

This article by **Edward Pitt of UK legal firm Addleshaw Goddard**, seeks to set out the legal framework of rules covering Ordnance Survey's behaviour when competing as a commercial undertaking and how those rules (especially the competition rules) are designed to encourage Ordnance Survey to supply first class geographic information alongside others in the public and the private sector, in the light of interesting recent items in the press recently making some assertions about Ordnance Survey's obligations when competing with the private sector.

Ordnance Survey claims that some £100 billion worth of economic activity in the national economy is underpinned by good quality geographic information. To have the very best geographic information available this will be provided by both the public sector and by the private sector.

The Issue

The means of making very high quality geographic information are changing fast, particularly driven by changes in technology and computer techniques. It is natural that Ordnance Survey, now operating as a commercial body, albeit state-owned, should seek to protect its commercial position, and indeed the position of its employees. What however it cannot do, as a commercial undertaking, is to shelter behind the skirts of Government. As a Trading Fund it must now compete on equal terms with the private sector; it is that full blown competition which, as Government policy tells us, will lead to the most efficient outcomes in terms of modern geographic information and products.

There are two broad sets of allegations against Ordnance Survey:

1 that it uses Government funding (70 per cent of Ordnance Survey's revenue comes from Central and Local Government) to cross-subsidise the making of mapping products which are also available from the private sector (see, for example, Getmapping's allegation that Ordnance Survey's digital imagery layer is cross-subsidised by its Government revenues);

2 that Ordnance Survey's agreements with both Central Government and with Local Authorities are so structured that private sector suppliers of products which compete with those of Ordnance Survey do not have the same real chance to supply the public sector.

The Law

Broadly, there are four sets of rules important to third party suppliers of mapping products when competing against Ordnance Survey or seeking to supply government:

1 the UK (and EC) competition rules, which prohibit restrictive agreements between undertakings and, pertinently for Ordnance Survey, the abuse of a dominant position;

2 the EC rules which prohibit the granting of state aid by EU Member Governments, which does or threatens to distort competition within the European Community;

3 the EC rules on public procurement; and

4 the UK Government's own "Value for Money" guidelines which departments must follow when procuring services for Government.

Competition Law: An important competition law rule, which constrains Ordnance Survey's behaviour, is Section 18 of the Competition Act, which prohibits it from abusing its dominant position. Ordnance Survey claims that it has no "monopoly". It also claims it has "survived all legal challenges based on accusations of unfair competition". The position is not quite as simple as that. It is true that Ordnance Survey does not have a statutory monopoly to provide maps, mapping products and derived data. In practice however, it does have a monopoly as a result of "first mover" advantage; it has been supplying maps for 200 years and has a huge installed database and it has been able, rightly or wrongly, to use Crown Copyright to protect its position. The database was built with, and is kept up to date by, government funding: 70% of Ordnance Survey's revenues come from the public's money. It would be impossible for third party suppliers to replicate the entire database which Ordnance Survey has and continually maintains. Even if Ordnance Survey has no formal statutory monopoly, it has itself admitted that it is dominant "in the market for maps and mapping products". It therefore agrees that it must not abuse that dominant position.

Ordnance Survey's obligation not to abuse its dominant position under Section 18 has two specific consequences:

1 there must be no unfair cross-subsidy - Ordnance Survey must sell each of its products, where it competes with the private sector, on a fully allocated cost basis, without any element of subsidy. This means that Ordnance Survey must recover at least its marginal costs of supplying such a product; in the context of maps, where the marginal cost of replication of an extra copy is often very small, this rule means that it must meet at least its Long Run Average Incremental Cost (LRAIC) of producing that product;

2 there must be "no bundling" of products – where Ordnance Survey sells, including to the public sector (Central Government or Local Government), products must not be bundled i.e. the purchasing authority or department must be free to pick and choose, and only pay for, those Ordnance Survey products that it actually needs.

On cross-subsidy there is little public confidence that Ordnance Survey has cost methodologies in place, and which are independently policed, to ensure that cross-subsidy does not happen in each case. Firstly, the Minister responsible for the Ordnance Survey promised a Framework Document which would set out some broad rules; it has yet to appear. Secondly there is no body which claims a detailed ability to be able to enforce whatever accounting rules Ordnance Survey says it follows. Each of Ordnance Survey, the National Audit Office (and indeed the House of Commons Select Committee) may make broad statements of accounting principles but no one Government Authority seems to be able to get down to the nitty gritty of being able to satisfy itself, and the public, that these cross-subsidy rules are observed with regard to individual product ranges which compete with the private sector's offerings.

As to bundling of products, the ODPM acts as central buyer of geographic information of all central government departments, under the so called Pan Government Agreement (PGA) with Ordnance Survey. It seems that the way in which the PGA is structured means that Government Departments who benefit from the PGA have a financial disincentive from buying third party products, even if they may provide a better, more efficient solution than that offered by Ordnance Survey. Central Government Departments are subject to tight central financial control and departments pay a block fee for all services and products supplied by Ordnance Survey. A Department therefore has an extra cash outlay if it wishes to buy a third party product, even if it is better than the Ordnance Survey equivalent. A parallel SLA between Local Government and Ordnance Survey is being renegotiated now through the IDeA, on behalf of Local Authorities. The terms of this have not yet been disclosed so it is not yet clear whether this agreement will suffer the same defect of forcing each local authority to buy products it may not wish to buy, as the "price" for getting those it does need.

State Aids: Ordnance Survey is also subject to the disciplines of Article 86 EC Treaty, which prohibits any aid granted by a Member State through State resources which distorts or threaten to distort competition by favouring certain undertakings, insofar as it affects trade between Member States. Since the precise terms on which Ordnance Survey receive £65/£70 million per year from Government funds (the Central Government PGA, the Local Authority SLA and the so-called "NIMSA" payments) are not public, it is not possible for the public to be satisfied that Ordnance Survey has not received State aid from the UK Government to the detriment of third party suppliers.

The EC Procurement Rules: These are essentially designed to ensure that EU Member States do not favour national producers or the "national Champion", by awarding Government contracts to them. However the rules, so the ODPM claims, do not apply where a Government decides to resource its requirements for products internally; it views procurement of geoinformation products from Ordnance Survey as a merely an "internal allocation" of tasks between government departments. This will particularly be the case, so ODPM says,

where there is no formal contract between the supplying Government Department (Ordnance Survey) and ODPM, as buyer for government. The ODPM says that the PGA is not a contractual supply agreement; each year some £25 million is paid to Ordnance Survey under an informal "understanding".

Value for money: A fourth set of Rules are the Government's own Guidelines (managed through the Office of Government Commerce – OGC) on achieving "value for money". All Government departments must seek to achieve value for money when acquiring either goods or services. Value for money is described in the Guidelines as "getting the optimum combination of whole-life cost and quality/fitness purpose". Under the PGA, the procurer for Central Government is the ODPM. No disclosure has been made (so far as I am aware) of how ODPM feels that the PGA with Ordnance Survey, as structured, meets that "value for money" test. Did ODPM's view, that for the purposes of procurement of geographic information, Ordnance Survey is an invisible part of Central government colour its view of how to achieve "value for money" under the PGA?

Enforcing the rules: A real issue is that Ordnance Survey is not seen to be effectively subject to the disciplines of the Competition Act and other rules; enforcement against Ordnance Survey is perceived to be soft:

(i) A commercial organisation can be fined up to 10% of annual turnover if it breaches the Competition Act: A Government body operating a commercial undertaking, such as Ordnance Survey, cannot be fined under the Competition Act; in practice this means that when operating in a "grey area" as to how the law applies, there is very little incentive on Ordnance Survey to change its practices until forced to change them;

(ii) Ordnance Survey is not subject to independent regulation (in the way that monopoly/quasi monopoly suppliers of telecoms, gas and electricity and water have independent regulators). The ODPM remains in practice a sponsoring Ministry, not an independent regulator. Further, bodies such as the Office of Fair Trading are timid when launching investigations into the behaviour of Government departments which operate as commercial businesses ;

(iii) Ordnance Survey's cost allocation methodologies are opaque. They have still not been published (where is the Framework Document promised for last November?) and there is no confidence that they are being vigorously monitored.

The Way forward

It is trite, but writing legislation or setting out the rules is the easy bit. Much harder is enforcing such rules and making them work. As set out above the current system for enforcement of the existing rules over Ordnance Survey is weak. It seems to me that public dissatisfaction with the current system (and the economic inefficiencies which result from an inadequately enforced system) might be corrected by a four pillar approach:

1 The appointment of small body of experts whose clear objective is the monitoring and the enforcing of the rules as it applies to bodies owned by the state which also compete commercially with the private sector (other examples include, for example, the Meteorological Office, the Crown Estate and Companies House).

2 Dispute resolution – linked to the above, there could be a framework in place, with set timescales, for disputes between the Government owned body and the private sector to be resolved properly. Ground rules might include:

- (a) proper public consultation on the problem;
- (b) consultation on the proposed solution;
- (c) a list of independent arbiters to manage the process.

A considerable amount of work has been done in the telecommunications sector to put in place effective, swift and firm dispute resolution systems. They are not complicated to set up. These might be a template for dispute resolution with Government commercial Trading Funds.

3 A proper separation between Ordnance Survey's natural monopoly business and its non-monopoly businesses, where it competes commercially with the private sector. This can be done in one of two ways:

- (a) "structural" separation – two separate companies, one for the natural monopoly business and another for the downstream businesses which compete with this private sector;
- (b) "accounting" separation ie formalised systems of accounts for each side Ordnance Survey business which are properly monitored (as happens for example between the regulated and unregulated sides of BT's businesses).

4 Public procurement - ensuring that both Central as well as Local Government, when procuring geographic information and products put the contract out to tender (whether or not obliged to do so by the EC Procurement Rules or not).

In this way the Government, and more importantly the public, could be satisfied that the very best geographic information products are made available to Central and Local Government and that the rules that apply to Ordnance Survey are properly and swiftly enforced.

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