

Annexe H

The legal framework

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1 INTRODUCTION

- 1.1 This legal annexe gives a brief outline of the principal legislation, and in some cases guidance, governing, at a level of general application, public sector information and its re-use.¹ It does not cover PSIH specific legislation or guidance (for example the obligations on the Registrar of Companies/Companies House under the Companies Act 1985) because, in respect of the subjects of the PSIH case studies that has been done so far as is necessary and to seek to cover all PSIHs in that way would be too large a task for this market study.

¹ See also Chapter 8 which examines, in particular, the re-use legislation and compliance issues.

2 COMPETITION ACT 1998

2.1 The Competition Act 1998 (CA98) in its chapter I and chapter II prohibitions (limited to affects on UK trade) (principally sections 2 and 18) mirrors Articles 81 and 82 EC Treaty (where the affect is on trade within the European Community). The prohibitions are set out as follows:

'2. Agreements etc preventing, restricting or distorting competition(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which –

- (a) may affect trade within the United Kingdom, and
- (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which –

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions
- (b) limit or control production, markets, technical development or investment
- (c) share markets or sources of supply
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, and
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

...18. Abuse of dominant position

(1) Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

(2) Conduct may, in particular, constitute such an abuse if it consists in –

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions
- (b) limiting production, markets or technical development to the prejudice of consumers
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, and
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.¹

2.2 In the case of PSIHS it is likely that the Chapter II/Article 82 prohibition² is of more potential relevance than the Chapter I/Article 81 prohibition.³ This is because many PSIHS are in a monopoly or near monopoly position, with the result that they are in many cases likely to be in a dominant position. It is important to recall, however, that the prohibition is against abusing a dominant position, not merely in holding one. It

² The OFT has published guidance on this prohibition:

<http://www.offt.gov.uk/NR/rdonlyres/0620258B-3006-4B1C-ADC6-5CC69E6EF4F1/0/OFT402.pdf>

³ OFT guidance on this prohibition can be found at

<http://www.offt.gov.uk/NR/rdonlyres/773EAAA9-2D86-4AC1-94B0-AF7DEAE72996/0/oft401.pdf>

should also be noted that only certain types of behaviour by an undertaking in a dominant position will legally constitute abuse.

- 2.3 As set out in OFT guidance on the Competition Act 1998, the term undertaking is not defined in the EC Treaty nor the Act but its meaning has been set out in Community law.⁴ It covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed. The key consideration in assessing whether an entity is an undertaking is whether or not it is engaged in economic activity. An entity may engage in economic activity in relation to some of its functions but not others.
- 2.4 Schedule 3 of CA98 contains a number of general exclusions from those prohibitions. The exclusion in paragraph 4 is, potentially, the most relevant:
- 'Neither the Chapter I prohibition nor the Chapter II prohibition applies to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.'
- 2.5 This is very similar in language to that in Article 86(2) which pertains to the Article 81 and 82 prohibitions. There is no definition of what constitutes a service of general economic interest, though discussion and papers on the subject abound.⁵⁶ It is not the purpose of this market

⁴ Case C-41/90 Hofner and Elser v Macrotron GmbH

⁵ In December 2004 the OFT published guidance on the services of general economic interest exclusion - <http://www.offt.gov.uk/NR/rdonlyres/336EFEC6-CCOE-4313-B026-A7AA1BB3714E/O/oft421.pdf> That guidance includes references to relevant EC Commission Communications and Decisions, as well as judgments of the CFI and ECJ.

study to seek to determine whether or not any PSIH is, in respect of any particular activity, an undertaking entrusted with the operation of a service of general economic interest.

- 2.6 It should not be forgotten, however, that a condition for the application of the Schedule 3 exclusion is that the relevant prohibition would obstruct the performance of the assigned task(s). If the PSIH, all other criteria being satisfied, can perform the entrusted task while nonetheless being subject to the competition rules, the exclusion will not apply.
- 2.7 The decision to conduct this market study was made partly because of the perceived difficulties in applying Competition Act 1998 to public sector information holders.

⁶ At the following link, there is an opinion on services of general economic interest of the EAGCP State Aid group

<http://ec.europa.eu/comm/dgs/competition/sgei.pdf#search=%22%22services%20of%20general%20economic%20interest%22%20eu%22>

3 COPYRIGHT

- 3.1 Much of the public sector information we have looked at during this study is subject to Crown copyright. Broadly, this will be the case where the information forms part of a work made by officers or servants of the Crown in the course of their duties. Where this is the case, the Queen is the first owner of copyright in that material.⁷
- 3.2 Similar provisions also entitle the Queen to the copyright in Acts of Parliament, Acts of the Scottish Parliament and the Northern Ireland Assembly, whilst copyright in Parliamentary Bills is held by one or both houses of Parliament the Scottish Parliament or the Northern Irish Assembly, as the case may be.⁸
- 3.3 Where there are joint authors to a work but not all of those authors are in a position such that their work would attract Crown copyright (for example, because they are in the private sector), Crown copyright applies only in relation to the copyright in the work of those authors who are officers of the Crown (for example, civil servants).⁹ It is, of course, possible for the different authors to make provision by agreement as to in whom copyright in any work will vest (for example, if a government department engages consultants, it is common practice for the parties to agree in the contract that copyright in the work produced will vest in the Crown).
- 3.4 The responsibility for the administration of Crown copyright is that of the Director of the Office of Public Sector Information in her capacity as the

⁷ Copyright Designs and Patents Act 1988 (CDPA) section 163.

⁸ CDPA sections 164-166B.

⁹ CDPA s.163(4)

Queen's Printer. With regard to Scotland, as explained on the OPSI website:¹⁰

'Crown copyright material originated by the Scottish Administration is managed by the Queen's Printer for Scotland (QPS). The Information Policy team of the Office of the QPS licenses on the QPS' behalf.'

- 3.5 Management and licensing of Crown copyright material and Parliamentary copyright material¹¹ is mainly carried out by the Licensing Team of the Office of Public Sector information,¹² although there are some instances where the licensing responsibility has been delegated to departments to avoid delay and to minimise bureaucracy.¹³
- 3.6 In 1999 the Government published the White Paper 'Future Management of Crown Copyright' which set out to devise a blueprint for the future management of Crown copyright, catering for the needs of businesses and professional and specialist interest groups and also for the citizen.¹⁴ The White Paper set out the guiding principles that would be applied in relation to the management of Crown copyright to ensure that government information is used and developed to best advantage. These principles are as follows:

¹⁰ <http://www.opsi.gov.uk/advice/crown-copyright/index.htm>

¹¹ More details about Parliamentary copyright are set out at paragraphs [3.17 – 3.20] below.

¹² For more details of the management and licensing of Crown and Parliamentary copyright see the 'Information Policy Team' page on the Office of Public Sector Information (OPSI) website. www.opsi.gov.uk/about/team-information-policy.htm

¹³ See OPSI Guidance Note – Policy Arrangements on the Licensing of Government Information - www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/policy-arrangements-on-the-licensing-of-government-information.htm

¹⁴ Future Management of Crown Copyright Chapter 1 paragraph 1.3. www.opsi.gov.uk/advice/crown-copyright/future-management-of-crown-copyright.pdf

- The coherent application for the re-use and licensing of government materials and information
- Transparent licensing and charging terms
- Consistency of approach across central government
- Establishing new routes and finding guides enabling users to locate material (this access to be initiated by the Information Asset Register)
- Increasing use of waiver of copyright, liberalising broad categories of information with the lightest of management
- A streamlined administrative process where licensing control is required
- Strengthened accountability by the Controller of HMSO with close supervision and regulation of the exercise of authority as the Queen's printer regulating standards across government
- Clear co-ordination and control by HMSO providing a central one-stop shop approach, and
- The extension of the principles governing the operation of Crown copyright to non-Crown governmental bodies and local government where possible, in order to encourage confidence in a consistent and coherent linked approach to the use of public sector information.¹⁵

3.7 In line with the policy set out in the fifth bullet point above, there are several categories of document where Crown copyright is asserted and then waived in order to ensure 'light touch' management where it is in

¹⁵ Ibid paragraph 3.2.

the government's interest to encourage unrestricted use. The waiver of Crown copyright extends to the following types of document:

- Primary and secondary legislation – which, as well as covering primary and secondary legislation in England, Wales, Northern Ireland and Scotland¹⁶ also includes measures of the General Synod of the Church of England'
- Explanatory notes to legislation¹⁷
- Government Press notices,¹⁸ and
- Government forms – for example forms covered by the Rules of the Supreme Court, or the County Court (Forms) Rules.¹⁹

¹⁶ Ibid paragraph 5.2. The waiver also includes Scottish, Welsh and Northern Irish primary and secondary legislation. See OPSI Guidance – Reproduction of United Kingdom, England, Wales and Northern Ireland Primary and Secondary Legislation – www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/reproduction-of-legislation.htm and the Office of the Queen's Printer for Scotland (OQPS) Publishing and Copyright Guidance Note – Reproduction of Acts of the Scottish Parliament, Explanatory Notes to Acts of the Scottish Parliament and Scottish Statutory Instruments – www.oqps.gov.uk/copyright/guidance/gn_01.htm

¹⁷ Policy in relation to Explanatory Notes is set out in the OPSI and OQPS Guidance notes referred to in footnote 9 above.

¹⁸ See OPSI Guidance – Reproduction of Government Press Notices for England, Northern Ireland and Wales www.opsi.gov.uk/advice/crown-copyright-guidance/reproduction-of-government-press-notices.htm. The reproductions of press notices issued by the Scottish Administration are the subject of an OQPS Guidance Note found at www.oqps.gov.uk/copyright/guidance/gn_02.htm

¹⁹ OPSI Guidance Note – Reproduction of Court Forms sets out a list of the relevant Rules for the purposes of this head of copyright waiver at paragraph 4. (see www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/reproduction-of-court-forms.htm)

- Government consultative documents. This category includes consultative documents which are published as charged publications, for example, Green Papers
- Government documents featured on official departmental websites
- Headline statistics, including statistics of the type often published as an ONS First Release or in a departmental press release. Underlying statistics may be subject to specific licensing arrangements
- Published papers of a scientific, technical or medical nature
- Text of ministerial speeches and articles²⁰
- Public records (for example, the waiver of Crown copyright in unpublished records held by The National Archives),²¹ and
- Typographical arrangement (which covers the style, composition, layout and general appearance of the page of a published work).²²

3.8 As well as the types of document listed above, various materials relating to the schools curricula in England, Wales and Scotland may be freely

²⁰ See further OPSI Guidance – Publication of Articles written by Ministers and Civil Servants in Journals and Conference Proceedings. www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/publications-of-articles-written-by-ministers-and-civil-servants.htm (This Guidance replaced previous guidance on the arrangements for the publication of scientific technical and medical papers and articles).

²¹ See OPSI Guidance Copyright in Public Records. www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/copyright-in-public-records.htm

²² See OPSI Guidance in Typographical Arrangement which advises departments to clarify the copyright in typographical arrangements with private sector publishers and suggests appropriate wording for assignment of copyright should that be appropriate. www.opsi.gov.uk/advice/publishing-guidance/copyright-in-typographical-arrangement.htm

reproduced²³ as well as the record of proceedings of the National Assembly for Wales.²⁴

Effect of the waiver

- 3.9 The effect of the waiver of Crown copyright is set out differently in different OPSI and OQPS Guidance.²⁵ Broadly, however, where material is subject to the waiver, reproduction and publication of the material is permitted without the need for a formal licence or the paying of a fee. There are certain restrictions on reproduction where the waiver is in place, in order to prevent the misuse and to preserve the integrity of Crown material.²⁶
- 3.10 These restrictions differ depending on the type of material involved but mainly relate to requiring the material to be accurately reproduced in a way which is not misleading or derogatory, that the source of the material is correctly acknowledged and that the current version of the material is used (or, where the material is not the current version, that this is specifically stated).

²³ See OPSI Guidance – Reproduction of National Curriculum Material and Literacy and Numeracy Strategy Documents, for England – www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/reproduction-of-national-curriculum-material-england.htm

OPSI Guidance - Reproduction of National Curriculum Material for Wales – www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/reproduction-of-national-curriculum-material-wales.htm and OQPS Guidance Note – Reproduction of 5-14 Curriculum Documents – www.oqps.gov.uk/copyright/guidance/gn_03.htm

²⁴ OPSI Guidance Note – Reproductions of the Record of Proceedings, the National Assembly for Wales. www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/reproduction-of-the-record-of-proceedings-the-national-assembly-for-wales.htm

²⁵ See for example paragraph 8 of OPSI Guidance on the reproduction of Government Press Notices and paragraph 5 of OPSI Guidance on Copyright in Public Records.

²⁶ Future Management of Crown Copyright – paragraph 5.1.

Documents not covered by waiver

- 3.11 Material that is subject to Crown copyright but which does not fall within one of the categories covered by the waiver may still be reproduced but a licence will be required. Where licensing responsibility has not been delegated (see paragraph 3.7 above) applications for licences to reproduce Crown copyright material should be made to OPSI.
- 3.12 PSIHs provide on-line licences known as 'Click-Use' licences. There are two types of Click-Use licences covering Crown Copyright material which are known as the Core Licence and the Value Added Licence. Which type of licence is more appropriate depends on the category of document to be re-used.
- 3.13 A Core Licence covers material which is likely to satisfy certain conditions. The conditions are listed on the 'Core Licence' page of OPSI's website²⁷ and are as follows:
- the material is essential to the business of government
 - it explains government policy
 - it is the only source of the information
 - it sets out how the law, in both UK and EU, must be complied with
 - the information is key to a citizen's relationship with government, or
 - there may be a statutory requirement to produce or issue the information.

²⁷ www.opsi.gov.uk/click-use/core-licence-information/index.htm

- 3.14 The application process is set out on OPSI's website and can be made on-line.²⁸
- 3.15 A Value Added Licence allows the use of certain value added products, services and publications made available by or on behalf of government departments and agencies.²⁹
- 3.16 Section 47(2) Copyright, Designs and Patents Act 1988 (the CDPA) provides that, where material is open to public inspection pursuant to a statutory requirement (for example, information required to be made available by Companies House), any copyright in a literary work is not infringed by the copying or issuing to the public of copies of that material, by or with the authority of the person on whom rests the requirement to make it available (for example, Companies House), for the purpose of more convenient inspection etc. of that material.

Parliamentary Copyright

- 3.17 Separately from government produced material that is subject to Crown copyright, some material will be subject to parliamentary copyright. Parliamentary Copyright is defined in section 165 of the CDPA and applies to any work made by or under the direction or control of the House of Commons or the House of Lords.
- 3.18 As is the case with certain categories of Crown Copyright material, some material protected by Parliamentary Copyright is the subject of a waiver and its reproduction is allowed (subject to similar restrictions as

²⁸ See www.opsi.gov.uk/click-use/core-licence-information/core-licence-procedures.htm

²⁹ An illustrative list of value-added material is set out at www.opsi.gov.uk/click-use/value-added-licence-information/examples-of-value-added-material.htm

set out in paragraph 8 above). This material includes Bills and Explanatory Notes to Bills of the United Kingdom Parliament.³⁰

- 3.19 In Scotland, first copyright in works made by or under the direction or control of the Scottish Parliament is owned by a body called the Scottish Parliamentary Corporate Body. The provisions relating to Scottish Parliamentary Copyright are in line with section 165 CDA.
- 3.20 It is possible to apply for a Click-Use licence for parliamentary material from OPSI. The licence covers those circumstances where parliamentary material can be reproduced free of charge under a standard set of terms and conditions.³¹

Government Publishing

- 3.21 Government departments have to communicate policy to the public. There are several options a department may use to do this including publishing the material themselves, contracting others to produce an 'official' version of the information, publishing material on its own or another official departmental website or, in certain circumstances by publishing items such as Command Papers or Departmental House of Commons papers under central OPSI managed contracts.
- 3.22 Where a private sector publisher is chosen to print official material on behalf of a government department, the government department should not grant exclusive (other than in the 'official' version) publishing rights to the publisher since this would prevent others from using the material and goes against current government and European policy advocating and encouraging the wider use of public sector information.

³⁰ www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/reproduction-of-bills-and-explanatory-notes.htm

³¹ The terms of the licence are set out at www.opsi.gov.uk/click-use/system/licenceterms/ParliamentaryLicence_01-00.pdf

3.23 A related point is that the publisher should not be given the right to reproduce the material, other than in accordance with the usual click-use or value added licence that would be granted to any other party. OPSI have published standard wording for incorporation into publishing agreements which deal with these issues.

4 DATA PROTECTION ACT 1998

4.1 The Data Protection Act 1998 (the 'DPA 1998') controls access to personal data by imposing a duty upon data controllers – here Public Sector Information Holders (PSIHs) who hold personal data³² – to comply with eight data protection principles set out in Part I of Schedule I of the DPA 1998 (and which are further explained in Part II of that schedule).³³

4.2 'Personal data' is defined as data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.³⁴ Data is defined very broadly to cover information stored or recorded in a wide variety of ways.

4.3 The eight data protection principles require that data are:

- fairly and lawfully processed
- processed for limited purposes
- adequate, relevant and not excessive
- accurate
- not kept longer than necessary
- processed in accordance with individuals' rights
- kept secure

³² By virtue of section 63, the DPA binds the Crown and each government department is treated as a person separate from any other government department.

³³ Section 4(4)

³⁴ Section 1(1)

- not transferred to countries outside the European Economic Area without adequate protection.
- 4.4 The DPA 1998 and the Freedom of Information Act 2000 are mutually exclusive (see section 40 of the Freedom of Information Act 2000 providing an exemption from access under that regime for data protected by the DPA 1998).
- 4.5 The DPA 1998 imposes a number of restrictions on the uses that can be made of personal data by a data controller and provides rules by which a person about whom data is held can access it³⁵ and, to some extent, control the use that the data controller may make of it.³⁶
- 4.6 By virtue of Regulation 5(2)(c) of the Re-Use Regulations 2005, those Regulations do not apply to a document which is accessible by making a request for access under the DPA 1998.
- 4.7 Further information on the DPA 1998 can be found on the website of the Department for Constitutional Affairs at the following link:

<http://www.dca.gov.uk/foi/datprot.htm>

³⁵ Section 7

³⁶ Eg ss 10 and 11

5 DATABASE RIGHTS

- 5.1 Directive 96/9/EC on the legal protection of databases ('the Database Directive') created a new right specific to and in databases in addition to harmonising the laws of Member States of the EC relating to the protection of copyright in databases.
- 5.2 The Directive was implemented in the UK by The Copyright and Rights in Databases Regulations 1997³⁷ ('the Regulations') which amended the Copyright, Designs and Patents Act 1988 ('CDPA') and included Regulations creating the new, substantive database right.
- 5.3 The European Court of Justice has considered the Database Directive on several occasions, including in a reference from the Court of Appeal, *The British Horseracing Board Ltd and others v William Hill Organisation Ltd*,³⁸ in which it was claimed that William Hill had infringed the database right of the British Horseracing Board Ltd ('BHB') in its computerised database on the annual horse race fixture list, containing details of horse owners, trainers and jockeys, racing colours, horses and other relevant information.
- 5.4 On the facts, following the judgment of the European Court of Justice, the Court of Appeal found that the **sui generis** right did not attach to the database in question.

Overview of database right

- 5.5 A useful explanation of the purpose of the Directive was given by Mr Justice Laddie in the first instance decision of the *BHB v William Hill*

³⁷ SI 1997/3032

³⁸ ECJ Case C-203/02. Other cases before the ECJ, including Case C-46/02, have dealt with databases of football fixtures lists.

case.³⁹ While his judgment as to the existence of the database right in this case was successfully appealed, the explanation remains of interest:

'The reason for introducing a new database right into the domestic law of the Member States of the European Union is largely explained in the recitals to the Directive. Databases used to be protected by copyright in all or most states. Unfortunately there existed major difference between the relevant national laws. A collection of data which could be protected in one State might not be protected at all in another, or the scope of protection might be different. In an attempt to resolve some of the difficulties created by this lack of uniformity in national laws, the Directive does two things. First it requires Member States to implement certain common features in their national copyright law in so far as they deal with databases. There are set out primarily in Articles 3 to 6 inclusive. Secondly, it creates an entirely new kind of right, which it refers to as 'sui generis'. This is dealt with primarily in Articles 7 to 11 inclusive. This is the database right. It is independent of any copyright or other intellectual property rights which may exist in the database or in any of the individual pieces of data or information collected together within the database.'

5.6 Article 1(2) of the Directive defines 'database' as:

'...a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.'

5.7 Article 1(3) adds that:

'Protection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means.'

³⁹ [2001] ECDR 20

5.8 Article 7(1) sets out the object of protection of the sui generis right and Article 7(4) speaks of the relationship between that right and copyright:

'1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

...4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights in respect of their contents.'

5.9 What is meant by 'investment in obtaining the contents' of a database was explained by the European Court of Justice at paragraph 31 of its judgment⁴⁰ in the following terms:

'...the expression investment in...the obtaining...of the contents of a database must...be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials. The purpose of the protection by the sui generis right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database.'

⁴⁰ C-203/02

- 5.10 The ECJ also clarified⁴¹ what is meant by 'verification' and took pains to distinguish between checking the accuracy of the component data during its creation and its accuracy once a part of the database:

'The expression investment in...the...verification...of the contents of a database must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the state of creation of data or other materials which are subsequently collected in a database, on the other hand, are resources used in creating a database and cannot therefore be taken into account in order to assess whether there was substantial investment in the terms of Article 7(1)...'

- 5.11 In the cases ruled upon so far by the ECJ, the issue of substantial investment in the presentation of data in a database has been found to be closely linked to the creation of the data itself,⁴² such that there has been no useful exposition of where the database right might be created by such investment.

First owner and term

- 5.12 The first owner of the database right is its maker, subject to certain provisions in Regulation 14 of the Regulations. Regulation 14 defines the maker as:

'...the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation shall be regarded as the maker of, and as having made, the database.'

⁴¹ Case C-203/02 paragraph 34

⁴² Eg Case C-46/02 paragraph 46,

- 5.13 Regulations 14(2) and (3) provide, respectively, that where an employee in the course of his or her employment or an officer or servant of the Crown in the course of their duties makes a database, the employer or Her Majesty/the Crown as appropriate shall be regarded as the maker (and thus first owner). It is, however, no bar to the holding of a database right that the holder also owns the copyright in its constituent data.
- 5.14 The database right expires at the end of fifteen years from the end of the year in which the database was completed⁴³ or, if made available to the public before the end of that period, 15 years from the end of the year in which the database was first made available to the public.⁴⁴

Infringement of the right

- 5.15 The database right is infringed if a person, without the consent of the database right owner, extracts or re-utilises all or a substantial part of the contents of the database.⁴⁵ The European Court of Justice has explained the basis for the infringement provisions in the Directive⁴⁶ in the following terms:

'According to the 48th recital of the preamble to the directive, the sui generis right has an economic justification, which is to afford protection to the maker of the database and guarantee a return on his investment in the creation and maintenance of the database.

Accordingly, it is not relevant, in an assessment of the scope of the protection of the sui generis right, that the act of extraction and/or

⁴³ Regulation 17(1)

⁴⁴ Regulation 17(2)

⁴⁵ Regulation 16

⁴⁶ Case 203/02 paragraphs 46 and 47

re-utilisation is for the purpose of creating another database, whether in competition with the original database or not, and whether the same or a different size from the original, nor is it relevant that the act is part of an activity other than the creation of a database. The 42nd recital of the preamble to the directive confirms, in that connection, that the right to prohibit extraction and/or re-utilisation of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment.'

5.16 'Extraction' is defined in Article 7(2)(a) as 'the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means in any form'.

5.17 'Re-utilisation' is defined in Article 7(2)(b) as 'any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmissions.'

5.18 It should be noted that Article 7(5) states that the:

'...repeated or systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.'

5.19 This provision is aimed at preventing evasion of the Article 7(1) prohibition. As to what constitutes a 'substantial part', qualitatively or quantitatively, the ECJ has said:⁴⁷

⁴⁷ Case C-203/02 paragraphs 70 to 73 inclusive

'The expression substantial part, evaluated quantitatively, of the contents of a database within the meaning of Article 7(1) of the directive refers to the volume of data extracted from the database and/or re-utilised, and must be assessed in relation to the volume of the contents of the whole of that database. If a user extracts and/or re-utilises a quantitatively significant part of the contents of a database whose creation required the deployment of substantial resources, the investment in the extracted or re-utilised part is, proportionately, equally substantial.

The expression substantial part, evaluated qualitatively, of the contents of a database refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation, regardless of whether that subject represents a qualitatively substantial part of the general contents of the protected database. A quantitatively negligible part of the contents of a database may in fact represent, in terms of obtaining, verification or presentation, significant human, technical or financial investment.

It must be added that, as the existence of the sui generis right does not, according to the 46th recital of the preamble to the directive, give rise to the creation of a new right in the works, data or materials themselves, the intrinsic value of the materials affected by the act of extraction and/or re-utilisation does not constitute a relevant criterion for the assessment of whether the part at issue is substantial.

It must be held that any part which does not fulfil the definition of a substantial part, evaluated both quantitatively and qualitatively, falls within the definition of an insubstantial part of the contents of a database.'

- 5.20 Among other provisions, sections 96 to 102 CDPA (remedies for infringement) apply in relation to database right and databases in which

that right subsists as they apply in relation to copyright and copyright works.⁴⁸

Copyright in a database

- 5.21 In implementing the Directive, the Regulations amended the CDDPA to extend copyright protection, in appropriate cases, to databases. There is of course the potential for a degree of overlap between copyright in a database and the sui generis database right. Regulation 29 of the Regulations contains a saving provision in respect of copyright that exists in databases created on or before 27 March 1996. Provided that such a database was a copyright work immediately before 1 January 1998, copyright shall continue to subsist in the database for the remainder of the copyright term.
- 5.22 It is particularly important to distinguish between the copyright or the database right that may exist in a database and the copyright that may exist in its contents. References below are to the source of the right, Directive 96/9/EC:

'Article 3, Object of protection

In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.'

- 5.23 Further analysis of copyright can be found in Chapter 3 of this annexe.

⁴⁸ Regulation 23

6 THE ENVIRONMENTAL INFORMATION REGULATIONS 2004

6.1 The Environmental Information Regulations 2004⁴⁹ (EIR 2004) (in Scotland the Environmental Information (Scotland) Regulations 2004) implement the EC Directive on public access to environmental information⁵⁰ and came into force on 1 January 2005. They provide a regime for access to environmental information held by public bodies, similar to that contained in the Freedom of Information Act 2000.⁵¹ 'Environmental information' is defined⁵² broadly as 'any information in written, visual, aural, electronic or any other material form on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sights including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors

⁴⁹ SI 2004/3391

⁵⁰ Directive 2003/4/EC

⁵¹ Environmental information is exempt information under the Freedom of Information Act 2000 by virtue of s.39 of that Act.

⁵² Regulation 2

referred to in (a) and (b) as well as measures or activities designed to protect those elements

- (d) reports on the implementation of environmental legislation
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c), and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).¹

6.2 Under regulation 4 EIR 2004, public authorities are required progressively to make available to the public by electronic means any environmental information that they hold, subject to certain exemptions (information which a public authority would be entitled to refuse to disclose under Regulation 12).

6.3 Regulation 5 requires public authorities to respond to requests for environmental information by making available the information that they hold as soon as possible and no later than 20 working days after the date of receipt of the request. Again, certain exemptions apply, for example for information that is personal data where the applicant is not the data subject⁵³ and for information whose disclosure would adversely affect intellectual property rights⁵⁴ or the confidentiality of commercial or industrial information.⁵⁵

⁵³ Regulation 12(3)

⁵⁴ Regulation 12(5)(c)

⁵⁵ Regulation 12(5)(e)

6.4 It is important to recall that the EIR 2004, as with the Freedom of Information Act 2000, is an instrument dealing with access to information, not its re-use. Paragraph 6.35 of the DEFRA Guidance to the Environmental Information Regulations 2004⁵⁶ makes this point:

'EIR focuses on responding to requests for environmental information and on the supply of that information to a person or organisation that requests it. The supply of information under EIR does not give the person who receives the information an automatic right to re-use the information in a way that would infringe copyright.'

6.5 Attention is drawn to the fact that, save for certain uses of the information, the permission of the holder of the copyright (or other applicable intellectual property right) would be needed so as not to infringe that right.

⁵⁶ <http://www.defra.gov.uk/corporate/opengov/eir/guidance/full-guidance/index.htm>

7 FREEDOM OF INFORMATION ACT 2000

- 7.1 The Freedom of Information Act 2000 (FoIA), which came into force on 1 January 2005, provides two routes for individuals to be able to access information held by public authorities, that is, a public sector information holder (PSIH) at a national, regional and local level. Firstly, it gives a general right of access to information held by public authorities (s1). **In principle**, the right of access is capable of applying to all types of information held by public authorities. Secondly, it requires public authorities to set up a publication scheme and to publish information in accordance with its publication scheme (s19).
- 7.2 The FoIA, by virtue of the public authorities listed in Schedule 1 to the Act, includes Welsh public authorities and by virtue of s88(2) extends to Northern Ireland. The FoIA also applies to Scotland but only in relation to bodies which are not devolved under the Scotland Act 1998. Scotland has its own Scottish Environmental Information Regulations and the Freedom of Information (Scotland) Act 2002 (Fol(S)A). The Fol(S)A 2002 applies to public bodies whose functions are within the scope of the Scottish Parliament's competence. The Scottish legislation is regulated by the Scottish Information Commissioner's Office. The UK legislation and the Scottish legislation are separate freedom of information regimes, with some similarities but with some significant differences too.
- 7.3 The Government published a White Paper 'Your Right to Know' as a part of its programme of constitutional reform in December 1997. The rationale for the introduction of the FoIA was to improve the democratic process by enabling a greater public access to information about government administration and working to foster a culture of openness and to end the 'culture of secrecy' which had become prevalent in central government and public bodies.
- 7.4 Although the legislation creates a general right of access to information held by public authorities, the FoIA recognises that some information held by public authorities will be exempt from that statutory right of

access. The exemptions are set out at sections 21-44 of the Act and include for example an exemption for information supplied by, or relating to, bodies dealing with security matters (s23), information if its disclosure under the Act would or would be likely to prejudice the commercial interests of any person (s43) or where disclosure of information is prohibited by or under any enactment, incompatible with any Community obligation or would constitute or be punishable as a contempt of court (s44).

7.5 By virtue of sections 9 and 13 a Public Authority may charge a fee in certain circumstances. Section 9 applies to requests where the appropriate limit has not been met (see below on the appropriate limit) and section 13 allows a public authority to charge a fee where the cost of complying with a request for information exceeds the appropriate limit. In any event, Public Authorities are not required to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit (s12). The 'appropriate limit' for the purposes of section 12(1) is set by Regulation 3(2) of the Data Protection Act (Appropriate Limit and Fees) Regulations 2004 and is currently set at £600 for government departments and £450 for local government.

7.6 The following provisions contained in Part I of the Act, deal with the procedural aspects of requests for information:

- a request for information must be made in writing, state the name and address of the applicant and describe the information requested (s8)
- a public authority must comply with a request for information 'promptly and in any event not later than the 20th working day following the date of receipt' (s10)
- a public authority is not obliged to comply with a request for information if the request is vexatious or repeated (s14)

- by virtue of s16 a public authority has a duty to provide advice and assistance to persons who are proposing to make or have made requests for information to it
- S17 places a duty on public authorities to give reasons when refusing a request for information by way of a notice to an applicant
- requirement to provide a publication scheme s19 (mentioned above).

7.7 The exemptions from the statutory right of access listed in Part II of the FoIA are a mixture of absolute and qualified. Where information falls within an absolute exemption there is no requirement for the public authority to consider whether the public interest favours disclosure. There are eight absolute exemptions listed in section 2(3) of the Act. Of those, the exemptions at sections 21, 40, 41 and 44 seem to be the most relevant to the OFT's work on this study:

- by virtue of section 21 'information which is reasonably accessible to the applicant otherwise than under section 1 of the Act is exempt information'
- section 40 is an absolute exemption for information which constitutes personal data within the meaning of the Data Protection Act 1998
- section 41 provides that information is exempt information if it was obtained by the public authority from any other person, including another public authority and the disclosure of that information to the public (otherwise than under the Act) by the public authority would constitute a breach of confidence **actionable** by any person
- by virtue of section 44 a public authority is exempt from the duty to communicate information where its disclosure is prohibited by or under any enactment; is incompatible with any European Community obligation or would constitute or be punishable as a contempt of court. This is the main exemption that is likely to apply to information held by the OFT. In particular, Part 9 of the Enterprise

Act 2002 prohibits the disclosure of specified information which has come to the OFT in connection with its functions, unless there is an applicable gateway and subject to the balance of interest test in section 244 of that Act.

7.8 Those exemptions which are not absolute are described as qualified exemptions. By virtue of section 2(1)(b) a qualified exemption will only be effective in excluding the duty to confirm or deny where '...in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.' In respect of the duty to communicate information, by virtue of section 2(2)(b) a qualified exemption will only be effective where '...in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

7.9 Where the public interest in withholding the information outweighs the public interest in disclosure, the applicant does not have a right of access to the information. If the arguments are evenly balanced (or favours disclosure) then the information must be disclosed.

7.10 The qualified exemptions which seem to be the most relevant to the OFT's work on this study include:

- section 22 – information intended for future publication
- section 31 - disclosure would or would be likely to prejudice specified matters such as the prevention or detection of crime, the administration of justice or the exercise by the OFT of its functions (section 31(1)(g) for any purpose specified in section 31(2) such as investigations to find out:
 - whether any person has failed to comply with the law, or
 - is responsible for any conduct which is improper, or

- checking whether circumstances exist or may arise which would justify regulatory action (qualified exemption).
- section 39 applies to environmental information. Such Information is exempt information if the public authority holding it is obliged by regulations (namely the Environmental Information Regulations 2004) to make the information available to the public in accordance with those Regulations or would be so obliged but for any exemption contained in them. This means that access to environmental information is governed by the Regulations rather than the Act
- section 43 relates to commercial interests – that is, information is exempt information if it constitutes a trade secret or if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).

7.11 Running alongside the Act there are two codes of practice issued under sections 45 and 46. The code of practice issued under s45 provides guidance to public authorities as to the practice it would, in the opinion of the Secretary of State, be desirable for them to follow in connection with the discharge of the authorities' functions under Part I of the Act. By virtue of section 16(2) 'any public authority which, in relation to the provision or assistance in any case, conforms to the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case'.

7.12 The code of practice issued under s46 by the Lord Chancellor relates to the keeping, management and destruction of records. The DCA Procedural Guidance observes that 'Good records and information management will underpin Freedom of Information...' (DCA Procedural Guidance, chapter 10).

7.13 Part IV of the Act (sections 50-56) covers Enforcement: which includes powers available to the Information Commissioner for dealing with complaints from applicants who have applied for access to information – where the applicant has exhausted the internal complaints and review procedures provided by the public authority (in accordance with the code

or practice under section 45). Essentially a complainant may apply for a decision from the Information Commissioner as to whether a request for information has been dealt with in accordance with the requirements of Part I of the Act, because, for example, the public authority has refused to supply the information sought, or has failed to comply with a request with the time limits provided by the Act.

7.14 The Information Commissioners Office website describes it as follows:

'When a complaint is made against a public authority the ICO investigates the facts behind the complaint and may then issue a decision notice. This is the Commissioner's final view on whether or not the public authority has complied with the Freedom of Information Act or the Environmental Information Regulations.'

7.15 When the Information Commissioner reaches a decision on the complaint he must serve notice of that decision on the complainant and public authority (section 50(3)(b)). Where the Commissioner decides that a public authority has failed to comply with the requirements of Part I the decision notice must specify the steps which must be taken by the authority for complying with that requirements and the time within which they must be taken (section 50(4)).

7.16 By virtue of section 52 if the Information Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part I, the Commission may serve the authority with an enforcement notice requiring the authority to take, within such time as may be specified in the notice such steps as may be so specified for complying with those requirements. The Information Commissioner's Office website observes '... In practice, this [an enforcement notice] is most likely to be used where there is systemic or repeated non-compliance.' Failure to comply with either a decision or enforcement notice can be treated as a contempt of court (section 54).

7.17 Part V of the Act (sections 57-61) deals with appeals to the Information Tribunal against notices issued by the Information Commissioner.

- 7.18 Part VI of the Act (sections 62-67) deals with the status of historical records, records in public record offices and how the Act applies to them. Wadham and Griffiths⁵⁷ have succinctly addressed this topic in their text. Before the FoIA came into force access to historical records was governed by the Public Records Act 1958 – so that public records were usually (with some exceptions) transferred to a public records office and those records were available to the public 30 years after the year of their creation.
- 7.19 Since the FoIA has come into force the 1958 Act still governs the transfer of records, but the access to those records is now governed by the FoIA – by amending section 5 of the Public Records Act 1958 in accordance with s67 and Schedule 5 of the FoIA. Access to public records is no longer determined by the 'Thirty year rule' but whether they 'fall to be disclosed in accordance with the Freedom of Information Act 2000' (new section 5(3) of the 1958 Act).
- 7.20 Section 62(1) defines a record as a 'historical record' 'at the end of the period of thirty years beginning with the year following that in which it was created. Sections 63 and 64 limit the exemptions applicable to historical records generally, and to historical records in public records offices, respectively. Wadham and Griffiths note (at page 155) that these provisions reflect the fact that the disclosure of such information is less likely to harm the public interest.
- 7.21 Part VII (sections 68-73) deals with amendments to the Data Protection Act 1998. Part VIII (sections 74 to 88) contains miscellaneous and supplemental provisions.

⁵⁷ Blackstone's Guide to the Freedom of Information Act 2000, 2nd edition, 2005.

8 IMS HEALTH GMBH & CO OHG V NDC HEALTH GMBH & CO KG

Interplay between competition law and copyright licensing from ECJ Case C-418/01 IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG⁵⁸

- 8.1 This case concerned the refusal by IMS, a dominant undertaking in the relevant market, to licence to NDC certain intellectual property. The principal question was whether or not, in the circumstances, that refusal constituted an abuse of its dominant position by IMS, contrary to Article 82 of the EC Treaty.
- 8.2 IMS provided data to its customers formatted according to a brick structure the components of which, according to the order for reference, were created by taking account of various criteria, for example, postcodes, population density etc. According to the national court, the brick structures became the normal industry standard for the clients of IMS, to which those clients adapted their information and distribution systems.
- 8.3 PII, subsequently acquired by NDC, competitors to IMS, sought to market similar data products using similar brick structures but IMS obtained injunctions to prevent them from doing so. In December 2000, NDC complained to the European Commission that the refusal by IMS to grant it a licence to use a particular brick structure constituted an infringement of Article 82 of the Treaty.

⁵⁸ Paragraph 7.25 of the market study report comments on the significance of this case for PSIHs

First question

8.4 The first question referred by the national court was identified by the European Court of Justice as follows:

'21. ...the national court asks...whether the refusal to grant a licence to use the brick structure for the presentation of regional sales data by an undertaking in a dominant position which has an intellectual property right therein to another undertaking which also wishes to provide such data in the same Member State, but which, because potential users are unfavourable to it, cannot develop an alternative brick structure for the presentation of the data that it proposes to offer, constitutes an abuse of a dominant position within the meaning of Article 82 EC.'

8.5 In answering that question, the Court made the following observations:

'As the Advocate General stated in point 29 of his Opinion, that question is based on the premiss, whose validity it is for the national court to ascertain, that the use of the 1860 brick structure protected by an intellectual property right is indispensable in order to allow a potential competitor to have access to the market in which the undertaking which owns the right occupies a dominant position.'

8.6 Having explained that premiss, the Court analysed the observations submitted to it and gave its reply. While that reply was of course given in respect of the facts and the market in question (the supply of data on sales of pharmaceutical products in the Member States concerned), the principles are of general application. The Court decided that in order for a refusal by an undertaking [which is dominant] to give access to a product or service protected by copyright and which is indispensable for carrying on a particular business to be treated as abusive, three conditions must be satisfied:

- 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, and
- the refusal is such as to reserve to the owner of the intellectual property right the [relevant] market...by eliminating all competition on that market.

8.7 Unfortunately, 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.

8.8 The third criteria poses the question of whether or not the product or service in question could, despite the refusal by the dominant undertaking to license the intellectual property, be produced by the potential competitor. Is the matter protected by the intellectual property right indispensable for the product or service market in question? This will depend on the facts of each particular case.

Second and third questions

8.9 The second question asked by the referring court was as follows:

'Is the extent to which an undertaking with a dominant position on the market has involved persons from the other side of the market in the development of the databank protected by copyright relevant to the question of abusive conduct by that undertaking?'

8.10 The third question was whether or not material outlay (for example, costs) by customers, necessary in order for them to use the product of a competing undertaking (rather than that of the dominant undertaking), was relevant to the question of whether or not there was an abuse of a dominant position.

8.11 The Court said the following in answer to the second and third questions:

'It is clear from paragraphs 43 and 44 of **Bronner**⁵⁹ that, in order to determine whether a product or service is indispensable for enabling an undertaking to carry on business in a particular market, it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services. According to paragraph 46 of **Bronner**, in order to accept the existence of economic obstacles, it must be established, at the very least, that the creation of those products or services is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service.'

8.12 In the IMS case, the Court concluded that the level of participation by others in the protected material and the outlay which would be required of customers to use another product are both relevant factors in determining whether or not the protected material is indispensable to the products or services in question.⁶⁰

⁵⁹ Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others

⁶⁰ An analysis of the opinion of Advocate General Tizzano in this case, which the Court followed, can be found at http://pharmalicensing.com/articles/disp/1067456033_3fa0162198382

9 THE INSPIRE DIRECTIVE

Proposed Directive establishing an Infrastructure for Spatial Information in the European Community (INSPIRE)⁶¹

- 9.1 The INSPIRE Directive is still going through the legislative process in the European Community and thus the text may be subject to change.⁶² In November 2005, the Council (Member States) reached a common position on the text of the Commission proposal. In May 2006 the European Parliament had its second reading of the Council's common position, during which it recommended amendments to the text. Consequently, the text will go through the conciliation procedure in November of this year, during which a compromise on the text will be sought.
- 9.2 As a result, it is not possible in the context of this market study to give a thorough analysis of the principal ways in which the re-use of public sector information will be affected. At this stage it seems appropriate only to identify some of the key, current, proposed provisions as contained in the Council's Common Position text of November 2005. Several of these are likely to change during the conciliation meeting on 21 November 2006.
- 9.3 The two principal aims of the proposed Directive are to make spatial data sets and services more accessible, consistent and usable between Member States for the fulfilment of their public tasks, and also to make the spatial data sets and services more readily available to the public (see in particular proposed Article 11). 'Spatial data' is defined in

⁶¹ File 2004/0175 (COD)

⁶² The European Parliament and the Council agreed the text of the Directive at a conciliation meeting on 21 November. References to the INSPIRE Directive in this market report do not reflect the final text of the Directive that came from that meeting.

proposed Article 3(2) as 'any data with a direct or indirect reference to a specific location to a geographical area'.

9.4 It is stated in proposed Article 4(4) that:

'This Directive does not require collection of new spatial data.'

9.5 Provision is made not only for new spatial data sets and services to conform with the implementing rules but also for existing sets and services to be brought into conformity.

9.6 Proposed Article 7 makes provision for rules to be adopted under the comitology process (using the regulatory procedure)⁶³ in respect of what might be regarded as the key thrust of the proposed directive; 'the interoperability and, where practicable, harmonisation of spatial data sets and services.'

9.7 Recital 7 notes that there is a degree of overlap between this proposal and EC Directive 2003/4/EC on public access to environmental information and states that this proposal should be without prejudice to that Directive. Recital 8 similarly states that the proposal should be without prejudice to EC Directive 2003/98 on the re-use of public sector information, 'the objectives of which are complimentary to those of this Directive.' Article 2 currently repeats that no-conflict intent. Some of the key, currently proposed provisions are as follows.

9.8 Proposed Article 1:

'1.The purpose of this Directive is to lay down general rules aimed at the establishment of the Infrastructure for Spatial Information in the European Community [INSPIRE]...for the purposes of Community environmental policies and policies or activities which may have an impact on the environment.'

⁶³ Under Decision 1999/468/EC as modified by Council Decision 2006/512/EC of 17 July 2006

9.9 Proposed Article 3:

'1. infrastructure for spatial information' means metadata, spatial data sets and spatial data services; network services and technologies; agreements on sharing, access and use; and co-ordination and monitoring mechanisms, processes and procedures, established, operated or made available in accordance with this Directive...

3. 'spatial data set' means an identifiable collection of spatial data

4. 'spatial data services' means the operations which may be performed, by invoking a computer application, on the spatial data contained in spatial data sets or on the related metadata...'

9.10 Proposed Article 4:

'This Directive shall cover spatial data sets which fulfil the following conditions:

- (a) they relate to an area where a Member State has and/or exercises jurisdictional rights
- (b) they are in electronic format
- (c.) they are held by or on behalf of any of any of the following:
 - a public authority, having been produced or received by a public authority, or being managed or updated by that authority and falling within the scope of its public tasks
 - a third party to whom the network has been made available in accordance with Article 12 [third parties whose spatial data sets and services comply with certain obligations]
- (d) they relate to one or more of the themes listed in Annex I, II or III.'

9.11 Proposed Article 5 obliges Member States to create and keep up to date metadata for the spatial data sets and services corresponding to the themes listed in proposed Annexes I, II and III. These are set out below:

Table x: Annex I - Spatial data themes

1. Coordinate reference systems	Systems for uniquely referencing spatial information in space as a set of coordinates (x,y,z) and/or latitude and longitude and height, based on a geodetic horizontal and vertical datum.
2. Geographical grid systems	Harmonised multi-resolution grid with a common point of origin and standardised location and size of grid cells.
3. Geographical names	Names of areas, regions, localities, cities, suburbs, towns or settlements, or any geographical or topographical feature of public or historical interest.
4. Administrative units	Units of administration, dividing areas where Member States have and/or exercise jurisdictional rights, for local, regional and national governance, separated by administrative boundaries.
5. Transport networks	Road, rail, air and water transport networks and related infrastructure. Includes links between different networks. Also includes the trans-European transport network as defined in Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community Guidelines for the development of the trans-European transport network and future revisions of that Decision.

6. Hydrography	Hydrographic elements, including marine areas and all other water bodies and items related to them, including river basins and sub-basins. Where appropriate, according to the definitions set out in Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy and in the form of networks.
7. Protected sites	Area designated or managed within a framework of international, Community and Member States' legislation to achieve specific conservation objectives.

Table x: Annex II - Spatial data themes

1. Elevation	Digital elevation models for land, ice and ocean surface. Includes terrestrial elevation, bathymetry and shoreline.
2. Addresses	Location of properties based on address identifiers, usually by road name, house number, postal code.
3. Cadastral parcels	Areas defined by cadastral registers or equivalent.
4. Land cover	Physical and biological cover of the earth's surface including artificial surfaces, agricultural areas, forests, (semi-)natural areas, wetlands, water bodies.
5. Orthoimagery	Geo-referenced image data of the Earth's surface, from either satellite or airborne sensors.
6. Geology	Geology characterised according to composition and structure. Includes bedrock, aquifers and geomorphology.

Table x: Annex III - Spatial data themes

1. Statistical units	Units for dissemination or use of statistical information.
2. Buildings	Geographical location of buildings.
3. Soil	Soils and subsoil characterised according to depth, texture, structure and content of particles and organic material, stoniness, erosion, where appropriate mean slope and anticipated water storage capacity.
4. Land use	Territory characterised according to its current and future planned functional dimension or socio-economic purpose (for example, residential, industrial, commercial, agricultural, forestry, recreational).
5. Human health and safety	Geographical distribution of dominance of pathologies (allergies, cancers, respiratory diseases, etc), information indicating the effect on health (biomarkers, decline of fertility, epidemics) or well-being of humans (fatigue, stress, etc) linked directly (air pollution, chemicals, depletion of the ozone layer, noise, etc) or indirectly (food, genetically modified organisms, etc) to the quality of the environment.
6. Utility and governmental services	Includes utility facilities such as sewage, waste management, energy supply and water supply, administrative and social governmental services such as public administrations, civil protection sites, schools and hospitals.
7. Environmental monitoring facilities	Location and operation of environmental monitoring facilities includes observation and measurement of emissions, of the state of environmental media and of other ecosystem parameters (biodiversity, ecological conditions of vegetation, etc) by or on behalf of public

	authorities.
8. Production and industrial facilities	Industrial production sites, including installations covered by Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, and water abstraction facilities, mining, storage sites.
9. Agricultural and aquaculture facilities	Farming equipment and production facilities (including irrigation systems, greenhouses and stables).
10. Population distribution – demography	Geographical distribution of people, including population characteristics and activity levels, aggregated by grid, region, administrative unit or other analytical unit.
11. Area management/restriction/regulation zones and reporting units	Areas managed, regulated or used for reporting at international, European, national, regional and local levels. Includes dumping sites, restricted areas around drinking water sources, nitrate-vulnerable zones, regulated fairways at sea or large inland waters, areas for the dumping of waste, noise restriction zones, prospecting and mining permit areas, river basin districts, relevant reporting units and coastal zone management areas.
12. Natural risk zones	Vulnerable areas characterised according to natural hazards (all atmospheric, hydrologic, seismic, volcanic and wildfire phenomena that, because of their location, severity, and frequency, have the potential to seriously affect society), for example, floods, landslides and subsidence, avalanches, forest fires, earthquakes, volcanic eruptions.
13. Atmospheric conditions	Physical conditions in the atmosphere. Includes spatial data based on measurements, on models or on a combination thereof and includes measurement

	locations.
14. Meteorological geographical features	Weather conditions and their measurements; precipitation, temperature, evapotranspiration, wind speed and direction.
15. Oceanographic geographical features	Physical conditions of oceans (currents, salinity, wave heights, etc).
16. Sea regions	Physical conditions of seas and saline water bodies divided into regions and sub-regions with common characteristics.
17. Bio-geographical regions	Areas of relatively homogeneous ecological conditions with common characteristics.
18. Habitats and biotopes	Geographical areas characterised by specific ecological conditions, processes, structure, and (life support) functions that physically support the organisms that live there. Includes terrestrial and aquatic areas distinguished by geographical, abiotic and biotic features, whether entirely natural or semi-natural.
19. Species distribution	Geographical distribution of occurrence of animal and plant species aggregated by grid, region, administrative unit or other analytical unit.
20. Energy resources	Energy resources including hydrocarbons, hydropower, bio-energy, solar, wind, etc, where relevant including depth/height information on the extent of the resource.
21. Mineral resources	Mineral resources including metal ores, industrial minerals, etc, where relevant including depth/height information on the extent of the resource.

- 9.12 Provision is made in proposed Article 4(7) for changes to be made by the comitology procedure⁶⁴ to the themes listed in the three annexes.
- 9.13 A requirement that metadata for the spatial data sets and services corresponding to the themes listed in Annexes I, II and III are created and kept up to date is imposed by proposed Article 5(1). That provision sets out certain information which is to be included in the metadata.
- 9.14 Proposed Article 4(2) adds that '[i]n cases where multiple identical copies of the same spatial data set are held by or on behalf of various public authorities, this Directive shall apply only to the reference version from which the various copies are derived.'

Provision of services

- 9.15 Article 11 of the proposal sets out a list of services required to be established and operated by Member States for metadata created in accordance with the Directive:

(a) discovery services making it possible to search for spatial data sets and services on the basis of the content of the corresponding metadata and to display the content of the metadata

(b) view services making it possible, as a minimum, to display, navigate, zoom in/out, pan, or overlay viewable spatial data sets and to display legend information and any relevant content of metadata

(c) download services, enabling copies of spatial data sets, or parts of such sets, to be downloaded and, where practicable, accessed directly

(d) transformation services, enabling spatial data sets to be transformed with a view to achieving interoperability, and

⁶⁴ Under Decision 1999/468/EC as modified by Council Decision 2006/512/EC of 17 July 2006

(e) services allowing spatial data services to be invoked.

Those services shall take into account relevant user requirements and shall be easy to use, available to the public and accessible via the Internet or any other appropriate means of telecommunication.'

9.16 Proposed Article 14 makes provision as to charging for certain of those services:

'1. Member States ensure that:

(a) the services referred to in point (a) of Article 11(1) are available to the public free of charge

(b) the services referred to in point (b) of Article 11(1) are, as a rule, available to the public free of charge. However, in cases where charges and/or licences are an essential precondition for maintaining the spatial data sets and services or for fulfilling the requirements of already existing international spatial data infrastructure in a sustainable way, Member States may apply charges and/or licences either to the person providing the service to the public, or, where the service provider chooses, to the public itself.

2. Data made available through the view services referred to in point (b) of Article 11(1) may be in a form preventing their re-use for commercial purposes.'

Derogations for restricting access to spatial data sets and services

9.17 Proposed Article 13 permits Member States to limit public access to spatial data sets and services on the basis of a number of grounds, each of which will be narrowly interpreted. Those grounds include:

'(b) ...public security or national defence

(c) ...intellectual property rights

(d) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law.'

Data sharing

9.18 Chapter V of the proposal sets out provisions for the sharing of spatial data sets and services between public authorities.

'Article 17

1. ...measures shall enable [certain] public authorities to gain access to spatial data sets and services, and to exchange and use those sets and services, for the purposes of public tasks that may have an impact on the environment.

2. The measures provided for in paragraph 1 shall preclude any restrictions likely to create, at the point of use, practical obstacles to the sharing of spatial data sets and services.

3. The provisions of paragraph 2 shall not prevent public authorities that supply spatial data sets and services from licensing them to, and requiring payment from, the public authorities or institutions and bodies of the Community that use these spatial data sets and services.

4. The arrangements for the sharing of spatial data sets and services provided for in paragraphs 1, 2 and 3 shall be open to...[certain public authorities] of other Member States and to the institutions and bodies of the Community, for the purposes of public tasks that may have an impact on the environment.'

9.19 The implementing rules setting out the technical details etc. of how interoperability will be achieved (including, where practicable, harmonisation), as well as many of the other provisions which will need

further detail in order to be implemented, are proposed to be subject to the comitology procedure.⁶⁵

9.20 For the purpose of complying with those implementing rules on interoperability, proposed Article 10 provides that:

'Member States shall ensure that any information, including data, codes and technical classifications, needed for compliance with the implementing rules provided for in Article 7(1) is made available to public authorities or third parties in accordance with conditions that do not restrict its use for that purpose.'

⁶⁵ Under Decision 1999/468/EC as modified by Council Decision 2006/512/EC of 17 July 2006

10 GUIDANCE OF THE INTRA-GOVERNMENTAL GROUP ON GEOGRAPHIC INFORMATION

Guide to Principles and Practice of Sharing and Trading Government Information (September 2001)⁶⁶

10.1 The Intra-Governmental Group on Geographic Information (IGGI) was formed in 1993 and, as stated in the foreword to the guide, it:

'promotes the effective use of government geographic information (GI) by increasing awareness of GI within government, acting as a forum for GI issues, encouraging the use of standards and producing Best Practice guidance...'

10.2 The guide refers to the policy framework applicable at the time to the wider use of government information⁶⁷ and also briefly identifies the relevant legal framework⁶⁸. It identifies a key objective of the overall policy framework:⁶⁹

'...it is intended that providing access to government information more easily and at a fair price will stimulate innovation and private sector business activity to the ultimate overall benefit of the UK economy. The private commercial sector has a crucial role to play as both entrepreneur and partner in achieving it.'

10.3 This approach is reflected at paragraph 2.4.1:

⁶⁶ http://www.iggi.gov.uk/assets/downloads/files/share_trade_gi_complete.pdf?PHPSESSID=ec1c305091142686ceefa57ef054f352

⁶⁷ Chapter 2

⁶⁸ Chapter 3

⁶⁹ Paragraph 1.1.5

'Although different policy statements stem from different departmental viewpoints, there are some common themes, the most important of which are that government information must be made more accessible to a wider audience, and that the development of value-added information products and services is something to be encouraged.'

10.4 The introductory chapter of the guide also includes the following point:⁷⁰

'In some respects, of course, the question of whether a government department or agency should adopt a more or less commercial position in respect of its information assets is secondary to its ability to satisfactorily meet demand from an organisational point of view. Indeed, there are several high-profile examples, such as ONS' branded National Statistics, for which ONS' policy is to produce high-quality, independent statistical information, increasingly delivered through their website in order to achieve the wider dissemination and use that has been set out as a government policy objective.'

10.5 Chapter 4 of the guide titled 'The Trading Agreement Framework' sets out a variety of possible models for by which government information could be shared and traded.

10.6 Chapter 5 includes a step by step guide to the product development process. The chapter includes the following two general points under the heading 'Business Strategy':

'5.1.2 Apart from revenue considerations, there are other important management imperatives facing departmental business planners: one key issue, for example, is to gain control of and manage the growing number of requests from commercial users of government data,

⁷⁰ Paragraph 1.1.10

which has the potential for causing considerable departmental disruption with a significant consequent efficiency cost.

5.1.3 It must be recognised, though, that, when departments or agencies are approached by private sector publishers and others wishing to repackage or otherwise add value to particular strands of government data for the purpose of reselling it, an established and reputable publisher may bring to the party certain essential attributes, such as a willingness to invest and take a commercial risk, and considerable knowledge and experience of marketing information products.'

11 MEMORANDUM OF UNDERSTANDING

What follows is the actual text of the Memorandum of Understanding

Memorandum of understanding between the Office of Fair Trading (OFT) and the Office of Public Sector Information (OPSI) outlining procedures to be followed upon receiving a complaint regarding the re-use of information held by a public sector body.⁷¹

Introduction

- 11.1 This Memorandum of Understanding (MOU) records the basis on which the OFT and OPSI (the Parties) will co-operate in respect of complaints relating to issues concerning the re-use of information held by public sector bodies that may fall within the scope of the Competition Act 1998 (CA98) and the Re-use of Public Sector Information Regulations 2005 (SI 2005 No.1515) (the Regulations).
- 11.2 The Regulations bring into effect the provisions laid out in the EU Directive on the Re-use of Public Sector Information (2003/98/EC). A failure to meet obligations under the Regulations may, in certain circumstances (such as those involving pricing), also amount to an infringement of CA98 or of Articles 81 or 82 of the EC Treaty. A particular complaint, with the potential to fall within the ambit of both regimes, may be better addressed by OPSI acting under the Regulations or by the OFT acting under CA98.
- 11.3 The Parties recognise that this MOU may require amendment in the light of future experience, and that it will be reviewed periodically, and is published on both Parties' websites.

⁷¹ This MOU was signed on 28 July 2005.

Procedures

- 11.4 Where the OFT receives a complaint raising issues over the re-use of information held by public sector bodies it may, in assessing its administrative priorities, consider whether the issue may be better addressed by OPSI acting under the Regulations. If the OFT concludes that a particular issue is better addressed by OPSI acting under the Regulations, the case will generally be closed on the grounds of administrative priority. Where this occurs, the complainant will be informed that the OFT does not propose taking the matter further and it will be suggested to the complainant that they may wish to consider contacting OPSI.
- 11.5 It is envisaged that in practice many of the complaints received by the OFT regarding the re-use of public sector bodies' information will be better addressed by OPSI acting under the Regulations. However, the OFT is likely to consider itself better placed to deal with any complaint raising issues which fall within the OFT's administrative priorities for competition enforcement from time to time. An indication of the OFT's priorities can be found in its Annual Plan.
- 11.6 Where a complaint is received that OPSI believes may raise concerns under CA98 or Articles 81 or 82 of the EC Treaty, OPSI will contact the OFT via the Parties' respective identified contact points.
- 11.7 In the course of an investigation under the Regulations, OPSI will apprise the OFT of any issues it comes across that it believes raises concerns under CA98 or Articles 81 or 82 of the EC Treaty. Where a complaint raises issues, which it appears could be dealt with under the Regulations and/or under CA98, the OFT will consider whether to investigate those issues that could be addressed under CA98.
- 11.8 Where OPSI has concerns that conditions have been imposed on re-use which may unnecessarily restrict competition for the purposes of regulation 12(2)(b) of the Regulations, it may seek advice from the OFT on this question.

- 11.9 Both Parties will establish a contact point to ensure a consistent point of contact. The OFT will ensure that the OPSI liaison is provided with Guidelines on CA98 and that the OPSI liaison is kept up to date with the OFT's administrative priorities for competition enforcement.

Background Notes to the MOU

- 11.10 The Competition Act 1998 (CA98) contains two prohibitions. The first prohibition, the Chapter I prohibition, prohibits agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition within the UK.
- 11.11 The second prohibition, the Chapter II prohibition, prohibits conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market if it may affect trade within the UK. The OFT can investigate under CA98 if there are reasonable grounds for suspecting an infringement and, if the OFT decides that either of the prohibitions have been breached, the OFT can impose a financial penalty against the undertakings concerned of up to 10 per cent of their world-wide turnover.
- 11.12 The OFT can also investigate under CA98 where it has reasonable grounds for suspecting an infringement of Articles 81 and/or 82 of the EC Treaty establishing the European Community. Articles 81 and 82 contain equivalent prohibitions to the Chapter I and Chapter II prohibitions (respectively), applicable where the conduct or agreement in question may affect trade between EC Member States.
- 11.13 The EU Directive on the Re-Use of Public Sector Information (the Directive) aims to stimulate the markets that are dependent on the re-use of information held by the public sector. In the UK, the Directive is given effect through the Re-use of Public Sector Information Regulations 2005 (the Regulations). The Regulations establish a legislative framework covering the re-use of public sector information.

11.14 Responsibility for ensuring compliance with the Regulations rests with the Office of Public Sector Information (OPSI). The Regulations provide:

- i) how public bodies should deal with requests for re-use'
- ii) that conditions for re-use should not place unnecessary restrictions, particularly on competition between re-users, including where the public sector body itself is a re-user
- iii) that terms and conditions (including any charges) should not discriminate between re-users who re-use documents for similar purposes, including where the public sector body is itself a re-user
- iv) that exclusive arrangements for re-use will not ordinarily be permitted
- v) that where the public sector body decides to charge for the information, total income should not exceed the costs of collection, production, reproduction and dissemination and a reasonable return on investment
- vi) that public sector bodies should be transparent by publishing details of what information assets are available for re-use; terms and conditions of re-use, including details of any charges and any exclusive arrangements
- vii) that public sector bodies should have an established complaints procedure, and
- viii) time limits for responding to applications.

11.15 If the public sector body's own complaints procedure is unable to resolve any issues of concern over re-use raised by third parties, the third party can then approach OPSI. OPSI will either investigate whether the public sector body has complied with the Regulations, or mediation may be offered as an alternative route to investigation. On concluding an

investigation or mediation, OPSI will make a recommendation. OPSI will monitor compliance with the recommendation; non-compliance will be referred to the Minister for the Cabinet Office (or Scottish equivalent) to issue a Ministerial Letter of Direction. Both the public sector body and the complainant have the right to apply to the Advisory Panel on Public Sector Information for a review of the recommendation.

- 11.16 A failure to meet obligations under the Regulations may, in certain circumstances (such as those involving pricing), also amount to an infringement of CA98 or of Articles 81 or 82. Because of this overlap, it is conceivable that some complaints could be addressed either by the OFT under the Competition Act 1998 or by OPSI under the Regulations.
- 11.17 For further information on CA98 and the work of the OFT, see www.offt.gov.uk
- 11.18 For further information on the Directive and the work of OPSI, see www.opsi.gov.uk

12 THE RE-USE OF PUBLIC SECTOR INFORMATION REGULATIONS 2005 AND EC DIRECTIVE ON THE COMMERCIAL USE OF PUBLIC SECTOR INFORMATION 2003/98/EC

- 12.1 Directive 2003/98/EC on the re-use of public sector information (the 'Directive')⁷² came into force on 31 December 2003. In the UK the Directive has been implemented by The Re-use of Public Sector Information Regulations 2005⁷³ (the Re-use Regulations) which came into force on 1 July 2005.
- 12.2 The aim of the Directive is to 'facilitate the establishment of European data-products based on public sector information, enhancing an effective cross-border use of public sector information and limiting distortions to competition on the European market.'⁷⁴ The Directive is built on the two key pillars of (a) the internal market and (b) transparency and fair competition. It is intended to establish a minimum set of rules governing the re-use and practical means of facilitating re-use of existing documents held by public sector bodies of Member States.⁷⁵
- 12.3 The implementing Regulations set out the requirements for a request for re-use of public sector information and the 20 working day time limit in which a public sector body must respond.⁷⁶ The Regulations do not change the provisions governing access to public sector information

⁷² OJ L354 31.12.2203, p.90

⁷³ S.I. No 1515/2005.

⁷⁴ Directive on the re-use of public sector information – background document
www.europa.eu.int/information_society/policy/psi/directive/index_en.htm

⁷⁵ Article 1.

⁷⁶ Regulations 6 and 8.

such as the Freedom of Information Act 2000, the Freedom of Information (Scotland) Act 2002 and the Environmental Information Regulations 2004 and Environmental (Scotland) Regulations 2004. Nor do they affect the protection afforded to personal data by the Data Protection Act 1998. They do, however, provide a framework for re-use of information once access has already been obtained.

- 12.4 Set out below is a brief overview of the Regulations and the obligations of public sector bodies once the relevant public sector body has decided to allow re-use of its information.

The Scope of the Directive and Regulations

Public Sector Bodies

- 12.5 The Directive and Regulations apply to documents held by 'public sector bodies'. In relation to UK public sector bodies, the Regulations set out a list of entities they cover.⁷⁷ The list is based on European public procurement Directives⁷⁸ and UK Procurement Regulations.⁷⁹ Bodies covered by the Regulations include Government departments, government trading funds, the devolved institutions and local authorities. Documents held by National Health Service Bodies and various non-departmental bodies such as the Environment Agency are also covered by the Regulations.
- 12.6 Documents held by certain public bodies are excluded from the scope of the Regulations. These fall into three categories and are as follows:

⁷⁷ Regulation 3

⁷⁸ Directives 92/50/EEC, (OJ L 209, 24.7.1992, p.1) 93/36/EEC, (OJ L 199, 9.8.1993, p.1.) 93/37/EEC, (OJ L199, 9.8.1993, p.54) and 98/4/EC (OJ L 101, 1.4.1998, p.1).

⁷⁹ Public Supply Contracts Regulations 1995 (SI 1995/201)

- documents held by public sector broadcasters and other bodies for the purposes of the provision of programme services or the conduct of activities which a public service broadcaster is required or empowered to provide or engage in by or under any enactment or other public instrument⁸⁰
- documents held by educational and research establishments, or
- documents held by cultural establishments, such as museums, libraries, archives, orchestras and opera, ballet and theatre establishments.

Documents

12.7 For the purposes of the Directive and the Regulations 'documents' are defined by reference to content. The Directive lays down a generic definition covering any representation of acts, facts or information and any compilation of such acts, facts or information whatever its medium.⁸¹ The Regulations define 'document' as 'any content, including any part of such content, whether in writing or stored in electronic form or as a sound, visual or audio visual recording, other than a computer programme.'⁸²

Documents falling outside of the Directive/Regulations

12.8 The Directive and Regulations do not apply to documents where the supply of those documents is an activity which falls outside the public task of the public sector body.⁸³ The terms 'public task' is not defined,

⁸⁰ Regulation 5(3)(a).

⁸¹ Recital 11 and Article 2(3).

⁸² Regulation 2.

⁸³ Directive Article 1(2)(a), Regulation 5(1)(a).

either in the Directive or the Regulations, however the Office of Public Sector Information (OPSI) has produced Guidance which considers the term in more detail.⁸⁴

- 12.9 Briefly, OPSI considers that the production of documents may fall outside the scope of a public sector body's public task where they are not related to its core responsibility, such as where there are optional commercial products competing in the open market.
- 12.10 Documents are also excluded from the scope of the Directive and Regulations where a third party owns relevant intellectual property rights in the document.⁸⁵ For the purposes of the Directive and Regulations, relevant intellectual property rights include copyright, database rights, publication rights and rights in performances.
- 12.11 Documents, the content of which are exempt from release under freedom of information legislation, environmental information and any other access to information legislation are not covered by the Regulations. There is however one exception to this rule which is that documents that are not available because they are readily accessible to the applicant (that is, the exemption set out in section 21 of the Freedom of Information Act 2000 and section 25 of the Freedom of Information (Scotland) Act 2002 are not excluded from the scope of the Regulations.⁸⁶

⁸⁴ The Re-use of Public Sector Information: A Guide to the Regulations and Best Practice (OPSI Guidance) – Office of Public Sector Information, June 2005 paragraphs 3.13 – 3.15.

⁸⁵ Directive Article 1(2)(a) and Regulation 5(1)(b).

⁸⁶ Article 1(3) of the Directive and paragraph 3.10 of the OPSI Guidance.

Re-Use of Information

12.12 Re-use of information is the 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.⁸⁷ Re-use does not include the transfer of a document within a public sector body for the purpose of carrying out its public task, or the transfer for use of document from one public sector to another for the purpose of either public sector body carrying out its public task.⁸⁸

Obligations

12.13 Neither the Directive nor the Regulations impose an obligation on public sector bodies to allow re-use of documents they hold.⁸⁹ This is in order to comply with the Berne Convention for the Protection of Literary and Artistic Works and the WTO TRIPS Agreement. However, the Recitals to the Directive state that public sector bodies should be encouraged to make documents available for re-use and should promote and encourage re-use of documents.⁹⁰

Provision of documents for re-use

12.14 Where public sector bodies do permit re-use of documents, this has to be done in accordance with the Regulations.

⁸⁷ Regulation 4(1) and Directive Article 2(4).

⁸⁸ Regulation 4(2).

⁸⁹ Recital 9 of the Directive and Regulation 7(1) which states that a public sector body may permit re-use.

⁹⁰ Recital 9.

Format of documents required

12.15 The Regulations make it clear that public sector bodies may make a document available in the format and language in which it exists on the date the request for re-use was made, although where possible and appropriate, the public sector body should make the document available for re-use by electronic means. There is no obligation on the public sector body to create or adapt a document for re-use, provide an extract from a document where, to do so, would involve disproportionate effort or continue to produce a certain type of document for the purposes of re-use.⁹¹

Conditions

12.16 Regulation 12 allows public authorities to impose conditions on the re-use of the documents it makes available, however, where conditions are imposed they shall not unnecessarily restrict the way in which a document can be re-used or competition.⁹² The Recitals to the Directive state that 'ensuring that the conditions for re-use of public sector documents are clear and publicly available is a pre-condition for the development of a Community-wide information market. Therefore all applicable conditions for the re-use of the documents should be made clear to the potential re-users.'⁹³ Regulation 16(1)(a) requires that any applicable conditions for re-use are made available to the public.

⁹¹ Regulation 11. (Although if the public sector body has decided to stop producing a certain type of document, efforts should be made to alert re-users of this decision). OPSI Guidance paragraph 4.16).

⁹² Regulation 12.

⁹³ Recital 18.

Non-discrimination

12.17 An important aspect of the Regulations is that where documents are made available for re-use, they should be made available on non-discriminatory terms between applicants who make a request for re-use for comparable purposes.⁹⁴ Also, should the public sector body, itself wish to re-use the document for activities which fall outside of its public task the same conditions apply to that re-use as would apply to re-use by any other application for comparable purposes (for example, where the public sector authority wanted to use a document for a purpose outside its public task – perhaps in order to sell a value added product.)⁹⁵ The OPSI Guidance suggests that one way a public sector body could ensure that they comply with this principle is to consider the amount they would charge an outside re-user for the re-use of the document. They should then apply the same charge to themselves in setting the price of the value added product.⁹⁶

Prohibition of exclusive arrangements

12.18 The purpose of the Directive and Regulations is to stimulate the information industry. Public sector bodies are not therefore permitted to enter into exclusive arrangements unless it is necessary for the provision of a service in the public interest.⁹⁷ An example of where this may be the case is set out in the OPSI Guidance as where a public sector body has completed a tendering exercise and can demonstrate that without exclusive rights no commercial publisher would be prepared to publish a

⁹⁴ Regulation 13(1)

⁹⁵ Regulation 13(2)

⁹⁶ OPSI Guidance paragraph 4.19.

⁹⁷ Directive Article 11 and Regulation 14.

particular document that would adversely affect the provision of a service in the public interest.

- 12.19 The Regulations also set out requirements for the review of exclusive arrangements which fall within the exception.

Charging for re-use of information

- 12.20 Whether or not to charge for the re-use of information is at the discretion of the relevant public sector body. However, the Directive and the Regulations impose an upper limit on the amount of total income that may be earned from charges for re-use.⁹⁸ The upper limit imposed by the Regulations is the cost of collection, production, reproduction and dissemination of documents plus a reasonable return on investment⁹⁹ and charges should be calculated in accordance with applicable accounting principles on the basis of a reasonable estimate of the demand for documents over the appropriate accounting period.¹⁰⁰

- 12.21 The Regulations do not allow a public sector authority to 'double charge' an applicant for re-use where the applicant has already been charged by it for the labour etc to access to the information under the Freedom of Information Act 2000 (or any other legislation providing for access to information.)¹⁰¹

⁹⁸ Directive Article 6 and Regulation 15.

⁹⁹ Regulation 15(2).

¹⁰⁰ Regulation 15(3).

¹⁰¹ Regulation 15(4)

12.22 The Directive states that Member States should encourage public sector bodies to make documents available at charges that do not exceed the marginal costs for reproducing and disseminating the documents.¹⁰²¹⁰³

12.23 Where public sector bodies do charge for re-use of information the Regulations stipulate that, as far as reasonably practical, it shall establish standard charges and, where requested, it shall specify in writing the basis on which the charge has been calculated. If the public sector body does not apply standard charges, the Regulations require that the public sector body specifies the factors that will be taken into account in calculating the charge.¹⁰⁴ The requirement to make standard charges available to the public is set out in Regulation 16(1)(b).

Asset lists

12.24 Article 9 of the Directive (see also Recital 23) deal sets out a requirement that Member States should ensure that practical arrangements are in place that facilitate the search for documents available for re-use, such as asset lists of main documents and portal sites that are linked to decentralised assets lists. This requirement is dealt with in Regulation 16(1)(c) which requires that a list of documents available for re-use is made public and 16(1)(3) which requires that, as far as reasonably practicable, a public sector body shall ensure that

¹⁰² Recital 9.

¹⁰³ In relation to marginal cost pricing, HM Treasury's Cross-cutting Review of the Knowledge Economy in the 2000 Spending Review recommended at paragraph 1.16 that Government trading funds which trade information should improve their pricing and dissemination policies; but elsewhere (in departments and agencies other than trading funds) that there should a move to an immediate policy of marginal cost pricing. This should apply to the licensing of raw data.

¹⁰⁴ Regulation 15(5)-(7).

potential applicants are able to search the list of documents by electronic means.

Complaints

12.25 The Regulations require public sector bodies to establish internal complaints procedures to deal with complaints about its actions under the Regulations.¹⁰⁵ Where the internal complaints procedure has been exhausted, the Regulation also allows for a complaint to be made to the Office of Public Sector Information.¹⁰⁶ There is an obligation on OPSI to publish its procedures¹⁰⁷ for considering complaints and to consider any complaint in accordance with those published procedures.¹⁰⁸ Should a complainant be dissatisfied with any recommendation made by OPSI, a request can be made for the recommendation to be reviewed by the Advisory Panel on Public Sector Information (APPSI).¹⁰⁹

¹⁰⁵ Regulation 17(1).

¹⁰⁶ Regulation 19.

¹⁰⁷ OPSI's procedures for investigating complaints arising under the Re-use of Public Sector Information Regulations 2005 can be found at www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance-/psi-complaints-procedure.doc

¹⁰⁸ Regulation 19(2).

¹⁰⁹ The Advisory Panel on Public Sector Information is a Non-departmental Public Body established by the Cabinet Office in 2003. Its remit is (a) to advise Ministers on how to encourage and create opportunities in the information industry for greater re-use of public sector information; (b) to advise the Director of the Office of Public Sector Information and Controller of HM Stationary Office about changes and opportunities in the information industry, so that licensing and Crown copyright and public sector information is aligned with current and emerging developments; and (c) to review and consider complaints under the Re-use of Public Sector Information Regulations 2005 and advise on the impact of the complaints procedure under those regulations. (See www.appsi.gov.uk for more information.)

Re-use and Freedom of Information

- 12.26 As previously discussed in Chapter 5, the FoIA is principally about access to information held by public authorities. The above discussion has focussed on the legislation providing for the re-use of that public sector information. In essence the Re-use Directive aims to encourage the commercial exploitation of that information.
- 12.27 The relationship between freedom of information and re-use regimes is neatly summed up in the following:

'It is important to recognise that the [Re-use] Regulations do not provide a right of access to information. The supply of information under FoIA does not automatically give the recipient of the information the right to re-use it. Moreover, there is no obligation in the Regulations for a public sector body to permit re-use of documents held by it. What information is made available for re-use is left to the discretion of the public body. However, if it does decide to permit re-use, it must comply with the terms of the Regulations.'¹¹⁰

¹¹⁰ *The UK Freedom of Information Act 2000 and the re-use Regulations*, Townsend, L and Southern, V, *Open Government: a journal on freedom of information*, Volume 1, Issue 2, July 2005.

13 TRADING FUNDS

- 13.1 Trading Funds operate within a framework of legislation and guidance. The legislative framework includes the primary legislation (that is, statutes) setting up Trading Funds and the secondary legislation (that is, statutory instruments) establishing each individual Trading Fund. The legislative framework is considered below. The relevant guidance is called 'Guide to the Establishment and Operation of Trading Funds' ('the Guide') produced by HM Treasury. The current version is dated May 2004 and sets out the policy and procedure for setting up and operating Trading Funds. The Guide will also be referred to subsequently as appropriate.
- 13.2 There is no statutory definition of a Trading Fund in the legislation which provided the powers to set them up – the Government Trading Funds Act 1973 ('the 1973 Act'), as amended. Essentially, a Trading Fund is a means of financing a government department, executive agency or part of a department outside the usual Supply Process.¹¹¹ Accordingly a Trading Fund would expect to raise income from its activities to cover its costs and does not have to surrender surplus monies to the Consolidated Fund¹¹² at the end of the year. A Trading Fund is not a separate legal entity since it remains part of a government department or it may be a

¹¹¹ 'Resources voted by Parliament in response to Estimates, for expenditure by government departments.' Quotation from Government-Accounting, Glossary

¹¹² 'The Government's 'current account' kept by the Treasury at the Bank of England through which pass most government payments and receipts.' Quotation from Government-Accounting, Glossary

government department in its own right (or an executive agency¹¹³) and therefore it is a Crown body.

- 13.3 Although a Trading Fund's finances are not subject to detailed and advance Parliamentary scrutiny, Parliament retains some control: the statutory instrument establishing each Trading Fund has to be approved by Parliament before it can come into force; the examination of statutory annual accounts and the power to examine the Trading Fund Accounting Officer; and the Minister responsible for the Trading Fund remains accountable to Parliament for all aspects of its policy and operation.

The statutory framework for the establishment and operation of trading funds

- 13.4 The legislation creating Trading Funds is the 1973 Act. The 1973 Act was amended by the Government Trading Act 1990, to increase the range of revenue generating activities that could be financed through a Trading Fund. The 1973 Act was further amended by the Finance Acts of 1991, 1993 and 2001.
- 13.5 Section 1 of the 1973 Act as amended provides that a Minister of the Crown ('the responsible Minister') has discretion to establish a Trading Fund for the trading operations of his department where those operations can suitably be financed by a Trading Fund and the financing of those operations by a Trading Fund would be 'in the interests of improved efficiency and effectiveness of the management of those operations'. This means that the operations being proposed for a Trading Fund must be already financed through the Supply process.
- 13.6 The Guide describes this (at paragraph 2.3.2) as the first (of three) statutory tests and notes that generally there is no difficulty with this,

¹¹³ Executive Agencies were first established following Sir Robin Ibbs' 'Next Steps' Report in 1988 to undertake the delivery of government services, as distinct from policy development.

since usually a Trading Fund is established from an existing agency. However, the Guide observes (at paragraph 2.3.3) that if a Trading Fund were to take on new functions, which had not previously been financed through the Supply process, then those new functions would have to be financed under the Supply process for a period of time, for example, six months, before they could fall within the trading fund financing.

- 13.7 The second statutory test relates to the reference in section 1 of the 1973 Act to '...the revenue of the fund would consist principally of receipts in respect of goods and services provided in the course of the operations in question' (at s1(1)(a)). The Guide explains (at paragraph 2.3.4) 'principally' in the previous sentence as being more than 50 per cent and goes on to note that receipts (that is, monies in) can come from supplying services to other government departments, public and/or private sector customers and to users outside government and which are financed directly by payment of a charge for the service – even where the services and charges have a statutory basis, for example registering title to land.
- 13.8 The White Paper¹¹⁴ explains (at paragraph 4.11) the rationale for wanting to expand the scope of activities that could be brought within a trading fund as the original wording in the 1973 Act was considered to be 'too imprecise in its meaning and too unreliable in its application...' However, the Guide also observes (at paragraphs ES.5, 2.2.1 & 2.3.6) that although the 1973 Act appears to limit the scope of activities of trading funds, there is legal advice to the effect that 'a trading fund can be established where a customer/supplier relationship can be introduced which involves full payment for the goods or services provided.'
- 13.9 The third statutory test is 'that the financing of the operations in question by means of a trading fund would be in the interests of the

¹¹⁴ 'The Financing and Accountability of Next Steps Agencies' Cm.914, December 1989. This White Paper also published proposals for a bill to amend the 1973 Act, which subsequently became the Government Trading Act 1990.

improved efficiency and effectiveness of the management of those operations' (s1(1)(b)). The Guide notes (para 2.3.10) that agencies which sell goods or services to other government departments or public and/or private customers should find it easier to demonstrate the benefits of efficiency and effectiveness from being a Trading Fund, but that it may be more difficult for statutory or regulatory agencies to show. Section 1(2) of the 1973 Act provides that the Minister's power can only be exercised with the concurrence of the Treasury.

- 13.10 Section 1(3) provides that where a Minister proposes to make an order in respect of activities not already financed by a Trading Fund and he considers that the activities in question consist substantially in the provision of goods or services in the UK otherwise than to government departments (that is, users outside government) and that an opportunity to make representations to him should be given he must take appropriate steps to give such an opportunity to such persons as appear to him to be appropriate – which may include consulting customers of the service (para 3.6.3 of the Guide).
- 13.11 Section 6(1) provides that the power to make an order establishing a Trading Fund 'shall be exercisable by statutory instrument and includes the power to vary or revoke such an order...' Section 6(2) requires that an order establishing, extending or restricting a Trading Fund is subject to the affirmative resolution procedure. The Guide (at paragraph 3.5.1) describes this as follows: 'This requires a draft of the Order to be laid before Parliament ... The Order comes into effect only after Parliamentary approval has been granted...'
- 13.12 Section 2(2) of the 1973 Act as amended permits the responsible Minister to determine what additional Crown assets and liabilities can be attributed and appropriated to the Trading Fund and to provide by Order for those assets and liabilities to be appropriated. Section 2(2A) requires the responsible Minister to value assets and liabilities in accordance with Treasury directions.

13.13 Section 2B provides for Trading Funds to take on additional borrowing and section 2C requires a Trading Fund to set a borrowing limit. The Guide (at 5.4.2) explains that loans can be either temporary – of less than six months to finance short term requirements and Term loans – of one year or more, to finance capital expenditure or longer term working capital requirements. A statutory limit on the amount a Trading Fund can borrow is set out in the statutory instrument establishing the individual trading fund – in accordance with section 2C and s2C(3).

13.14 Section 3(1) of the 1973 Act, as amended requires receipts from the 'funded operations' (set out in the statutory instrument establishing the Trading Fund) to be paid into the Trading Fund and expenditure relating to those operations by the responsible Minister to be paid out of the fund, except for expenditure for liabilities not appropriated to the fund. The Guide (at paragraph 8.2.1) describes this provision as 'one of the key characteristics of a trading fund... is that cash received need not be surrendered but may be retained within the business.'

13.15 Section 3(4) states that the requirements for payments into and out of the Trading Fund are not affected by the powers relating to fees and charges contained in section 102 of the Finance (No 2) Act 1987 (see paragraph 12.5.4 of the Guide).

13.16 Section 4(1) imposes the following principal obligations on the Minister responsible for any given Trading Fund:

'(a) to manage the funded operations so that the revenue of the fund:

- consists principally of receipts in respect of goods or services provided in the course of the funded operations, and
- is not less than sufficient, taking one year with another, to meet Outgoings which are properly chargeable to revenue account; and

(b) to achieve such further financial objectives as the Treasury may from time to time, by minute laid before the House of Commons, indicate as having been determined by the responsible Minister (with Treasury concurrence) to be desirable of achievement.'

13.17 The Guide notes (at paragraphs 2.4.1 and 12.2.1-12.2.5) that the phrase 'taking one year with another' is not defined and could literally mean that a deficit in one year should be made good the next year. In practice the phrase is taken to mean 'over a period' usually linked to the period over which the further financial objective is set. The 'further financial objectives' for most Trading Funds is the achievement of an agreed return on the capital employed during the year. Generally the 'return' is the surplus on ordinary activities measured before interest and dividends payable. 'Capital employed' is the capital, that is, PDC and loan capital and reserves. Section 4(2) allows a Trading Fund to 'establish and maintain general, capital and other reserves in the accounts of the trading fund.' Here 'reserves' means 'cash balances'.

13.18 By virtue of section 4(4) Departments may require 'that any amount standing in the reserves of the trading fund is surplus to any foreseeable requirements of the funded operations' be paid into the Consolidated Fund. Section 4(4) deals with the situation where a Trading Fund has no PDC¹¹⁵ – so there is no requirement to pay a dividend. In such a situation the responsible Minister can determine how any surplus should be used – either in connection with the 'funded operations' or repaid as a dividend.

13.19 Section 4(6) provides for the Treasury to appoint the Accounting Officer of a Trading Fund – usually the Chief executive, responsible to the

¹¹⁵ Public Dividend Capital (PDC) is 'finance provided by the government to public sector bodies as an equity stake; an alternative to loan finance' Quotation from Government-Accounting Ch 7, paragraph 7.1.6. PDC is [remunerated] by dividend – as opposed to interest payable on a loan.

Minister for the organisation and management of the fund, the proper management of funds and the achievement of targets. Additionally section 4(6), together with section 4(6A) set out the arrangements for the preparation and audit of the annual accounts, the preparation of the annual report and their presentation to Parliament (the Guide, paragraph 15.7.1).

13.20 The following lists Trading Fund Orders for a number of the PSIH's referred to in this Study:

- Companies House Trading Fund Order 1991 SI1991/1795
- Driver and Vehicle Licensing Agency Trading Fund Order 2004 SI 2004/1037 varied by SI 2005/1672
- Fire Service College Trading Fund Order 1992 SI1992/640
- Hydrographic Office Trading Fund Order 1996 SI1996/773 varied by SI1997/1428
- Land Registry Trading Fund Order 1993 SI 1993/938 extended and amended by SI2003/2094; Land Registry Trading Fund (Additional Assets) Order 1996,
- SI 1996/750
- Meteorological Office Trading Fund Order 1996 SI1996/774
- Ordnance Survey Trading Fund Order 1999 SI1999/965
- Patent Office Trading Fund Order 1991 SI 1991/1796 amended: Patents Act 2004 s16(3)
- The Queen Elizabeth II Conference Centre Trading Fund Order 1997 SI 1997/933 varied by SI2002/1951

14 FINANCIAL TRANSPARENCY DIRECTIVE

Commission Directive on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings – Directive 80/723/EEC¹¹⁶

14.1 The purpose of the Directive (as amended) is to enable the Commission more easily to ensure that Member States do not grant undertakings, private or public, aids incompatible with the common market. It aims to do this by requiring transparency in the financial relations between Member States and undertakings. The following recitals of the Directive (as amended) set this out:

- 'whereas the Treaty requires the Commission to ensure that member States do not grant undertakings, public or private, aids incompatible with the common market
- whereas, however, the complexity of the financial relations between national public authorities and public undertakings tends to hinder the performance of this duty
- whereas a fair and effective application of the aid rules in the Treaty to both public and private undertakings will be possible only if these financial relations are made transparent
- whereas such transparency applied to public undertakings should enable a clear distinction to be made between the role of the State as public authority and its role as proprietor.'

¹¹⁶ As amended by Directives 85/413/EEC, 93/84/EEC, 2000/52/EC and 2005/81/EC

Article 1

14.2 'The Member States shall ensure that financial relations between public authorities and public undertakings are transparent as provided in this Directive, so that the following emerge clearly:

- (a) public funds made available directly by public authorities to the public undertakings concerned
- (b) public funds made available by public authorities through the intermediary of public undertakings or financial institutions, and
- (c) the use to which these public funds are actually put.'

Source of public funds

14.3 'Public authorities', from whom the funds in question come, is widely defined as meaning 'all public authorities, including the State and regional, local and all other territorial authorities.'

Recipients of public funds on whom the requirement of transparency lays

14.4 '**Public undertakings**' – 'means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.' In the context of this market study, it is considered that by definition, public sector information holders will fall within this definition of 'public undertakings'.

14.5 '**undertaking required to maintain separate accounts**' (Article 1(2)) – 'means any undertaking that enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty or is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty, that receives public service compensation in any form whatsoever in relation to such service and that carries on other activities.'

- 14.6 It is not within the remit of this market study to seek to determine which, if any, public sector information holders fall within the definition of an undertaking required to maintain separate accounts.
- 14.7 There are also specific provisions concerning public undertakings operating in the manufacturing sector (being undertakings whose principal area of activity, defined as being at least 50 per cent of annual turnover, is in manufacturing). There are no such undertakings within the scope of this market study.

Exceptions to Art.1 transparency requirements

14.8 Article 4(1) of the Directive provides a short list of undertakings to whom the transparency requirement in Article 1(1) does not apply. The two most relevant of these are:

- '(a) public undertakings, as regards services the supply of which is not liable to affect trade between member states to an appreciable extent, and
- (d) public undertakings whose total annual net turnover over the period of the two financial years preceding that in which the funds referred to in Article 1(1) are made available or used has been less than EUR 40 million...'

14.9 Article 4(2) of the Directive provides short list of undertakings to whom the requirements in Article 1(2) shall not apply, including:

- 'Article 4(2)(a)...undertakings, as regards services the supply of which is not liable to affect trade between Member States to an appreciable extent.'

Transparency requirements - public undertakings

14.10 Article 3 requires transparency 'in particular to the following aspects of financial relations between public authorities and public undertakings:

- (a) the setting-off of operating losses
- (b) the provision of capital
- (c) non-refundable grants, or loans on privileged terms
- (d) the granting of financial advantages by forgoing profits or the recovery of sums due
- (e) the forgoing of a normal return on public funds used, and
- (f) compensation for financial burdens imposed by the public authorities.'

Undertakings required to maintain separate accounts

14.11 Article 3a(1) requires that the following are ensured for such undertakings:

- '(a) the internal accounts corresponding to different activities are separate
- (b) all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles, and
- (c) the cost accounting principles according to which separate accounts are maintained are clearly established.'

14.12 Article 3a(2) adds that the above 'shall only apply to activities which are not covered by specific provisions laid down by the Community and shall not affect any obligations of Member States or undertakings arising from the Treaty or from such specific provisions.'

14.13 By a consultation document, dated 4 March 2005,¹¹⁷ the DTI sought the views of stakeholders on a proposed implementation of Directive 2000/52/EC. Member States are expected to transpose the Directive, as most recently amended by Directive 2005/81/EC, by December 31 2006.

¹¹⁷ Found at <http://www.dti.gov.uk/consultations/page16333.html>