



## **REVIEW BOARD OF APPSI**

### **Report**

in relation to requests by Intelligent Addressing Limited and Ordnance Survey to review certain recommendations made in the Report of the Office of Public Sector Information of 13 July 2006 relating to a complaint by Intelligent Addressing Limited (SO 42/8/4)

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# REVIEW BOARD OF APPSI

## REPORT

This Report relates to requests by Intelligent Addressing Limited and Ordnance Survey to review certain recommendations made in the Report of the Office of Public Sector Information of 13 July 2006 relating to a complaint by Intelligent Addressing Limited (SO 42/8/4). It represents the unanimous views of the members of the Review Board.<sup>1</sup>

### 1. Background and scope

- 1.1 Intelligent Addressing Limited (IA) is a partner in a joint venture with Local Government Information House Ltd (LGIH) in the preparation and publishing of the National Land & Property Gazetteer (NLPG).
- 1.2 Ordnance Survey (OS), a public sector body accredited under the Information Fair Trading Scheme (IFTS), has produced a dataset, OS Addresspoint (AP), which uses its own mapping data, and, under licence dated 26 July 1996, Royal Mail (RM)'s proprietary post coding address file (PAF).
- 1.3 LGIH seeks a licence from OS for the use of AP in its joint venture with IA, but IA is dissatisfied with the terms so far offered by OS, and no licence has yet been issued. IA first sought to secure reconsideration of the terms and procedures offered by OS under OS's internal complaints procedure, but was successful on only one of approximately nineteen specific points which had been raised.
- 1.4 IA then complained on 15 February 2006 to the Office for Public Sector Information (OPSI) and OS, that OS was in breach of its obligations under both the Re-use of Public Sector Information Regulations SI 2005 No 1515 (the Regulations) and IFTS, and in the light of a letter of 15 March 2006, in response, formally complained to OPSI by letter, and annex, of 7 April 2006.
- 1.5 OPSI reported on that complaint in draft on 5 June 2006, and in final form on 13 July 2006 (SO 42/8/4). Its report considered complaints both under the Regulations and IFTS, and made a number of recommendations. The first draft report dated June 2006 was slightly shorter and less concise than the final report (63 paragraphs as opposed to 74), which sought to separate more clearly obligations under the Regulations and IFTS.
- 1.6 Although IA regarded that final report as being generally favourable to its contentions, it nevertheless made a formal request to the Advisory Panel on Public Sector Information (APPSI) on 31 July 2006 for review of one specific matter in the report, and of some more general considerations.

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<sup>1</sup> Professor Richard Susskind OBE (Chair of APPSI), Mr Peter Wienand (Deputy Chair of APPSI) and Emeritus Professor Colin Tapper.

- 1.7 APPSI's procedures in relation to complaints under the Regulations are set out in its 'Procedures For Reviewing Complaints Arising Under the Re-Use of Public Sector Information Regulations 2005' as published on 30 June 2005 (the APPSI Procedure).
- 1.8 APPSI communicated on 11 August 2006 its preliminary decision that IA's request fell broadly within its remit, and its intention to proceed. At that stage no formal request for a review had been received from OS, but such a request was made on 28 September 2006. OS's request did not comply with the APPSI Procedure, and a further request which did comply was made on 20 October 2006, and accepted by APPSI on 31 October 2006 as being broadly within APPSI's remit.
- 1.9 Paragraph 21(3) of the APPSI Procedure requires a request to be limited to 2000 words, a response of the same length from the other party, and a further response of 500 words from the original requester. All applicable submissions having been received by 22 December 2006 (upon receipt of OS's response to IA's response to its request), APPSI was in a position to proceed with its review and a Review Board (the Board) consisting of Professor Richard Susskind OBE (Chair of APPSI), Mr Peter Wienand (Deputy Chair of APPSI) and Emeritus Professor Colin Tapper was convened, and the parties informed of its composition.
- 1.10 On 27 March 2007, the Board sent a draft of this Report to the parties and to OPSI, inviting them to identify any errors of fact and to notify the Board if there were any further documents that the Board should examine. By 12 April 2006, the Board had received responses from the parties and from OPSI. The Report has been amended in light of these replies, but none of the central substantive findings have been changed.

#### *Remit*

- 1.11 Under the Regulations the Board is confined to considering complaints relating to non-compliance with them (see Regulation 17(2) relating to the origination of the process of complaint). It has no power to extend its consideration to complaints of breach of IFTS, and those parts of OPSI's report which related to such matters have not been considered as such by the Board, or made subject to its formal decision. The parties were informed on 6 October 2006 that such complaints fell outside the remit of the Board, except to the extent that any such matters were directly relevant to an alleged breach of the Regulations. It is noted that in paragraph 2.1 of its request for a review OS intimated a request for a change in the remit of APPSI in this respect. APPSI has not been informed of any such change, and this report has been compiled on the basis that no such change has been made.
- 1.12 It should be stressed at a more general level that the powers and duties of APPSI in this context are established by the Regulations, and that neither APPSI, nor the parties, nor the Board, has any power to extend its remit, or to waive the

limits so set. The interpretation of the Regulations in this respect is a matter of law for the Board to determine.

## 2. Analysis

2.1 The Regulations apply at their broadest to the re-use of public sector information. No issue arises here as to OS being a body in the public sector (as defined in Regulation 3), nor as to AP being a document. ‘Document’ is broadly defined in Regulation 2, and explicitly includes ‘any part’ of any content. An issue does arise as to whether any of the proposed transactions in relation to AP amounts to re-use within Regulation 4, but it is inappropriate, for the reasons set out below, for the Board to resolve that issue in the context of the requests for review that have been made by the parties.

2.2 Some documents, despite falling within the broad ambit of the Regulations as set out in 2.1 above, are excluded explicitly from the application of the Regulations by Regulation 5, of which sub-section (1) is reproduced in full:

“5. (1) These Regulations do not apply to a document where –

- (a) the activity of supplying the document is one which falls outside the public task of the public sector body; or
- (b) a third party owns relevant intellectual property rights in the document.”

Nothing in the remaining sub-sections of Regulation 5 affects the interpretation of those exclusionary words.

2.3 It is accordingly necessary, at the outset, for the Board to determine whether or not AP is a document which falls to be excluded under either or both limbs of Regulation 5. If it determines that AP is such a document, the Regulations do not apply to transactions relating to it, and the parties must seek remedies for any grievance elsewhere, such as litigation in the area of competition law. While it is no necessary task of the Board to express its views on possible alternatives it has included some observations on the matter in section 4 below.

### *Excluded matters*

2.4 Under Regulation 5, the two classes of documents excluded from the ambit of the Regulations are those where supply of the document is not part of the public task of the sector body, or where a third party owns relevant intellectual property in it. Neither of these classes is fully or further defined in the Regulations, nor are the explanatory notes to Regulation 5 helpful. The Regulations do however implement Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 (the Directive), and help may be derived from that document in the interpretation of the Regulations. Argument by the parties on these matters was also addressed to OPSI (especially in the exchange of letters of 15 March (from OS to IA), and the annex to the letter of 7 April (from IA to OPSI)), and was dealt with in OPSI’s final report. OS raised these issues again in its request for a review in relation to the interpretation of regulation 4(1), to which IA responded, and OS further responded. Important guidance is also provided in OPSI’s Guide to the Regulations and Best Practice published in June 2005 (the Best Practice Guide).

- 2.5 It is proposed first to consider separately each of these exclusions (under the rubrics ‘intellectual property’ and ‘public task’) in the light of the matters and documents mentioned in 2.4 above.
- 2.6 The former seems the clearer cut, and will be considered first. The second is more controversial, and obscure; but nevertheless, for reasons given in section 2.16 below, requires detailed consideration by the Board.

*Intellectual property*

- 2.7 There is no dispute that under the licence of 26 July 1996 RM retains copyright in its PAF (cl 8.1), and that RM has agreed to the use by OS of PAF as an integral part of AP (cl 4), and to permit OS to pass AP on to end users upon a further end user licence, the terms of which are required to be in the terms set out in Annex 5 (which reiterate RM’s retention of copyright). It would thus seem that AP falls within the exclusion by Regulation 5(1)(b) of documents (here part of AP) in which a third party (here RM) owns intellectual property rights (here copyright in the PAF component of AP).
- 2.8 Paragraph 27 of OPSI’s report expresses the view that the exclusion fails to apply because any licence for the use of AP also contains a licence for the use of PAF. This appears, as argued in paragraph 4.2 of OS’s request for a review (see also paragraph 5 of the Annex to OS’s letter to IA of 16 March 2006), to confuse the issue of ownership of intellectual property rights with that of infringement of intellectual property rights.
- 2.9 It might be sought to justify this position by invoking the qualification in Regulation 5(1)(b), that the intellectual property rights be *relevant*, on the basis that where the use of the third party intellectual property is agreed, then such intellectual property rights become irrelevant for the purposes of construing the Regulations, and adjudicating upon complaints of their breach.
- 2.10 The Board takes the view that this would be to misunderstand the qualification *relevant*, which more naturally refers to the type of intellectual property right which is owned by the third party. While many forms of intellectual property exist, the Regulations apply to only four, and these are defined in Regulation 2 as being ‘relevant intellectual property rights’.
- 2.11 In any event, the qualification could not, in the Board’s view, exclude intellectual property rights in an essential and functional prime component of a commercial product, which could be incorporated only by agreement with the third party in question.
- 2.12 Had it been intended, either by the Directive or by the Regulations, to restrict the exclusion to documents in respect of which no licence had been granted for the incorporation of third party intellectual property rights, it would have been simple to have drafted them so as to do so, but neither document incorporates any such drafting or imposes any such restriction upon the natural meaning of the words used.

- 2.13 For these reasons the Board rejects OPSI's conclusion in paragraph 27 of its Report that Regulation 5(1)(b) does not apply.
- 2.14 It necessarily follows that the Board has no power under the Regulations to make recommendations in relation to the requests for review that are the subject of this report (see section 1.6 and section 1.8).

#### *Public Task*

- 2.15 As noted above there is no definition of 'public task' in the Regulations, nor is it elaborated in the explanatory notes. The most authoritative guidance is to be derived from Recital 9 of the Directive, which states that:

“Activities falling outside the public task will typically include supply of documents that are provided or charged for exclusively on a commercial basis and in competition with others in the market.”

The supply of AP by OS appears to fall squarely within such a categorisation, which clearly recognises that while the supply of some products falls within the public task of a public body the supply of others does not. This is also explicitly acknowledged by Best Practice Guide (paragraph 3.13).

- 2.16 It has however been contended by OS (paragraph 3.2 and appended footnote 3 of its own request for a review), that the commercialisation of the information held by OS is 'a core part of its public task'. This argument is supported by reference to The Ordnance Survey Trading Fund Order 1999 SI 1999 No 965 (the Trading Fund Order), and the Ordnance Survey Framework Document of July 2004 (the Framework Document). This mirrors OPSI's conclusion in paragraphs 24 and 25 of its Report, which further remarks in paragraph 26 that neither IA nor OS had suggested the provision of AP falls outside OS's public task. However, it does not follow that, because the parties and OPSI do not disagree over the question of public task, the Board should therefore disregard the question. The question of public task is relevant and must be addressed in this case not because it is the subject of dispute but because if the activity of supplying the document (in this case, AP) falls outside the scope of OS, then the dispute falls outside the Regulations and outside APPSI's power to make recommendations under the Regulations. This is a matter of legal interpretation of the Regulations which APPSI cannot settle simply by accepting the positions of the parties. The Board's responsibility when it comes to determining remit is to undertake the interpretation for itself.
- 2.17 IA's position, as expressed in its original complaint, distinguished between OS's supply of AP, which it contended was within OS's public task (reference 2 of Annex to letter of 7 April, first paragraph), and the supply of other commercial products such as MMAL, see especially IA's response to OS's formal request for a review of OPSI's report by APPSI (paragraph 3.1 and appended footnote 3). It there denies that such provision does fall within OS's public task, and in so doing refers to paragraphs 3.13 and 3.14 of the Best Practice Guide. The Board finds

no justification for this distinction between two commercial products both supplied under licence by OS, as further amplified below.

- 2.18 In seeking to determine whether the supply of a document is within the public task of OS or outside it, the Board has found few definitive statements to assist it. While the Trading Fund Order and Framework Document describe the operations of OS, they nowhere define the public task of OS. Indeed these documents pre-date the Regulations so that any specifications within them of the scope of OS's activities and responsibilities could not have been articulated in response to the concept of 'public task', as introduced by the Regulations. The Best Practice Guide devotes a separate section to the consideration of the nature of the public task of a body in the public sector, and is, for the time being, regarded by the Board as the most definitive statement available on the subject. It begins in paragraph 3.13 with a sentence reminiscent of the words quoted in 2.15 above from Recital 9 of the Directive:

"The production of documents may fall outside the scope of a public sector body's public task where they are not directed to its core responsibility, *such as where they are optional commercial products competing in the open market.*" (Emphasis supplied.)

- 2.19 Having noted that the boundary of the public sector task is difficult to draw, the Best Practice Guide goes on to cite the very example of government trading funds:

"For example, government trading funds are required to develop profitable commercial outlets for their services in order to offset core and central overheads (and they then make a return to the Treasury). These value added services are often built around information provided as part of their public task." (paragraph 3.13)

The clear implication of this passage is that while the provision of core information is part of the body's public task, the fundamental idea of a trading fund is to require and authorise the commercial exploitation of such core information to finance the carrying out of the core tasks, which may thus be clearly separated from the core task itself.

- 2.20 This view is then reinforced in paragraph 3.14 of the Best Practice Guide, which sets out in a list of bullet points the characteristics likely to feature in a public sector's particular activity so as to identify it as a public task:

- “• It is essential to the business of the public sector;
- It explains the policy of public sector bodies;
- It sets out how the law, in both UK and EU, must be complied with;
- The citizen will consider the information to be key to their relationship with the public sector;
- There may be a statutory requirement to produce or issue such information;
- It enjoys an authoritative status by virtue of its issue by the public sector.”

- 2.21 In the view of the Board, none of these criteria applies to AP in particular, and the overall tone of their cumulation tells still more strongly against the



categorisation of its supply as a core part of OS's public task. It is also significant that paragraph 3.16 of the Best Practice Guide states that 'Value-added information, however, is not automatically outside the public task, though it would be a reasonable working assumption that it was unless there are other persuasive factors arguing otherwise.' The Board agrees with that approach, and has been unable to identify any sufficiently convincing factors to persuade it that the supply of AP, an undoubtedly value-added product (see paragraph 14 of OS's letter to IA of 15 March), does fall within OS's public task, or is a core responsibility.

- 2.22 The Board notes that in paragraph 1 of Annex B to its Framework Document of July 2004, OS's remit is described as to "maintain the master map of Great Britain sufficiently up to date and of suitable content to meet the current and future data, graphic and information needs of all its customers, and provide national coverage of medium and small-scale data". The Board regards it as significant that certain surveying and mapping activity was there stated to be funded through central government. The paragraph goes on to mention that in addition to such 'core' activities, 'additional services may be undertaken with private or public sector partners' (emphasis supplied). Thus where partnership is required (in the case of AP with RM as a public sector partner), the service is described as an additional service.
- 2.23 The Board takes the view that the core responsibility and public task of OS is to compile and maintain accurate mapping data, and to finance that activity by commercial means, but that it does not necessarily follow that the supply of any particular commercial product thus becomes part of its public task. The Board is aware that OS takes the view that all of the products it supplies are part of its core task, that it is impractical to distinguish between its basic mapping functions which include the maintenance of its main topographical dataset (which it does not supply as such), and commercial products such as AP and MMAL which add value and are derived in part from it. In the Board's view such a distinction can, and should, be made. In this respect, the Board agrees with the analysis of the Office of Fair Trading (OFT)'s Report of December 2006 *The commercial use of public information (CUPI)* (OFT861), and in particular its distinction between 'unrefined' and 'refined' material (which in key respects also corresponds roughly with that made by HM Treasury in its paper *Cross-cutting Review of the Knowledge Economy: Review of Government Information* of December 2000, which distinguished 'raw' and 'value-added' information<sup>2</sup>). If it is possible to separate and to supply information from the main topographical dataset for the purposes of the compilation of AP within OS, it is not clear why it would not also be possible to do the same for the purposes of supply to any third party.
- 2.24 This conclusion as to the ambit of its core public task may be tested by asking hypothetically whether OS would be in derogation of its public task and answerable to Parliament if it determined not to compile or maintain

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<sup>2</sup> The requirement for investment in the obtaining of data as a prerequisite for securing database right in a database presents an analogy here (especially, in light of the decision of the European Court of Justice in *British Horseracing Board Ltd v William Hill Organisation Ltd* (C203/02), ECJ 9 November 2004; [2004] E.C.R. I-1041; [2005] 1 CLMR 15; see especially paragraph 42).

appropriately accurate, comprehensive, and current basic mapping data (its main topographical dataset). The answer to that question would surely be a resounding 'yes'. It is much less clear that a similar conclusion would be arrived at in relation to the supply of any particular commercial products by OS, such as AP, derived in part from that main topographical dataset.

- 2.25 This view is reinforced by the consideration that if the production of AP were to be regarded as part of the core public task of OS, it is difficult to see why other commercial products themselves utilising AP, such as Master-Map Address Layer 2 (MMAL2), which are also designed to produce a commercial return to finance the other work (to use a deliberately neutral description) of OS, would not themselves as such form part of OS's core public task (a conclusion forcefully rejected in Reference 2 of IA's annex to its letter of 7 April 2006). In other words the view that OS is required to supply products which produce a commercial return is too indiscriminating, and does not of itself prove that the production or supply of any such products is part of the public task.
- 2.26 The Board takes the view that the whole scheme for the supply of public sector information envisages that the supply of some information (for example, that falling within the definition 'raw data' referred to in the Best Practice Guide, paragraph 3.15) will fall within the scope of the public sector body's public task, and the supply of other information will not. The Regulations apply only to a supply of information which does, and the Board's remit extends only to the application of the Regulations. The Board must thus determine in relation to any document which is the subject of a reference to it, in the light of the information available to it, whether or not it is within the public sector body's core public task. While the Board accepts that the supply of some products on a commercial basis can fall within the public task, in this case, given the terms of the Best Practice Guide, the Board concludes that, on balance, the supply of AP falls outside the public task of OS.
- 2.27 For all of the reasons advanced above, the Board does not therefore accept OPSI's conclusion in paragraph 25 of its Report that Regulation 5(1)(a) does not apply to the supply of AP, and so determines that such supply falls outside the category of documents to which the Regulations apply.

### *Overall*

- 2.28 The Board finds that RM owns intellectual property rights in AP; that its supply is not part of the public task of OS; and consequently that it falls outside the scope of the Regulations, and hence that there can be no breach. It thus rejects as inappropriate and inapplicable those parts of OPSI's Report which refer to any and all alleged breaches of the Regulations. It follows, consistent with section 2.14 above, that the Board has no power under the Regulations to make recommendations in relation to the requests for review that are the subject of this report (see section 1.6 and section 1.8).

### 3. Specific Requests

- 3.1 It may be helpful for the Board to indicate its resolution of the more specific requests made by the parties in their applications for review in the light of its determination of the scope of its powers in relation to this dispute.

#### *Request by IA*

- 3.2 The specific issue raised by IA related to the establishment and publication of charges which could be made by value added retailers (VARs) for the use of AP. Given that the supply of AP by OS has been determined to fall outside the Regulations, the resolution of any such issue would fall to OPSI. In the Board's view such resolution would be likely to involve issues of competition law which ought to be remitted to the Office of Fair Trading (OFT) under the Memorandum of Understanding between OFT and OPSI of 26 August 2005, or otherwise to be considered by the courts.
- 3.3 The more general issue raised by IA relates to an alleged lack of emphasis in its final report, an allegation that the final version had been toned down, and the absence of either a timetable for action or a financial remedy. Given the conclusions reached in this Report in relation to the substantive issues, the Review Board does not consider it appropriate to consider the question of the tone of the OPSI final report.

#### *Request by OS*

- 3.4 The conclusion of OS's request contains a convenient list of the various issues upon which it seeks the Board's consideration, and the Board's response adopts that listing:
- 3.4.1 the Board accepts as a general policy that the Regulations and IFTS should be interpreted consistently, but since the latter falls outside its remit, the Board could never have been in a position to apply that policy in relation to this particular dispute;
  - 3.4.2 the Board agrees, for the reasons set out above, that the Regulations do not apply to this dispute;
  - 3.4.3 whether or not OS's licensing policy satisfies the standards of transparency required by IFTS is, in the light of APPSI's determination of its remit, a matter for OPSI or, to the extent that competition law issues are concerned, the OFT or the courts, to determine;
  - 3.4.4 the Board agrees that it necessarily follows from its determination that the supply of AP falls outside the ambit of the Regulations that they do not require AP to be licensed, and whether or not IFTS does so is also a matter for OPSI or, to the extent that competition law issues are concerned, the OFT or the courts, to determine;

- 3.4.5 it also necessarily follows from the Board's determination that the supply of AP falls outside the ambit of the Regulations that there can have been no breach of the Regulations in its supply, and whether or not they are in breach of obligations under IFTS is further a matter for OPSI or, to the extent that competition law issues are concerned, the OFT or the courts; to determine;
- 3.4.6 whether or not the cost allocation in the supply of AP complies with the requirements of IFTS is yet another matter for OPSI or, to the extent that competition law issues are concerned, the OFT or the courts, to determine;
- 3.4.7 exactly the same comment applies to the pricing of OS data by volume, and to any requirement that its intellectual property in AP be licensed;
- 3.4.8 once again the same comment applies to the question of whether additional use of OS data might constitute double charging.

#### *Policy*

- 3.5 The Board takes the view that AP is a commercial product competing in the open market with other commercial products, and whether or not in supplying it OS has made agreements with a third party (whether RM, or licensees of AP) which may be intended to, or have, the effect of preventing, distorting or restricting competition within the UK, or has acted in a way which would amount to abuse of a dominant position, which seems to the Board to constitute the substance of this dispute, are clearly questions more appropriate for resolution by the Office of Fair Trading or the courts.

#### 4. Policy observations

- 4.1 As intimated in 2.3 above the Board takes the view that it may be helpful to the parties for it to express its more general views and recommendations both in relation to the interaction of the different schemes and interaction of the various bodies and rules, and as to the general policies, operating in the broad area of the use and re-use of public sector information, as illustrated in the context of this particular dispute.

##### *Implications of this report*

- 4.2 The Board notes generally that, under paragraph 12 of the APPSI Procedure, consideration of a complaint or review of a recommendation by the Board does not preclude recourse to the courts at any time, or to any other form of dispute resolution or regulatory process. Further, the conclusions of the Board in this report are not binding on the parties or on OPSI in respect of other complaints or reviews.

##### *Interactions*

- 4.3 The Board takes the view that, in broad terms, the system governing the use and re-use of public sector information is coherent (although there is debate over the underlying policy). Public sector bodies often have as core tasks, or sometimes as necessarily incidental to them, the creation, maintenance and supply of primary information, which requires the expenditure of public funds. Current policy seeks to mitigate the cost to public funds by permitting (or even requiring) relevant public sector bodies to seek to recoup part of that cost by supplying the data, or products derived from them, on a commercial basis.
- 4.4 If the raw data is to be supplied, for value to be added, both to other public sector users (including sub-groups within the originating public sector body) and to the private sector, it is right that the terms of such supply be consistent for all users, and it is to secure such consistency and fairness that the Directive and Regulations have been implemented.
- 4.5 However, there is no requirement under the Directive or the Regulations for either raw data or any particular commercial or value added product to be supplied. If such a requirement does arise, then it would be right that the data or product be supplied by the application of fair procedures and upon fair terms. In relation to government trading funds in particular those terms and practices should comply with the scheme set out by the Cabinet Office document entitled 'Information Fair Trading Scheme' of March 2004 (IFTS).
- 4.6 Confusions and complications can and do arise from having two parallel systems that impose broadly similar requirements (namely the Regulations and IFTS). **It is recommended that the Government should consider whether it would be preferable to combine IFTS and the Regulations into one coherent scheme (consistent with the requirements of the Directive)**, allowing that IFTS is in some respects broader in scope than the regime under the Regulations (see 4.15 and 4.20 below). In any event, assuming that OPSI is the most appropriate body

to adjudicate upon complaints of breach of IFTS (a point which could itself be debated), **it is recommended that consideration should be given by the Government to the possibility of appealing decisions of OPSI relating to IFTS.**

- 4.7 In any event, where a commercial or value added product is supplied by a public sector information holder it is particularly necessary that it be supplied subject to the ordinary working of the law of competition, especially that it comply fully with the provisions of the Competition Act 1998, so as, broadly, to inhibit such an offering from either exploiting monopolistic control of the raw information upon which it depends and so precluding altogether the development of a competing product within the private sector, or discriminating unfairly in the terms upon which such a product is made available to different entities within the public and private sectors.
- 4.8 The division of function between the Regulations (remitted to OPSI), and competition law (remitted to the Office of Fair Trading, and the courts of law) is recognised, and enshrined in the Memorandum of Understanding between the OFT and OPSI of 26 August 2005, arrived at in the wake of the implementation of the Regulations.
- 4.9 In this particular dispute the essence of the complaint is that a commercial product has been shielded from private competition by a refusal to license the use of that product as a vehicle for the production of further value added products upon reasonable terms.
- 4.10 Because this is a dispute relating to the commercial terms upon which a particular system is supplied it seems squarely to engage the ordinary rules and principles of competition law, and to be appropriate for resolution by OFT and/or the ordinary courts.
- 4.11 A different view would have been more appropriate had the dispute related to the terms upon which a non-commercial product consisting of 'raw' 'up-stream' information had been made available to different value-added system compilers, some within the relevant public sector body and some outside it. In that different situation, not involving at that stage elements of commercial competition, the involvement of a body such as APPSI might well have been helpful.

*Public task*

- 4.12 While the Board accepts that the concept of the public task is necessary in any analysis of the activities and functions of public sector bodies, it has found that existing definitions of 'public task' are highly problematic and insufficiently precise. The Board certainly does not take the view that any supply of products by a public sector body on a commercial basis must necessarily fall outside that body's public task, but the boundary between what is within the public task and what lies outside it is difficult to discern, especially in the case of trading funds. It is not clear whether the question is to be determined primarily by reference to

(i) the public (including social or economic) need for the information; or to (ii) the duties of the public sector body as set by local law and practice. The Directive itself is not clear even though it suggests the latter. This would, however, militate against the harmonising intent of the Directive. Given the lack of material to inform any analysis of this critical point, **the Board recommends that the Best Practice Guide be reviewed and amended to clarify the concept of 'public task', following appropriate consultation with relevant Government departments, and that each trading fund should then produce and publish a statement of scope of its public task consistent with such an amended Best Practice Guide.**

#### *Competition law*

4.13 In the light of its finding that the supply of AP by OS falls outside the remit of the Regulations, but on account of the potential competition law issues, **the Board recommends that OPSI should contact the OFT, in accordance with the 'Memorandum of understanding between the Office of Fair Trading and the Office of Public Sector Information', dated 28<sup>th</sup> July 2005, and apprise the OFT of the findings of this report.** In the Board's opinion, the issues in dispute are more appropriate for consideration and decision by OFT as the body primarily charged with the administration of competition law in the United Kingdom or by the ordinary courts.

#### *Information Fair Trader Scheme (IFTS)*

4.14 IFTS effectively seeks to set out best practice for public sector bodies, and any others who wish to subscribe to its principles, so as to comply as a minimum with the requirements of competition law, but to exceed them where best practice so suggests. The operation of the scheme is the responsibility of Her Majesty's Stationery Office (HMSO), and its Controller and the Queen's Printer for Scotland has emphasised her insistence that the open and transparent system of trading under the scheme meets the terms of the Competition Act 1998.

4.15 It is important to note that the scheme does not contain any exemptions similar to those contained in the Re-use of Public Sector Information Regulations 2005, and thus extends to documents traded by public sector bodies outside the ambit of their public task, and incorporating third party intellectual property (of any sort).

#### *Reflections on the Review process*

4.16 The Review Board felt it important, finally, to make some observations in relation to the process that led to this Report. The reviews requested by IA and OS were APPSI's first under the Regulations, so that the parties and the Government may find it helpful to learn of the Board's views.

4.17 In the first instance, the Board has been conscious of the length of time that the review process has taken; and, moreover, is acutely aware that the analysis laid out in this Report may not bring an end to the dispute between the parties. Although the thinking behind the Government's policy for the resolution of

complaints and disagreements relating to PSI has generally been that the process should be speedy, and both OPSI's and APPSI's procedures generally support this, the process will be more time-consuming in complex cases especially where, as in this case, two reviews run concurrently. The Board felt it was preferable for reasons of efficiency to consolidate the requests even if this meant that its review might take slightly longer. **It is recommended that the Government should consider whether the APPSI Review Board's procedures are appropriate or in need of revision in light of this Report.**

4.18 It might be argued that this Report is too legalistic and that a more informal approach would have been preferred. However, although this may not be the case in future reviews, the key questions at issue here are questions of interpretation of the Regulations. These are fundamentally questions of law. So far as the Board's role and remit are concerned, the Board must operate within the confines of the Regulations, and its procedures reflect this. Although there was discussion before the Regulations were brought into force about APPSI or another body offering ADR (alternative dispute resolution) services in respect of all aspects of PSI disputes (including competition and IFTS as well as PSI issues), an APPSI Review Board as constituted under the Regulations has limited powers and limited scope. Such a Board, however well-intentioned, may not seek to resolve issues that are beyond its remit as its conclusions could be subject to criticism by commentators and later complainants, and would not survive Judicial Review. However, in the light of the findings made in this Report, **it is recommended that the Government should reconsider (a) whether an ADR process for PSI disputes can be accommodated within the Regulations and (b) whether the remit of an APPSI Review Board should be extended, at least to include IFTS issues.**

4.19 As to the substantive conclusions reached, it is anticipated that many actual and potential re-users of PSI will be concerned about the scope of the Regulations, as they have been interpreted in this Report. It may be argued that some of the UK's most valuable PSI may now be seen to be outside the ambit of the Regulations. This conclusion would seem to conflict with the Government's and OPSI's concerted efforts to encourage the re-use of PSI. And it certainly conflicts with the general aspirations of APPSI in its advisory role. It is not the role of an APPSI Review Board, however, to evaluate whether the scope of the Regulations is sensible or acceptable. The role of the Board is to apply the Regulations to particular complaints or requests for review that are presented to it. In the current reviews, the members of the Board unanimously agree that the Regulations do not apply. However, the Board recognises that this interpretation suggests that the Regulations as drafted do not implement the Government's policy aspirations. **It is therefore recommended that the Government, as a matter of priority, should re-assess the extent to which the Regulations and Government policy on PSI are aligned and, if there is not full alignment, then the Regulations should be amended accordingly.** The Board notes in this context that the Directive acknowledges that certain Member States may choose in their policies to go further than the minimum standards established in the Directive, thus allowing for more extensive re-use (Recital 8).



### Summary of recommendations

- The Government should consider whether it would be preferable to combine IFTS and the Regulations into one coherent scheme (consistent with the requirements of the Directive).
- Consideration should be given by the Government to the possibility of appealing decisions of OPSI relating to IFTS.
- The Best Practice Guide should be reviewed and amended to clarify the concept of 'public task', following appropriate consultation with relevant Government departments, and each trading fund should then produce and publish a statement of scope of its public task consistent with such an amended Best Practice Guide.
- OPSI should contact the OFT, in accordance with the 'Memorandum of understanding between the Office of Fair Trading and the Office of Public Sector Information', dated 28<sup>th</sup> July 2005, and apprise the OFT of the findings of this report.
- The Government should consider whether the APPSI Review Board's procedures are appropriate or in need of revision in light of this Report.
- The Government should reconsider (a) whether an ADR process for PSI disputes can be accommodated within the Regulations and (b) whether the remit of an APPSI Review Board should be extended, at least to include IFTS issues.
- The Government, as a matter of priority, should re-assess the extent to which the Regulations and Government policy on PSI are aligned and, if there is not full alignment, then the Regulations should be amended accordingly.