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**THE COMMERCIAL USE OF PUBLIC
INFORMATION (CUPI)**

The Government Response
to the Office of Fair Trading
Study

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THE GOVERNMENT RESPONSE TO OFFICE OF FAIR TRADING (OFT) MARKET STUDY ON COMMERCIAL USE OF PUBLIC INFORMATION (CUPI)

Introduction

1. The Government welcomes the OFT market study of the commercial use of public information (CUPI) in the UK, which identifies some important and complex issues where the market is not functioning as well as it could. This study usefully builds on the Government's Cross-Cutting Review of the Knowledge Economy published in 2000. The Cabinet Office report "The Power of Information" published on 7 June explores new developments in the use and communication of citizen and state-generated public information in the UK.
2. The market study was launched by OFT in July 2005. The OFT recommendations reflect an OFT current priority theme concerning the interaction between government and markets and specifically the impact the public sector can have on the way markets work. The other key issue is the estimated potential value of public sector information within the economy. The OFT's report concentrates on the commercial use of public sector information by customers.
3. Public sector information holders (PSIHs) are usually the only source for much of this raw data, and although some make this available to businesses for free, others charge. A number of PSIHs also compete with businesses in turning the raw information into value-added products and services. This could enable PSIHs to restrict access to information provided solely by themselves.
4. The OFT study found that raw information is not as easily available as it should be, licensing arrangements are restrictive, prices are not always linked to costs and PSIHs may be charging higher prices to competing businesses and giving them less attractive terms than their own value-added operations.
5. The report has also found that much of the legislation and guidance, which aims to ensure access to information is provided on an equal basis, lacks clarity and is inadequately monitored. As a result the full benefits of public sector information are not being realised. OFT has estimated that the market could increase from £400m to over £1billion annually.
6. The Government acknowledges the estimated economic benefits highlighted in the OFT report. At the same time Government has to consider the costs, ensuring the on-going financial provision of the information currently collected, the fiscal cost and the costs to the bodies affected by the OFT's recommendations. At the present time the

likely scale of these costs is unknown and more work is required to make sensible indicative assessments.

7. It is the job of central Government to provide the right market conditions to enable fair and free competition. The Government is keen to establish what can be done, working with others, to address the issues identified by the OFT most effectively. This response is therefore the start of an ongoing dialogue and plan of work that we hope to have with our delivery partners.
8. The government welcomes the recommendations, and is able to accept the majority at this point. There are some that require further work. We are heartened by the commonality between the principles of this market study, and the Knowledge Economy review in 2000. Many of these recommendations have been put in place and the public sector information sector has expanded significantly as a result.
9. The key actions as a result of the proposed action plan would be; an expansion of the OPSI information fair trader scheme with all PSIHs with income over £100,000 encouraged to join, Trading Funds will prepare an action plan setting out where they are now, and how they propose to open access to their information further using the principles for improving its pricing and dissemination set out in the Knowledge Economy report, improved guidance documents for PSIHs, improved accountability through the CE including in the annual accounts a statement that they comply with the cost allocation and charging principles.
10. We are encouraged that the IFTS currently includes a number of principles that are covered by the recommendations, and consider that as this scheme is expanded better practice will spread through the sector. Examples of commonality relate to clear and fair licence terms and complaints procedures being fair, transparent and not punitive.
11. We are unable to accept all the recommendations at this time. Some further work is required by officials to consider the impact of changing data definitions and pricing policy, especially for trading funds, to ensure that there are not adverse impacts on the ability to collect the information in the future and that the proposed benefit is sufficient to justify the fiscal cost.
12. The remainder of this paper looks in turn at each of the recommendations and provides a joint government response.

The recommendations and the Government response

OFT recommendation

Addressing the inadequate availability of unrefined information

Definitions of unrefined and refined information

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

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

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

Response

The OFT point is well made and Government understands that bodies themselves and potential re-users need greater clarity. The current definitions for different types of data are from a mixture of sources, which reflect their origin. The distinction between raw/value-added comes from the review of the knowledge economy in 2000; the provisions relating to public task/documents, etc, are set out in the Re-use of Public Sector Information Directive. The situation is already complex and introducing new terms may not be helpful as existing definitions cannot be replaced or removed.

The split recommended by OFT does have the effect of making a distinction between data where competition exists and where there is no competition (contestible and non-contestible). PSIHs should be able to allocate data along these lines, with some guidance drawn up by OFT and HMT. Any guidance should recognise the role of the PSIH in ensuring that the statutory or public remit is not jeopardised. If the new concepts result in information being allocated in a different category to where it currently sits, this could have implications for the price of that information. Government will need to investigate further the potential public expenditure impacts of this before being able to accept it.

Government will report back in six months on what the implications of these possible changes are likely to be; this includes what the costs are estimated to be, recognising that they will be indicative rather than exact, and also the benefits in terms of economic efficiency. The work

will also need to take account of other terminology used in the EU Directive on the Reuse of PSI.

OFT recommendation

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

Response

The Government recognises that acceptance of this recommendation is reliant on accepting the new distinction of unrefined and refined outlined above. However, the Government accepts the principle that whatever the definitions are and the distinctions made it is right that third parties be able to make their views known to PSIHs and have them considered seriously. It would not necessarily be helpful to leave PSIHs open to constant challenge as they would not be able to plan ahead, especially on pricing if data moved from “unrefined” to “refined” and vice versa at frequent intervals. Therefore we encourage each PSIH to review its asset register at regular intervals of no longer than 5 years or earlier if there is a substantial body of enquiries or (for those bodies covered by the OPSI Information Fair Trader Scheme) at OPSI’s discretion.

OFT recommendation

Improving the availability of unrefined information

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

Response

The Government encourages PSIHs to make their unrefined information available where possible and that bodies keep their asset management structures under constant review. A Review of Government Information was carried out during the Government’s Spending Review 2000 as part of the Cross-Cutting Review of the Knowledge Economy, co-chaired by Andrew Smith, the then Chief Secretary to the Treasury, and Patricia Hewitt, then DTI Minister for Small Businesses and e-Commerce. It was concerned particularly with the availability of information subject to Crown copyright for reproduction and reuse by the information industry. The review accepted that the development of the government information sector is of considerable importance in the growth of the

UK's information sector and that information intermediaries have the key role to play in delivering products and services based on government information. The Chief Secretary to the Treasury asked that each relevant government trading fund prepare an action plan setting out where they were, and how they proposed to open access to their information further using the principles for improving its pricing and dissemination set out in the report. Trading Funds are requested to provide action plans to the CST by the end of 2007.

All PSIHs should be transparent about refusals. Government anticipates that central government and PSIHs already in the PSI market will be best placed and have the processes in place to improve the availability of unrefined information. Other bodies that hold public sector information are also encouraged to make unrefined information available.

OFT recommendation

Addressing overly restrictive terms

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

Response

The Government accepts that PSIHs should ensure that they are fully compliant with the Re-Use Regulations.

9.6 We recommend that:

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

Response

The Government accepts the recommendation. The first three points already form part of the IFTS verification process and can be addressed through the PSI complaints process. The Government encourages those PSIHs who are not accredited to IFTS to adopt these measures.

Government believes that it is acceptable for some third party market information to be made available to PSIHs in order for them to ensure that the appropriate information is made available and a fair price is paid. However, Government supports the recommendation that commercially sensitive information from a third party should not form part of such requests.

On the final bullet, the licence term should be sufficient to provide the re-user with an appropriate level of security to be able to develop information products and services. Government accepts that license periods should be appropriate for re-users but that perpetual licenses may restrict the PSIH's ability to review licence terms and that of the regulator to advise on changes and improvements that could benefit re-users. In addition where data has a very long shelf life, perpetual licences may prevent the PSIH from recovering the full costs of maintaining its data on an ongoing basis. A sensible balance needs to be maintained.

OFT recommendation

Addressing concerns about quality of service

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

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

Response

Accept in principle that PSIHs should improve their accountability. However, Government believes that PSIHs generally know who their customers are and are best placed to determine how accountability to them is achieved. Government endorses the idea of wide consultation with stakeholders as an excellent step in improving accountability. In addition some communication from PSIHs which outlined new types or forms of unrefined data that it is planned to make available in the future and how it would be delivered would be beneficial to all parties.

OFT recommendation

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

Response

The Government accepts that PSIHs should list on their asset registers or elsewhere on public websites the unrefined information that they make available for re-use and the services they offer in a clear and transparent manner that is easy for potential users to access. As part of this customer service all PSIHs should publish target times for turnaround of the information. Government recognises that for requests for one-off or non standard products, other constraints might delay their provision; however, even in these cases some indicative turnaround time should be achievable.

OFT recommendations

Addressing potential high prices

Improving accounting practices

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

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

Improving pricing practices: unrefined information

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

information operations. We do however recommend that directly attributable costs should be identified and that the justification for the pricing policy should be articulated.

Improving pricing practices: refined information

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

Responses

The government accepts this recommendation in principle – and indeed as a result of the Knowledge Economy bodies are encouraged to provide raw information at marginal cost where possible. This leads to a much easier access and lower prices for the majority of information than even recommended by the OFT.

An exception was made for Trading Funds on the basis that with very high fixed costs of collection, marginal cost pricing was likely to shift the cost to taxpayers and away from commercial re-users. We need to consider further whether this no longer applies and the implications of changing the charging policy of trading funds.

This series of recommendations is of significant importance for Trading Funds but will impact on all PSIHs. Currently Trading Funds are required to set their prices in line with market prices – through a process of price differentiation through product differentiation for all their information services whether raw/unrefined or value-added/refined information. The move by Departments and agencies (other than trading funds) to a policy of marginal cost pricing for the licensing of basic "raw" data came into effect on 1 April 2001.

The OFT recommendation would set limits of no more than full cost recovery and required rate of return. This may have major implications for the way in which Trading Funds obtain income and may reduce surpluses needed for maintenance of their data and future investment. It will also impact on revenue collection for other forms of PSIH. The current pricing regime provides a balance between the needs of commercial re-users, the maintenance of trading funds' public tasks, and a reasonable return to the taxpayer from the IPR purchased by them. Any change to it would potentially have significant public expenditure implications.

There may, on the other hand, be potentially significant wider economic benefits from the greater use of public sector information that may be encouraged by the OFT's recommendations on pricing.

The 2000 Knowledge Economy report looked at the price of Government information and the different methods of charging. It concluded that the benefit to the economy of a policy of marginal costing for all Government information was uncertain and this was most evident in the Trading Funds model. The report recommended that work should be carried out by HM Treasury and the DTI on the economics of information pricing with a view to developing further the evidence base and to inform future policy decisions. This work had been put on hold, but the importance attached to this aspect of the public information sector by the OFT provides helpful momentum for this work now to be taken forward. It is Government's intention to minimise the period of uncertainty for PSIHS.

OFT recommendation

Recommendations concerning guidance documents

9.10 To address the issues with the guidance we are participating in HMT's modernisation of 'Government Accounting'. HMT announced the plans in April 2006, stating the aim is 'to articulate the high level principles clearly and concisely, and in a reasonably timeless way.' 210

Response

Accepted. Officials from OFT are members of the modernisation of Government Accounting project consultation group. The aim is to publish the new version in summer 2007, which will include, for the first time, detailed guidance on charging for government information.

OFT recommendation

9.11

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

Response

It is planned that the revised Government Accounting will include, for the first time, detailed guidance on charging for government information as well as guidance on costing, forecasting, monitoring and accounting. The revised guidance is being circulated widely across government for consultation, and as part of this process there will be opportunity for OFT to comment on the contents of these prior to publication.

OFT recommendation

Addressing concerns with Ordnance Survey

9.12 As a result of the problems identified with OS, and considering it is the largest PSIH in the UK, based on the revenue received from licensing information, we consider it essential that the issues set out in Chapter 7 are resolved without delay.

9.13 We have discussed our concerns both with OS and Communities and Local Government (CLG) – OS' parent department - and we will maintain an ongoing dialogue with them regarding these issues. However, should the concerns set out in Chapter 7 not be resolved, we would need to consider whether further action by the OFT would be warranted to address these concerns.

Response

OFT and OS have met to discuss and resolve a number of outstanding issues. The Government welcomes this constructive engagement. These discussions are continuing.

OFT recommendation

Recommendations on the regulatory framework and securing Compliance

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

Response

The Government agrees that PSIHs should allow equal access to raw/unrefined information and that this is built into the IFTS accreditation. If the recommendations in relation to pricing issues are accepted then OPSI will require specialist advice to undertake this scrutiny. This is covered in the response at 9.19 below. The Government welcomes the suggestion that a proportionate approach should be taken.

OFT Recommendation

9.15 Under current arrangements, the full IFTS only applies to major Crown information traders with delegated authority for licensing Crown copyright information and other PSIHs that choose to join voluntarily. We would like to see all PSIHs (both Crown and non-Crown) earning income of more than £100,000 per annum from the supply of PSI being expected to gain IFTS Accreditation.

Response

The Government accepts that all PSIHs should be encouraged to join the IFTS scheme, especially those earning income in excess of £100,000. Accreditation brings benefits to those in membership and gives reassurance to customers that they will receive a level of service. However, there are resource implications for the wider public sector and OPSI as the body who would process and assess applications. How increased participation in the IFTS scheme could work, and its resource implications, will be looked at further over the next six months. There are a number of possible ways in which this could be achieved and all need exploring in more detail.

OFT recommendation

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

Response

The Government recognises and understands the thrust of this recommendation. PSIH asset lists should be complete. However, Government wants to ensure that information audits add real value. The Government agrees that audits should take place where OPSI consider necessary and be based on principles set out in the Hampton report which rule out inspections without cause. Spot checks should only be undertaken when there is a reason and based on an assessment of risk. Government believes that best results will be obtained by giving the parties concerned some advance notice (up to 48 hours) so that the appropriate information and persons can be made available to enable the audit to proceed successfully.

OFT recommendation

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

Response

The merger of OPSI with the National Archives (TNA) in October 2006 enables the combined organisation to provide strong and coherent leadership for the development of information policy across government and the wider public sector.

The Comprehensive Spending Review for 2008 - 11 has been settled for TNA (of which OPSI is an executive agency). The TNA will consider what their policy priorities are and provide funding accordingly within this allocation. In coming to this decision they will take into account the benefits and merits of implementation compared with the costs of delivery.

OFT recommendation

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

Response

The Government accepts that the Chief Executive or equivalent of a PSIH should include a statement in the annual accounts confirming compliance with HMT and OPSI guidance in regard to cost allocation and charging requirements. Government believes that this will improve transparency.

OFT recommendation

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

Response

The Government supports the use of specialist advice to support OPSI's work when necessary. OPSI will need to consider the costs and benefits of using such specialist expertise on a case by case basis.

OFT recommendation

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

Response

The Government is happy to support this recommendation. This is already existing government policy. Government accepts that it is right that customers who make a legitimate complaint should not receive inferior treatment or be treated in any way different to similar customers while any complaint is being investigated. Every PSIH should, in its published procedures, state clearly that customers will not be treated unfairly following a complaint.

OFT recommendation

9.21 We recommend that OPSI amends its published procedures for investigating complaints under the Re-use Regulations to provide explicitly for the option of (a) revoking a delegation of authority in full or in part for Crown

bodies, and (b) recommending to the parent department, in appropriate circumstances, that a PSIH is divested of its refined information operation.

Response

Government accepts that OPSI already has these powers to investigate complaints and that they should be made explicit. The recommendation is in line with current policy. OPSI can already revoke a delegation, and they can make recommendations to parent departments.

OFT recommendation

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

Response

As the OFT report notes, the Commission's forthcoming review of the Re-use Directive provides an opportunity to review the coverage of public research organisations. We would be willing to participate in the Commission's review, although we do not at present believe that a case has been made for extending the coverage of the Directive. Commercial operations of public research organisations are still relatively small scale. There is no evidence to suggest market distortions are occurring, but if such evidence emerges we would of course review the position.

The terms of the OFT report mention briefly the issue of data from public research organisations, and this paragraph contains the Government's response in relation to such organisations. In relation to this, the Government supports the policy with regard to dissemination of publicly funded research laid out in a Research Council UK position statement published in June 2006

www.rcuk.ac.uk/research/outputs/access/default.htm. The models and mechanisms for publication and access to research must be both efficient and cost-effective in the use of public funds. Public research organisations should be able, in handling any requests for data, to recover the full economic costs they incur, including collection, maintenance and delivery, to sustain the public sector investment in their research.

OFT recommendation

Review of improvements in the PSI sector

9.23 To ensure that our recommendations are implemented and improvements are seen in practice in the PSI sector, we will review the changes that arise, the effectiveness of our recommendations and take stock of the developments that have occurred since the publication of our report. As

a result of this review, the OFT will consider whether it would be appropriate, if PSIHs have not implemented our recommendations, to propose legislation in order to realise their benefits. This review would not prevent the OFT from exercising its powers in the meantime, should it consider this to be appropriate.

Response

Government welcomes OFT's continued interest in the PSI sector. It is hoped that the recommendations that Government has accepted will have a beneficial impact on the sector as a whole. Government hopes that where further work has been identified OFT will allow sufficient time for this to reach a conclusion before taking action.

The Government would need to be persuaded that additional legislation was necessary beyond regulatory mechanisms already available or powers already available to OFT.

End
DTI
June 2007