National Statistics	13%
OPSI Click-Use Licences (core users)	9%
Companies House	5%
Others	18%
All	15%

Source: Annexe B

- 6.8 We have also received a number of confidential submissions from businesses and trade bodies that have detailed allegations of problems with PSIHs.
- 6.9 The following sections of this chapter set out the available evidence on each of the concerns above (where we are able to use this – some information cannot be reproduced for confidentiality reasons).
- 6.10 Where concerns arise, it is usually not possible to distinguish whether these are the result of PSIHs being sole suppliers of unrefined information, or whether these arise from the involvement of PSIHs in

⁹⁰ Our more detailed questioning about problems moved away from businesses in general, to focus on arrangements between business and specific suppliers. Some businesses were using data from several PSIHs. However, to avoid imposing an unreasonable burden on businesses with many arrangements we limited detailed questioning to a maximum of three cases per business. This generated a data set covering 756 arrangements and this forms the basis of the results in table 6.1.

producing both unrefined and refined information. For this reason, our recommendations, as set out in Chapter 7, address both of these issues.

Inadequate availability of unrefined information

- 6.11 The first concern is that PSIHs may not have sufficient incentives to make all their information available for commercial use and re-use, and specifically that information available may not be unrefined – which is the form which businesses require to produce refined information products.
- 6.12 There is a three-stage process for making unrefined information available for businesses to use and re-use. First, the PSIH has to separate its information products into those which are unrefined and those which are refined. Second, it needs to make businesses aware of the unrefined information assets it holds, both those already available and those that could be made available for use and re-use. Third, it needs to allow businesses access to the unrefined information that they need to develop refined information products.

Defining unrefined and refined information

- 6.13 Overall, we found that some distinction between the different types of information PSIHs supply is being made but it is often being drawn at the wrong point. This can happen because there are several different concepts relating to information in legislation and guidance. We are not confident that these separate effectively the monopoly products from those where there is scope for competitive supply. Additionally, PSIHs' interpretations of the various concepts and definitions are not consistent. Our PSIH survey found that most PSIHs said they were able to distinguish between raw and value-added products (see Chapter 4 for a discussion of these terms), although the definitions used were not

always consistent.⁹¹ This is important as such distinctions should drive the determination of prices for PSI. Although, as discussed in Chapter 4, HMT guidance does not stipulate that Trading Funds need to make the distinction.

- 6.14 Our case studies on PSIHs showed a variation in what they considered to be 'raw' and 'value-added' information. This is illustrated in the table below.

⁹¹ The notable exceptions include the UKHO, Companies House and Ordnance Survey which did not consider that the distinctions applied to their organisations. The UKHO stated that as a Trading Fund it was not required to make the distinction, Companies House considered its outputs to be entirely raw and Ordnance Survey considered its outputs to be entirely value added.

Table 6.2: PSIHs' view of the type of information supplied

PSIH	PSIH view of type of information provided
Environment Agency	<p>All information activities are underpinned by some form of statutory obligation. As a result, the Environment Agency considers all its information (as listed in the Agency's Publication Scheme⁹²) as raw information.⁹³</p> <p>The Environment Agency regards value-added information as information created in a bespoke format for a third party (for example, data supplied to value-added resellers for property search products).</p>
UK Hydrographic Office	<p>The UKHO supplies a mix of basic navigational charts, regular updates to those charts and tailored products (for example, for its larger commercial or defence customers). The form in which this information can be provided varies with some charts being provided in paper form (and updates as patches to those charts) and some digitally. The UKHO considers its entire product range value-added insofar as it has to interpret its individual readings and tag these to co-ordinates on a chart.</p>
Local Authorities and NHS bodies⁹⁴	<p>Of the view that they only supply raw information, defined by them as information collected in order to fulfil a core or statutory function.</p>
HM Court Service	<p>HMCS itself does not provide any products to its users. It has instead designated its Registrar function to a not-for-profit organisation, Registry Trust Ltd (RTL). RTL verifies the information, makes it easier to use commercially and provides a customer service to the courts, credit reference agencies and the general public.</p> <p>RTL's view is that it only undertakes a small amount of value-added work, including the verification and adaptation of the information which goes to its core users. However, RTL has been recently feeding some of its information into databases to generate increased functionality of this information to allow more sophisticated uses, that is, through increased search capabilities. As such, RTL expects to be undertaking value-added activities increasingly in the future, such as competing with its customers at the fringes, marketing and packaging judgment records.</p>

⁹² [www.environment-agency.gov.uk/other/help/your right to know/publication scheme](http://www.environment-agency.gov.uk/other/help/your%20right%20to%20know/publication%20scheme)

⁹³ The Environment Agency has a wide definition of its statutory function that affords it some flexibility in what activities it could include under the term statutory obligation.

⁹⁴ Only small non-representative samples of both types of organisation were contacted in this case. The focus of the local authority studies was not on property search information as the OFT has recently completed a market study in this area.

British Geological Survey	<p>The BGS provides a range of information products and services to its customers. The BGS also engages in competitive tendering for bespoke products and services for its various customers. These might also take the form of providing advice on geological issues given the expertise of BGS staff.</p> <p>The BGS considers that its physical sample library and field notebooks can generally be regarded as raw, while any products where interpretation or 'internal value enhancement' is needed (such as derived ground stability) and the creation of bespoke products for customers (such as their services supplied to tender) can be regarded as value-added.</p>
Companies House	<p>In providing products and services, Companies House sells the information it collects and does so in a number of different ways. For example, it will generally disseminate information to large users in bulk as it is received (with only basic cleaning of data and checking that all fields are completed) and as a direct digital feed (the information submitted to Companies House is increasingly digitised).</p> <p>Companies House states that all of its information products are 'raw' insofar as it does not manipulate any of the information contained within filings made by the companies.</p>
Ordnance Survey	<p>Ordnance Survey provides products ranging from detailed mapping products to its larger users (sometimes in the form of digital layers) to basic printed maps, usually used by individual customers.</p> <p>Ordnance Survey's view is that all its products are value-added, according to its interpretation of HMT's definition of the term, insofar as all its individual survey inputs are collated in a structured database from which geographic data which is useful to customers can be generated.</p>
Met Office	<p>The Met Office's information database includes individual observation points from weather observing equipment. Using this information the Met Office makes detailed forecasts using various meteorological prediction models. It also generates some basic forecasts in order to meet international requirements. The Met Office supplies a mix of wholesale and retail services to its customers.</p> <p>The Met Office's view is that it provides both raw and value-add services. It considers raw products to be its basic forecasts and value-added to be those that have required more complex modelling or which provide a tailored service to its users (for example, it offers specific services to the building trade and to insurance companies).</p>

Source: Annexes C, D and E

6.15 It should be noted that the current terms used by PSIHs, 'raw' and 'value-added' information, cannot necessarily be equated with the concepts of unrefined and refined information as they may make distinctions at different points between information products. (For example, raw data is often classed as information relating to a PSIH's core/public task, the latter often being ill-defined.) However, separating different types of information in ways other than to isolate the monopoly

products from those where there is scope for competition in supply can make it difficult for businesses to access the information (often unrefined information) they require to produce an information-based product. This can also affect the prices charged for unrefined and refined information, as well as the scope for refined information prices to be subsidised by higher prices for unrefined information.

Awareness of information held by PSIHs

- 6.16 Without comprehensive lists of the types of unrefined information held by PSIHs, businesses will find it difficult to access information and develop innovative commercial products based on information.
- 6.17 The Re-use Regulations and OPSI's IFTS require PSIHs to produce a publicly accessible list of the main documents available for re-use (sometimes known as an information asset list). OPSI informed us that most PSIHs do not have adequate information asset lists for the purposes of commercial use and re-use. There is also an obligation under the FOI legislation to maintain a publication scheme which lists information the PSIH has published, although this does not confer any rights to re-use the information.⁹⁵ Many PSIHs have produced their own or contributed to another organisation's publication scheme (94 per cent of the respondents to our survey of PSIHs), although according to OPSI, these vary in quality.⁹⁶
- 6.18 Publication schemes and information asset lists are not sufficient for a potential customer to know all the information held by a PSIH that could be available to businesses. In order for businesses to have this knowledge, the PSIH would also need to produce something like an Information Asset Register (IAR). IARs are part of an initiative across central government which cover virtually all information resources. The initiative is concentrating on listing un-published resources to encourage

⁹⁵ Publication schemes are referred to in section 19 of the Freedom of Information Act 2000.

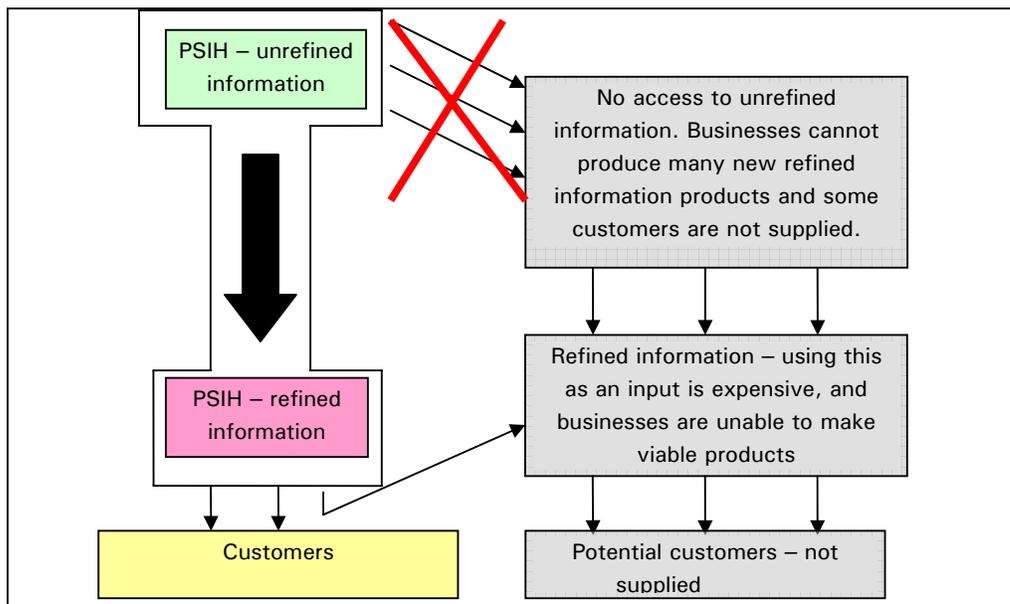
⁹⁶ In most cases, the 'other organisation' referred to above would be a parent or sponsor department of the PSIH.

greater access and re-use. IARs specify rights and restrictions to use of the data. Overall, 81 per cent of respondents to our PSIH survey indicated that they did not have, or had not contributed to an IAR.⁹⁷

- 6.19 Some PSIHs state that they have a number of priorities and do not always have sufficient staff, resources and/or IT software to carry out a full audit to locate all the disparate sources of information that could be made available for use and re-use. This was one of the issues highlighted by the Environment Agency. Despite these constraints, it is producing an information list which shows what information is held under certain topics and how the topics are inter-related.

Access for commercial use and re-use

Figure 6.1 – Diagram of limited access to unrefined information



Source: OFT

⁹⁷ IARs were more common for PSIHs with delegated authority to control their Crown copyright material (58 per cent) and Crown bodies (38 per cent) when compared to non-Crown bodies (13 per cent). IARs do not distinguish between which information is unrefined and which is refined.

- 6.20 The above diagram (compared with Figure 3.1 in Chapter 3) indicates the potential consequences of drawing a distinction between different types of information in the wrong place. If unrefined information is not made available by PSIHs, this restricts the ability of businesses to develop valuable new information products from that unrefined information.
- 6.21 If the PSIH only makes its refined information available to businesses, this can be expensive when used as an input and businesses may find legitimate products are too expensive and are not viable to produce. PSIHs making only refined information available may be assuming that the unrefined information is unusable, or that businesses would not find this valuable. This need not be the case, as some businesses may be as well placed as PSIHs to manipulate this unrefined information into commercial products for consumers.
- 6.22 Our PSIH survey found that 78 per cent of information supplied by PSIHs is what PSIHs described as value-added/analysed rather than raw information. As one example, on the whole, OS' information products could be regarded as value-added where they require additional inputs or more extensive manipulation. However, once survey information has been assimilated, extracts from its information databases are close to being raw information. Some businesses have noted that OS does not provide a basic mapping product that is a direct extract from one of its databases. This may imply that, in some cases, re-users are unable to gain access to the underlying data (at a stage where the field data has been assimilated but no more).⁹⁸ In addition, they may have to pay a premium price for a product OS describes as value-added information.⁹⁹

⁹⁸ OS states that it provides information at the first point at which it is useful to businesses and that it has not had requests for its raw data. Businesses state that they would be able to use data in a less refined form than OS currently supplies and that they have asked for this but have been refused.

⁹⁹ OS has stated that producing data in a more rudimentary form involves more cost where that data is generalised from higher specification unrefined data. Our view is that such data should be produced and priced to reflect the costs of its production.

This may lead to fewer businesses being able to add value to unrefined information from OS and to produce different or possibly cheaper products. OS however, considers that many of its products are practically direct extracts from its databases.

- 6.23 We found some evidence that PSIHs were not always being transparent about the information that was available for re-use. In our business survey, businesses reported encountering problems relating to a, 'lack of transparency about what information is available' in 63 out of 756 business-supplier arrangements (eight per cent). For a similar group of businesses, there were also problems related to a 'lack of transparency about why information/data are not supplied' in 48 out of 756 business-supplier arrangements (six per cent). Our survey was directed at current customers of PSIHs and therefore could understate the severity of the problem. Businesses which had been unable to access information from a PSIH due to such transparency problems would not have become customers, and consequently, they would not feature in our survey.
- 6.24 There may be valid reasons for PSIHs restricting the supply of unrefined information including the confidentiality, quality and/or reliability of the information. IFTS accredited PSIHs are required to publish exceptions to allowing the re-use of information. We have, however, found examples in our consultations with businesses where this was not the case. It should be noted that as our evidence is not complete, we cannot quantify the extent to which this is taking place.
- 6.25 Some PSIHs hold unrefined information sourced from a number of different organisations. Examples include the Environment Agency, the UKHO (which does not collect its own data) and the Coal Authority.
- 6.26 In such cases, it can be more difficult for a PSIH to license the data it holds for re-use, as permission needs to be obtained from all the third parties that own copyright in the data. This can be a time-consuming process. In addition, if one party refuses, the data cannot be provided, unless those parts in respect of which permission was granted can be separated from those for which it was not. If the information cannot reasonably be provided complete, it should be possible for potential re-

users to contact the original IPR owners of the source material such that businesses could gain direct access to the component parts of the information in which the IPR owner has rights. If a request for re-use is refused by a PSIH because a third party owns relevant intellectual property right, the Re-use Regulations 2005 require PSIHs to supply potential re-users with the name of third party IPR holders or state from whom they obtained the information.¹⁰⁰

- 6.27 The Coal Authority, for example, holds information with IPR from OS, BGS and the Cheshire Brine Subsidence Compensation Board. It is also custodian of the Health and Safety Executive's collection of coal mining plans and other records. Additionally, information is held on the future proposed activities of its coal mining licensees. It makes this information available subject to the relevant terms and conditions of the third party IPR owner.

Summary

- 6.28 We have found that PSIHs are not defining unrefined and refined information so as to separate the monopoly products from those where there is or could be competition in supply. Current definitions of raw and value-added are not being used consistently, and would not make the distinction we desire. In addition, PSIHs are not providing businesses with complete knowledge about the information assets they hold that could be considered for commercial use and re-use.
- 6.29 Consequently, it is unlikely that the commercial use and re-use of unrefined information is being maximised. There is clear scope for improvements to allow businesses access to more information at an unrefined level, to allow them to develop additional refined information products for consumers. In cases where definitions are wrong or are misinterpreted, there is scope for PSIHs to act in a discriminatory manner, both with and without the intention of so doing. This would prevent businesses from having equal access to unrefined information.

¹⁰⁰ Regulation 9 (4)

Overly restrictive licensing conditions

- 6.30 The second concern is that PSIHs may have incentives to put in place overly restrictive conditions with businesses that wish to use and re-use unrefined information. If realised in practice, such restrictions would limit the extent of competition with the PSIHs own refined information operations. In addition, where the internal development of refined information products within PSIHs does not suffer similar restrictions, this would be clear evidence of discriminatory behaviour against businesses using and re-using unrefined information. This would give the PSIH a competitive advantage in producing refined information products for consumers.

Box 6.1: Allegations of inconsistent treatment

On the issue of the consistency of treatment, a selection of comments from Annexe B, *Businesses that use PSI*, included the following:

'Misuse of being a monopoly supplier to ring-fence business for their own exploitation. Misuse of public funds for producing competitive products already in the marketplace.'

'The problem is not with obtaining data, the problem is with [public body] actively encouraging distributors and [licensees] to develop services and markets and then undercutting with its own service whilst still charging royalties to distributors and [licensees].'

'[Public body] only provided the data to [X] and they wanted to charge too much for their data which would then make our product more expensive than theirs. In reality, they were protecting their product from commercial competition.'

Complicated and lengthy negotiations and licences

- 6.31 An issue that businesses have raised is that negotiations over licence terms and the licences themselves can be complex. They consider that there is insufficient certainty about decisions made by PSIHs, which may be reversed at a later date, after the business has invested in developing a new product. PSIHs may not always realise how costly it is for businesses to have protracted negotiations with no certainty of a successful conclusion. This problem could hinder the development of valuable new products and services for consumers.

6.32 We note that licensing and licensing negotiations are often complex, as they involve intellectual property rights (IPR) including Crown copyright and third party IPR. In some cases, PSIHs may perceive a need to retain rights over the material contracted to protect its integrity and accuracy, particularly where this is Crown copyright. Despite these complexities, OPSI has introduced a successful and simple licensing system (for PSIHs which do not have delegated authority to control Crown copyright), called Click-Use Licensing.¹⁰¹

¹⁰¹ Delegated authority is where the Controller of HMSO has authorised a government department or agency to license the re-use of Crown copyright material on her behalf. This takes place where there are sound policy or practical benefits in doing so. All government Trading Funds have been offered delegations. <http://www.opsi.gov.uk/about/faqs-ifts.htm> For details of Click-Use Licensing see: <http://www.opsi.gov.uk/click-use/index.htm>

Box 6.2: Intelligent Addressing and Ordnance Survey

A business, Intelligent Addressing, which complained to OPSI, raised concerns (amongst others) about negotiations with OS. It described them as lengthy and said that OS introduced new levels of licensing complexity at various stages of the negotiations, indicating a lack of transparency. OPSI's investigation report, published in July 2006 stated that the terms of the OS licence unnecessarily restricted the way in which AddressPoint (an OS product) can be re-used. OPSI concluded that by producing a restrictive AddressPoint licence, OS was in breach of the fairness principle of IFTS. OS has acknowledged that its Framework Partner Licence and its accompanying Specific Use Contracts are long and, in places, complex. It considers that licences for intellectual property rights are inevitably complex to some degree, although it does try to minimise this. OS stated that it is reviewing its licences with a view to reducing their complexity and to reduce some of the details.

Both OS and Intelligent Addressing have informed us that they have appealed this decision to the Advisory Panel on Public Sector Information.

Box 6.3: Allegations of restrictive and complex licences

On the issue of restrictive and complex licences, a selection of comments from Annexe B, *Businesses that use PSI*, included the following:

'The public body decided to deny us availability of [excised] information and keep it for their own direct customers, a decision that we regarded as tantamount to an abuse of their dominant power.'

'We cannot get licence terms that allow us as a [licensee] to compete with [public body's] direct sales.'

'Changes to licensing agreement and royalty structures to the benefit of the [public body].'

'The [public body] data we are licensed to use is of very limited accuracy. We find ourselves and our competitors are denied access to more accurate data which appears to be used exclusively by the [public body] in producing their [excised] product and their other [excised] product.'

'Licensing terms were unreasonable and seemed designed to drive our company out of business.'

Licences for inappropriate periods of time

- 6.33 We found that the length of licences offered by some PSIHs were not always appropriate for their particular business customers. Some licences made it impossible for a business to provide a product to end-consumers for longer timeframes. This affects the viability of investment decisions by businesses in terms of which products to develop. Other licence periods appeared too long and therefore too costly.
- 6.34 OS has been cited as an example of a PSIH that provides contracts for some of its products which may be too short to allow businesses to invest in creating a viable product. OS stated it needed to have flexibility and amend terms and conditions to ensure similar licences have the same terms and conditions. An example of this problem is highlighted below in Box 6.4.
- 6.35 In contrast, the BGS recognises customer needs to make long-term plans, and offers licences for one to five years, based on the preferences of the licensee, with discounts for longer licence periods.
- 6.36 An example of a contract which is too long for some customers is the purchase of electronic navigational charts from the UKHO, which can be for a minimum period of 12 months. This means that a UKHO end-user, potentially a commercial shipping company visiting a destination once, has to buy a full 12 month subscription.¹⁰² A business stated that this issue arises with vessels that are only used a few months a year or which move around regularly, such as offshore supply vessels or seismic vessels.

¹⁰² The UKHO notes that allowing shorter licence periods would benefit some users at the expense of others. It considers that this would be complex, difficult and relatively costly for regular users.

Box 6.4: The Pan Government Agreement

The Pan Government Agreement (PGA) is an agreement for central government departments, providing them with a variety of mapping products and services that are needed for the core business of central government.

The PGA is one example where access to unrefined information is critical for success. Communities and Local Government (CLG) has recently tendered a new PGA, which was divided in 13 Lots, to replace the existing agreement. CLG has identified a preferred bidder for the height and aerial photography Lots, but none of the remaining sections could be awarded as there were no compliant bids.

One potential bidder was Intelligent Addressing, which claimed it was unable to meet CLG's requirement for a four year contract in respect of a PGA Lot for the supply of Address Gazetteer data. It explained that the data it wished to supply (the National Land & Property Gazetteer or NLPG) contained an element of data derived from Ordnance Survey and that Ordnance Survey would only agree to a one year license term for this data. Ordnance Survey itself would have been able to meet the requirement for a four year supply contract as it owns the source information and would have no such contractual constraints.

We note that this issue comprises part of the complaint made by Intelligent Addressing to OPSI and is both OS and Intelligent Addressing have informed us that they have appealed this decision to the Advisory Panel on Public Sector Information.

Requirement to provide commercially sensitive information

- 6.37 We found evidence that some PSIHs require access to potential customers' confidential business models and information before agreeing to supply data. This allows the PSIH to gain access to commercially sensitive information, such as detailed plans for innovative products, from potential competitors in the supply of refined products and services. Consequently, PSIHs can gain access to the creative ideas developed by businesses which they could use to their advantage. This is a significant concern as PSIHs are the sole source of unrefined information. This distortion may lead to reduced competition for refined information with consumers facing less choice of suppliers and higher prices.
- 6.38 For example, to become a licensed partner of OS for a new and innovative product can involve a detailed assessment of the proposed use of the OS data and the business of the partner. OS' website FAQs

on its licensed partner programme state that, 'An account manager will need to fully understand your own business model, market segmentation, market size, market share and so on in order to assess potential impacts across our business'.¹⁰³

- 6.39 The Environment Agency requires a full understanding of any value-added product that will include its data. It states that this is to ensure equal treatment regarding charging, and to ensure that the product does not damage its reputation in any way. It also states that it has Chinese walls in place between its IPR management and its commercial information services in relation to Property Search Services. The reason that it applies stringent re-use conditions, it says, is to protect the quality of raw information supplied and its reputation.
- 6.40 The UKHO asks applicants wanting to use its data for commercial purposes to provide details of the products and services intended. In particular, it requests 'wholesale and recommended retail prices and your firm's two year predicted sales figures and an indicative five year sales projection'.¹⁰⁴ The UKHO states that such information will help prepare a licence agreement and provides estimates for licence fees.
- 6.41 Part of the reasons for requesting information such as this appears to be calculating likely royalty payments and to offer the business the correct licence terms. However, if the information provided is in sufficient detail, and is used for purposes other than setting unrefined information prices, this could allow the PSIH to take advantage by using the product idea itself.
- 6.42 This would be a particular cause for concern with OS if it were to use this information in conjunction with its non-compete condition (see paragraph 6.43), thus preventing businesses from accessing the PSI they

¹⁰³ <http://www.ordnancesurvey.co.uk/oswebsite/partnerships/licensedpartners/faq.html#2>

¹⁰⁴ UKHO's application form for re-use of UKHO material entitled, *Permission to reproduce UK Hydrographic Office material for commercial purposes*.

need to produce the new product but using the idea itself. One business claimed [3<].¹⁰⁵ OS insists that it has no ulterior motives in requesting business information from potential customers and that it would not contemplate breaching confidentiality in order to use information to undermine a competitor's business.

Non-compete licence policy

- 6.43 In addition to the indications concerning whether PSIHs were providing unequal access to unrefined information, we found that OS publishes a licence exception policy which sets out the circumstances under which it identifies that it may not license the use of its information. This states that OS may refuse applications, 'to market a product whose intended use is the same as, or comparable to, that of any product marketed by Ordnance Survey itself or any product which Ordnance Survey intends to market'.¹⁰⁶ OS informed us that its licensing policy follows the case law

¹⁰⁵ [3<]

¹⁰⁶ See <http://www.ordnancesurvey.co.uk/oswebsite/business/copyright/docs/D03800.pdf>

published as a result of a dispute between IMS Health and NDC Health Corporation, involving the supply of health information.¹⁰⁷

6.44 OS uses this as a reason for not licensing applicants producing similar products to its own. Any such decision would involve OS determining whether the proposed product would actually be new or different. We recognise that this case law represents the most recent statement of the outer limits of a dominant undertaking's obligation to license its IPRs under Article 82 (see Chapter 8 and Annexe H for more details). Nevertheless, we think it preferable for Public Sector Information Holders such as OS (whether or not they act as undertakings for the purpose of Article 82) to adopt a more flexible licensing policy than this case law would suggest in relation to what we defined as unrefined and refined information products.

¹⁰⁷ ECJ Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] **ECR** I-5039.

The *IMS* case involved a refusal to license the copyright in a 'brick' structure that was used to present pharmaceutical data in Germany. The brick structure had become a de facto industry standard in Germany for those purposes. The Court decided in this case that in order for a such conduct by a dominant undertaking to amount to an infringement of Article 82 EC Treaty, it must be the case that:

- the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand;
- the refusal is not justified by objective considerations;
- the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market.

The Court said nothing about what might constitute 'objective considerations' other than that it would be for the national court to determine, on the facts, whether or not such justification exists in any given case. Further details of this case can be found in Annexe H.

Summary

- 6.45 We have found that arrangements for licensing PSI are complicated and there are indications that this could be simplified, which would in turn reduce the complications in negotiations. We have also found evidence that licences provided by PSIHs may be of unsuitable duration for businesses. Specifically, we have found that Intelligent Addressing was unable to obtain a licence of long enough duration (only a one year licence was offered) to allow it to provide a qualifying bid for one section of the Pan-Government Agreement, while OS bid to supply the information for four years. In addition, we have found that OS has an explicit licence exception policy that prevents businesses from competing with it in supplying refined information. We have also found indications of some PSIHs requesting confidential business information before licensing information.
- 6.46 The evidence of overly restrictive licensing conditions is significant and shows that some PSIHs are not providing businesses with equal access to unrefined information, which restricts the ability of businesses to compete with PSIHs in providing refined information products. However, these issues do not apply consistently to all PSIHs, as we have also found evidence of good practice among PSIHs in this area.

Inadequate quality of service provided

- 6.47 The third concern is that PSIHs may not have sufficient incentives to provide a high quality service to customers, particularly those businesses seeking to use and re-use unrefined information to develop refined products.
- 6.48 A reliable, good quality service is critical for many businesses using unrefined information. Without such a service, businesses would be unable to provide a reliable service to consumers, and new viable products may not be developed.

Delays in providing information

- 6.49 Our business survey found 18 per cent of businesses reported encountering some problems in relation to the supply of data. Of these, about half related to tardiness or unnecessary delay. Complaints from businesses concerning delays related to: OS, the Met Office, UKHO, DVLA and ONS.
- 6.50 These problems related typically to regular data feeds and meeting agreed delivery dates. While we are aware that PSIHs have limited resources, and some delays may occur, it may be argued that such delays cause businesses difficulty in supplying their own customers on a consistent and timely basis. This may reduce the amount of use made of information-based products by time-sensitive customers, which would prevent the efficient use of information. In addition, some of the complaints regarding delays have indicated that the PSIH provided its internal refined information operations with the information before providing this to business customers. Such practice is a clear form of discrimination that gives PSIHs an undue advantage in developing refined information products.

Box 6.5: Concerns surrounding the late delivery of data

On the issue of late delivery of information, a selection of comments from Annexe B, *Businesses that use PSI*, included the following:

'Late delivery of data. The public body supplied their own third-party printer in advance of its licensees.'

'Very slow to respond to customer requirements and deliver new services.'

'Late delivery of data and data errors.'

'Very late delivery of requested data which jeopardised a project completion within tight deadlines.'

Box 6.6: The availability of mapping Information

In 2005, a small start-up company developed an idea for a product that needed the use of detailed OS maps for small geographic areas for its clients.

The business needed to purchase a licence from OS in order to be able to use its maps in the products provided to clients. On approaching OS, it was told that OS expected to earn a specific level of income from the licence and requested the business to provide reassurance through its business plan that this could be assured.

The business however, was unable to develop a credible business plan without information from the OS regarding its licence terms and in particular, prices. Therefore, it did not have a suitable business plan that it could provide to OS and it was not possible to resolve the matter.

The business has now approached alternative mapping suppliers, finding few substitute products with sufficient detail for its uses. Some clients of the business now approach OS individually for a licence to use mapping data. This is not an ideal business model to address the problem, as clients find this approach difficult and cumbersome. Additionally, the start-up company itself is unable to develop the product to its full potential.

The business considers OS to have poor customer service, with pricing models that are too complex for businesses to understand, preventing new products from being created and developed to their full potential.

OS has not had an opportunity to respond to the OFT about this complaint because we are under an obligation not to identify the complainant.

Usability of information

6.51 Some respondents to our business survey noted concerns regarding the accuracy and/or formatting (and hence usability) of data supplied by PSIHs. This did not seem to affect all PSIHs but was an area of particular concern for those dealing with Companies House and DVLA.¹⁰⁸ We have received comments suggesting that sometimes PSIHs receive inaccurate information or updates were not undertaken by PSIHs when they should have been. In particular, businesses considered themselves

¹⁰⁸ DVLA notes that the accuracy of its information is related directly to the accuracy of information provided to it by the public.

unduly restricted from making obvious corrections to Environment Agency data. To counter such problems, the Environment Agency has set up a Data Quality Forum to improve the quality of its information and to understand better the needs of customers.

Summary

- 6.52 We have found problems in this area related mostly to the speed of supply of information. This is likely to be particularly important for some types of PSI where a fast reliable service is inherent to the value of the information. This may be particularly the case for statistics and company information. In addition, we have found limited problems regarding the usability of information.
- 6.53 Where there are delays in providing businesses with unrefined information, and these delays do not occur for internal use, or are less for internal use, again this implies that businesses do not have equal access to unrefined information. The PSIH would have an inherent advantage over businesses in any refined information products, restricting the ability of businesses to compete effectively in refined information markets. Similarly, where problems relating to the usability of data apply to businesses, and where the data is prepared for easier internal manipulation, this could restrict the ability of businesses to supply competing refined information products.
- 6.54 In practice, about half of those businesses that reported problems in the supply of data in our business survey stated that these were related to tardiness or unnecessary delay. We have also found some problems concerning the usability of information.

Unduly high prices

- 6.55 The final concern is that PSIHs may have incentives to set prices unduly high, particularly the prices of unrefined information supplied to businesses for commercial use and re-use.
- 6.56 As PSIHs are public bodies, they are subject to guidance from HMT concerning the acceptable levels of pricing and controls on any surplus

earned. Trading Funds in particular, have financial targets, 'over a period – usually five years.'¹⁰⁹ The expectation is that charges should adjust over the five year period to ensure that the target is met. Consequently, it is unlikely that when considered over the period of any return, that additional profits would be earned by public bodies such as PSIHs. Consequently, if there are allegations of unduly high prices, there are two possibilities that result:

- PSIHs may be inefficient, such that while prices reflect the costs, the costs themselves may be unduly high
- when evaluated at an organisation level, aggregate prices may be reasonable, however, prices of unrefined information for businesses may be unduly high. In some cases, this may result in PSIHs charging lower prices for their own refined information products sold in competition with businesses.

¹⁰⁹ Guide to the establishment and operation of trading funds, HMT May 2004 – section 12

Box 6.7: Concerns regarding prices and price increases for PSI

On the issue of price levels and increases, a selection of comments from Annexe B, *Businesses that use PSI*, included the following:

'Charging system is absurdly complex and totally unsuitable for small/occasional uses.'

'Data is often overpriced. The [public body] have a monopoly so we cannot go elsewhere.'

'Costs greater than those originally obtaining the data.'

'Public body is using its monopoly to impose price changes far above inflation.'

'Prices have gone up by a factor of about ten. Have recently made contact with Sales and Marketing Director who is now taking the issue seriously but we have been making the point for over a year before this happened.'

Inefficiency of PSIHs

6.57 We consider that PSIHs could, unfettered, be unduly costly. Sponsoring or parent departments may control costs in many cases but not in all instances. The Trading Fund model allows for sponsoring departments to set efficiency improvement or cost reduction targets for PSIHs, although we are only aware of a few organisations that are active in licensing information that have such targets. Examples we have found include the Fire Service College which has general targets imposed and the UKHO which has targets as set out in its 2005-06 report. In general, cost reduction and efficiency targets do not appear to be widely used.

High prices of unrefined information

6.58 We do not have direct evidence on this concern. Indeed, it would be impossible to collect evidence on this point without many PSIHs improving their accounting practices, including accounting separately for their unrefined and refined operations.

6.59 One business customer of the Environment Agency was concerned that, where the Environment Agency is the sole supplier of a type of unrefined information, high charges may be used unfairly to cross-subsidise refined

information activities in the Environment Agency. In addition businesses alleged that the Environment Agency set its prices at what the market could bear, rather than in relation to underlying costs.

- 6.60 One anonymous example is business X, which claimed that one PSIH reacted to the popularity of its product by bundling two products together, including a competing product to its own, and cross-subsidising the price of the competing product. The business claimed this ceased to make its individual products viable for customers.

Pricing practice among PSIHs

- 6.61 In practice, PSIHs vary significantly in their approach to pricing of information. Half of those that responded to our PSIH survey indicated that they employed more than one model for pricing value-added information.¹¹⁰
- 6.62 Some PSIHs, particularly Trading Funds are largely self-financing and so prices cover the full costs of production and dissemination. There are other PSIHs that charge prices intended to recover purely the costs of dissemination of that particular information and some PSIHs offer information available for re-use with no charge. There are several PSIHs that use a combination of the above models, including some information offered with no charge and other information where a cost recovery model is used to determine prices. One notable example is the Met Office, which provides some basic forecasts for free, funded directly by the government, while charging to recover the total costs of its range of more bespoke products.
- 6.63 When considering prices for individual information products, the most common single approach to price setting reported in our survey was with

¹¹⁰ Annexe A, *Survey of PSIHs*

reference to private sector comparators, namely, 'market pricing', 'market factors' or 'market demand'.¹¹¹

- 6.64 It is likely that PSIHs find it difficult to set individual product prices for businesses based on the recovery of total costs. Given the popularity of market pricing, they may find this easier as it can be used in the absence of detailed cost knowledge. However, the use of market pricing for unrefined information appears inappropriate, as suitable comparators would not be available to determine a competitive market price. Despite this, the Environment Agency has acknowledged that its 'raw' information prices take into account, 'a market price'.
- 6.65 Where markets are competitive and there are many suppliers, a market price can be indicative of the costs of supplying products. However, where there are fewer suppliers, or no close comparators can be found, market prices may not reflect the cost of providing PSI products and may be misleading. This is particularly the case for unrefined information, where PSIHs are the sole providers, and one might expect reasonable comparator firms or markets to be difficult to find.
- 6.66 The table below summarises the different pricing practices adopted by the PSIHs that were part of our case studies:

¹¹¹ Para 2.4.4, draft *Fees and Charges guide*, HMT 2004:

http://www.aasdni.gov.uk/pubs/FD/fd1005att1.doc?bcsi_scan_A2018E0826464712=0&bcsi_scan_filename=fd1005att1.doc

Table 6.3 PSIH Pricing Practices

PSIH	Pricing practices
Companies House	Charges both registering companies and users of information. Revenue split of £41.1m from registering information and £14.2m from the sale of services. As a Trading Fund, it is required to charge to cover its costs and meet a target rate of return of 3.5 per cent from its charges to both registering companies and users. ¹¹²
Ordnance Survey	As a Trading Fund, it is required to charge to cover its costs and meet a target rate of return of 5.5 per cent from its charges. All costs incurred by OS are spread across their various products, although OS has no specific cost allocation mechanism in place. Product prices are differentiated between licensed uses. In practice this involves OS considering demand for its products and forecasting prices based on this demand.
Met Office	Obligated to offer certain services free of charge under international World Meteorological Organisation (WMO) obligations. As a Trading Fund, it is required to charge to cover its costs net of government funding and meet a target rate of return of 3.5 per cent from its charges.
UKHO	Separate charging structure differentiating, for example, amongst services to the Ministry of Defence and to commercial users of their information. ¹¹³ As a Trading Fund, it is required to charge to cover its costs and meet a target rate of return of nine per cent from its charges.
HM Courts Service	Charges cost reflective prices to the credit reference agencies for information collection and preparation. Prices charged increased following cost allocation indicating it had been under-recovering its costs, although HMCS is taking action to reduce its costs overall. Charges for the public to access individual judgments are set by statute.
British Geological Survey	The prices of BGS information products are calculated on a cost recovery basis. Bespoke services are costed at full economic rates. It is a not-for-profit organisation and does not aim to earn a positive rate of return as such.

¹¹² HM Treasury sets the target rate of return for PSIHs based on the type of product or service and an assessment of the risk of the activities undertaken. See section 12.4 of the Guide to the establishment and operation of Trading Funds: http://www.hm-treasury.gov.uk/documents/financial_management/government_fin_report/pss_aud_tfunds.cfm

¹¹³ Separate charging is permitted under the Re-use Regulations for the supply of products which is for either the provider or recipient's public task.

Environment Agency	<p>Aims to set re-use charges for raw information at, 'a market price', with consideration given to costs and expected future market conditions. Actual prices are negotiated with customers.</p> <p>In practice, it recovers only part of its costs through re-use charges. It is considered that wide dissemination of environmental information is valuable to society and that it would not be as widely used if charges reflected the full costs of collection and dissemination, consequently government funding covers part of the costs of this activity. The Environment Agency has updated its pricing policy during our study. The key changes are listed in Box 6.8.</p>
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Source: Annexes C, D and E

Cost allocation practice among PSIHs

- 6.67 We have found that there are few PSIHs that keep cost records for individual products or product categories, although records were being kept for the overall organisation. Our PSIH survey found that of those 10 PSIHs that are part of the 'delegated authority and voluntarily IFTS accredited group',¹¹⁴ five attempted to allocate indirect/common costs across different activities and products and five did not.¹¹⁵ In each case where costs were allocated, the respondent described some form of allocation based on activity, often specified as related to measures of staff time and other facilities.
- 6.68 The table below shows some examples from our case studies of the various approaches to cost accounting.

¹¹⁴ See Annexe A, *Survey of PSIHs*, for further details.

¹¹⁵ Ibid.

Table 6.4: Current PSIH practices on Cost Allocation

PSIH	Cost Allocation
Ordnance Survey	No upstream and downstream business unit or accounting split. There is no costing of upstream activities to demonstrate non-discriminatory pricing of upstream services between Ordnance Survey's downstream activities and third parties, nor any clear distinction between upstream and downstream products.
UK Hydrographic Office	Has a cost allocation mechanism that distinguishes between the costs of different services for example to the Ministry of Defence and to commercial users of its information.
Environment Agency	Does not currently keep activity based accounts for its raw information activities, so the actual role of environmental licensing income (and government subsidy) in the funding of such activities is not clear (see box 7.2 for recent amendments made by the Environment Agency to its pricing policy).
HM Courts Service	HMCS has a detailed cost allocation system in place when determining its charges to the Registry Trust Ltd.
Local authorities	None of the locally based case study PSIHs currently record costs related to information activities, although it was found in some cases the technology was in place for activity based cost accounting to occur.
British Geological Survey	Costs of value-added information products and costs of making raw data available are broken down by activity.
Companies House	Detailed cost allocation process in place, where costs are tagged to the registration of information and to the dissemination of information.
Met Office	Operates an internal arm's-length relationship between its wholesale and retail activities with internal cross-charging at the same rate as is applied to third parties.

Source: Annexes C, D and E

6.69 The table above shows that OS does not account separately for its unrefined or refined activities. Although it is not the only PSIH in this category it is by far the biggest income earner from supply, sale or licensing of PSI (and accounts for approximately 25 per cent of the total income to PSIHs from the supply, sale or licensing of information) and this lack of separation is a cause for concern.¹¹⁶ Moreover, a similar

¹¹⁶ The largest income earning PSIHs are highlighted in Chapter 3.

issue concerning the need for separation of its operations has been drawn to OS' attention previously.¹¹⁷

- 6.70 In contrast, the Met Office has accounting systems that enable it to allocate costs through activity-based costing. The level of detail undertaken by the Met Office can be regarded as an example of good practice among PSIHs. Its accounting system manages accounts which are split on the basis of competable [competitive] and non-competable [sole supply] products and services.¹¹⁸ Competitive products are priced at a market rate, while sole supply products and services are priced on a cost-plus basis. Wholesale [refined] products are priced so as to recover additional costs to provide them, plus a small contribution to the overall Met Office infrastructure.¹¹⁹
- 6.71 The table above also shows other examples of potential good practice, namely Companies House and HMCS. Companies House has a cost allocation process in place that seeks to allocate its cost base between the different activities of the organisation. It also has a cost allocation mechanism that breaks up collection and different dissemination costs. Companies House has noted that its cost allocation process is designed to enable it to set prices in compliance with relevant law and the Fees and Charges Guide and that it is a straightforward approach, applied consistently.¹²⁰

¹¹⁷ This was mentioned in the Transport, Local Government and Regions Select Committee's tenth report on Ordnance Survey, 2002, '...there is a clear need to define the boundaries of Ordnance Survey public service and national interest work...the two activities ought to be separately accounted for and its commercial arm should pay the same copyright fees as any other organisation.' The Government response accepted the need for clarity but thought it difficult to draw the line between national interest and commercial activities. This referred particularly to NIMSA, see Table 5.2.

¹¹⁸ The Met Office notes that non-competable is a term used for some products provided to UK Government Departments.

¹¹⁹ Annexe C, *UK case studies*

¹²⁰ Ibid

- 6.72 Moreover, we found that the internal price between unrefined and refined operations of a PSIH was rarely calculated.¹²¹ In our PSIH survey, just three of the significant income earning PSIHs (within the delegated authority and voluntarily IFTS accredited group) indicated that they had a cost representing a transfer price charged to their value-added information activities.¹²² One of these, the Met Office, reported this charge in both its business plan and its accounts. The other two, The Natural Environmental Research Council and The General Register Office for Scotland did not, but were much smaller organisations without delegated authority for Crown copyright. Consequently, we would not necessarily expect many of these bodies to have detailed financial allocation methods in place, particularly for their information licensing activities.
- 6.73 Our international case studies have shown the problems that can occur without the rigorous use of cost allocation and separation of activities. In Sweden, there have been several complaints from private companies relating to the behaviour of Swedish PSIHs. The Swedish Competition Authority found that one of the main factors that affect competition in the public sector information markets is the failure to separate the different tasks of information holders, between commercial and non commercial tasks.¹²³ While the definition of the split may not accord exactly with our definitions of unrefined and refined information, it is clear that the Swedish Competition Authority has recognised the benefits of separating different types of information activity.
- 6.74 These issues are not new for PSIHs, and have been highlighted before. The *Cross-cutting Review of the Knowledge Economy* in 2000

¹²¹ This is the price at which the part of the PSIH which produces unrefined information sells that to the part of the PSIH which produces refined information products or services. Such a concept only has meaning where the parts of the PSIH producing unrefined and refined information products are separated.

¹²² Annexe B, *Businesses that use PSI*

¹²³ Annexe F, *International Case Studies*, section 1.6.

highlighted the need to separate public task activities from commercial ones. In addition, the EU Financial Transparency Directive 1980 (as amended) will require similar separation and dis-aggregation of accounts for public bodies that are within the scope of the directive from the end of 2006.¹²⁴

- 6.75 We are aware that some PSIHs currently may lack the skills and resources to split accounts and allocate costs between unrefined and refined information operations or that the current divisions may be undertaken on a different basis to unrefined and refined information. However, the presence of good practice among some PSIHs shows that this is both possible and reasonable for other PSIHs as well.
- 6.76 We note that, for many PSIHs, the low level of income derived from information licensing/sales would not justify the costs of a detailed accounting system enabling a cost-reflective approach to pricing. For instance, re-use charges imposed by the Environment Agency were not based on a rigorous consideration of costs, as income from the supply, sale or licensing of information covered only a small proportion of the information activity costs. Given the small-scale nature of this activity, the Environment Agency's accounting system did not cover information activities in detail. In response to our case study, the Environment Agency is however implementing improvements, including moving to a more structured form of pricing for its information.

¹²⁴ Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings. See Annexe H for further details.

Box 6.8: Environment Agency response to OFT case study

The Environment Agency has noted that in response to the OFT's case study, it has sought to amend the way in which it makes information available for re-use. In particular it noted that:

It is now taking a pro-active approach to identifying information to be made available for re-use.

It is developing a topic map of information held by the Environment Agency (as highlighted in paragraph 7.11).

It has amended the terms on which raw data sets are offered for re-use, and all data sets are now available for re-use and priced on an individual basis – a more structured form of pricing.

Summary

- 6.77 In this section we have noted that there may not always be a focus on the levels of costs incurred by PSIHs, which may lead them to incur more costs (and corresponding higher prices) than would be efficient. We have also considered whether unrefined information may be priced too high. In this case, the lack of separation between unrefined and refined information operations of PSIHs in many cases, and the lack of cost allocation between these means that it is inherently impossible for us to determine whether charges are unduly high in such cases.
- 6.78 As noted above, we have shown that indirect/common costs are not always being allocated within PSIHs. Where these costs are not allocated, it is not possible to determine whether the prices for unrefined information charged to businesses are recovering some costs that should be attributed to refined information. If this occurred it would give a PSIH an undue advantage in the sale of refined information products.
- 6.79 We have, however, found PSIHs which are examples of good practice in this area, particularly the Met Office, which does allocate its indirect/common costs using an activity-based costing approach and separates the information for which it is the sole supplier to that where it faces competition from businesses.

Conclusion on competition concerns

- 6.80 As this chapter has shown (and is described in more detail in the Annexes), we have obtained evidence on a wide range of different issues regarding the way in which information markets are working. Given the lack of transparency within PSIHs and the lack of accounting separation and cost allocation, we have found limited direct evidence of discriminatory behaviour between PSIHs and their business customers. However, where there is a lack of transparency, PSIHs are not demonstrating that they are affording businesses equal access to unrefined information to allow them to compete with PSIHs purely on the merits of the products produced.
- 6.81 Our evidence provides us with the indication that many businesses feel they are not being treated reasonably and consistently by PSIHs. As stated above, there are problems with the definition and availability of unrefined information, problems with obtaining a good standard of service from PSIHs, several problems concerning reasonable licences, and the potential for pricing problems remain as we cannot evaluate pricing in more detail in many cases.
- 6.82 We have obtained little direct evidence of the degree to which demand for PSI is being restricted and where businesses have failed to be able to use PSI to develop viable products. One explanation for this is that there is no significant restriction on demand occurring in the sector and we have unrepresentative and isolated cases. The alternative explanation for this is that we are unaware of the identity of many such businesses and any contact relies on them being aware of our study and proactively contacting the OFT. Our business survey was undertaken using lists of current customers of PSIHs and as such would not include those unable to use PSI for their products. We consider that the nature of the evidence we have collected does indicate that there are wider problems in the supply of PSI and that restrictions are in place that are preventing businesses from developing new products.
- 6.83 Many of these problems with unrefined information would apply purely to PSIHs' relationships with their current business customers. Given this

key difference, it would be reasonable to conclude that the concerns identified relate to both the sole supplier status of PSIHs (for unrefined information) and their involvement in both unrefined and refined information. Consequently, in Chapter 7 we present recommendations which address both issues.

The benefits of addressing concerns within the PSI sector

- 6.84 The following section presents two pieces of economic estimation relating to the PSI sector. First, an estimate of the value to society today of the PSI sector. Second, an estimate of the potential for growth in the value of the sector if problems in supply are resolved.
- 6.85 We commissioned economic consultants, DotEcon Ltd, to produce estimates of the current value to society of the PSI sector and the potential for growth in value that could occur if problems from the current PSI supply framework, including the behaviour of PSIHs were resolved in full.¹²⁵
- 6.86 The value to society from PSI is the net benefit that society as a whole gains from the consumption of all PSI, or how much better off society is from the use of PSI. Where the benefit of a product is equal to the cost of producing it, the net benefit is zero. Therefore, we are seeking to measure the net benefit of PSI, over and above the costs of its production, and measure the value this adds to the decisions made by society (that is, government, businesses and consumers).
- 6.87 This work uses our PSIH survey, data from OPSI, information from individual PSIHs and literature on PSI. However, we do not have complete information regarding the current and potential uses of all PSI. Consequently, DotEcon's approach has been to develop order of

¹²⁵ See Annexe G, *Economic value and detriment analysis*, for further explanation and details.

magnitude estimates of the above, based on data available and reasonable, conservative assumptions where data is not available.

The value to society today of the PSI sector

6.88 There are two main approaches to estimating the value added to society from the PSI sector:

- **The top-down approach:** adds up the value added today by each PSI product throughout the industries or sectors that use PSI as an input to their products. Such estimates can suffer problems of double-counting the benefits (for example, from the value to PSIHs and the value to businesses) and can overstate the value of PSI, particularly where the extent of alternatives to the use of PSI are not identified directly.
- **The bottom-up approach:** considers the net value to society today, associated with the current PSI products and services, taking into account the possibility for alternatives to PSI products. This is the net willingness to pay for PSI (the maximum price someone would pay for PSI) minus the cost of supplying it.¹²⁶ This method does not suffer the problems of double-counting and over-estimation that are associated with the top-down approach.

6.89 There has been little previous work in this area, with some limited top-down studies for particular PSIHs and a broader study for the EC in 2000, conducted by PIRA International.¹²⁷ PIRA undertook a top-down

¹²⁶ In practice, this can be estimated adding together the following two concepts:

The net consumer surplus, that is, the difference between customers' willingness to pay for PSI (the maximum price they would pay to purchase PSI) minus the cost of supplying it.

The producer surplus from supplying PSI (that is, the extent to which suppliers might be able to obtain revenues greater than the cost of supplying PSI).

¹²⁷ 'Commercial exploitation of Europe's public sector information' PIRA International 2000

approach to identify the element of value added by users of PSI which is due specifically to the PSI itself for the countries in the EU. This was compared with figures for PSI in the USA as an indicator of the potential for growth in the EU PSI. PIRA estimated the value of PSI for the UK to be £11.2 billion annually.

- 6.90 PIRA did not, however, have access to the detailed information relating to UK PSIHs that is contained in our PSIH survey. In particular, PIRA relied on published figures of turnover. DotEcon had access to survey reported figures for PSIHs showing the revenues specific to information. For this reason, combined with the potential for overstatement of value from the top-down approach, we consider DotEcon's estimates of the value of the PSI sector to be more justifiable and conservative.
- 6.91 DotEcon undertook an estimate of the value to society today associated with the current PSI products and services. This estimate was a bottom-up assessment as indicated in paragraph 6.88.
- 6.92 As noted above, using this approach is a conservative manner of estimating the current value to society from PSI products and takes into account the potential for substitutes for PSI products. This estimate of the current value is of the order of **£590 million annually**. This figure includes both the value to PSIHs, and the value to the wider economy from the development of refined information products.

The potential for growth in the value of the PSI sector

- 6.93 The potential growth in the PSI sector in the UK is estimated assuming that current problems in the supply of PSI are resolved. In particular, three problems were identified, the presence of which would limit the value of the PSI sector and would indicate that the sector could be more valuable to society if these problems were resolved. These were the following:

- **Type A – unduly high pricing:** Information holders may be able to charge high prices that are above costs to customers.¹²⁸ As such suppliers have market power over the information provided and customers often have few alternatives. In practice, unduly high pricing may be seen where PSIHs recover more than their target rate of return from sales of information.¹²⁹
- **Type B – distortion of competition in refined information markets:** This can arise where a PSIH is a sole supplier of unrefined information and restricts access to unrefined information, or charges prices that restrict the use of unrefined information. In turn, this can restrict competition in refined information markets and can lead to a small range of products being available for consumers to purchase. PSIHs may be motivated to place such restrictions on unrefined information to expand their range of products. Our evidence of these problems is presented in Chapter 6 under the headings: 'Inadequate availability of unrefined information', 'Overly restrictive contract terms' and 'Inadequate quality of service'.
- **Type C – failure to exploit PSI:** Where PSIHs are not making all unrefined information available for use and re-use, customers are not able to develop products and benefit from that information. This is likely to be more common for smaller rather than larger PSIHs. Our evidence of this problem is discussed in Chapter 6 under the heading 'Inadequate availability of unrefined information'.

6.94 The PSIHs were split into different groups, based on the similarities in the organisations' status and types.¹³⁰ This allowed DotEcon to consider

¹²⁸ Prices above costs refer to prices that recover more than the costs of producing and supplying PSI, including a target rate of return where specified.

¹²⁹ This analysis was undertaken for a one year period. Some PSIHs had returns higher than the target rate which, when conducting a static estimation, may be seen as unduly high prices. In practice as noted in Chapter 4, profits over the target rate of return can be used to justify lower prices in future years.

¹³⁰ See Annexe G, section 3, for details of this delineation.

which groups of PSIHs would be likely to suffer from which of the three problems identified above and to estimate the magnitude of such problems in those cases.

- 6.95 For type A: unduly high pricing, the analysis covered only those PSIHs with positive income targets. The comparison was made between the actual level of income produced and the level of income expected in a competitive environment, that is the target rate of return. The estimated value of this problem was approximately **£20 million annually**. This is a conservative figure as it does not take into account any PSIHs that are incurring unduly high levels of costs, which could disguise unduly high prices.
- 6.96 For type B: distortion of competition in refined information markets, the scope for detriment of this type depends on the extent to which the demand for unrefined information is being restricted by the actions of PSIHs. Given the lack of benchmarks for this type of assessment in the PSI sector, DotEcon based its calculation on assumptions around the potential magnitude of the restriction of supply of raw PSI, in order to provide an indication of the likely magnitude of detriment. DotEcon examined the proportion of revenue in PSIHs attributable to the different types of information, raw and value-added, and used this ratio to identify small groups of PSIHs where there would be a high probability of restrictions. For these small groups, demand was assumed to have the potential to be 50 per cent higher, while for the remaining PSIHs, demand was assumed to have the more conservative potential to be 10 per cent higher (DotEcon examined the sensitivities of these assumptions explicitly).¹³¹ Under these assumptions, the magnitude of detriment could potentially be of the order of approximately **£140 million annually**.
- 6.97 For type C: failure to exploit PSI, it is difficult to estimate the potential magnitude of this problem as, in this case, current revenues are not a useful indicator of the scale of the problem. Consequently, DotEcon identified the group of PSIHs that would be most likely to suffer from

¹³¹ See Annexe G, section 4, for further details.

this problem. The proportion of PSIHs that earned income from the supply of PSI in this group was around seven per cent. In order to calculate the potential significance of this type of detriment, DotEcon assumed that this proportion could increase to 25 per cent,¹³² and that PSIHs that would start earning income would generate the same economic value as PSIHs in their group currently earning income. As an indicator of the conservative nature of this particular estimate, the proportion of Trading Fund PSIHs earning income is around 70 per cent on average. This gives an estimated value from this problem of **£360 million annually**.

6.98 Combining the types A, B and C gives a combined potential growth in value for the PSI sector of approximately £520 million annually. Given the current estimate of the value of the sector, this potential for growth indicates that, if the problems in supply were resolved, combined with a greater degree of exploitation of PSI, the sector could double in value to around **£1.1 billion annually**. This information is summarised in the table below.

Table 6.5 Summary of DotEcon estimates for the PSI sector

Category	Annual value
Type A: unduly high prices	£20 million
Type B: distortion of competition	£140 million
Type C: failure to exploit PSI	£360 million
Total of A, B and C	£520 million
Current Value of PSI sector	£590 million
Total value of PSI sector if problems are resolved	£1.11 billion

Source: Annexe G, Economic value and detriment analysis

¹³² This was based on the findings of the PIRA study's comparison of the EU and USA PSI sectors, which implied that the EU PSI sector could be between two and five times larger than its current value. The increase predicted by PIRA is equivalent to an increase in the proportion of this group of PSIHs generating revenue from seven per cent to between 14 and 35 per cent. See Annexe G, section 4, for further details of methodology and assumptions.

Sensitivities

6.99 DotEcon's work contains further analysis of a number of sensitivities that would affect the magnitude of these estimates of the potential growth in the value of the sector. Two of the main sensitivities analysed are the following:

- the responsiveness of customers to changes in the price of PSI (this is also considered as a sensitivity for the estimate of the current value of the PSI sector). In both cases, DotEcon considered that customers are likely to be reasonably unresponsive to price changes, particularly where there are limited alternative products to PSI available
- the degree to which innovation is being restricted by the problems – types A, B and C. DotEcon's figures shown above exclude the assessment of potential restrictions to innovation. DotEcon did present two further cases, where innovation could lead to demand being twice and five times the current levels. To further ensure the conservative nature of the estimates, these options were excluded from the main results presented above.

7 RECOMMENDATIONS TO ADDRESS COMPETITION ISSUES

Introduction

7.1 This chapter presents our recommendations to address the problems outlined in Chapter 6. We analyse the options for ways to address these, and present our preferred approach to resolve the problems. We then present our detailed recommendations to address the issues raised. We also propose that the OFT reviews progress in two to three years time.

Addressing competition concerns

7.2 Our central aim is to ensure that businesses are provided with equal access to unrefined information to allow them to produce valuable refined information products to the benefit of consumers. There are two main options to consider:

- PSIHs to divest any refined information operations and not to produce any further refined information products themselves
- build on the current regulatory framework to provide equal access to unrefined information.

7.3 As discussed in Chapter 4, a further potential option is for PSIHs to provide all unrefined information to businesses without charge, or at prices covering no more than marginal costs. This does however raise issues that go beyond the scope of this study. Consequently, we consider the two remaining options further in the following sections.

Option one: PSIHs to divest any refined information operations

7.4 Where the benefits of PSIHs being active in refined information markets are small and/or the potential costs (in terms of consumer detriment from PSIHs restricting competition and hindering innovation) are large, one obvious solution would be to prevent the encroachment of PSIHs into refined information markets. This would mean restricting the

activities of PSIHs to the production of unrefined information, with PSIHs divesting themselves of any refined information operations.

- 7.5 One benefit of this option is that PSIHs would have fewer incentives to restrict competition in PSI, as they would no longer have commercial interests in their own internal refined information operations. In addition, there would be a lesser need for regulatory oversight of PSIHs.
- 7.6 However, it should be recognised that even if PSIHs are prevented from producing refined information, there is still likely to be a need for some type of regulator to ensure that the line between unrefined and refined information is drawn at the right point and for a body, similar to a regulator, to have an ongoing monitoring role. The purpose of this would be to ensure that the PSIH focuses only on the supply of unrefined information, with this being supplied in a manner which is not unduly restrictive and that charges for unrefined information are at no more than total cost recovery (as discussed below). The resources required for this monitoring role would be less than the resources required to ensure that PSIHs (active in both unrefined and refined information markets) provide equal access to PSI.
- 7.7 A potential disadvantage with limiting PSIHs to producing unrefined information is that some existing refined products may not get produced due to a loss in economies of scope. A PSIH may serve a particular type of customer which may be comparatively unattractive, risky or difficult for a business to supply. Potential examples include products with occasional or unpredictable purchasing patterns or products which are of only low value to customers. During our consultation, some businesses noted that there would be some valued refined information products produced by PSIHs that businesses would be unlikely to replicate in the absence of PSIH production. One example of a PSIH benefiting from economies of scope is the UKHO, which derives both paper based and electronic versions of its charts from the same source data.

7.8 Our international case studies have shown that, at the Federal level, the USA restricts its PSIHS to the production of information of a similar nature to our concept of unrefined information.¹³³ This limits the incentives for PSIHS to restrict access to information and to restrict competition for refined information products.

Option two: build on the current regulatory framework to provide equal access

7.9 The current regulatory framework for PSI goes some way towards setting out the principles that we would like to see in order to achieve equal access to PSI. As noted in Chapter 4, some guidance documents allow for distinctions between different types of information, including raw/value-added distinctions and statutory and commercial services. Correct distinctions are crucial in isolating monopoly products from those where there is scope for competition in supply. In addition, the Re-use Regulations also state that conditions imposed on re-use should not be unnecessarily restrictive and should not discriminate between comparable users.¹³⁴ However, there is insufficient regulatory oversight of the distinctions being made and the manner in which re-use is permitted.

7.10 An option for reform of the PSI sector is to build on the current framework as a basis for recommending improvements. In order to provide equal access to unrefined information, PSIHS should make unrefined information available for re-use to all customers on comparable terms and conditions to those that PSIHS provide to their own internal refined information operations. If equal access to unrefined information is provided, this will ensure competition in refined information markets can

¹³³ Federal agencies must in general collect or produce only the information they need to fulfil their prescribed function and then disseminate this information to the public on a non-commercial basis, regardless of how it is used. See Annex F, *International case studies*.

¹³⁴ Re-use of Public Sector Information Regulations 2005 SI 2005 No.1515, Regulations 12 – 14.

occur on the merits of the products and the efficiency of competitors, with no undue advantage for PSIHs or some businesses over others.

- 7.11 As indicated by the discussion of HMT's *Cross-cutting Review of the Knowledge Economy* in Chapter 4, the aims of this option are not new. In the UK, the principle of equal access and competitive neutrality (see box below) forms part of the manner in which access regulation has been undertaken in the telecommunications industry. In addition, the UK Confederation of British Industry (CBI) is a strong advocate of the principle of competitive neutrality. Moreover, our international case studies have indicated that other countries (particularly Australia and to a limited extent Sweden) have found the concept a useful way in which to approach competition between public and private sector organisations.

Box 7.1: Competitive neutrality

Access regulation in the UK telecommunications sector compared with PSI: The regulation of network industries in the UK is based on the concept of isolating the monopoly element of the activities from those where competition in supply is possible. While it is recognised that there are some elements of this industry which will be best served by a single supplier, providing comparable access to the monopoly products at certain points can allow competition to take place in the remaining sections of the industry, providing businesses with the access at the desired level.

The CBI: 'Competitive neutrality is a simple concept: it involves a commitment to fair markets and maintains that there should be a level playing field between public, private and voluntary providers of goods and services...Competitive neutrality is most often concerned with the advantages enjoyed by public undertakings, but the principle is just as applicable to the disadvantages suffered by government enterprises...Why does it matter? Because where public, private or voluntary sector providers compete with an unfair advantage, public spending will be redirected away from the most efficient producers, resulting in a decline in social savings.'¹³⁵

Australia: In Australia, the issue of vertically integrated public bodies has been addressed by the promotion of competitive neutrality. The Independent Competition and Regulatory Commission Act 1997 – Schedule 1 (Competition Principles Agreement) states that:

'The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities. Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities'.

¹³⁵ *A fair field and no favours – competitive neutrality in UK public service markets*, CBI 2006

- 7.12 The benefits of providing equal access include a greater range of both unrefined and refined information being made available, more effective competition for refined information, lower prices of refined information, and more efficient and customer focused PSIHs.

Assessment of options one and two

- 7.13 The following bullet points summarise the key benefits and costs of **option one** (divestment of refined information activities of PSIHs):

- Benefits:
 - this is a clear-cut solution to the problems of unequal access, and removes a significant incentive for PSIHs to restrict competition
 - there is arguably a lesser need for regulatory oversight and monitoring of the sector.
- Costs:
 - this is a more extreme solution and may be disproportionate for the vast majority of PSIHs. It is difficult to tell whether problems throughout the sector warrant this overall level of response
 - PSIHs remain as monopolists of unrefined information and there may still be incentives for them to restrict access to PSI
 - implementing this option would require primary legislation for each PSIH affected, which would be time consuming, costly and would be difficult to justify across the board
 - this could result in some useful, but not commercially attractive PSI products not being produced
 - typically, divestment measures would need little ongoing regulatory oversight, however in this case, there is still some monitoring needed, particularly to ensure no refined information is developed.

- 7.14 The costs and benefits of **option two** (building on the current regulatory framework), can be summarised as follows:

- Benefits:
 - can be undertaken without significant change to the current structures in the sector
 - preserves the range of refined information products PSIHs produce and customers' value
 - preserves any economies of scope that PSIHs' possess, and from which their customers benefit.
- Costs:
 - a more significant level of regulatory oversight and monitoring is needed, with a need for greater resources for OPSI
 - a number of steps are required to implement this effectively
 - some PSIHs would need to alter their business models and allocate costs effectively between their unrefined and refined products and this will incur some costs. For some PSIHs, this change may lead to unrefined information prices changing.¹³⁶

7.15 We are aware that preventing PSIHs from engaging in refined information activities (option one) would be a significant policy change requiring primary legislation which can be both time-consuming and costly. We consider it to be a disproportionate solution for all, or a significant number of PSIHs to implement. Therefore, considering the need to achieve a practical and swift resolution to the competition issues identified, our preferred recommendation focuses on how to ensure that all businesses are provided with equal access to PSI within the current framework (option two). This should be provided externally on equal terms and conditions to a PSIH's refined information operations, with greater regulatory oversight of the sector and more resources for OPSI.

¹³⁶ This would be where current charges recover the majority of costs from refined information, or where little unrefined information is available. Some businesses indicated to us a willingness to accept this in return for achieving equal access to PSI, with more transparent and cost-reflective pricing.

- 7.16 In our view, improvements to regulatory oversight could be best achieved by an expansion in the use and scope of OPSI's IFTS accreditation scheme for PSIHs. The IFTS, and other ways to improve the regulatory framework, are discussed in more detail in Chapter 8.
- 7.17 We now present the detail of our recommendations of how to address the competition concerns presented in Chapter 6 in line with our preferred methodology discussed above. These recommendations follow the same four categories as identified in Chapter 6.

Addressing the inadequate availability of unrefined information

- 7.18 The key elements in improving the availability of unrefined information are as follows:
- define unrefined and refined information. This will separate the monopoly information products (unrefined) from those with scope for competitive supply (refined)
 - improve the availability and knowledge of unrefined information held by PSIHs.

Definitions of unrefined and refined information

- 7.19 To address the confusion surrounding terminology about PSI and to ensure that monopoly and competitive activities are separated, we present a framework for defining unrefined and refined information. It has not been possible within the scope of this study to consider in detail the distinctions for particular PSIHs. However, the underlying principles are set out below, and these can be applied to specific PSIHs.
- 7.20 **The following recommendation concerning the separation of unrefined and refined information is critical to the successful implementation of the remaining recommendations discussed in this chapter.**
- 7.21 As stated in Chapter 4, unrefined information relates to the monopoly activities of a PSIH. If the information is not available from other sources it is **unrefined information**. We consider that PSIHs should make

unrefined information available to third parties at the first point in the supply chain at which it could be of use to a business. Where a business asks for information in a less refined form than is currently available, the presumption should be that this will be provided.¹³⁷ The cost of providing the PSI in this form should be reflected in the price charged.

- 7.22 Information may require either no assimilation or an extensive level of assimilation before it becomes useful to businesses as unrefined information, depending on the particular information type. For example, for Companies House, the information collected remains largely unchanged and is made available to third parties either electronically or in paper form. However, weather information may require more interpretation to be meaningful for business users and re-users as unrefined information. It is important to note that unrefined information neither equates to other terms like 'raw' and 'value-added' nor to a PSIH's statutory obligations/core/public task. It is a different concept in which unrefined information relates to the monopoly element of PSIHs' activities.
- 7.23 **Refined information** is unrefined information that has either been combined with other information (from internal or external sources) or has been manipulated in some manner. This manipulation needs to add value to the information beyond that which makes the underlying data useable for customers. The process of refining information is one which could be replicated by a business providing it had access to the underlying unrefined information.

We encourage PSIHs to make their unrefined information available for re-use. Where they supply unrefined information, we recommend that this should be:

¹³⁷ There are benefits for the economy, including PSIHs, businesses and consumers from more PSI being made available for commercial use and re-use. However, we note that we cannot require PSIHs to make their information available in this manner for the reasons detailed in Chapters 3 and 8.

- **At the earliest point in the supply chain at which it could be of use to businesses, other public sector bodies or consumers, namely, information that has been collected and, if necessary, assimilated.**
- **In a form that could be used as an input for refined information, either internally within the PSIH, or externally by businesses.**

Consequently, PSIHs should clarify how they will distinguish between the unrefined and refined information products they hold.

Third parties should be able to challenge the distinction between unrefined and refined information made by a PSIH. Therefore, individual PSIHs and OPSI should ensure that their feedback, complaints and redress mechanisms are capable of considering such issues.

Improving the availability of unrefined information

7.24 Once the distinction between unrefined and refined information has been made at the correct point, it is necessary to ensure that potential customers (businesses, individuals and other public sector bodies) know what information PSIHs hold. PSIHs should provide details of the information that they make available for use and re-use, except where there are valid exceptions.

7.25 This is a relatively simple process for many PSIHs which have unrefined information generated purely through internal data collection. There are some PSIHs, however, that rely on other public bodies for their data and act effectively to collate this material. The solution is that, where necessary, the PSIH should direct customers to the owners of the unrefined information sources to obtain permission for re-use.¹³⁸ This will ensure that customers can access the unrefined information as collated by the PSIH.

¹³⁸ As required under the Re-use Regulations 2005.

We encourage PSIHs to comply with requests to make unrefined information available for use/re-use provided it is lawful to do so. Where a PSIH refuses to allow the commercial re-use of unrefined information, this decision should be made known to the public with possible review by OPSI.

Addressing overly restrictive terms

7.26 The following recommendations will ensure that businesses are afforded equal access to unrefined information and are able to use this for the production of valuable refined information products that can compete on the merits of the products with PSIHs. The implementation of these recommendations should provide a wider range of competitively priced information products that consumers value.

We clarify that OPSI will ensure that PSIHs allow re-use on a non-discriminatory basis in the circumstances where this is required in the Re-use Regulations.

We recommend that:

- **PSIHs should remove non-compete conditions from their licences. OPSI should continue to monitor this issue.**
- **PSIHs should make the terms and conditions of licences for unrefined information flexible and easy to understand. OPSI should continue to promote best practice in this area.**
- **PSIHs should not require commercially sensitive information from third parties who request unrefined information. Unrefined information should be made available to third parties regardless of its intended use (provided it is lawful) and OPSI should continue to monitor this issue.**
- **PSIHs should award licences for periods of time that are appropriate for customers' needs.**

Addressing concerns about quality of service

- 7.27 We received wide-ranging views from businesses about their dissatisfaction with some interactions with PSIHs. However, we have also seen examples of good practice in this area. We have used these as a basis for recommendations to improve PSIHs' quality of service across the board.
- 7.28 A suggestion in support of the recommendation is that PSIHs could make the business plans for their **unrefined** information operations available to businesses. This would ensure that long term investment by businesses can occur, giving them knowledge of what will happen to the information they need. By establishing fora for communication with stakeholders, businesses and PSIHs can debate the future of PSI and how they can best work together to ensure its wide dissemination and use, to the benefit of both parties and the wider economy.

We recommend that PSIHs should improve their accountability for the service provided. The following are two examples of how this could be achieved (with monitoring by the OPSI):

- **PSIHs could publish and consult on business plans indicating their intended future uses of their unrefined information.**
- **PSIHs could establish industry stakeholder fora to discuss the needs of businesses from the PSIHs. Such fora would need to be based on meaningful discussions, with real opportunities for businesses to have their needs addressed.**

Furthermore, we recommend that PSIHs should provide unrefined information in a timely manner and publish target times to respond to customer requests as key performance measures.

Addressing potential high prices

- 7.29 We consider that the prices charged by PSIHs to third parties and to their internal refined information operations (internal transfer prices)

should take account of the cost of providing unrefined information. This requires that PSIHs know their costs. The costs arise from activities such as collecting, recording and making the information available for others. Some of these activities happen as the PSIHs discharge statutory functions or established roles and it can be unclear which costs should be considered by PSIHs when setting charges for unrefined information.

7.30 The additional costs of making unrefined information available to third parties may be substantial. This may arise from employing staff to extract the information from databases, although these costs are likely to be lower if information is available electronically.

7.31 The two concerns we need to address in this area are:

- that PSIHs may be inefficient, such that while prices reflect costs, the costs themselves may be unduly high
- that prices of unrefined information may be unduly high relative to costs and in some cases, this may be linked with PSIHs subsidising their internal refined information products.

Improving PSIHs' internal efficiency

7.32 Sponsoring departments of PSIHs can impose efficiency improvement targets or cost reduction targets for PSIHs, to ensure that PSIHs have the incentives to ensure their internal operations are acting in an efficient manner.

7.33 While we provide no formal recommendations on this issue, we would hope that sponsoring departments and HMT spending teams consider the more frequent use of cost reduction and/or efficiency targets for PSIHs.

Improving PSIHs' accounting and pricing practices

7.34 As indicated in Chapter 6, we have found that pricing and accounting practices vary among PSIHs and in many cases we are unable to determine whether prices of unrefined and refined information products

are reasonable. In addition we are aware that there are numerous information products sold at low prices or without charge. We do not wish to change such practices, but wish to ensure that PSIHs offering information at such prices are aware of the direct costs they incur in so doing.

- 7.35 Consequently, we present recommendations to address these issues below, and provide a further supporting recommendation regarding guidance on cost allocation.

Improving accounting practices

We recommend that PSIHs should undertake the following to improve their accounting practices:

- **Account separately for costs and revenues from their unrefined and refined information operations.**
- **Where indirect/common costs relate to unrefined and refined information activities, they should be allocated to both the unrefined and refined activities to attribute fairly the resources used.**
- **If unrefined information activities are provided with a subsidy (for example due to wider public interest of provision), any subsidy should be netted off the activity costs after any allocation of indirect/common costs. This should be carried out before considering pricing decisions.**
- **The sophistication of cost allocation methods should reflect proportionality and take into account the size of the organisation and the relative importance of the PSI activity to its total activity. As far as possible, we would expect some form of activity-based costing to be applied.**
- **The basis for cost allocation, including the split between unrefined and refined operations, and pricing decisions should be documented and subject to review by OPSI.**

Improving pricing practices: unrefined information

7.36 We are concerned that the development of refined information products and markets may be restricted if the price of unrefined information were set too high. Ensuring there is a ceiling on the price of unrefined information should avoid this. Where a subsidy is made for unrefined information, directly attributable costs should still be identified to ensure that the subsidy relates only to the unrefined information and not to refined information products.

- **We recommend that unrefined information should be priced at no more than full cost recovery including any required rate of return. Full costs should include any directly attributable costs, whether variable or fixed, and an appropriate share of any indirect/common costs.**
- **Unrefined information should be available to third parties and PSIHs' own refined information operations at the same price and on equal terms.**
- **If a PSIH sets prices for all its unrefined information at or below marginal costs,¹³⁹ we would not recommend changing this policy. In these cases, it is not essential for a PSIH to allocate indirect/common costs to its unrefined information operations. We do however recommend that directly attributable costs should be identified and that the justification for the pricing policy should be articulated.**

Improving pricing practices: refined information

7.37 In refined information markets, we are concerned that no subsidy should be provided from unrefined to refined information operations, as this could lead to an unfair competitive advantage for PSIHs. Ensuring there is a floor on the price of refined information could avoid this.

¹³⁹ Includes situations where information is available for use and re-use without charge.

- **We recommend that PSIHs' refined information products should be priced at no less than full cost recovery, including any required rate of return. Full costs should include any required rate of return and an appropriate share of any indirect/common costs.**

7.38 The issue of possible under recovery of costs from unrefined information is not addressed explicitly in these recommendations. This is because any concerns regarding this issue are not related to competition and therefore the OFT is not best placed to advise on such issues.

Guidance on the allocation of indirect/common costs

7.39 We are aware that there are costs involved in implementing cost allocation and accounting separation. However, as indicated in Chapter 6, there are several PSIHs that already undertake this successfully on a sophisticated basis and we consider that the benefits of this practice will exceed the costs. Furthermore, there is a forthcoming requirement for similar accounting practices for public bodies, in the Financial Transparency Directive, as amended, to be implemented in the UK by the end of 2006.¹⁴⁰ We consider that many PSIHs may be within the scope of this directive.¹⁴¹

7.40 In cases where it is difficult to introduce a cost accounting system immediately, we consider that PSIHs should have a phased approach to

¹⁴⁰ Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings. See Annexe H for further details.

¹⁴¹ Given the stated threshold for public bodies in the Directive, we expect a diverse range of PSIHs could be within the scope of the Directive. These could include Ministerial Departments, non-Ministerial departments as well as the PSIHs themselves, such as Ordnance Survey, Companies House, The Met Office, UK Hydrographic Office, HM Land Registry, The Coal Authority, Registers of Scotland, the Natural Environment Research Council and the Environment Agency.

introduce detailed cost accounting systems as this would spread the costs of the system over the next two to three years.

- 7.41 Further, as outlined above, we have given consideration to ensuring that the sophistication of the cost accounting undertaken is proportionate to the amount of income that PSIHs receive from the supply, sale or licensing of information.
- 7.42 We are also aware that HMT guidance on accounting separation and cost allocation is necessarily at a high level, as it has to cover a wide range of organisations. We are aware that PSIHs may need more information to implement this in practice. Such guidance could also be clearer on the specific requirements for PSIHs.

HMT and sponsoring departments should make their guidance on setting prices for unrefined information and allocating costs clearer to address our concerns.

- 7.43 The OFT is working with the Treasury, OPSI and other relevant Departments to produce clear, consistent and user-friendly guidance on how PSIHs should supply and charge for unrefined information. This will include a mechanism that will allow the guidance to be updated on an ongoing basis to incorporate changes to government policy.
- 7.44 To assist in this process, we have provided some background information regarding the concept of accounting separation and indirect/common cost allocation and its applicability to PSIHs in Annexe I.

Addressing concerns with Ordnance Survey

- 7.45 We consider that a combination of factors appear to differentiate OS from other PSIHs. Apart from being the largest PSIH based on the revenue from licensing information, one of the more noticeable factors is the way in which previous attempts by regulators and other bodies to influence the behaviour of OS have met with resistance.
- 7.46 The nature and seriousness of many of the problems experienced by re-users also differentiates OS from other PSIHs. A summary of the key difficulties with OS is provided below:

- the implementation of OS' licence exception policy – while in keeping with strict competition law applicable to dominant undertakings – goes further than we would like given OS' public monopoly status¹⁴²
- licence terms do not encourage the re-use of its information
- OS provides limited access to its unrefined information and concentrates on developing value-added or refined information products itself, giving businesses fewer opportunities to add-value and develop new refined information products
- OS does not separate its upstream and downstream operations. This makes it difficult for OS to prove whether it is providing equal access and the same prices to business customers and its own internal use of information
- OS' specific use contracts allow it the right to terminate its contract with a re-user in a wide range of situations, including when the re-user is in dispute with OS.¹⁴³ This may prevent some businesses from using OS' products or from raising disputes with OS, whether this is justified or not.

¹⁴² Ordnance Survey, Licence exceptions,
<http://www.ordnancesurvey.co.uk/oswebsite/business/copyright/docs/D03800.pdf>

¹⁴³ This is only acceptable in a small number of cases, for example where the user has not paid for the service.

As a result of the problems identified with OS, and considering it is the largest PSIH in the UK, based on the revenue received from licensing information, we consider it essential that the issues set out above are resolved without delay.

We have discussed our concerns both with OS and Communities and Local Government (CLG) – OS' 'parent' department¹⁴⁴ and we will maintain an ongoing dialogue with them regarding these issues. However, should the concerns set out above not be resolved, we would need to consider whether further action by the OFT would be warranted to address these concerns.

Review of improvements in the PSI sector

7.47 Save in respect of possible fees regulations,¹⁴⁵ we do not consider that legislative change is needed to implement the recommendations outlined in this chapter.

7.48 We expect these recommendations to address the competition concerns outlined in Chapter 6. They are proportionate to the size of the sector and the overall level of problems found within it. Therefore, we would hope that these recommendations can be implemented as soon as possible after the 90-day period for the Government response.

7.49 Although much of what we recommend should already be happening there are some new aspects. Therefore, it would be difficult to justify legislative change at this time, when our recommendations have not been tested and PSIHs have not been given time to address the problems identified.

¹⁴⁴ CLG describes its relationship with OS as a 'shareholder' relationship.

¹⁴⁵ For example, The Public Record Office (Fees) Regulations 2005 SI 2005/471, and Companies (Fees) Regulations 2004 SI 2004/2621.

To ensure that our recommendations are implemented and improvements are seen in practice in the PSI sector, we will review the changes that arise, the effectiveness of our recommendations and take stock of the developments that have occurred since the publication of our report. As a result of this review, the OFT will consider whether it would be appropriate, if PSIHs have not implemented our recommendations, to propose legislation in order to realise their benefits. This review would not prevent the OFT from exercising its powers in the meantime, should it consider this to be appropriate.

8 THE REGULATORY FRAMEWORK AND SECURING COMPLIANCE

Summary

- 8.1 Public Sector Information Holders (PSIHs) operate within a framework of rules and principles that are created, overseen and enforced by a variety of regulators and policy-makers. Some of these rules and principles are sector-specific, focusing on the re-use of public sector information (PSI), and some have a broader focus, dealing with matters such as competition in a wide range of sectors, or with the protection of intellectual property rights.
- 8.2 The current framework of rules and principles contains a number of positive elements that promote competition but it also suffers from gaps and weaknesses. PSIHs are under no legal obligation to allow the re-use of public sector information in the first place and gaps in the regulatory framework are caused by the exclusion of certain categories of PSI from the scope of the relevant legislation.
- 8.3 A sound framework will not achieve the desired benefits unless PSIHs comply with it and we have found that PSIHs are given too much scope for non-compliance. The principal regulator for the sector lacks powers and resources and some of the rules and principles that PSIHs are assessed against lack sufficient detail on topics that we consider necessary to make the sector work well. Regulators often rely on complaints to draw their attention to non-compliance but we found that customers of PSIHs are reluctant to complain for fear of repercussions.
- 8.4 If the recommendations in our report are adopted by government and PSIHs, they should go a long way towards ensuring that markets for PSI work well for businesses and end-consumers. A solution which does not require additional legislation is desirable but if, after two to three years, we do not see that our recommendations are being implemented and there is non-compliance by PSIHs with the regulatory framework, we would need to consider proposing further action, possibly including measures requiring primary legislation. This would not prevent the OFT

from exercising its powers in the meantime, should it consider this to be appropriate.

The regulatory framework

- 8.5 Annexe H provides a fuller overview of the legal framework applicable to the re-use of public sector information. Of particular importance in ensuring that PSIHs behave in a fair, open and transparent manner are the EC Directive on the Re-use of Public Sector Information (the Re-use Directive),¹⁴⁶ the Re-use of Public Sector Information Regulations 2005 (the Re-use Regulations), and the Competition Act 1998 (CA98).
- 8.6 The Re-use Regulations, which came into force on 1 July 2005, implemented the Re-use Directive in England, Wales, Scotland and Northern Ireland. They establish a minimum set of rules governing and the practical means of facilitating the re-use of information held by public bodies in the UK. The Regulations include measures relating to consistency of treatment and transparency for re-users. This includes non-discrimination between a PSIH's own refined information operation and external applicants making a request to re-use information for comparable purposes.¹⁴⁷
- 8.7 The Office of Public Sector Information (OPSI) is the principal body charged with monitoring and enforcing compliance with the Re-use Regulations. OPSI was established on 16 May 2005 from the resource of Her Majesty's Stationery Office (HMSO). HMSO, a separate legal entity within OPSI, is responsible for managing and licensing Crown copyright, publishing legislation¹⁴⁸ and providing guidance in relation to the publication of official documents. The Director of OPSI holds the

¹⁴⁶ European Directive 2003/98/EC OJ [2003] L 354/90

¹⁴⁷ See further at paragraph 8.13

¹⁴⁸ Including regulating the contracts covering the printing and publication of legislation and other official materials.

Letters Patent titles and statutory roles of Controller of HMSO, Queen's Printer of Acts of Parliament, Queen's Printer for Scotland and Government Printer for Northern Ireland.

- 8.8 On 31 October 2006, OPSI, which was previously attached to the Cabinet Office, merged with The National Archives (TNA).¹⁴⁹ TNA continues to exist as a government department in its own right and an Executive Agency reporting to the Lord Chancellor.¹⁵⁰ OPSI and HMSO still exist as distinct entities within TNA and continue to perform their existing roles.
- 8.9 From 1 July 2005, the Advisory Panel on Public Sector Information (APPSI) was provided with a complaints handling and reviewing role under the Re-use Regulations. APPSI is a Non-Departmental Public Body (NDPB) sponsored by the Department for Constitutional Affairs (DCA)¹⁵¹ and consists of a wide range of members, including business re-users, academics and representatives from PSIHs and the devolved administrations. It was set up on 14 April 2003, following recommendations in HM Treasury's (HMT's) *Cross-cutting Review of the*

¹⁴⁹ The merger was announced in a joint statement by Hilary Armstrong MP, Chancellor of the Duchy of Lancaster, in the Commons, (Hansard HC, 21 June 2006, col.94WS) and Baroness Ashton of Upholland, Parliamentary Under-Secretary of State at the Department for Constitutional Affairs, in the Lords (Hansard HL, 21 June 2006, col. WS44)

¹⁵⁰ The National Archives (TNA) was formed in April 2003 by a merger of the Public Record Office and the Historical Manuscripts Commission. The Chief Executive is both Keeper of Public Records and sole Historical Manuscripts Commissioner.

¹⁵¹ APPSI was originally sponsored by the Cabinet Office but, following the merger between OPSI and TNA on 31 October 2006, responsibility for APPSI was transferred from the Cabinet Office to DCA. APPSI now advises Ministers at the DCA rather than the Cabinet Office. The press notice announcing the transfer can be found on the Government News Network at <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=238406&NewsAreaID=2&NavigatedFromDepartment=True>

Knowledge Economy.¹⁵² At that time, it was called the Advisory Panel on Crown Copyright but the Panel changed its name in April 2004 to reflect a widening of APPSI's work, as a result of the advent of the Re-use Directive and Re-use Regulations.

- 8.10 The Chapter II prohibition of the Competition Act 1998 (CA98) prohibits conduct by one or more undertakings¹⁵³ which amounts to the abuse of a dominant position in a market if it may affect trade within the UK. Article 82 of the EC Treaty (TEC) is similar to the Chapter II prohibition but applies to conduct which may affect trade between Member States of the European Community.
- 8.11 Where a PSIH fails to meet its obligations under the Re-use Regulations, this may in certain circumstances also amount to an infringement of the Chapter II prohibition of the CA98 or of Article 82 TEC.
- 8.12 Competition law is enforced in the UK principally by the Office of Fair Trading (OFT).¹⁵⁴ The OFT is a non-ministerial government department, established as a corporate body on 1 April 2003, replacing the Office of the Director General of Fair Trading that had been established by the Fair Trading Act 1973. The OFT's role is to make markets work well for consumers.

¹⁵² HMT, *Cross-cutting Review of the Knowledge Economy: Review of Government Information* [online], http://www.hm-treasury.gov.uk/spending_review/spending_review_2000/associated_documents/spend_sr00_ad_ccrcontents.cfm (accessed 3 August 2006)

¹⁵³ The term 'undertaking' is not defined in the EC Treaty or the Competition Act 1998 but its meaning has been set out in Community law. It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed.

¹⁵⁴ In relation to certain sectors the OFT applies and enforces the CA98 and Article 82 TEC concurrently with the sectoral regulators.

Issues with the legal framework

- 8.13 The current legislation that applies to PSIHs contains a number of positive elements that promote competition. For example, the Re-use Regulations include measures regarding non-discrimination that apply when a PSIH wishes to re-use the information it holds for activities falling outside its public task.¹⁵⁵ The Regulations also contain measures to ensure that, where a PSIH imposes conditions on the re-use of information, these conditions do not unnecessarily restrict the way in which a document can be re-used or unnecessarily restrict competition.¹⁵⁶
- 8.14 In addition, the Regulations prohibit PSIHs from entering into exclusive arrangements unless it is necessary for the provision of a service in the public interest.¹⁵⁷ This exception to the principle of non-exclusivity might apply, for example, in a situation where no commercial publisher is willing to publish a document without exclusive publishing rights but publication is necessary to provide a service in the public interest.¹⁵⁸

¹⁵⁵ Re-use of Public Sector Information Regulations 2005 (SI 2005/1515), r.13(2). The term 'public task' is not defined in the Re-use Regulations. In its guidance on the Re-use Regulations, OPSI states that information produced as part of the public task is likely to display certain characteristics. For example, the information might be essential to the business of the public sector or there might be a statutory requirement to produce or issue the information (See OPSI, *The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice*, at p.12)

¹⁵⁶ Re-use of Public Sector Information Regulations 2005 (SI 2005/1515), r.12(2)

¹⁵⁷ Re-use of Public Sector Information Regulations 2005 (SI 2005/1515), r.14. An exclusive arrangement is defined as 'a contract or other arrangement granting an exclusive right to re-use a document'.

¹⁵⁸ This example is provided by OPSI in *The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice* [online], <http://www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance/guide-to-psi-regulations-and-best-practice.doc>, (accessed 5 April 2006), at p.20

- 8.15 Notwithstanding these positive elements, we have found that controls on PSIAs are diminished as a result of gaps and weaknesses in the legal framework.

No obligation to make information available for re-use

- 8.16 The Re-use Directive and the Re-use Regulations impose no obligation on PSIAs to allow the re-use of PSI in the first place.¹⁵⁹ This is necessary to ensure compatibility with international agreements on the protection of intellectual property rights, particularly the Berne Convention¹⁶⁰ and the TRIPS Agreement.¹⁶¹

Other issues

Certain categories of PSI excluded from scope

- 8.17 Regulatory gaps are created by provisions in the Re-use Directive and Re-use Regulations that exclude certain categories of PSI from the scope of the legislation. The Re-use Regulations do not apply to documents held by public service broadcasters, educational and research establishments (such as schools, archives, libraries and research facilities), or cultural establishments (such as museums and theatres).

¹⁵⁹ Directive 2003/98/EC, Recital 9 and Article 1(5); Re-use of Public Sector Information Regulations 2005 (SI 2005/1515), r.7

¹⁶⁰ Berne Convention for the Protection of Literary and Artistic Works of 1886, as revised and amended.

¹⁶¹ World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Agreement came into effect on 1 January 1995.

Neither do they apply to documents which are produced for a purpose outside the public task of the PSIH¹⁶² or to documents in which third parties own relevant intellectual property rights.

- 8.18 The Re-use Regulations do not apply to documents unless they have been identified by PSIHs as being available for re-use, have been provided to applicants, or are otherwise accessible by means other than making a request for them under specified access legislation.
- 8.19 In most cases, these exclusions are both logical and necessary. It would make no sense if documents were exempt from disclosure under access legislation, perhaps for reasons of national security, data protection of individuals or to protect health and safety but could nevertheless be re-used for commercial or non-commercial purposes. Equally, a PSIH could not be allowed to authorise the re-use of information in which it does not own the intellectual property rights. However, the rationale for some of the exclusions is not always obvious.
- 8.20 We considered whether to recommend that documents held by government archives be brought within the scope of the Re-use Regulations but on balance decided against this proposal. The information in unpublished public records and those open for public inspection can already be reproduced freely under Crown copyright waiver.¹⁶³ Much of the information held by archives is owned by third parties and would therefore be excluded from the scope of the Re-use Regulations in any event. Finally, the attempt to earn large sums from exploiting the information it holds appears to be incompatible with the business model adopted by TNA.

¹⁶² An example of this might be where a PSIH published a book on its history, which is likely to be an optional activity and, on that basis, a non-public task. For example, in 1986, HMSO published a history of its first 200 years. A number of other PSIHs have also published their histories.

¹⁶³ OPSI, *Guidance – Copyright in Public Records* [online], <http://www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/copyright-in-public-records.htm> (accessed 1 November 2006)

- 8.21 There may be a stronger case for ensuring that documents held by government research establishments trading in PSI are subject to controls that promote competition and fair trading. A number of stakeholders found it hard to see the logic of distinguishing between documents held by PSIHS such as the British Geological Survey (BGS) and Ordnance Survey (OS) when determining the scope of the Re-use legislation. It could be argued that both bodies conduct broadly analogous activities and that if information held by OS is subject to the provisions contained in the Re-use Regulations, then information held by BGS should also be subject to those provisions.
- 8.22 In addition, following the Baker Report of 1999,¹⁶⁴ increased emphasis has been placed on the ability of public sector research establishments (PSREs) to commercialise their research. As the level of information trading by government research establishments increases, the need to ensure that these PSIHS trade in a fair, open and transparent manner also gains in importance. Bringing public sector research establishments into the scope of the re-use legislation does not mean that they have to make their information available for re-use, nor even that they have to charge for access or re-use. However, if they did make their PSI available for re-use they would need to comply with the re-use legislation.
- 8.23 It would be necessary to amend the Re-use Directive, before the Regulations could be changed. A possible opportunity to secure such a change is the upcoming review of the application of the Directive. Under Article 13, the European Commission must carry out a review of the

¹⁶⁴ HMT, *Creating Knowledge, Creating Wealth: Realising the Economic Potential of Public Sector Research Establishments* (August 1999) [online], <http://archive.treasury.gov.uk/docs/1999/baker.html> (accessed 2 October 2006). See also Cabinet Office, *Information Note for Personnel Managers: Commercial Exploitation of Intellectual Property Rights and Other Assets – An Overview of Government Guidance* (August 2003) [online], <http://www.civilservice.gov.uk/publications/rtf/pin47.rtf> (accessed 24 October 2006).

application of the Directive before 1 July 2008, and communicate any proposal for amendment to the European Parliament and Council.

- 8.24 The Department of Trade and Industry (DTI) has statutory responsibility for the UK Research Councils, operates the Public Sector Research Exploitation Fund and runs an annual survey of knowledge transfer activities in PSREs. It also retains an interest in the Re-use Directive which it implemented in the UK jointly with the Cabinet Office in 2005. The DTI would therefore be in a good position to assess the case for including documents held by government research establishments within the scope of the Re-use legislation.

We recommend that the Department of Trade and Industry (DTI) reviews the case for including documents held by government research establishments within the scope of the Re-use Directive.

Lack of clarity

- 8.25 The effectiveness of the regulatory framework is reduced by the absence of clear definitions for certain key terms. In particular, the concept of a public sector body's 'public task' is left undefined by the Re-use Regulations, despite the crucial role it plays in determining the scope of the legislation.
- 8.26 The Re-use Regulations do not apply where 'the activity of supplying a document is one which falls outside the public task of the public sector body'.¹⁶⁵ However, as OPSI acknowledges, 'it may not always be a straightforward matter to identify with precision what a public sector body's core responsibilities are, and where the boundary lies between documents within the public task and those that fall outside it.'¹⁶⁶

¹⁶⁵ Re-use of Public Sector Information Regulations 2005 (SI 2005/1515), r.5(1)(a)

¹⁶⁶ OPSI, *The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice* [online], <http://www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance/guide-to-psi-regulations-and-best-practice.doc>, (accessed 5 April 2006), at p.12

- 8.27 Whilst OPSI has provided guidance about the characteristics that information produced as part of the public task is likely to display,¹⁶⁷ there is still scope for confusion and uncertainty. This confusion is experienced both by PSIHS and by their customers. For example, there appeared to be doubts about the boundaries of Ordnance Survey's public task until the matter was determined by the regulator in July 2006.¹⁶⁸
- 8.28 As the definition of 're-use' within the Re-use Regulations relies on terms such as 'initial purpose' and 'public task' which themselves are not defined, further confusion is created. For example, OPSI recently stated that it disagreed with the interpretation of 'initial purpose' made by Ordnance Survey.¹⁶⁹

Securing compliance

Existing compliance and redress mechanisms

- 8.29 OPSI seeks to monitor and secure compliance with the Re-use Regulations in a variety of ways. It performs a central role in the complaints procedure established by the Regulations, operates the Information Fair Trader Scheme (IFTS) and promotes compliance by undertaking a large amount of awareness-raising, providing support and

¹⁶⁷ For example, the information might be essential to the business of the public sector or there might be a statutory requirement to produce or issue the information (See OPSI, *The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice*, at p.12)

¹⁶⁸ OPSI, *Office of Public Sector Information Report on its Investigation of a Complaint (SO 42/8/4): Intelligent Addressing and Ordnance Survey* [online], <http://www.opsi.gov.uk/advice/psi-regulations/complaints/SO-42-8-4.pdf> (accessed 10 October 2006), paras 24-26

¹⁶⁹ OPSI, *Office of Public Sector Information Report on its Investigation of a Complaint (SO 42/8/4): Intelligent Addressing and Ordnance Survey* [online], <http://www.opsi.gov.uk/advice/psi-regulations/complaints/SO-42-8-4.pdf> (accessed 10 October 2006), paras 24-26

assistance to enable public sector bodies to meet their obligations and promoting best practice.

Complaints Procedure under the Re-use Regulations

- 8.30 The Re-use Regulations establish the framework for a complaints procedure that has both internal and external elements. To be considered under this procedure, the complaint must relate to non-compliance with the Re-use Regulations. Examples could include complaints about undue delays by PSIHS in responding to requests for re-use or about the imposition of unnecessarily restrictive conditions on re-use.
- 8.31 If an issue cannot be resolved through the usual business channels and contacts, a re-user is expected to complain formally to the PSIHS. Parties may also approach OPSI directly to see if it can mediate the dispute in order to avoid a formal complaint.
- 8.32 Where a re-user has exhausted the internal complaints procedure, they may refer their complaint to OPSI. OPSI has published its procedures for investigating complaints under the Re-use Regulations.¹⁷⁰ On receiving a complaint, OPSI will assess whether the complaint concerns the Re-use Regulations. If it is satisfied that it does, OPSI will then either investigate whether the public sector body has complied with the Regulations or offer mediation as an alternative to investigation. On concluding a mediation or investigation, OPSI will make a recommendation and then monitor compliance with its recommendation.
- 8.33 Both the public sector body and the complainant may apply to the Advisory Panel on Public Sector Information (APPSI) for a review of the recommendation.¹⁷¹ APPSI has published its own procedures describing

¹⁷⁰ OPSI, *Procedures for investigating complaints arising under the Re-use of Public Sector Information Regulations 2005* [online], <http://www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance/psi-complaints-procedure.doc>. These procedures are published in accordance with the Re-use of Public Sector Information Regulations 2005 (SI 2005/1515), r.19(1)

¹⁷¹ Re-use of Public Sector Information Regulations 2005 (SI 2005/1515), r.20(1)

its role in considering complaints and reviewing recommendations made.¹⁷² If APPSI agrees that the recommendation should be reviewed, the Chair or Deputy Chair of the Panel will convene a specially constituted Review Board. This Board will review OPSI's recommendation in the light of the Regulations and the *Guide to the Regulations and Best Practice* and then make its own recommendation.

- 8.34 The main remedy available to complainants under the Re-use Regulations is the recommendation produced by OPSI or APPSI which can, if necessary, be backed up by a Ministerial Letter of Direction. This is a letter from the Minister¹⁷³ to the head of the public sector body directing them to comply with the recommendation.
- 8.35 The courts or other regulatory bodies may also take into account any recommendation or Letter of Direction in their deliberations. However, neither OPSI nor APPSI have authority to impose legally binding decisions with penalties attached for non compliance or to award financial compensation.

Information Fair Trader Scheme

- 8.36 The Information Fair Trader Scheme (IFTS) is a system for setting and assessing standards for PSIHS. It is designed to ensure that 're-users of public sector information can be confident that they will be treated

¹⁷² APPSI, *Advisory Panel on Public Sector Information: Procedures for Reviewing Complaints Arising Under the Re-use of Public Sector Information Regulations 2005* [online] <http://www.appsi.gov.uk/complaints-resolution/psi-complaints-procedure.doc> (accessed 6 November 2006).

¹⁷³ Following the merger between OPSI and TNA, a Ministerial Letter of Direction would probably be issued by the Lord Chancellor or by the Minister for Finance and Public Services in the Scottish Executive. The position in Scotland thus remains unchanged.

reasonably and fairly by public sector information providers'.¹⁷⁴ There are two Scheme levels: IFTS Accreditation and IFTS Online Assessment.

8.37 Major Crown information traders with delegations to manage their own licensing systems on behalf of the Controller of HMSO must gain IFTS Accreditation. This involves a full onsite verification of information trading activities, measuring standards of openness, fairness and transparency. To gain IFTS Accreditation, the Chief Executive (or equivalent) of an organisation must make a public commitment to the IFTS principles, which are as follows:

- **Openness** - the organisation maximises the information available for re-use
- **Transparency** - the organisation has clear and simple policies and procedures
- **Fairness** - all customers are treated the same
- **Compliance** - the organisation has procedures and policies in place to enable them to comply with the first three principles
- **Challenge** - the organisation has a robust complaints procedure.¹⁷⁵

8.38 The organisation must then satisfy the verification team that the Chief Executive's commitment is genuine and that the organisation is meeting the principles in practice. It must also establish a complaints process empowered to reconsider licensing decisions and ultimately allow OPSI to investigate the organisation's licensing decisions if a complaint is received and internal processes have been exhausted.

¹⁷⁴ Cabinet Office, *Information Fair Trader Scheme Review: The First Two Years* [online], <http://www.opsi.gov.uk/ifts/first-two-years-report.pdf>, (accessed 27 December 2005), p.2

¹⁷⁵ OPSI, *The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice* [online], <http://www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance/guide-to-psi-regulations-and-best-practice.doc>, (accessed 5 April 2006), p.26

- 8.39 Where a complaint involves an IFTS member not complying with the Re-use Regulations, the procedure established by the Re-use Regulations is followed. However, IFTS members operate under more onerous duties than other public sector bodies and OPSI investigates complaints that IFTS members have not met aspects of their commitments that fall outside the Regulations.¹⁷⁶ The 'IFTS-only' complaints procedure is the same as that established by the Regulations but there is no appeal to the APPSI Review Board.
- 8.40 To remain IFTS Accredited, the organisation must be re-verified at intervals of one to three years. The frequency of re-verification visits, and the extent of re-verification required, is determined by a risk assessment based on criteria contained in OPSI's risk matrix. This covers a range of factors such as the income generated by the organisation from licensing activity, the complexity of the organisation's licensing regime and the number of complaints received by the organisation.¹⁷⁷ IFTS Accreditation is designed to indicate that an organisation has achieved or is working towards 'a very high standard of compliance with IFTS principles and the Re-use [Regulations]'.¹⁷⁸
- 8.41 So far, there have been no cases of PSIHs losing their IFTS Accreditation but some have failed to gain it in the first place. When this happens, OPSI works with the PSIH involved to secure the necessary

¹⁷⁶ For example, the commitment to openness requires IFTS members 'to maximise the re-use of all information, unless there is a very good reason to justify refusal' (Office of Public Sector Information, *IFTS: Complaints Procedure* [online], <http://www.opsi.gov.uk/ifts/ifts-complaints-procedure.htm> (accessed 28 December 2005), para 2). This places a more onerous duty on IFTS members than other public sector bodies since the Re-use Regulations simply state that 'A public sector body *may* permit re-use' (Re-use of Public Sector Information Regulations 2005 (SI 2005/1515), r.7(1), emphasis added)

¹⁷⁷ OPSI, *Determining the IFTS Visiting Programme* [online], <http://www.opsi.gov.uk/ifts/ifts-visiting-programme.pdf#search=%22OPSI%20and%20risk%20matrix%22> (accessed 9 October 2006)

¹⁷⁸ Office of Public Sector Information, *The Information Fair Trader Scheme* [online], <http://www.opsi.gov.uk/ifts/>, (accessed 31 December)

improvements. If these improvements are not forthcoming and the PSIH holds a delegation of authority, OPSI would consider revoking the delegation or the part of it that was not working. However, a revocation is not automatic after a certain time limit and some responses given to IFTS verification or re-verification reports suggest that OPSI's recommendations can be the subject of extended discussion and debate, rather than being immediately implemented by the PSIH in question.¹⁷⁹

8.42 Although the IFTS was originally aimed at Trading Funds with delegated authority for licensing Crown copyright, it has since been expanded to include voluntary members and the wider public sector.¹⁸⁰ The Controller of HMSO has also granted limited delegated authority to parts of government departments which are responsible for specialised forms of licensing activity.¹⁸¹ These bodies undergo IFTS Online Assessment rather than IFTS Accreditation.

8.43 IFTS Online is a simpler version of the full Accreditation process. Its purpose is to provide a quick and easy system for managing the re-use of public sector information and to help public sector bodies manage their responsibilities under the Regulations. IFTS Online Assessment is aimed at PSIHs that wish to demonstrate 'basic compliance with IFTS principles and the Re-use [Regulations]'.¹⁸²

¹⁷⁹ See for example the response by Ordnance Survey to OPSI's re-verification report at OPSI, *Ordnance Survey Response to OPSI Report on Re-verification of Commitment to Information Fair Trading* [online], <http://www.opsi.gov.uk/ifts/ordnance-survey-response.pdf> (accessed 31 May 2006)

¹⁸⁰ Examples of voluntary members are the Environment Agency and British Geological Survey

¹⁸¹ Examples include Defence Geospatial Intelligence (DGI), the MOD's primary organisation for the provision of geographic information and imagery intelligence, which licenses aerial photographs and geographical information, and the Department for Culture, Media and Sport (DCMS) Government Art Collection Branch, which licenses photographic and digital archives of the Government Art Collection.

¹⁸² Office of Public Sector Information, *The Information Fair Trader Scheme* [online], <http://www.opsi.gov.uk/ifts/index.htm> (accessed 6 August 2006)

Providing advice, raising awareness, and promoting best practice

- 8.44 Raising awareness of the Re-use Regulations and giving practical help and advice to public sector bodies and re-users of public sector information is one of OPSI's key priorities.¹⁸³ In performing these activities, OPSI aims to achieve a high degree of compliance with the Regulations without recourse to sanctions.
- 8.45 Awareness is raised through an extensive programme of publications, workshops and talks. OPSI provides practical help and advice by publishing guidance on a variety of topics, on its website, and through workshops and presentations.¹⁸⁴ It spreads best practice by providing standard models for public sector bodies to use, such as information asset lists, standard licence terms, technical licensing solutions through the Click-Use Licence¹⁸⁵ and by operating the Information Fair Trader Scheme. The mediation service offered by OPSI, which can be used as an alternative to the formal complaints process under the Re-use Regulations, is a further aid to compliance.
- 8.46 On 1 April 2006, OPSI extended the coverage of the Click-Use Licence to cover information produced by public sector organisations such as

¹⁸³ See for example Cabinet Office, *Departmental Report 2005* (Cm 6543) [online], http://www.cabinetoffice.gov.uk/publications/reports/annualreport/co_report2005.pdf (accessed 6 April 2006), para 2.102, and *Notes of Meeting of Licensing Forum: 28 July 2005* [online], <http://www.opsi.gov.uk/advice/lf-minutes-2005-07-28.pdf> (accessed 6 April 2006), item 2

¹⁸⁴ The advice page on OPSI's website can be found at <http://www.opsi.gov.uk/advice/index.htm> (accessed 6 April 2006). Advice and guidance on complying with the Re-use Regulations is at <http://www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance/index.htm> (accessed 6 April 2006)

¹⁸⁵ Click-Use Licences are online, class licences developed by HMSO for the re-use of Crown copyright information, Public Sector Information and Parliamentary copyright information.

local authorities, the NHS, police and fire services.¹⁸⁶ In order to authorise OPSI to license the re-use of their information via the Click-Use Licence, these organisations must identify the information they would like to be covered and then sign a simple mandate form.

- 8.47 In addition to these activities which OPSI performs as part of its main role, OPSI also offers to provide tailored consultancy services to assist public sector bodies in meeting their responsibilities under the Regulations. As these are tailored, non-standard services, they attract a charge.¹⁸⁷

Issues with the compliance and redress mechanisms

The IFTS approach is too high-level

- 8.48 The IFTS verification process tests PSIHs against five high level principles.¹⁸⁸ This high level approach comes at the expense of clarity and detailed scrutiny, and allows scope for non-compliance. One business told us:

'As far as I can see, there is no requirement that licensing terms must be fair 'per se' or any definition of what the term 'fair' actually means. I would like to see clarity as to what terms OPSI consider fair and that organisations ... should be obliged to adopt them.'

- 8.49 The IFTS does not look in depth at a number of issues that we consider necessary to make the sector work well. For example, it does not look in

¹⁸⁶ Cabinet Office Press Release (31 March 2006), *Click-Use Licensing across Public Sector*, [online], <http://www.opsi.gov.uk/click-use/click-use-licensing-across-public-sector-news-release.pdf> (accessed 6 April 2006)

¹⁸⁷ OPSI, *Consultancy Services* [online], <http://www.opsi.gov.uk/advice/consultancy-services.pdf> (accessed 6 April 2006)

¹⁸⁸ Openness, transparency, fairness, compliance and challenge.

depth at how charges are arrived at or whether PSIHs have effective cost allocation systems in place.

- 8.50 As a result, PSIHs may be IFTS Accredited and still behave in ways that potentially restrict or distort competition. Our business survey showed that businesses experienced problems relating to how information was made available, prices and pricing (the way in which pricing decisions were made), and licence terms and conditions, even from PSIHs that were IFTS members.
- 8.51 Of the 15 PSIHs most frequently mentioned as a source for the supply of PSI in our business survey, 10 were IFTS Accredited and two of the three PSIHs with the largest proportion (over 30 per cent) of customers experiencing problems were established members of the IFTS.¹⁸⁹ The PSIH with the largest proportion (22 per cent) of customers encountering problems relating to the consistency of treatment of users was an established member of the IFTS.
- 8.52 We know of one IFTS member, Ordnance Survey, that states in its licence exceptions policy that it may refuse to grant a licence if an applicant wants to market a product whose intended use is the same as, or comparable to, that of any product marketed by the PSIH itself or any product which the PSIH intends to market. This might be considered to have the potential for distorting competition in refined information activities.

We recommend that OPSI develops the IFTS to test PSIHs rigorously for compliance with our recommendations relating to equal access to unrefined information. The IFTS verification process should include detailed scrutiny of how charges are arrived at, whether PSIHs have proportionate and appropriate cost allocation systems in place and whether there is adequate separation between accounts for unrefined and refined information activities.

¹⁸⁹ That is to say, they had been members for a number of years.

- 8.53 This recommendation is designed to ensure that PSIHs provide equal access to unrefined information on comparable terms and conditions between their own internal operations and businesses seeking to use and re-use the information.
- 8.54 OPSI staff involved in the IFTS verification process would need to observe and assess:
- the suitability and robustness of the accounting principles and procedures being used by IFTS members¹⁹⁰
 - the extent of vertical separation in place between the unrefined and refined information operations of a PSIH
 - the allocation of costs between unrefined and refined product groups
 - the prices, terms and conditions of licences for competitors in refined information activities and the refined information operation of the PSIH
 - the charges for information collection and provision, and
 - adherence to HMT guidance on prices and income earned on assets.
- 8.55 Under current arrangements, the full IFTS only applies to major Crown information traders with delegated authority for licensing Crown copyright information and other PSIHs that choose to join voluntarily. We would like to see all PSIHs (both Crown and non-Crown) earning income of more than £100,000 per annum from the supply of PSI being expected to gain IFTS Accreditation. The principles that we have outlined above are not dependent on the Crown status of a PSIH. In addition, business re-users and end-users are unlikely to be aware of whether or not a PSIH is a Crown body but this should not affect the degree of protection they are afforded as consumers.

¹⁹⁰ See Chapter 7, *Improving PSIHs' Pricing and Accounting Practices*.

- 8.56 Although PSIHs that are IFTS Accredited must be re-verified periodically in order to retain their Accreditation, we think that incentives for PSIHs to be efficient and transparent could be increased if OPSI conducted unannounced spot information audits. A spot information audit would assess what information was held and made available by a PSIH for re-use and could potentially target any PSIH holding documents within the scope of the Re-use Regulations.
- 8.57 Under the Re-use Regulations there is no obligation on public sector bodies to allow re-use. However, where a public sector body does allow re-use it has a legal obligation under regulation 16(1)(c) to make available a list of the main documents available for re-use. Spot information audits would be a useful way of ensuring that PSIHs are complying with their obligations under the legislation.

We recommend that OPSI considers the case for carrying out unannounced spot information audits to assess what information is held and made available by a PSIH.

Lack of resources impedes OPSI's ability to regulate

- 8.58 We consider OPSI's resources to be extremely limited and insufficient to meet the objectives that are required for OPSI to be a fully effective regulator. The estimated budget for OPSI's two objectives relating to its work on PSI and its management of Crown copyright across government for the financial year 2006-07 was £729,000 with a staff of around 13.
- 8.59 Comparing the size of OPSI and the size of the sector it regulates with the established economic sector regulators and the size of the market sectors they regulate, OPSI appears very small, with both fewer financial resources and fewer staff. For example, the value of the sector per pound of regulator operating cost for Ofcom and Ofgem is approximately

£388 and £681 respectively, compared to a figure of approximately £770 - £1,282 for OPSI.¹⁹¹

- 8.60 It is also worth noting that the Information Commissioner's Office receives baseline funding from the DCA of some £5m per annum for its work relating to freedom of information (FOI) and has asked for an additional grant of £1.13m to clear its backlog of cases.¹⁹² However, we recognise that government may need to prioritise access to official information over its re-use.
- 8.61 OPSI's remit under the Re-use Regulations covers documents held by most¹⁹³ of the UK's 100,000 public sector bodies.¹⁹⁴ The Office has a very small number of staff for all of the activities it engages in, spread across such a large number of public sector bodies. These activities include Information Fair Trader Scheme re-verifications, presentations to public sector bodies, awareness-raising seminars, complaint handling and

¹⁹¹ The estimates for sector revenue per regulator cost are based upon figures for regulator operating costs and sector size gained from the following sources: Ofcom, *Annual Report 2005-06* [online] (accessed 17 October 2006), p.66; Ofcom, *The Communications Market 2006* [online] (accessed 17 October 2006), p.1; Ofgem, *Resource Accounts 2005-06* [online] (accessed 17 October 2006), p.4; Key Note, *Energy in the UK: 2000 Market Review* (Hampton: Key Note, 2000), p.1. Estimates for OPSI were based upon figures obtained from the organisation in October 2006 and adjusted to take account of the possibility for some flexibility in the use of its budget.

¹⁹² House of Commons Constitutional Affairs Select Committee, *Freedom of Information: One Year On* (uncorrected transcript of oral evidence, 14 March 2006) [online], <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/uc991-i/uc99102.htm> (accessed 8 June 2006)

¹⁹³ The main exceptions are those contained in regulation 5, such as documents held by public service broadcasters, educational and research establishments (such as schools, archives, libraries and research facilities), or cultural establishments (such as museums and theatres)

¹⁹⁴ For estimate of public sector bodies see DCA, *Project plan for implementation of Freedom of Information Act 2000* [online], <http://www.foi.gov.uk/execsum.htm#part1> (accessed 8 June 2006)

mediation, administering the Click-Use system and providing the APPSI secretariat function.

- 8.62 The lack of staff at OPSI's disposal means that its ability to monitor the activities of PSIHs and enforce compliance with the Re-use Regulations and IFTS principles is limited. In the past, a possible consequence was that some Trading Funds remained outside the IFTS even though they appeared to be licensing information for re-use and should therefore, in accordance with the purpose of the Scheme, have applied for full IFTS Accreditation.
- 8.63 We are aware that OPSI's resources were recently stretched to the limit when investigating a complaint about a large PSIH from a business. It would not be desirable for OPSI's other activities to suffer in order to meet its aim of completing investigations within a 30 day time limit.¹⁹⁵ Nor would it be desirable to extend the time limit as a result of staff shortages.
- 8.64 OPSI's resources need to be sufficient to enable it to perform its current duties and also the new duties contained in our recommendations. At present, the IFTS verification teams consist primarily of OPSI staff with experience in information licensing, standards and policy but not specialist financial or economic expertise. In order to monitor and test PSIHs rigorously for compliance with our recommendations, the IFTS verification teams will need access to financial and economic expertise.

We recommend that HMT allocates sufficient resources to allow OPSI to perform its current duties and also the new duties contained in our recommendations. These resources would be allocated through TNA.

- 8.65 There is a general consensus amongst the UK audit offices that accounting by public sector bodies could be improved and in its report on the Wider Markets Initiative (WMI), the National Audit Office (NAO)

¹⁹⁵ OPSI, *Procedures for investigating complaints arising under the Re-use of Public Sector Information Regulations 2005* [online], <http://www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance/psi-complaints-procedure.doc> (accessed 7 June 2006), para 28.

made several recommendations relating to better accounting by public sector bodies. Some of the principles that we advocate in this report, such as those relating to cost allocation, are already enshrined in existing guidance but are not always being followed in practice.

- 8.66 One way of helping to ensure that PSIHs comply with our recommendations and with the guidance on accounting is to require the Chief Executive (or equivalent) of a PSIH to include a statement in the annual accounts confirming that the organisation has complied with the cost allocation requirements set out in HMT and OPSI guidance.

We recommend that HMT makes it a requirement for the Chief Executive (or equivalent) of a PSIH to include a statement in the annual accounts confirming that it has complied with the cost allocation requirements set out in HMT and OPSI guidance.

- 8.67 Whilst the primary responsibility for testing whether PSIHs are complying with our recommendations relating to better accounting rests with OPSI, we envisage the UK audit offices¹⁹⁶ becoming involved if OPSI asks them for specialist advice in relation to a particular issue. For example, an audit office could provide specialist advice in testing the assumptions that a PSIH made when undertaking cost allocation. This advice is likely to attract a charge which should be taken into account when allocating sufficient resources for OPSI.

We recommend that the UK audit offices provide support to OPSI on request when specialist advice is required, for example in assessing the assumptions used by PSIHs when undertaking cost allocation.

Businesses are reluctant to complain

- 8.68 Many businesses are reluctant to use the complaints procedure established under the Re-use Regulations or alternative routes to

¹⁹⁶ The National Audit Office, the Audit Commission, Audit Scotland, the Wales Audit Office and the Northern Ireland Audit Office.

redress,¹⁹⁷ because the PSIH may be a monopoly supplier and they fear jeopardising their working relationship. This means that businesses are not benefiting from redress when things go wrong and that PSIHs and regulators are missing out on important feedback.

- 8.69 Businesses often told us that they would suffer adverse consequences if they complained, and some were reluctant to speak to our economic consultants for fear of being identified. One business told us that 'it would be unwise for [them] to make a complaint to the [PSIH]. It had 'discussions' with the [PSIH] rather than making complaints'.
- 8.70 Our survey of businesses revealed that the number of actual complaints masked the real level of problems. More businesses felt they should complain than actually made a complaint. The results of the survey supported anecdotal evidence that complainants appear to be inhibited by a fear that they may face repercussions or else a feeling that they are wasting time through complaining.¹⁹⁸
- 8.71 Where businesses reported problems with the supply of information or data, most chose not to complain, with only a small proportion (around one in eight of the total sample) raising formal complaints with the supplier.
- 8.72 The Re-use Regulations normally require a person with a complaint against a PSIH that manages its own licensing to exhaust that body's internal complaints procedure before referring the matter to OPSI or APPSI. At the time of writing,¹⁹⁹ OPSI had investigated one complaint under the Re-use Regulations²⁰⁰ and was in the process of investigating a

¹⁹⁷ Such as those mentioned in paragraph 8.72

¹⁹⁸ Annexe B, *Survey of businesses that use public sector information*, Foreword and para 6.31-6.40

¹⁹⁹ 6 November 2006

²⁰⁰ A complaint by Intelligent Addressing Ltd against Ordnance Survey. OPSI's report on its investigation of this complaint was published in July 2006.

second complaint. APPSI had accepted as falling within its remit two requests to review recommendations of OPSI under the Re-use Regulations. Businesses also seem reluctant to make use of other routes to redress. The business survey revealed only a few instances of dissatisfied complainants pursuing their complaints through other channels such as an Ombudsman scheme,²⁰¹ their own MP, the Information Commissioner or the OFT.

8.73 Whilst it might be appropriate in some circumstances for complaints to be addressed by the OFT acting under the Competition Act 1998 (CA98), it is unlikely to be suitable in the majority of cases. For example, the CA98 cannot be used to address problems until after the detrimental behaviour has occurred.

8.74 In addition, a complaint must meet certain criteria²⁰² before the OFT can formally investigate a suspected infringement of the Chapter II prohibition.²⁰³ The OFT must also consider factors such as its administrative priorities and the value of the market in question when deciding whether to launch an investigation. As a result, few complaints to the OFT about the activities of Central Government PSIHs have been taken forward to a section 25 investigation so far.²⁰⁴

²⁰¹ The appropriate Ombudsman would depend upon the PSIH in question, but might include one of the Local Government Ombudsmen or the Parliamentary and Health Service Ombudsman

²⁰² See the OFT guideline, *Powers of investigation: Understanding competition law* (OFT 404, December 2004) [online], (accessed 20 November 2006), p.4

²⁰³ The Chapter II prohibition of the CA98 prohibits conduct by one or more undertakings which amounts to the abuse of a dominant position in a market if it may affect trade within the UK.

²⁰⁴ Section 25 of the Competition Act 1998 allows the OFT to undertake a formal investigation in certain cases, including where there are reasonable grounds for suspecting that the prohibitions contained in Chapter II of the CA98 or Article 82 TEC have been infringed. In 2001, the Director General of Fair Trading (DGFT) investigated a complaint by a member of the Business Information Providers Association (BIPA) that Companies House was engaging in predatory pricing and anti-competitively squeezing margins. Following the investigation, the DGFT found that Companies House had not infringed competition law.

- 8.75 We note that in many cases, PSIHs do not have detailed accounting mechanisms in place. This can make it difficult for PSIHs to set prices reflective of the costs of their unrefined and refined information products. Consequently, it can be difficult for PSIHs to ensure that their prices comply with UK competition law and would not distort competition. Our recommendations relating to pricing and cost allocation would address these issues by providing the PSIH with the information necessary to determine whether its charges comply with the relevant legislation.
- 8.76 For businesses, the cost of complaining under the Re-use Regulations, in terms of time, money and the risk of adverse consequences tends to be disproportionate to the results likely to be achieved. It is reasonable to suppose that more complaints about PSIHs would be made if the likelihood of adverse consequences for businesses was minimised. This requires internal and external checks to ensure that customers are treated fairly and not deterred from making complaints about PSIHs.

We recommend that PSIHs set up procedures for ensuring that customers are treated fairly if they make complaints. The existence of such procedures should be tested as part of the IFTS Accreditation process

- 8.77 Examples of the sort of procedures that would help to ensure that complainants are treated fairly were discussed in the Cabinet Office guide, *How to deal with complaints*.²⁰⁵ Such procedures might involve monitoring the services provided to people who have complained, giving people the opportunity to complain to staff who are not directly providing the service and carrying out surveys of people who have made a complaint.
- 8.78 Greater numbers of complainants might also come forward if the range of possible sanctions at OPSI's disposal was made explicit in its published procedures for investigating complaints under the Re-use Regulations. In relation to Crown bodies with delegated authority to

²⁰⁵ Cabinet Office, *How to deal with complaints* (London: Cabinet Office, 1998)

license Crown copyright material, it is open to the Controller of HMSO to revoke a delegation, licensing the information directly from within OPSI. This would deprive the PSIH of the freedom to determine (within limits) its own terms and conditions when licensing the re-use of PSI.²⁰⁶

- 8.79 A revocation could be done on a full or partial basis. We understand from OPSI that a partial or practical revocation could take place as part of a 'special measures' approach in which a task force from OPSI would watch over the licensing of a PSIH until such a time as it met the required standards.
- 8.80 In the most extreme cases, for example where a PSIH continually fails to comply with decisions made by OPSI or where fundamental structural changes to a PSIH are required to prevent serious damage to business re-users, more drastic measures may be required.
- 8.81 If OPSI considers that a PSIH may be abusing its monopoly position, it may be necessary to prevent the PSIH from competing with businesses in refined information activities whilst simultaneously holding a monopoly position in the supply of unrefined information. One way of achieving this would be for OPSI to recommend to the parent department, in appropriate circumstances, that a PSIH is divested of its refined information operation.

We recommend that OPSI amends its published procedures for investigating complaints under the Re-use Regulations to provide explicitly for the option of (a) revoking a delegation of authority in full or in part for Crown bodies, and (b) recommending to the parent department, in appropriate circumstances, that a PSIH is divested of its refined information operation.

²⁰⁶ A Crown body with a delegation of authority must still operate within the constraints set by the delegation of authority, the IFTS and the wider regulatory framework.

Re-visiting the sector

- 8.82 We have thought carefully through the options and feel that, on balance, the issues we have identified in relation to this sector are best addressed through non-legislative solutions. The principles we have developed for PSIHs to follow and the measures we have devised to ensure that the principles are complied with can be implemented without the need for primary legislation. As mentioned in Chapter 7, it would be difficult to justify legislative change at this time since our recommendations contain some new ideas that have not been tested and PSIHs have not been given the opportunity to address the problems identified.
- 8.83 The approach taken in our report is one that acknowledges the positive elements in much of the policy, guidance and legislation that applies to the sector and seeks to build on these elements to ensure that markets for PSI work well for business and end-consumers.
- 8.84 This applies, for example, to the work we are doing with HMT to set out clear guidance for PSIHs. It applies to the recommendations we make in relation to enhancing the IFTS and ensuring that OPSI has access to the resources and expertise it needs to work as a fully effective regulator and it applies to the measures we recommend to ensure that OPSI makes the most of the powers it already has.
- 8.85 Clearly, a solution which does not require additional legislation is desirable but if, after two to three years, we do not see that our recommendations are being implemented and there is non-compliance by PSIHs with the regulatory framework, we would need to consider proposing further action, possibly including measures requiring primary legislation. This would not prevent the OFT from exercising its powers in the meantime, should it consider this to be appropriate.
- 8.86 Another option would be to invest OPSI with a wider range of powers and sanctions, including the power to make and enforce legally binding decisions following an investigation under the complaints procedure

established by the Re-use Regulations.²⁰⁷ OPSI could be given the power to impose financial penalties on PSIHs or award financial compensation to businesses that had suffered loss as a result of the actions or inactions of a PSIH.²⁰⁸ It could also be empowered to give such directions as it considered appropriate to bring an infringement of the Re-use Regulations to an end.

8.87 Whilst the major PSI traders are generally Crown bodies at present,²⁰⁹ information trading by the wider public sector (including NHS bodies and local authorities) could be a growth area in future. It would then be increasingly unsatisfactory that controls on PSIHs should depend on their Crown status instead of the revenue they generate from information trading.

8.88 In response to these developments, government might wish to provide equivalent protection for customers of Crown and non-Crown bodies. One way of doing this would be to legally oblige rather than simply expect all PSIHs (irrespective of Crown status) earning income of more than £100,000 per annum from the supply of PSI being expected to gain IFTS Accreditation. To offset the additional resource implications for OPSI, one approach would be to charge the PSIHs themselves for the cost of IFTS Accreditation and re-verification.

8.89 The recommendations in our report are summarised in Chapter 9. Taken together, we believe that they provide an effective and proportionate way to make markets for PSI work well for businesses and end-

²⁰⁷ If such powers were given to OPSI it would be necessary to consider the adequacy of the existing review/appeals procedure.

²⁰⁸ OPSI would have to ensure that PSIHs did not simply recover the fines or compensation by raising prices for customers. Monitoring this would become easier if PSIHs had effective cost allocation systems in place.

²⁰⁹ The Environment Agency, which is a non-Crown body and forecasts its revenue from data exploitation at around £3m for 2005-06, could be considered an exception

consumers. With these improvements, there is potential for the sector to double in value, with significant benefits for consumers.

9 SUMMARY OF RECOMMENDATIONS

Recommendations on competition issues

Addressing the inadequate availability of unrefined information

Definitions of unrefined and refined information

- 9.1 We encourage PSIHs to make their unrefined information available for re-use. Where they supply unrefined information, we recommend that this should be:
- at the earliest point in the supply chain at which it could be of use to businesses, other public sector bodies or consumers, namely, information that has been collected and, if necessary, assimilated
 - in a form that could be used as an input for refined information, either internally within the PSIH, or externally by businesses.
- 9.2 Consequently, PSIHs should clarify how they will distinguish between the unrefined and refined information products they hold.
- 9.3 Third parties should be able to challenge the distinction between unrefined and refined information made by a PSIH. Therefore, individual PSIHs and OPSI should ensure that their feedback, complaints and redress mechanisms are capable of considering such issues.

Improving the availability of unrefined information

- 9.4 We encourage PSIHs to comply with requests to make unrefined information available for use/re-use provided it is lawful to do so. Where a PSIH refuses to allow the commercial re-use of unrefined information, this decision should be made known to the public with possible review by OPSI.

Addressing overly restrictive terms

- 9.5 We clarify that OPSI will ensure that PSIHs allow re-use on a non-discriminatory basis in the circumstances where this is required in the Re-use Regulations.
- 9.6 We recommend that:
- PSIHs should remove non-compete conditions from their licences. OPSI should continue to monitor this issue
 - PSIHs should make the terms and conditions of licences for unrefined information flexible and easy to understand. OPSI should continue to promote best practice in this area
 - PSIHs should not require commercially sensitive information from third parties who request unrefined information. Unrefined information should be made available to third parties regardless of its intended use (provided it is lawful) and OPSI should continue to monitor this issue
 - PSIHs should award licences for periods of time that are appropriate for customers' needs.

Addressing concerns about quality of service

- 9.7 We recommend that PSIHs should improve their accountability for the service provided. The following are two examples of how this could be achieved (with monitoring by OPSI):
- PSIHs could publish and consult on business plans indicating their intended future uses of their unrefined information
 - PSIHs could establish industry stakeholder fora to discuss the needs of businesses from the PSIHs. Such fora would need to be based on meaningful discussions, with real opportunities for businesses to have their needs addressed.

- 9.8 Furthermore, we recommend that PSIHs should provide unrefined information in a timely manner and publish target times to respond to customer requests as key performance measures.

Addressing potential high prices

Improving accounting practices

- 9.9 We recommend that PSIHs should undertake the following to improve their accounting practices:
- account separately for costs and revenues from their unrefined and refined information operations
 - where indirect/common costs relate to unrefined and refined information activities, they should be allocated to both the unrefined and refined activities to attribute fairly the resources used
 - if unrefined information activities are provided with a subsidy (for example due to wider public interest of provision), any subsidy should be netted off the activity costs after any allocation of indirect/common costs. This should be carried out before considering pricing decisions
 - the sophistication of cost allocation methods should reflect proportionality and take into account the size of the organisation and the relative importance of the PSI activity to its total activity. As far as possible, we would expect some form of activity-based costing to be applied
 - the basis for cost allocation, including the split between unrefined and refined operations, and pricing decisions should be documented and subject to review by OPSI.

Improving pricing practices: unrefined information

- We recommend that unrefined information should be priced at no more than full cost recovery including any required rate of return.

Full costs should include any directly attributable costs, whether variable or fixed, and an appropriate share of any indirect/common costs.

- Unrefined information should be available to third parties and PSIHs' own refined information operations at the same price and on equal terms.
- If a PSIH sets prices for all its unrefined information at or below marginal costs, we would not recommend changing this policy. In these cases, it is not essential for a PSIH to allocate indirect/common costs to its unrefined information operations. We do however recommend that directly attributable costs should be identified and that the justification for the pricing policy should be articulated.

Improving pricing practices: refined information

- We recommend that PSIHs' refined information products should be priced at no less than full cost recovery, including any required rate of return. Full costs should include any required rate of return and an appropriate share of any indirect/common costs.

Recommendations concerning guidance documents

- 9.10 To address the issues with the guidance we are participating in HMT's modernisation of 'Government Accounting'. HMT announced the plans in April 2006, stating the aim is 'to articulate the high level principles clearly and concisely, and in a reasonably timeless way.'²¹⁰
- 9.11 HMT and sponsoring departments should make their guidance on setting prices for unrefined information and allocating costs clearer to address our concerns.

²¹⁰ HMT letter, ref DAO(GEN) 04/06, from Paula Diggle, Treasury Officer of Accounts to Accounting Officers on 11 April 2006.

Addressing concerns with Ordnance Survey

- 9.12 As a result of the problems identified with OS, and considering it is the largest PSIH in the UK, based on the revenue received from licensing information, we consider it essential that the issues set out in Chapter 7 are resolved without delay.
- 9.13 We have discussed our concerns both with OS and Communities and Local Government (CLG) – OS' parent department - and we will maintain an ongoing dialogue with them regarding these issues. However, should the concerns set out in Chapter 7 not be resolved, we would need to consider whether further action by the OFT would be warranted to address these concerns.

Recommendations on the regulatory framework and securing compliance

- 9.14 We recommend that OPSI develops the Information Fair Trader Scheme (IFTS) to test PSIHs rigorously for compliance with our recommendations relating to equal access to unrefined information. The IFTS verification process should include detailed scrutiny of how charges are arrived at, whether PSIHs have proportionate and appropriate cost allocation systems in place and whether there is adequate separation between accounts for unrefined and refined information activities.
- 9.15 Under current arrangements, the full IFTS only applies to major Crown information traders with delegated authority for licensing Crown copyright information and other PSIHs that choose to join voluntarily. We would like to see all PSIHs (both Crown and non-Crown) earning income of more than £100,000 per annum from the supply of PSI being expected to gain IFTS Accreditation.
- 9.16 We recommend that OPSI considers the case for carrying out unannounced spot information audits to assess what information is held and made available by a PSIH.

- 9.17 We recommend that HMT allocates sufficient resources to allow OPSI to perform its current duties and also the new duties contained in our recommendations. These resources would be allocated through TNA.
- 9.18 We recommend that HMT makes it a requirement for the Chief Executive (or equivalent) of a PSIH to include a statement in the annual accounts confirming that it has complied with the cost allocation and charging requirements set out in HMT and OPSI guidance.
- 9.19 We recommend that the UK audit offices provide support to OPSI on request when specialist advice is required, for example in assessing the assumptions used by PSIHs when undertaking cost allocation.
- 9.20 We recommend that PSIHs set up procedures for ensuring that customers are treated fairly if they make complaints. The existence of such procedures should be tested as part of the IFTS Accreditation process.
- 9.21 We recommend that OPSI amends its published procedures for investigating complaints under the Re-use Regulations to provide explicitly for the option of (a) revoking a delegation of authority in full or in part for Crown bodies, and (b) recommending to the parent department, in appropriate circumstances, that a PSIH is divested of its refined information operation.
- 9.22 We recommend that the Department of Trade and Industry (DTI) reviews the case for including documents held by government research establishments within the scope of the Re-use Directive.

Review of improvements in the PSI sector

- 9.23 To ensure that our recommendations are implemented and improvements are seen in practice in the PSI sector, we will review the changes that arise, the effectiveness of our recommendations and take stock of the developments that have occurred since the publication of our report. As a result of this review, the OFT will consider whether it would be appropriate, if PSIHs have not implemented our recommendations, to propose legislation in order to realise their benefits. This review would

not prevent the OFT from exercising its powers in the meantime, should it consider this to be appropriate.

GLOSSARY

The symbol * has been used to indicate a statutory definition

Advisory Panel on Public Sector Information (APPSI) A Non-Departmental Public Body (NDPB) with a number of advisory duties, and a complaints-handling role under the Re-use of Public Sector Information Regulations 2005.

Asset List A register of information items held by a PSIH that are of interest or value to the PSIH itself, and potentially to others.

Class licence A licence that sets out standard terms and obligations, enabling the re-use of a particular class or category of material.

Click-Use OPSI's online licence system for the re-use of Crown copyright information, Public Sector Information and Parliamentary copyright information.

Content* Information recorded in any form (The Re-use of Public Sector Information Regulations 2005, SI 2005/1515, r2).

Copyright A property right giving the creators of a wide variety of material the ability to control use of their material in a number of ways.

Crown body An organisation which acts on behalf of the Crown, meaning the sovereign acting in a public or official capacity. This includes most central government departments including government Trading Funds. In many cases the Crown status or otherwise is specified within the context of legislation.

Crown copyright Material produced by employees of the Crown in the course of their duties. Most material originated by ministers and civil servants is protected by Crown copyright.

Crown copyright waiver Categories of material on which the Crown asserts its copyright but waives it and which is not subject to formal licensing or payment.

Document* means

- any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio visual recording)
- any part of such content (Directive 2003/98/EC on the re-use of public sector information, Art 2).

Executive Agencies A diverse group of organisations delivering a variety of services to internal and external customers. They are part of the Crown and do not usually have their own legal identity, but operate under powers that are delegated from Ministers and Departments.

Fixed costs Costs which do not vary with the level of activity in the short run.

Full cost pricing A pricing policy in which charges are set to recover the full resource costs of the activity.

Information Asset Register (IAR) A list of information resources held by the UK Government, concentrating on unpublished resources. OPSI has the policy lead for the Information Asset Register (IAR) which is used across central government as a way of identifying and accessing asset lists.

Information Fair Trader Scheme (IFTS) A system for setting and assessing standards for PSIHs, operated by OPSI.

Intellectual property rights (IPR) Intangible property rights which are granted to creators and owners of works resulting from intellectual effort. The main IPRs are patents, trademarks, designs and copyright.

Licence A permission by the copyright holder to reproduce or re-use material protected by copyright.

Marginal costs The cost of supplying another unit. Long run marginal cost is the full extra cost (both fixed and variable) of providing a further unit of output. Short run marginal cost measures how variable costs change when output alters. In practice, marginal costs are difficult to observe, and average variable costs are used as a substitute for the concept of marginal costs.

Non-Departmental Public Body (NDPB) A body which has a role in the process of national government, but is not a government departments or part of one, and therefore operate to an extent at arm's length from Ministers.

Office of Public Sector Information (OPSI) The body which advises on and regulates the operation of the re-use of public sector information regime. Established on 16 May 2005 as a unit attached to the Cabinet Office, it merged with The National Archives on 31 October 2006.

Publication scheme A guide to the types of information that a public authority routinely publishes, the format in which the information is available and the level of any charges for making the information available.

Public sector body* The State, regional or local authorities, bodies governed by public law and associations formed by one or several such authorities or one of several such bodies governed by public law. (Directive 2003/98/EC on the re-use of public sector information, Art 2).

Public sector information (PSI) Information, data or content (as defined) collected by and/or held by a public body. The information may or may not be Crown copyright information.

Public sector information holder (PSIH) A public sector body that collects and/or holds information, data or content (as defined).

Raw Data Information collected, created, or commissioned within government which is central to government's core responsibilities. Under HM Treasury guidance (*Charges for Information: When and How*), the supply of selected components of a raw data package exactly as in the package is raw data supply.

Refined information This is where the unrefined information has been enhanced, manipulated and/or added to other inputs to create a retail product for businesses or consumers. The process of refining information can be undertaken by a PSIH, or viably in a commercial market by the private sector.

Re-use* Use by a person of a document held by a public sector body for a purpose other than the initial purpose within that public sector body's public

task for which the document was produced. (Re-use of Public Sector Information Regulations 2005 (SI 2005/1515), r.4(2)).

As defined above, the term 're-use' includes activities that the CUPI Study defines as 'commercial use' and those that it defines as 'commercial re-use'

Trading Fund A government department, executive agency, or part of department, established as a Trading Fund by a Trading Fund Order made under the Government Trading Funds Act 1973. A Trading Fund has authority to use its receipts to meet its outgoings.

Undertaking A natural or legal person engaged in economic activity, regardless of its legal status or the way it is financed. The term can include public entities that offer goods or services in a given market.

Unrefined information This is information which cannot be substituted directly from other sources. It relates to a PSIH's monopoly activities, where competition is very unlikely. Once a PSIH does something with the data which could be performed viably in a commercial market by the private sector it becomes refined information.

Value-added information (or data) Raw data to which value has been added to enhance and facilitate its use and effectiveness for the user. Value can be added in a number of different ways including further manipulation, compilation and summarisation into a more convenient form for the end-user; editing and/or further analysis and interpretation; and commentary beyond that required for policy formulation by the relevant government department with policy responsibility.

Variable costs Costs which vary with the level of activity in the short run (the period over which some factor such as capital is fixed).

Vertical integration Ownership by the same undertaking of different functions in a value chain relating to the provision of a particular good or service.

Wider Markets Initiative (WMI) A Government policy designed to make better use of existing government assets through the development of non-statutory goods and services which are sold on a commercial basis.

ACRONYMS

APPSI	Advisory Panel on Public Sector Information
BGS	British Geological Survey
CBI	Confederation of British Industry
CCJ	County Court Judgments
CLA	Copyright Licensing Agency
CLG	Communities and Local Government
CUPI	Commercial Use of Public Information
DCA	Department for Constitutional Affairs
Defra	Department for Environment Food and Rural Affairs
DSA	Driving Standards Agency
DTI	Department of Trade and Industry
DVLA	Driver and Vehicle Licensing Agency
FOI	Freedom of Information
GROS	General Register Office for Scotland
HMCS	Her Majesty's Court Service
HMRC	Her Majesty's Revenue and Customs
HMSO	Her Majesty's Stationery Office
HMT	Her Majesty's Treasury
HSE	Health and Safety Executive

IAR	Information Asset Register
IFTS	Information Fair Trader Scheme
INSPIRE	Infrastructure for Spatial Information in Europe
IPR	Intellectual Property Rights
LA	Local Authority
MCA	Marine and Coastguard Agency
MoD	Ministry of Defence
MSA	Mapping Services Agreement
NAO	National Audit Office
NDPB	Non-departmental Public Body
NERC	Natural Environment Research Council
NHS	National Health Service
NIMSA	National Interest Mapping Services Agreement
NLPG	National Land and Property Gazetteer
Ofcom	Office of Communications
Ofgem	Office of Gas and Electricity Markets
OFT	Office of Fair Trading
ONS	Office for National Statistics
OPSI	Office of Public Sector Information
OS	Ordnance Survey

PAF	Postcode Address File
PGA	Pan Government Agreement
PSI	Public Sector Information
PSIH	Public Sector Information Holder
PSRE	Public Sector Research Establishment
ROCE	Return on Capital Employed
RTL	Registry Trust Ltd
SOLAS	Safety of Life at Sea
TNA	The National Archives
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UKHO	UK Hydrographic Office
VAR	Value-Added Reseller
WMI	Wider Markets Initiative
WMO	World Meteorological Organisation
WTO	World Trade Organisation