



**HM Treasury**

# **Selling into Wider Markets: A Policy Note for Public Bodies**

**Enterprise & Growth Unit  
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## **Contents**

	<b>Paragraph No.</b>
Foreword	
Summary	
Introduction	1
Scope of the policy	4
Definition of wider markets activities	11
Use of public sector assets for wider markets projects	14
Appropriateness, propriety and legality	18
Investment	19
Risk management	22
Pricing, costs and returns	26
Retention of income	27
Use of wider markets income to offset administration costs and efficiency targets	33
End year flexibility	34
Internal wider markets officers	35
Developing a wider markets opportunity	37
Use of public private partnerships	40
Partnerships UK support in developing a wider markets opportunity	46
Wider markets review service	50

Consulting Treasury	53
Reporting	56
Further information	57

<b>Annexes</b>	<b>Page</b>
A: The EC Procurement Rules and Wider Markets Projects	20
B: Competition Policy and Pricing for Wider Markets Projects	23
C: Freedom of Information, Intellectual Property and Crown Copyright	29
D: Retaining Income from Wider Markets - How Departments Benefit	36
E: Partnerships UK Wider Markets Review: Coverage	39
F: Audit and Accounting Treatment of Public Private Partnerships	40

## **FOREWARD**

This Note replaces 'Selling Government services into Wider Markets: Policy and Guidance Note'. Published in 1998, its purpose was to provide a framework of policy and good practice for developing commercial activities using public sector assets.

The basic principles remain the same. It has, however, become necessary to update the 1998 Note to reflect a number of developments. First, new legislation and policy have been introduced which impact on wider markets activity. Examples of this include the Competition Act 1998, the Freedom of Information Act 2000 as well as the transition to Resource Accounting and Budgeting.

Second, departments have made considerable progress in implementing wider markets projects. The experience of implementation has highlighted areas where further guidance or clarification of the policy is needed.

Finally, the Treasury has established Partnerships UK as a successor to the Treasury Taskforce. Partnerships UK has been tasked and funded by Treasury to provide a range of guidance and support to help implement wider markets projects. Some of this separate guidance replaces and augments that included in the 1998 Note: particularly on issues such as developing business cases, partner selection and forming Public Private Partnerships.

## SUMMARY

This paper sets out the Government's policy for selling services into wider markets. The key points of the policy are as follows:

- Government departments, agencies and NDPBs are encouraged to make better use of their assets by engaging in commercial services based on them, where appropriate and within certain rules (Paragraphs 4-10)
- The policy applies to the commercial exploitation of physical assets, including equipment, land and premises and non-physical assets: intellectual property, data and skills (6-7)
- Departments, agencies and NDPBs will normally undertake more straightforward projects themselves. However many projects, particularly those which are larger and more complex, should be taken forward with the private sector, and wider markets is in large measure one strand of policy on Public Private Partnerships (41-45)

Policy on selling services into wider markets includes incentives. These are:

- The automatic right to retain the benefit of income generated by sales into wider markets (27-32)
- The ability to use income from selling into wider markets to offset administration cost expenditure and meet efficiency targets (in proportion to the administration cost element of the expenditure) (33-34)

Departments, agencies and NDPBs are expected to seek out and implement wider markets opportunities. (8)

Departments will be responsible for signing off wider markets projects except where projects require approval by the Treasury because they raise issues of propriety or have the potential to affect the government's overall spending plans and priorities (52). Nevertheless certain controls remain in place:

- Activity must be financed from within existing resource and administration cost limits. The income will be subject to the usual arrangements on annuality and End Year Flexibility (19-21,35).
- The policy is intended to make better use of existing assets. The case for any new assets needs to be based on delivering core departmental objectives (9) and any substantial investment should normally be undertaken by the private sector (20).

The Treasury have tasked and funded Partnerships UK to provide co-ordination, guidance and project support to help departments implement wider markets opportunities (46-52).

Queries on the wider markets policy should be addressed to Partnerships UK wider markets unit ([wider\\_markets@partnershipsuk.org.uk](mailto:wider_markets@partnershipsuk.org.uk), Tel (0207 273 8340) or to the Technology & Innovation Team at the Treasury (020 7270 4354).

## **SELLING SERVICES INTO WIDER MARKETS**

### **Introduction**

1. The Government is committed to increasing the efficiency of the public sector, both through the more effective management and delivery of public services and the fuller utilisation of public assets. To this end the Government has introduced the National Asset Register(NAR), first published in November 1997. It has put in place incentives for departments and agencies both to sell off surplus assets and to make the best use of those retained. This note sets out details of the arrangements in respect of retained assets and a framework for enabling departments, agencies and NDPBs to develop proposals for their more efficient use through commercial activity, where appropriate.
2. The Government's policy is that departments and their agencies, and NDPBs, should enhance the utilisation and value of their assets, whether physical or non-physical. In some cases, and subject to sensible safeguards, the most efficient use of an asset may involve exploiting its commercial potential. Such public sector commercial activity (wider markets activity) has the ability to generate additional resources for core departmental objectives; and to benefit the economy as a whole through more productive use of assets, for example by marketing high quality goods and services originally developed in the public sector. In many cases, commercial activity can best be taken forward as a form of public-private partnership (PPP) and the guidance should, in large measure, be seen as one strand of PPP policy.
3. This policy note sets out a framework of incentives designed to encourage wider market activity by allowing departments normally to benefit from wider markets income. Departments are encouraged where appropriate to allow their agencies and NDPBs to benefit from income generated from their own sales into wider markets. This note is supported by best practice guidance produced by Partnerships UK.<sup>1</sup>

### **Scope of the policy**

4. This policy note applies to departments, including their agencies and Trading Funds, NDPBs, and most public corporations, including NHS Trusts and other NHS bodies.<sup>2</sup> It does not apply to 'self-financing public corporations' (where so defined in agreement with the Treasury General Expenditure Statistics Team) or to local authorities. Local authorities are covered by their own arrangements, under the Local Government (Goods and Services) Act 1970 and the Local Government and Housing Act 1989. The term 'public bodies' is used in this note to mean all bodies included in the scope of this note.
5. This policy note applies to the devolved administrations although they may have alternative arrangements in place for the treatment of income. Devolved bodies should consult with the relevant wider markets contact regarding any particular arrangements

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<sup>1</sup> Available at [www.partnershipsuk.org.uk](http://www.partnershipsuk.org.uk)

<sup>2</sup> Income generation powers for NHS bodies have a statutory basis under Section 7(1) of the Health and Medicines Act 1988 and Schedule 2 paragraph 15 of the NHS and Community Care Act 1990.

which apply. A full list of contacts can be found at the Partnerships UK website ([www.partnershipsuk.org.uk/widermarkets](http://www.partnershipsuk.org.uk/widermarkets)).

6. The policy applies to all asset types, physical and non-physical. It therefore applies to software, databases, expertise, skills, brands and intellectual property as well as to physical assets such as equipment, land and premises. Exploiting the commercial potential of these assets can take many forms including selling existing goods and services, developing new goods and services from existing assets, licensing and leasing arrangements, and sponsorship activities.
7. This guidance also concerns the commercial development of the outputs from Public Sector Research Establishments. In this area, there is additional policy which is set out in the Government's response to the Baker Report.<sup>3</sup>
8. Departments, agencies and NDPBs are expected to seek out and implement wider markets opportunities, and progress towards and strategies for implementing wider markets activities will be reviewed as part of Spending Reviews.
9. This guidance essentially concerns making best use of existing public sector assets. The case for acquiring any new assets should continue to be based on delivering core departmental objectives. It may, however, be sensible to consider potential future wider markets opportunities when acquiring new assets, for example, the potential to generate third party revenues in PFI projects. These considerations should not, however, significantly affect the size and nature of the public investment programme. Public bodies should not deliberately buy more assets than they need with the aim of producing a future income stream, as this would constitute a payment in advance of need.
10. Nothing in this guidance is intended to discourage departments from using their assets to sell services to other departments on inter-departmental service terms. (This applies whether the services are of a type which are unlikely ever to be suitable for wider markets, or which at some future date might also be sold as a commercial activity into wider markets).

### **Definition of wider markets activities**

11. For the purposes of the policy set out in this Note, wider markets activities are those where the sale of goods and/or services meet the following criteria.
  - It is not a statutory service<sup>4</sup> except where the enabling power for a (non-regulatory) service specifically states that charges can be made on a commercial basis;
  - It is charged on a commercial basis, meaning that the financial objective is to achieve additional revenues and that the price is not affected by public policy objectives.

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<sup>3</sup> *The Government Response to the Baker Report*, Office of Science and Technology and HM Treasury, 1999. ([www.hm-treasury.gov.uk/docs/1999/baker.html](http://www.hm-treasury.gov.uk/docs/1999/baker.html))

<sup>4</sup> A statutory service is normally defined as one where there is, or would need to be, a provision in statute, including statutory instruments giving effect to EC Directives, to recover a fee or charge for the service. (A specific statutory charging power is required if charges are to be made for services of the nature of a State regulatory service, but may also be considered appropriate in other cases.)

- The activity is discretionary in nature.<sup>5</sup>
  - Customers are not tied to the public body supplying the goods or service concerned, and are free to either not buy or to buy them from whatever source provides the best value for money.
  - The good or service is sold in a competitive market. Normally, this is where the public sector competes with the private sector for market share. In some cases the public sector may have a large share of the market, or be the sole supplier. This should not prevent the public sector engaging in a wider markets activity, but it is essential that it complies with Competition Law, the government Fees and Charges policy and does not act anti-competitively (see Annex B).
12. A service is not a wider markets service if it is sold only to other government departments and other public bodies listed in the definition of “inter-departmental services” (in the Fees and Charges Guide). However, where the conditions at paragraph 11 are met, wider markets projects involving trade between departments, NDPBS and local authorities are covered by the wider markets guidance.
  13. In circumstances where public bodies are unclear regarding the status of particular activities, they should seek advice from Partnerships UK and consult the relevant Treasury spending team.

### **Use of public sector assets for wider markets projects**

14. Departments intending to undertake a commercial activity which involves selling a good or service derived from public sector assets (other than in cases which involve carrying out a statutory function) should consider thoroughly whether the asset is needed at all to meet core public sector objectives. If not, the best option will usually be disposal subject to any necessary authority. The Government has announced incentives for the disposal of capital assets. PES (98) 5 refers.
15. Where a public body is contributing a public sector asset to a Public Private Partnership (PPP), it should not normally be vested in the PPP (where it is a joint venture company or other entity) or the private sector partner. Rather, the use of the asset should normally be made available to the PPP on appropriate terms which should be set out in a separate contract. Where, exceptionally, an asset is vested in a PPP, the public body should seek to ensure that in the event of disposal of the asset, an appropriate share of the proceeds accrues to the Exchequer.
16. Alternatively, if the public sector continues to need services derived from the asset, it could consider whether it would be more efficient to transfer that asset to the private sector and purchase the required services from a private sector provider, by means of a private finance or some other structure.

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<sup>5</sup> However, in some cases, for example some public corporations, certain commercial activity will be core to the objectives of the body. For the most part such activities can be defined as wider markets where the other criteria are met.

17. Consideration of whether to use an asset for wider markets purposes should also take into account the possibility of increasing the utilisation of the asset by sharing it with other parts of the public sector, including local authorities.

### **Appropriateness, propriety and legality**

18. The proposed commercial activity should be one which the responsible accounting officer would be able to defend as an appropriate use of resources. Public bodies should take into account the following.

- Whether they have the *Parliamentary authority* that may be needed for any expenditure concerned. For example, departments may need to seek a change in the ambit of the appropriate Vote (Request for Resource).
- Whether they have the *legal powers* (vires) to undertake the activity, for example there may be constraints on the scope of a public body's activity or its ability to form a joint venture company. Public bodies should be aware that contractual options remain open to them even where their vires place limitations on their ability to form a formal joint venture company.
- *Parliamentary and public expectations* about the type of activity in which public sector bodies should properly engage. Even when public bodies have the necessary vires, they may require statutory authority as a matter of financial propriety under the Concordat between the Treasury and the Public Accounts Committee (see Annex 2.1 of Chapter 2 of Government Accounting), if the activity will require expenditure extending beyond two financial years and in excess of £900,000 a year.
- *Domestic and European procurement rules*. In this context, selling into wider markets is not generally governed by public procurement rules, but departments should consider carefully whether any arrangement with a private sector partner would represent a contract for the provision of goods or services to which either government or the EC procurement rules might apply. Annex A sets out more detailed guidance on the scope and application of the EC procurement rules in wider markets projects.
- *Value for money*. Public bodies are required to achieve and demonstrate value for money for any expenditure or use of a public sector asset in a wider markets project. In the context of wider markets, value for money should be assessed as the net returns the public sector is projected to receive from the activity over its lifetime, consistent with the effective management of risks and liabilities to the public sector and consistent with achieving other policy objectives. This requires setting appropriate financial targets (see Annex B) and may require undertaking valuations of public sector assets being contributed to a wider markets activity.
- *Competition law and pricing policy*. Public bodies should consider whether the proposed activity would be subject to domestic or EC competition rules (including state aids rules). The Competition Act 1998 (as well as EC competition rules) applies to all bodies that are acting as 'undertakings', regardless of legal status and the way in which they are funded. The term 'undertaking' has a broad meaning which encompasses any entity that is engaged in economic or commercial activities. For the purposes of wider markets activities, public bodies should assume that they will be treated as 'undertakings' and

hence be subject to UK and EC competition law. Guidance on Competition Law and pricing is provided at Annex B.

- *Freedom of Information and Crown copyright.* Projects designed to sell government information into wider markets should take account of the Freedom of Information Act and policy on Crown copyright. Annex C sets out the key issues in each case.
- The *public body's core objectives.* Other than in simple cases involving utilisation of spare capacity, a commercial activity unrelated to a public sector body's core competences or objectives may be hard to justify.
- Any *conflicts of interest* between the public sector body's policy objectives and the proposed commercial activity.
- An *assessment of risks and liabilities* which could arise with the commercial activity. Risks should be managed and minimised to ensure that core budgets are protected from wider markets activities.

## **Investment**

19. Any investment in wider market activity must be financed from within existing Departmental Expenditure Limits and existing cash and administration costs limits.
20. Substantial investment in a wider markets projects should normally be undertaken by the private sector partner. New public sector investment in human or physical resources related to commercial activity covered by this guidance should normally be marginal relative to the asset base of the public sector body. Appraisals of any public sector investment should be carried out in accordance with "Appraisal and Evaluation in Central Government" (the Green Book). In some cases, public funding may be available to support commercialisation activities, such as the Public Sector Research Establishment Fund administered by the Office of Science and Technology.
21. Public bodies are encouraged, particularly in cases where a proposal requires significant investment or where specialist skills are required to realise the potential of an asset, to develop projects through joint arrangements with the private sector, such as Public Private Partnerships and Joint Venture Companies (see paragraphs 41-45 below).

## **Risk management**

22. Public bodies will have to meet from existing budgets any costs which may arise from commercial ventures. They should therefore ensure that they have a clear understanding of the nature of the commitments they enter into; and should satisfy themselves that they will be able to meet those commitments, which may be long-term in nature, without diverting significant management resources or otherwise prejudicing delivery of core public sector objectives. Careful account should be taken of :
  - the risks that anticipated income will not materialise or costs increase and of the need to avoid diverting resources from core objectives to make good shortfalls in income or to fund new commercial activity;

- any additional liabilities that might arise with selling into wider markets;
  - protecting the public body’s reputation (for example, through ensuring that wider markets activities are not counter to public policy objectives, that the public sector’s name is not misused to market and advertise products and through selecting reputable partners); and
  - avoiding conflicts of interest between a public body’s commercial activity and its core and statutory duties.
23. Public bodies are responsible for ensuring they have an ongoing risk management strategy for their wider markets activities, and a risk analysis should be conducted as part of the business case for wider markets project.<sup>6</sup> This should not only consider minimising risk but should also take into account the balance of risks and returns. A risk analysis would normally include the following stages:
- identifying the possible risks, e.g. damage to or loss of assets, claims from third parties, professional liability, etc.;
  - estimating the cost of the risks if they materialize (e.g. the size of possible losses and claims) and the likelihood of them arising
  - identifying the possible options for improving the returns and managing the risks and mitigating the impact of the risks (e.g. amending the scope of the wider markets service and/or the terms on which it is offered, commercial insurance, self insurance, transferring the risk to a private sector partner etc.).
  - appraising the options and selecting the best solution; and
  - monitoring and reviewing the performance of that solution.
24. Wider markets projects can introduce risks that are best covered by taking out commercial insurance. The Treasury has explicitly delegated to departments the right to take out commercial insurance where it is considered necessary to protect core budgets from possible losses arising from selling into wider markets (see Government Accounting, 30.2.11-12). The decision to purchase commercial insurance should be based on sound value for money grounds as part of an ongoing risk management strategy. For example, there might be circumstances where the potential size of claims and losses is lower than the cost of purchasing insurance, where the likelihood of losses occurring is so remote that expenditure on commercial insurance is not worthwhile, or where the risk can be reduced or eliminated by relatively cheap methods.
25. Where a Public Private Partnership is established to implement a wider markets activity, risks should be apportioned between the private and public sectors according to which party is best placed to manage them. The private sector will make its input through, for

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<sup>6</sup> Guidance on risk management can be found in the NAO report *Supporting Innovation: Managing Risk in Government Departments*. HC865 1999/2000. Available at [www.nao.gov.uk/pn/9900864.htm](http://www.nao.gov.uk/pn/9900864.htm).

example, financial resources, marketing, development and managing the venture. The public sector's principal input will usually be its assets. The ownership and reward structure is likely to reflect the input and level of investment and risk borne by each partner.

### **Pricing, costs and returns**

26. Pricing must be fair, in accordance with competition law and other requirements of the Fees and Charges Guide (and where it is an information service, with the supplementary guidance on charges for information – see Annex C) . For services sold into competitive markets, pricing should be set in line with the market rates. Prices must also reflect a full and robust measurement of the costs incurred. Further detailed guidance on costing and pricing is contained in Annex B.

### **Retention of income**

27. Subject to the points set out above, departments have an automatic right to benefit from income classified as negative public expenditure in Departmental Expenditure Limits (DEL) other than in exceptional circumstances where the scale of the income may be significant enough to distort the Government's spending plans and priorities<sup>7</sup>. Such income includes dividends received from private sector bodies in which the government is a minority shareholder. In exceptional cases, wider markets income may be classified as revenues, and not negative public expenditure.<sup>8</sup> In such cases, departments should consult with their Treasury spending team regarding the budgetary treatment and allocation of income.
28. Where the income is of a type which, with Parliamentary approval of an Estimate, can be appropriated-in-aid of expenditure (i.e. is related to expenditure in the same part of the Estimate) the Treasury will approve necessary Main and Supplementary Estimates action (an example of how the process works is contained in Annex D). If in any year actual income exceeds the authorised limit of appropriations in aid on the Estimates, the excess income and associated cash receipts have to be surrendered to the Consolidated Fund.
29. Special rules apply to income arising from commercially let EU contracts. The reason for this is that EU income reduces the abatement the UK receives from the EU in respect of its large positive net contribution to EU finances. However, Treasury is aware of the need to provide sufficient incentive for public bodies to secure such contracts. The Treasury has therefore introduced a budgetary regime which allows 50 percent of income from commercially let EU contracts to be treated as wider markets income and therefore scores as negative DEL. The rules regarding administrative costs of wider markets activity (see paragraph 33 below) apply to this income. The remaining 50 percent of income continues to score in Annually Managed Expenditure, and the benefit of this is not therefore retained directly by departments.

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<sup>7</sup> Treasury spending teams should be consulted on how income should be apportioned where a department's aggregated annual income from wider markets projects exceed 5 per cent of discretionary spending within the Departmental Expenditure Limit.

<sup>8</sup> Decisions on classification of income are made by the Office of National Statistics. Wider Markets Income will normally be classified as 'sales of goods and services' which counts as negative public expenditure.

30. Departments are encouraged to allow their agencies and NDPBs to benefit from income generated by their own sales into wider markets. In drawing up framework documents, financial memoranda or management statements, departments should consider how best to incentivise wider market activity in their agencies and NDPBs within a similar framework. Any such arrangements will need to safeguard the department's responsibility to meet its overall Departmental Expenditure Limit. Trading Funds will continue to benefit from commercial income in the normal way. Public bodies will need to put in place their own arrangements for how internal budget holders benefit from wider markets income generated in their area.
31. Income accrued from wider markets activities may only be matched against items or activities which can properly be funded using public funds, i.e. which are subject to the normal rules on regularity and propriety of expenditure.
32. The arrangements set out above apply to any project which began to generate income on or after the announcement of the current wider markets policy (24 November 1997). For projects predating this policy, departments only have the automatic right to benefit from income generated above the highest level received in the period 1994 to 1997.

### **Use of wider markets income to offset administration costs and efficiency targets.**

33. Where expenditure arises on a wider markets activity which comes from administration costs, departments will be permitted to use the proportion of the wider markets income which relate to administration costs to:
  - offset against their administration cost limit; and
  - count towards meeting departmental Public Service Agreement (PSA) efficiency targets.

A worked example and the rules on apportionment of income to administration costs over the lifetime of a project can be found in Annex D. Departments are encouraged to put in place similar arrangements with their sponsored bodies, as appropriate.

### **End Year Flexibility**

34. Wider markets income can be carried forward through Treasury provisions on End Year Flexibility, and departments are encouraged to allow their agencies and NDPBs to benefit in the same way.

### **Internal Wider Markets Officers**

35. Departments should nominate an official as an internal Wider Markets Officer to provide a first point of contact on wider markets issues. Wider Markets Officers should be able to respond to queries or internal requests for help, by pointing to the relevant guidance or policy holder, and providing information such as who to contact for further assistance. It is therefore important that the Wider Markets Officer is consulted at the project

development stage. Departments will need to set in place internal procedures for approval of wider markets projects to ensure adherence to the law and relevant policy and guidance. In some cases Agencies, NDPBs and NHS bodies may want to appoint Wider Markets Officers separate from their sponsor departments. The Treasury have also funded Partnerships UK to provide support on wider markets projects (see paragraphs 46-52).

36. The Wider Markets Officer should be available as a point of contact for private sector firms and others with queries about individual cases. Further guidance on the role of the Wider Markets Officer will be available from Partnerships UK. A list of Wider Markets Officers is available from the Partnerships UK website.

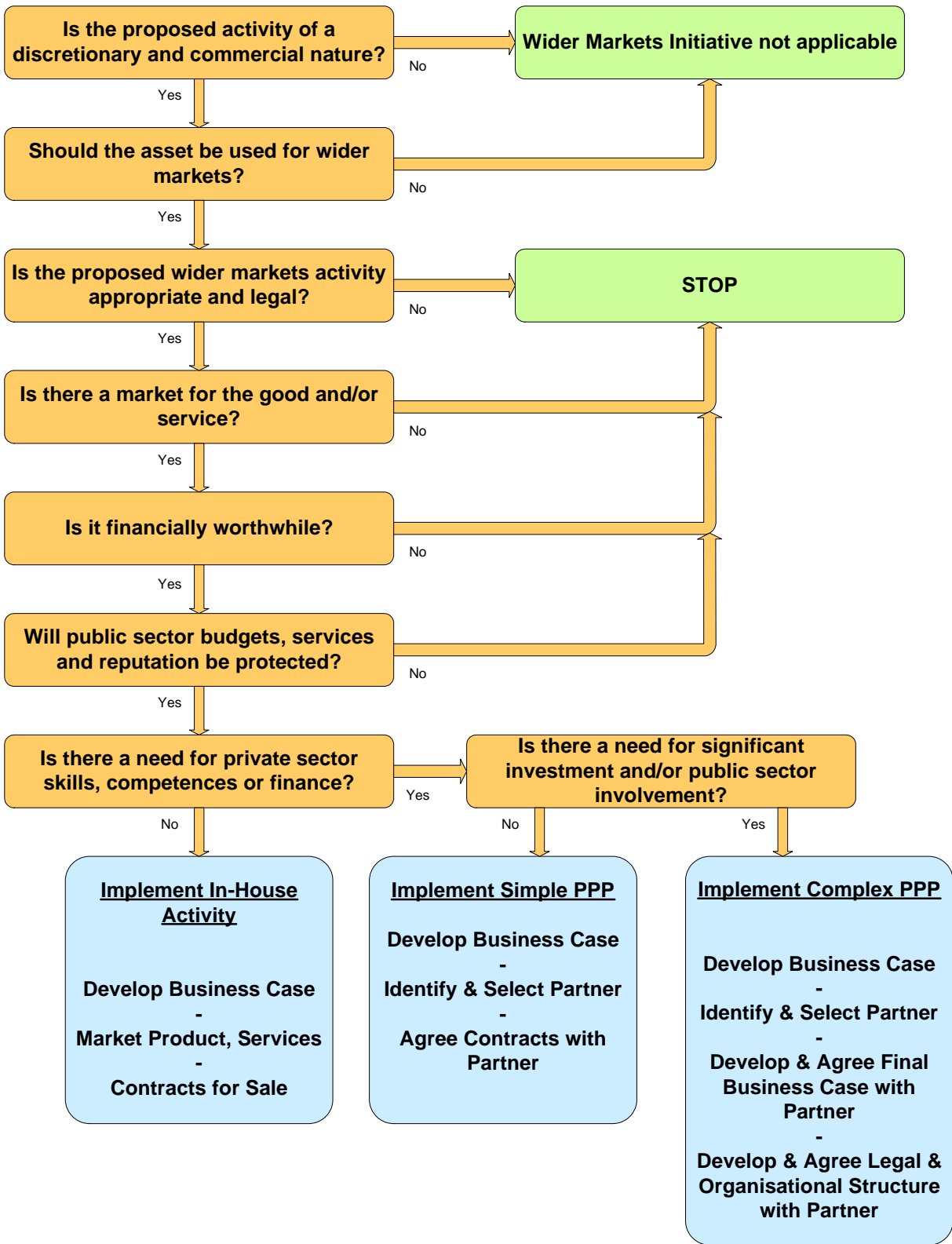
### **Developing a wider markets opportunity**

37. The process and resources needed to develop and implement a wider markets opportunity will vary depending on the specifics of the opportunity. Diagram 1 provides a flowchart of the key questions that should be addressed.
38. Among the first steps in the process of considering the potential of the proposed commercial activity should normally be the development of a business case. Public bodies should subject all proposals to a thorough commercial appraisal in developing the business case, taking into account factors including:
- The available options, such as: accommodating the activity within the existing structure; establishing a new unit or body within the public sector (e.g. a self financing unit, transition to trading fund status, or wholly owned company); and simple or more complex forms of Public Private Partnerships (see paragraphs 41 – 45).
  - How the activity will be managed and staffed to ensure public services are not negatively affected.
  - An analysis of the market.
  - Identifying the costs involved in start up, and ongoing costs.
  - Pricing and revenue assumptions, and targets to ensure that they can expect to secure an adequate return.
  - The degree and nature of risks involved (including financial, legal and reputational risks) and how they can be managed.
39. Public bodies should consider making use of available expertise within their organisations, the wider public sector, and Partnerships UK as well as the need to engage external advisors (e.g. financial, legal, technical or commercial). Guidance on developing a business case is available from Partnerships UK.

### **Use of Public Private Partnerships**

40. Public bodies should consider what commercial structure should be used to implement a wider markets activity. In some cases the public body may undertake the activity on its own, or with the help of an agent, for example a relatively simple, and probably small, operation (e.g. letting out some spare capacity in a building). In other cases, a public sector body may enter a relatively straight forward arrangement with a private sector firm to sell an existing good or service to third parties, in return for some form of fee.
41. In some cases a more complex Public Private Partnership (PPP) may be the most appropriate commercial structure. Such PPP structures include contractual arrangements, legal partnerships, and joint venture companies. PPPs should be considered in cases where:
- significant further development of the public sector asset and investment is necessary to be able to make a commercial return on the project;
  - the public body does not have the necessary expertise and experience, for example in areas such as product development and marketing;
  - the proposed commercial activity is on a substantial scale relative to the asset base of the public body;
  - where a PPP provides a better way of managing risks; and
  - where selling the good or service concerned requires a free-standing or new business.
42. Public bodies should be prepared to receive and consider project proposals initiated by the private sector, subject to the wider markets guidance in general and the following paragraph in particular.
43. Particularly when responding to such proposals, but also more generally, public bodies need to consider carefully the full implications of choosing a private sector partner. The EC procurement rules can, in some circumstances, apply to the selection of private sector partners (see Annex A). Even where EC rules do not apply, a selection process should normally be undertaken on grounds of value for money and propriety. Potential partners should be evaluated using criteria relevant to the proposed project. Public bodies will need to take into account partners' financial and management record, and other factors. Further guidance on partner selection is available from Partnerships UK.
44. Public bodies should take appropriate steps to protect the intellectual property of potential partners. Particularly in circumstances where an innovative proposal is made to a public body, any subsequent procurement process should be designed to test whether the market can deliver alternative propositions rather than competing claims for potential revenue generation based on the proposing firm's original idea.
45. PPPs should be established on the basis of a robust business case and public bodies will generally need to make use of external advice. In developing PPPs, public bodies should consider the audit and accounting implications (see Annex F). Public bodies should ensure that they have in place adequate internal arrangements to monitor the progress of their interests in PPPs and to liaise with private sector partners.

**Diagram 1: Illustrative Flowchart for Developing a Wider Markets Opportunity**



## **Partnerships UK support in developing a wider markets opportunity**

46. To support public bodies implement wider markets activities, a Wider Markets Unit and Science and Technology Commercialisation Unit have been established in Partnerships UK. The Units are being funded by the Treasury to allow support to be available free of charge for public sector bodies. The Wider Markets Unit provides:
- A helpdesk to respond to general queries.
  - Project specific support.
  - A service to review Wider Markets projects to assist in their development and sign-off.
  - Guidance material and online pro-forma.
47. Guidance material is developed in consultation with Government Departments and other stakeholders. The first guidance document is for public-sector bodies forming Joint Venture companies with the private sector and is available at: <http://www.partnershipsuk.org.uk/news/JVGsummary.htm>. Further best practice guidance to be developed includes:
- internal procedures and responsibilities (e.g. treatment of receipts, role of the wider markets officers, approvals procedures)
  - choice of vehicle (e.g. in-house, licensing arrangements, PPPs);
  - the process of commercialisation (e.g. developing business cases, selecting partners); and
  - key issues for commercialising public sector assets.
48. In the initial stages of assessing the wider market potential of assets or activities, public bodies may find it useful to consult with the Wider Markets Unit at Partnerships UK. The Unit can help with: exploring and identifying possible wider markets projects, responding to general questions about wider markets policy and implementation, advising on options and processes for implementation, and providing examples of how other departments have tackled projects.
49. Public bodies can benefit from more in-depth support from Partnerships UK if they wish, for example on wider markets projects where they consider that they do not have all the necessary experience or expertise. This will generally include cases where the projects are particularly innovative or complex relative to their experience or large relative to their asset base.

## **Wider markets review service**

50. Public bodies can contact Partnerships UK to conduct a review of a wider markets project at any stage in its development. This could include advice on issues such as choice of commercial vehicle, partner selection and strength of business case (see Annex E). The review is designed to support internal approval processes. It is also designed to ensure that potentially important projects, including those which may be replicable or high profile, have the necessary elements in place before private sector partners are sought or before contracts are signed.
51. There is no requirement for departments or other public bodies to use this review process. There should, however, be a presumption in favour of its use for wider markets projects which involve the formation of a PPP and/or which involve overseas partners. At present, this service is funded by HM Treasury. In order to avoid a conflict of interest Partnerships UK may not provide this service for any project which it is co-sponsoring or where it is intending to invest equity.
52. The review does not supplant public bodies' own project assessment and quality control procedures. Departments will remain fully responsible for all aspects of 'signed off' wider markets projects and will wish to consider their internal approvals process.

## **Consulting Treasury**

53. Public bodies are responsible for assessing and developing the commercial potential of their assets. There are also circumstances where Treasury will be involved for approval purposes. Public bodies will additionally wish to take advantage of their existing wider markets, private finance and efficiency contacts.
54. Some projects may require Treasury approval because they have the potential to affect Government's overall spending plans and priorities, or they have the potential to be contentious or repercussive. At present, all projects where the full annual cost is £1 million or more require Treasury approval (although Fees and Charges thresholds are subject to review). Where this is the case, projects should be cleared by Treasury spending teams. In addition, Treasury spending teams should be consulted where a department's aggregated annual income from wider markets projects exceed, or expected to exceed, 5 per cent of discretionary spending within the Departmental Expenditure Limit.
55. Departments will need to put in place appropriate arrangements with their sponsored bodies for approving wider markets projects.

## **Reporting**

56. Departments, agencies and other public sector bodies should provide a full account of their current and planned wider markets activities in their Departmental Investment Strategies. Agencies and NDPBs should report on their wider markets activities in their annual reports and accounts. This should include information about the scale of resources devoted to significant projects (or groups of projects which together are of a significant size), value for money information about the efficient use of public sector assets and indicators of commercial performance. Those bodies with higher levels of wider markets activity may wish to consider publishing a separate report of their commercial activity.

## **Further information**

57. Public bodies are encouraged to contact Partnerships UK (Tel: 0207 273 8340, e-mail [wider\\_markets@partnershipsuk.org.uk](mailto:wider_markets@partnershipsuk.org.uk)) in the first instance for any queries regarding this document or for project specific advice and guidance. Additional guidance on implementing wider markets is available at [www.partnershipsuk.org.uk/widermarkets](http://www.partnershipsuk.org.uk/widermarkets).

## **ANNEX A: THE EC PROCUREMENT RULES AND WIDER MARKETS PROJECTS**

### **Introduction**

1. This annex considers the circumstances in which the EC procurement rules (the Rules) apply. Specifically it sets out:
  - the key tests which should be applied by departments to decide whether and how the rules might apply;
  - how the rules might apply in different circumstances.
2. The guidance points here are intended to assist in the development of projects by highlighting key issues and questions. The points in this annex should not be regarded as definitive guidance in respect of any specific project and departments are strongly advised to apply the key tests set out in Paragraph 3 below. Nevertheless, in general terms:
  - it is unlikely that the Rules will apply to projects in which a department sells spare capacity unless in doing so it enters into arrangements which do involve procurement (such as the appointment of agents or contracts involving, for example, renovation);
  - in other situations, departments may procure marketing or other services from firms, which then act on the department's behalf to sell (or assist a department to sell) a good or service into wider markets. Here the Rules are likely to apply unless the agreement can be classed as a Service Concession Contract. It is probable that this will often be the case. If so the Rules will not apply; and
  - In most circumstances, it is unlikely that the Rules will apply to joint ventures.

Basic guidance on the EC Procurement Rules together with the current thresholds can be found on the Office of Government Commerce (OGC) web site.

### **The Key Tests**

3. The tests are as follows:
  - a. *is the body placing the contract/setting up the arrangement, a body which is covered by the Rules (known as a "contracting authority")?* Bodies such as Government departments and local authorities are clearly covered. The definition of "contracting authority" also includes a general category which could mean that a joint venture vehicle could itself be covered, though this is unlikely in projects established solely to sell into wider markets ;
  - b. *is the contracting authority seeking an offer in relation to a proposed supplies, works or services contract?* The relationship between the contracting authority and the other party needs to be in nature of a procurement contract for the Rules to apply;

- c. *does the contract fall into a category which is specifically excluded under the Rules?* Contracts with estimated values below the relevant threshold are excluded. Service concession contracts fall entirely outside the Rules. These are defined as: “Contracts under which a contracting authority engages a person to provide services to the public lying within its responsibility and under which the consideration given by the contracting authority consists of or includes the right to exploit the provision of the service”.
- d. *in the case of a service contract is it for a Part A or a Part B service?* Part B services are subject to a lighter regime under the Rules, under which, for example, there is no need for a contract notice calling for competition to be published in the Official Journal of the EC. Classification is frequently difficult. Nevertheless, mis-classification in order to avoid a call for competition must be guarded against.

### **Applying the EC Procurement Rules**

- 4. Because of the heterogeneous nature of projects, general guidance on the application of the Rules is of limited value. The paragraphs below illustrate some of the key issues in relation to the three project-types set out in Paragraphs 40-41 of the main guidance.
- 5. *Relatively Straightforward Cases: Simple Public Sector Structures.* In simple cases such as the letting out of premises or under-utilised equipment, there would not normally be a procurement and the Rules would not apply. However, care needs to be exercised if an agreement involves refurbishment of the premises or any other activity which might constitute procurement, and if the value of the works exceeds the relevant threshold. In these cases the Rules would apply.
- 6. *Relatively Straightforward Cases: Simple PPPs.* The types of project which might be covered here include contract licences. For example, a contracting authority might enter into a contract with a private sector firm for the exploitation of a piece of software which the contracting authority had developed for its own use, under which the firm would market the software and would be entitled to retain part of the income by way of remuneration. This particular example and other like it raise two issues:
  - a. *is the agreement a contract for services?* Possibly. The case above could be interpreted as a contract for services. It may be a contract for marketing services if the role of the private sector firm was simply related to the marketing of the existing product. If the firm invests in the further development of the product it may constitute a contract for IT services. Under the EC Procurement Rules these would be Part B and Part A services respectively;
  - b. *would the agreement constitute a Service Concession Contract (see Paragraph 3 c)?* In many cases, yes, this type of arrangement could be regarded as such a contract, however the type of arrangement described above be regarded as falling into this category only if it involves a contract for the provision for services lying within the contracting authority's responsibilities. Where a contracting authority is satisfied that this is the case and that the other criteria set out in Paragraph 3 (c) above are fulfilled, the arrangement would probably be classed as a service concession contract and the Rules will not apply. In cases of doubt advice should be sought from purchasing units, which in turn may wish to consult the OGC's Procurement Policy (PP) Division.

7. *More Complex Projects: More Complex PPPs.* The points above may apply in respect of joint ventures. Other issues need to be considered in these cases however:
  - a. is the agreement to establish a joint venture a contract for services to which the procurement Rules apply? In most cases, the view taken in the UK has been that such an arrangement is unlikely to constitute a contract for goods, works or services.
  - b. is the joint venture itself a contracting authority? Joint ventures established under the wider markets guidance would not normally be covered by the Rules.
8. The points set out above are for general guidance. It is important, in developing each wider markets project, that effective consultation is undertaken on the application of the Rules. This should involve discussions with the relevant purchasing unit or department at an appropriately early stage and where necessary, legal advice should be sought.

## **ANNEX B: COMPETITION POLICY AND PRICING FOR WIDER MARKETS PROJECTS**

1. Public bodies need to ensure any wider markets activity they undertake complies with UK and EC competition rules. Within these rules, they also need to consider the appropriate pricing structure for selling goods and services into wider markets. This Annex summarises the key points on these issues and provides guidance on when and how they affect wider markets activities.

### **Competition Law**

2. In general, wider markets activities should increase the number of players in the market and therefore be a pro-competitive force. As such, they are to be encouraged from a competition policy and wider productivity perspective. The public sector should act in accordance with competition law as a matter of policy and should be aware that competition law will in general apply to its wider markets activities in the same way as it applies to private sector companies.
3. The Competition Act 1998 introduced new prohibitions on anti-competitive agreements and abuse of a dominant position. The Act is based on Articles 81 and 82 of the EC Treaty but applying to trade within the UK rather than trade between Member States. These prohibitions, as with EC law, apply to all bodies that are acting as ‘undertakings’. It is likely that a public body conducting wider markets activities will be treated as an ‘undertaking’ (see paragraph 6 below).
4. The key rules applicable to undertakings are as follows:
  - *Chapter I of the 1998 Competition Act* prohibits agreements between undertakings which prevent, restrict or distort competition and which may affect trade within the UK. In particular, agreements which fix prices, limit or control production, share markets, discriminate against third parties or apply supplementary obligations to contracts are prohibited although this list is not exhaustive. The agreements must have an appreciable effect before they are caught by the Act. Exemptions may be available if an agreement has certain countervailing benefits.

Article 81 of the EC Treaty carries similar provisions and applies when trade between Member States is affected.

- *Chapter II of the Competition Act 1998* prohibits conduct by one or more undertakings which amounts to the abuse of a dominant position in a market which may affect trade within the United Kingdom. Such abuse could include conduct that exploits customers, or conduct which is anti-competitive. This includes excessively high prices, discriminatory prices or terms and conditions, predatory pricing, vertical restraints and refusal to supply although this list is not exhaustive. There is no exemption from Chapter II if conduct is shown to be abusive.

Article 82 of the EC Treaty carries similar provisions and applies when trade between Member States is affected.

5. In addition, there are a number of other EC Treaty Articles and directives which are relevant:
  - *EC Merger Regulation*: applies to mergers and certain joint ventures by undertakings which meet specified criteria and requires that approval is sought from the European Commission.
  - *State Aid (Articles 87 & 88)*: If a government body is an undertaking, any advantage granted to it by its home department (including but not limited to financial assistance) may constitute a state aid. Similarly if the activity undertaken provides a benefit (e.g. reduced costs) to another commercial undertaking this may be a state aid. Any queries related to the applicability of the state aid rules to specific projects should be addressed, at the earliest opportunity, to the State Aid Policy Unit at the DTI on (020) 7215 4472. Article 86 is relevant to state aid to public undertakings.
  - *EC Transparency Directive*: The UK will soon transpose into domestic law the latest Transparency Directive. The Directive will oblige government bodies which both engage in commercial activity and receive government funding for public service functions to maintain separate accounts for both types of activity. Guidance will be issued on the interpretation of the Directive before it enters into force. In the meantime, public bodies should maintain separate accounts for charging activities as required by the Fees and Charges Guide. It is also good practice to keep segmented accounts for larger individual wider market services. Segmented accounts make it possible to demonstrate that public funding of public service functions does not lead to a risk of distortion of commercial markets, and facilitates better management decision making.

### **Competition Law - Impact on Wider Markets Activities**

6. To ensure that a wider markets activity complies with competition law and related policies, the following points should be considered:
  - a *Is the public body acting as an 'undertaking'?* The term 'undertaking' has a broad meaning which is being developed through case law. It encompasses any entity that is engaged in economic or commercial activities, regardless of its legal status or the way in which it is funded. It is likely therefore that a public sector body will be deemed to be an undertaking for any wider markets activities it conducts, and it should be assumed that competition law will apply to wider markets activities. The prohibitions set out in the Act apply only insofar as a public sector body is acting as an undertaking, and any activities that they engage in as 'non-undertakings,' for example in fulfilling a clearly-defined statutory role, fall outside the scope of the prohibitions.
  - b *Is an appropriate structure for pricing and cost base being used?* Competition law seeks to prevent excessively high prices that may exploit market power, excessively low prices that may exclude competitors, or differential prices that achieve exploitation, exclusion or alternatively distort competition in upstream or downstream markets. (see also paragraph 8 below).

- c *Is the public sector in a dominant market position?* Dominant market position is judged in the context of the relevant product and/or geographic market, the public body's share of this market, the nature of competition in that market and other considerations such as barriers to entry.<sup>9</sup> A dominant market position should not prevent the public sector selling into wider markets. However, particular care should be taken over pricing and other behaviour, as set out in paragraph 8e.
  - d *What is the nature of agreements with any private sector partners?* Care should be taken that such agreements do not fall within the Chapter I prohibition of the Competition Act 1998. This will only be the case if the agreement is judged likely to have an appreciable effect on the prevention, restriction or distortion of competition. As a general rule, an agreement is unlikely to have an appreciable effect where the combined market share of the parties is less than 25 per cent of the relevant market. An agreement that fixes prices, shares markets, applies minimum resale prices or is part of a network of agreements will generally be appreciable even below this level. If the public sector is forming a joint venture company with the private sector, then the agreement may be subject to merger controls (under the 1973 Fair Trading Act and the EC Merger Regulation).<sup>10</sup>
7. Departments should take their own legal advice as appropriate and if there are competition concerns in respect of their wider markets activities they should consult in the first instance with Partnerships UK (helpdesk 0207 273 8340, [wider\\_markets@partnershipsuk.org.uk](mailto:wider_markets@partnershipsuk.org.uk)). Guidance on competition law is available from the Office of Fair Trading website: [www.oft.gov.uk](http://www.oft.gov.uk).

## **Principles Underlying the Pricing and Costing of Wider Markets Projects**

8. One of the objectives of a wider markets activity is to generate additional revenues for the public sector, and prices should be set with this purpose in mind. Pricing policy also needs to comply with the requirements of competition law and related policy (see above) and the Treasury's *Fees and Charges Guide*. If the wider markets activity involves use of an information asset then the Freedom of Information Act and the *Charges for Information: When and How* guidance may apply (see Annex C). The principles for all wider markets projects are as follows.
- a. *Pricing at market rates:* In developing a business case for a wider markets activity, public bodies should undertake an assessment of the relevant market and the existing competitors in that market. In a competitive market situation, prices for a wider markets service should be set at a similar level to those of comparable goods or services already available on the market. This principle applies even when the cost of providing the service is above or below market prices (but see below regarding profitability/ financial targets).

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<sup>9</sup> In the UK a share of less than 40% of the relevant market is unlikely to constitute a dominant position, but this is not a hard and fast rule and is judged in the context of that market. Guidance is available from the Office of Fair Trading website: <http://www.oft.gov.uk/Business/Legal+Powers/ca982.htm#abuse>

<sup>10</sup> Further information can be found in *A Guidance Note for Public Sector Bodies forming Joint Venture Companies with the Private Sector*, HM Treasury/Partnerships UK, December 2001 ([www.partnershipsuk.org.uk/news/JVGsummary.htm](http://www.partnershipsuk.org.uk/news/JVGsummary.htm))

b. *Full cost attribution.* Particular attention needs to be paid to the cost base of a wider markets service. A full cost attribution should be used. Full cost is the total cost of all the resources used in supplying a good or service, including:

- Direct costs of producing the output
- A full proportional share of overhead and administration costs: for heat and light etc; labour costs should include pension and employers' NICs, allowances for training and development etc
- Selling and distribution expenses.
- Commercial insurance or a notional insurance cost
- depreciation charges for capital assets used (e.g. equipment and premises).
- A cost of capital charge (which should be set at the appropriate real rate of return - see paragraph 8c below)
- Recouping any administrative costs incurred in developing the service (but not capital costs as these are recovered through depreciation and the cost of capital charge).

An analysis of the cost attribution should be included in the business case for a wider markets activity. The *Fees and Charges Guide* provides further guidance on calculating costs.

c. *Profitability/ financial targets:* Wider markets activities should aim to recover the full cost of providing the product or service and where selling into competitive markets, to charge the market price including a profit element (i.e. to recover more than the full costs). A real rate of return of 6 per cent is appropriate for a wider markets service where there is no competition. A real rate of return of 8 per cent is appropriate for a wider markets service sold in competitive markets. More than 8 per cent may be justified if, for example, the activity is high risk or where market rates allow it (see paragraph 8a above). The appropriate rates of return are currently under review and public bodies can check with Partnerships UK whether any change has been made. Where the market rate is below the full cost of providing the service, but above the average variable cost<sup>11</sup>, then it may be acceptable to charge at market rate but careful consideration should be given as to whether the activity is worthwhile. In a competitive market, the service may be provided at less than full cost for a temporary period in order to stimulate demand. A wider markets service should never be charged at a price below the average variable cost of supplying the service.

d. *Avoiding subsidies.* Public bodies should not subsidise their wider markets projects in general and should avoid cross-subsidy between individual activities. If the product or service cannot be brought to the market at a competitive price, the project should not be developed. Subsidising a wider markets activity could also raise EC State Aid implications (see paragraph 5 above).

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<sup>11</sup> The average variable cost is the average level of those costs which vary with the level of activity (amount of output produced) over the short run.

- e. *Rules where the public sector is in a monopoly or dominant market position.* Where there is little or no competition from private sector companies, particular care should be taken with pricing and other behaviour. Similar care should be taken when there are some competitors, but the public sector is in a position where it is able to affect market prices (dominant market position). The rules are that:
- Since the public sector may set market prices, the charges for the wider markets service should be clearly related to the cost base. Where there is no competition, charges should be set to meet the financial target of full cost recovery (including a return on capital of 6 % see paragraph 8b above). However a higher rate should be used if this is justified by the characteristics of the market, for example if there is a degree of competition, if the activity is high risk, where full cost recovery does not leave sufficient incentive for potential competitors to enter the market, or where the public asset on which the wider markets activity is based is in naturally scarce supply and the best way to allocate it is through an auction process.
  - Pricing and other behaviour must not constitute an abuse of a dominant market position under the Chapter II prohibition of the Competition Act 1998 (see paragraph 4 above).
  - The public sector body should not engage in pricing behaviour that could be interpreted as exploitation of a dominant position, even when the Competition Act is not infringed.
  - Where sensible, measures should be taken to foster competition and lower barriers to entry. For example, a unique database that potentially provides the public sector with a dominant market position should be licensed to others on a non-exclusive basis and the same terms and conditions applied to the commercial activities of the public sector body itself.

For projects which seek to commercialise the outputs of public research it is worth noting that the exclusive rights provided by the patent system do not necessarily constitute a dominant market position. For example, there may be competing technologies and/ or the relevant market yet to be defined. Even when a patent holder or licensee is in a dominant market position, competition law recognises that an exclusive right may be necessary in order to protect the investment in the technology. Care is needed, however, to ensure that the terms of any licensing arrangement (e.g. exclusivity, duration, geographic coverage, subject matter) comply with competition law. This is an issue which requires legal advice.

- f. *Differential pricing.* Different prices can be charged for wider markets goods or services where there are objective differences in the relative cost, quantity or any other characteristic. Different prices should not be charged in other circumstances unless there is a clear objective and sustainable justification. Differential pricing is only anticipated to be an abuse under competition law if prices are excessive or if competitors are excluded from the market.<sup>12</sup> Prices for a wider markets service should not depend on whether the customer is public or private sector, unless there is a difference in the service that is provided or where the service is provided to some public sector users as a core service (in

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<sup>12</sup> See *Assessment of Individual Agreements and Conduct*. Office of Fair Trading. Available at <http://www.offt.gov.uk/business/legal+powers/ca98+publications.htm>

the absence of relevant legislation, guidance or other policy decision requiring the service to be provided on the same terms to all).

g. *Monitoring and evaluation:* Pricing strategies and cost recovery should be reviewed on an ongoing basis and at least annually. A more fundamental review of charging regimes for wider market activities should normally take place at intervals of three years or less.

5. Further guidance and advice on pricing and costs for wider markets activities can be sought from:

Partnerships UK helpdesk: 0207 273 8340,

Partnerships UK e-mail: [wider\\_markets@partnershipsuk.org.uk](mailto:wider_markets@partnershipsuk.org.uk).

## **ANNEX C: FREEDOM OF INFORMATION, INTELLECTUAL PROPERTY AND CROWN COPYRIGHT**

### **Introduction**

1. Wider markets projects which make use of government information assets are subject to a number of legal and policy requirements. Information assets include databases, copyright protected materials and other recorded information. The requirements which may apply are:
  - the Freedom of Information (FoI) Act 2000;
  - government policy on charges for information, set out in *Charges for Information: When and How*, HM Treasury 2001;<sup>13</sup>
  - government policy on the use of Crown copyright, set out in *The Future Management of Crown Copyright* (Cm 4300), 1999<sup>14</sup> and *Cross Cutting Review of the Knowledge Economy*, HM Treasury 2000;<sup>15</sup> and
  - the Data Protection Act 1998.
2. Further relevant legislation is likely following proposed European Directives on the public access to environmental information (implementing the Aarhus Convention) and on the re-use and commercial exploitation of public sector documents.
3. This Annex sets out the key issues and details how wider markets projects involving information assets should be implemented.

### **Freedom of Information Act and Charges for Information Policy - Background**

4. The Freedom of Information Act 2000:<sup>16</sup>
  - *Will give a general right of access to all types of recorded information held by public bodies (including government departments and most NDPBs). It sets out exemptions from that right, some absolute, some which apply only if the exemption best serves the public interest. The right of access under the Act will come into force in January 2005. Until then, public bodies within the jurisdiction of the Parliamentary Commissioner for Administration are required to comply with requests for information under the Code of Practice on Access to Government Information.*<sup>17</sup>

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<sup>13</sup> [www.hm-treasury.gov.uk/mediastore/otherfiles/charging\\_for\\_info.pdf](http://www.hm-treasury.gov.uk/mediastore/otherfiles/charging_for_info.pdf)

<sup>14</sup> [www.hmsso.gov.uk/document/copywp.htm](http://www.hmsso.gov.uk/document/copywp.htm)

<sup>15</sup> [http://www.hm-treasury.gov.uk/spending\\_review/spending\\_review\\_2000/associated\\_documents/spend\\_sr00\\_ad\\_ccrcontents.cfm](http://www.hm-treasury.gov.uk/spending_review/spending_review_2000/associated_documents/spend_sr00_ad_ccrcontents.cfm)

<sup>16</sup> Separate Freedom of Information legislation applies in Scotland.

<sup>17</sup> <http://www.lcd.gov.uk/foi/ogcode981.htm>

- *Places a duty on public authorities to adopt and maintain a publication scheme, and to have it approved by the Information Commissioner. Publication schemes are being introduced progressively with schemes for central government departments and most NDPBs active from 30 November 2002. The schedule for introducing schemes for other public bodies and further guidance to help in preparing publication schemes, can be found at the Information Commissioner and Lord Chancellor’s Department websites ([www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk) and [www.lcd.gov.uk/foi/foidpunit.htm](http://www.lcd.gov.uk/foi/foidpunit.htm)).*
5. *Charges for Information: When and How* sets out additional government policy on charges for information. It deals separately with access to information (initial supply of information whether in a publication or in response to a specific request) and with re-use or reproduction of information protected by Crown copyright (but note that not all public bodies are Crown bodies and subject to Crown copyright - see paragraph 15 below).

### **Freedom of Information Act 2000 and related policy - impact on wider markets activities**

6. It is important to ensure that public bodies do not enter into arrangements which prevent them from meeting requests to provide information under the Freedom of Information Act. In general and subject to the paragraphs below, wider markets activities should not involve selling information which is exempt from the Freedom of Information Act. Such information is exempted because disclosure in any form would not be in the public interest (or would contravene other obligations such as those under the Data Protection Act).
7. However, the Act provides for commercial activities of public bodies and information may be exempted if it constitutes a trade secret or would, or would be likely to, prejudice commercial interests including those of the public body holding it.<sup>18</sup> This exemption may be applied if disclosure would result in harm to a commercial interest and where the harm caused by disclosure would outweigh the public interest in disclosure. In the context of wider markets projects, information where this exemption could apply includes: contracts, business plans, market surveys, consultants reports, client information, production formulae or processes and research findings.
8. The Act also provides for information to be exempt where it is made available through priced publications.<sup>19</sup> This extends to information intended for future publication.<sup>20</sup> Environmental Information is exempt from the Freedom of Information Act, but subject to separate regulations (see paragraph 11f below).
9. Wider markets activities are generally not appropriate where they rely solely on selling information which was collected, created or commissioned as a core activity by Crown bodies (other than Trading Funds). Such information is defined in *Charges for Information: When and How* as ‘raw data’<sup>21</sup> and the policy is that, if a charge is to be applied for the

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<sup>18</sup> Part II, Section 43 of the Act.

<sup>19</sup> Part II, Section 21 of the Act.

<sup>20</sup> Part II, Section 22 of the Act.

<sup>21</sup> See *Charges for Information: When and How* for a full definition.

provision of such information, it should be 'marginal cost'<sup>22</sup>. This applies even when the 'raw data' is being provided for uses other than the original purpose for which it was collected, created or commissioned. 'Raw data' will usually be licensed by HMSO free of charge (see paragraph 17 below). Government trading funds are subject to separate charging guidelines and have delegated responsibility for their licensing activities subject to regulations set by HMSO's Regulation Division (see [www.hmso.gov.uk/regulation-home.htm](http://www.hmso.gov.uk/regulation-home.htm)).

10. There remains considerable scope to develop wider markets activities involving information assets. Examples of types of projects include:
- *Commercial exploitation of the outputs of public sector research.* In such cases the information supporting the scientific or technical discovery (lab books, experimental results, etc.) may be eligible for exemption under the FOI Act if they would need to be kept confidential, at least for an initial period of time.<sup>23</sup>
  - *Consultancy or contract research.* Information which is collected or created by a public body as a service to a commercial client (beyond the information which existed at the time the contract for the service was made) may be eligible for exemption under the FOI Act. It is important to consider whether the client has requested the information to be provided in confidence and whether there is any need for the public sector to hold the information after it has been supplied to the client and if so, on what terms. The Act gives an absolute exemption for information provided in confidence where disclosure to the public would constitute a breach of confidence actionable by that person or by any other person. However public authorities are advised to avoid confidentiality agreements which are not justifiable.
  - *Value added information and products*<sup>24</sup> where the public sector undertakes work on an information asset (for example a dataset or creating a new publication) beyond that which would be done for the core purpose in order to increase its commercial value. In such cases the public sector would normally sell the information through a priced publication.
  - *Software applications.* Where software applications developed by, or on behalf of, a public body are sold on a commercial basis, the source code is likely to be eligible for exemption under the FOI Act.
  - *Licensing Intellectual Property Rights.* Where the public body owns Intellectual Property Rights over information or software (e.g. copyright, database rights, patents – see paragraph 13 below), the supply of information does not confer an automatic right on the recipient to copy, publish or reuse it. In such cases, a licence agreement is normally needed which sets out terms and conditions for reuse. It is important that public bodies do not enter exclusive licensing arrangements for Crown copyright material that would prevent HMSO from licensing the re-use of data and information (see paragraphs 15 –17

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<sup>22</sup> "Marginal costs" are defined for this purpose as relating to the additional costs over and above those of collecting (creating or commissioning) the information for the original government policy purpose (see *Charges for Information: When and How*).

<sup>23</sup> The exemption for information intended for future publication (Part 2, Section 22 of the Act) may be relevant where scientific or technical information is intended to be published pending a patent application.

<sup>24</sup> A full definition of 'value added information' can be found in *Charges for Information: When and How*.

below) and that they also understand what is permitted under the 'fair dealing' provisions of the Copyright Designs and Patents Act 1988.

11. Where a wider markets opportunity involving an information asset is being developed, the following issues must be considered.

a. *Will the activity affect the public body's ability to meet requests for information?*

The relevant principles are set out in paragraphs 6 to 8 above. This is an area where legal advice may be needed.

b. *Is pricing in line with government policy on charges for information?*

Government policy on charges for information specifies the charging basis for different types of Crown copyright information. Wider markets activities should be based on 'value added information' (see paragraph 10 above) or information produced by trading funds, and the general principles of pricing for wider markets will apply (see Annex B). The cost base should include the full cost of the additional work to create the value added information as well as the marginal cost of supplying any 'raw data' which is used as an input.

c. *Has the pricing basis been set out in the public body's publication scheme under the FOI Act?*

The relevant information class in the public body's publication scheme must indicate whether access will be free or charged. The publication scheme should also indicate the pricing basis for publications. Charges for information which is supplied separately from a publication scheme under the FOI Act must be in accordance with the Fees Regulations being introduced under the Act (the draft Regulations provide for charges to be 10% of prescribed costs under £600 plus disbursement costs) or other relevant legislation. Pricing details of consultancy and research services do not need to be included in publication schemes, as these are not a class of information the public body intends to publish. A copy of any government publication produced should be included in the official Government Bibliography.<sup>25</sup>

d. *Are any licensing arrangements consistent with government policy and have the necessary approval from HMSO?*

The relevant considerations for information and databases which are Crown copyright protected are set out below (paragraphs 15-18). The grant of exclusive licences can restrict subsequent reuse, and for this reason the policy is that information which is Crown copyright should be licensed on a non-exclusive basis except in exceptional circumstances where the Controller of HMSO may permit an exclusive licence. Where 'raw data' is made available to be used as an input to a wider markets product or service, the terms and conditions for use of the information should be the same as those available to private sector bodies. In this way, the public sector will not have an unfair advantage over competitors who are supplied with the information separately to create their own value added products and services.

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<sup>25</sup> For further details see HMSO's Guidance Note 17: <http://www.hmso.gov.uk/g-note17.htm>.

Intellectual Property Rights other than Crown copyright and database rights, (e.g.patents) can be licensed on an exclusive or non-exclusive basis as appropriate.

e. *Does the Data Protection Act apply to the information?*

The Data Protection Act will generally apply when the information to be disclosed relates to living individuals. The Act sets out a number of principles that must be complied with. These principles limit the use and disclosure of personal information and hence restrict the ability to use such information for wider markets activities. It may, however, be possible to develop wider markets activities when personal information is suitably anonymised and/ or individuals consent to information about them being used for that purpose. Guidance about the Data Protection Act can be obtained from [www.dataprotection.gov.uk](http://www.dataprotection.gov.uk).

f. *Does the information relate to the environment?*<sup>26</sup>

Access to environmental information is currently governed by the Environmental Information Regulations 1992 (as amended). A new EU Directive on access to environmental information is likely to be adopted shortly and will be incorporated into UK law by regulations under the Freedom of Information Act.<sup>27</sup> This is likely to provide access rights to environmental information in a similar way to other information under the Act. However, there are likely to be some additional obligations or procedural points. For advice on the existing and prospective regulations public bodies are advised to contact DEFRA (Alan Crockford, 01944 6486, [alan.crockford@defra.gov.uk](mailto:alan.crockford@defra.gov.uk)) for up to date guidance.

12. Information about the FoI Act 2000 can be found at [www.lcd.gov.uk/foi/foidpunit.htm](http://www.lcd.gov.uk/foi/foidpunit.htm), as can supplementary guidance for central government departments on publication schemes and the requirements of the Code of Practice on Access to Government Information. Public bodies should also refer to the fuller guidance in Charges for Information: When and How. Project specific advice should be sought from Partnerships UK wider markets helpdesk, [wider\\_markets@partnershipsuk.org.uk](mailto:wider_markets@partnershipsuk.org.uk), 020 7273 8340.

## **Intellectual Property Rights**

13. Intellectual Property Rights embrace a category of rights which concern property rights granted for the results of creative activity. There are two main branches, Copyright and Industrial Property. Industrial Property concerns the protection of inventions (Patent Law), industrial designs, trademarks, service marks and commercial names and designations as well as the law against unfair competition. The key types of IPRs are:

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<sup>26</sup> The definition of environmental information is broad and includes: the state and interactions between elements of the environment (air, water, soil, land, landscape, biological diversity); factors which may affect these elements (substances, energy, noise, radiation, waste); releases into the environment (emissions, discharges); analysis and assumptions used in environmental decision making; and the state of human health, safety, and living conditions.

<sup>27</sup> Proposal from the Commission for a directive on public access to environmental information [http://europa.eu.int/eur-lex/en/com/pdf/2000/en\\_500PC0402.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0402.pdf). A further Directive on the re-use and commercial exploitation of public sector documents has been proposed by the European Commission. [ftp://ftp.cordis.lu/pub/econtent/docs/public\\_sector\\_proposal\\_for\\_directive\\_en.pdf](ftp://ftp.cordis.lu/pub/econtent/docs/public_sector_proposal_for_directive_en.pdf).

- *Copyright* - protects literary, dramatic, musical and artistic works, sound recordings, films, broadcasts, cable programmes and typographical arrangement of published editions from being copied. To qualify for copyright protection the work must be original and recorded in some way. There is no requirement for the copyright to be registered in the UK.
- *Patents* - available for inventions relating to most industrially applicable processes and products. A patent must be registered before the invention is publicly disclosed, indeed prior disclosure or publication prejudices the patent position.
- *Designs* - the shape, configuration, pattern or ornament applied to an article may be protected by registering the design at the Designs Registry or, if not registrable, by virtue of the inherent design right.
- *Trade marks* - brands such as words, logos, colours, shapes, sounds and even scents which can be graphically recorded may be registered as trade marks to protect the way a supplier represents his goods and services. Rights in the look and feel of products and images can be protected under the laws of passing off.
- *Database rights* - the right to prevent extraction or re-use of the whole or a substantial part of the content of a database where the production has required a significant amount of time and/ or money to be invested.

Guidance on Intellectual Property Rights can be found on the Patent Office website ([www.intellectual-property.gov.uk](http://www.intellectual-property.gov.uk)).

14. Any wider markets project which involves material protected by Crown copyright or database rights will need to take account of government policy on the management of Crown copyright material and database rights (see below). Other IPRs owned by public bodies, may be taken out and licenses granted on terms (including on an exclusive or non exclusive basis) as they deem appropriate.

### **Crown copyright - background**

15. Crown copyright protects all material which is produced by Crown employees in the course of their duties. It covers a wide range of material, including legislation, government codes of practice, Ordnance Survey mapping, government reports and many public records. All government departments, departmental agencies, and some NDPBs are Crown bodies and so subject to Crown copyright.<sup>28</sup> The responsibility for licensing the reuse of Crown copyright material and Crown owned database rights rests with the Controller of HMSO in her capacity as Queen's Printer and Queen's Printer for Scotland. Although the authority for licensing the re-use of Crown copyright material rests ultimately with the Controller, licensing responsibility has been delegated to some of the trading funds, subject to regulatory review by HMSO's Regulation Division. All Crown bodies also have the authority to arrange for the publication of an officially endorsed version of their material. This includes publishing the material via private sector publishers, which may form the basis of a wider markets activity. However, publishers should not be granted exclusive publishing rights because this represents an obstacle to licensing the reuse of the material in non-official products and services. Further guidance

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<sup>28</sup> A list of Crown bodies is on the HMSO website at <http://www.hmso.gov.uk/crownbod.htm>

on licensing and publishing policy can be found on HMSO's website at: [www.hmso.gov.uk/guides.htm](http://www.hmso.gov.uk/guides.htm)

16. Public bodies which are not Crown bodies (this includes some NDPBs) are likely to own the copyright in the material which they originate and can license the material themselves.
17. There are two basic types of licences which HMSO administers for Crown copyright protected materials:
  - a. The on-line *Click-Use-Licence*<sup>29</sup> covers core material which is central to the process of government ('raw data', see paragraph 7d above). It contains standard terms, is free of charge, and is available for all potential re-users of core material.
  - b. *A tailored licence terms* is issued to re-use 'value added' material (see paragraph 9 above) and other material which does not fall within the scope of 'raw data'. HMSO will issue these licences in consultation with the originating department(s) where appropriate. Any income generated is allocated to the originating Crown body.
18. Guidance on Crown copyright and official publishing can be found on HMSO's website [www.hmso.gov.uk/guides](http://www.hmso.gov.uk/guides). Advice on specific projects which involve publishing or licensing of Crown copyright can be obtained from:

HMSO's enquiry line: Tel. 01603 621000

Partnerships UK Helpdesk: 0207 273 8340 or;

Partnerships UK e-mail: [wider\\_markets@partnershipsuk.org.uk](mailto:wider_markets@partnershipsuk.org.uk)

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<sup>29</sup> [www.clickanduse.hmso.gov.uk](http://www.clickanduse.hmso.gov.uk)

## **ANNEX D: RETAINING INCOME FROM WIDER MARKETS- HOW DEPARTMENTS BENEFIT**

### **Example 1: Working within total net provision**

#### **Summary**

		(£)
1	Total agreed net provision	100
2	Gross expenditure at Main Estimates	110
3	Wider market receipt authorised for A-in-A at Main Estimates	-10
4	Unchanged net provision at Main Estimates	100
5	Additional in-year receipt	-2
6	Additional gross headroom	2
7	Gross expenditure after Supplementary Estimate	112
8	Total wider markets income authorised for A-in-A after Supplementary Estimate	-12
9	Unchanged net provision after Supplementary Estimate	100

#### **Detail**

1. In the example above, a department develops a wider market project that expects to produce an income of £10 in the first year. The project costs £1 from within its agreed total net provision of £100 (line 1). At the time of preparing its Main Estimate, the department increases automatically its agreed gross provision by £10 to £110 (line 2) and introduces wider markets income of £10 (line 3) to be appropriated in aid. Total net provision remains at £100 (line 4). The project is commenced and the income of £10 arrives during the year. As this income is already taken into account in the Main Estimate, the department simply appropriates it in aid.
2. In-year the project gives rise to an additional £2 of unanticipated income. Provided this is known before the final (Spring) Supplementary Estimate round, i.e. before February, the department submits a request for a Supplementary Estimate to appropriate in aid the additional £2 (line 5) and to increase gross expenditure by a corresponding amount (line 6) to £112 (line 7)<sup>3</sup>. Total wider market income increase to £12 (line 8) and the total net provision remains unchanged at £100 (line 9). Treasury automatically approves the bid for the Supplementary Estimate, which is, of course, subject to Parliament's approval.

In this example the department has spent £112 (line 7); kept within its net provision of £100 (line 9) whilst retaining the benefit of the income totalling £12 (line 8) which includes a surplus of £11 taking into account the initial £1 of expenditure.

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<sup>3</sup> But, in practice, winter supplementary Estimates may be better timed as Spring Supplementaries are not normally voted until mid-March.

## **Example 2: Working within Administration Cost Limits**

### **Summary**

		(£)
1	Administration cost limit	50
2	Wider market receipt	-3
3	Administration cost related element (50%)	-1.50
4	Gross administration cost expenditure	-51.5
5	Unchanged administration cost limit	50

### **Detail**

3. In the example above a department develops a wider market project, 50% funded from administration costs, which it expects to produce an income of £3 in the first year. The project is developed in-year and therefore no account was taken of the wider markets income when the Main Estimate was prepared. The project costs £1 of which £0.50 is from within its agreed running cost limit of £50 (line 1). The Treasury would automatically allow the department to raise a Supplementary Estimate to increase expenditure and allowable income, assuming that there is no compensating under-recovery elsewhere in the relevant Request for Resource.
4. The project is commenced and the income of £3 arrives in-year (line 2). In this example, £1.50 (or 50%) of the income is administration cost-related (line 3). The income is of a kind which can be appropriated in aid and the department offsets this expenditure against its administration cost limit. The department's gross administration cost ceiling rises to £51.50 (line 4). The department nevertheless remains within administration cost limit (line 5). The department receives the total benefit of the £3 income including an administration cost-related element of £1.50 and a surplus on administration costs of £1.
5. Should additional administration cost-related income arise in-year these could be treated similarly.
6. The administration cost related element of the incomes over the financial year would count towards the departments PSA efficiency target.

### **Apportionment of receipts over the lifetime of a project.**

7. The rules on the apportionment of income are intended to ensure that, over the lifetime of a project, it is spent in rough proportion to share of costs across a department's budget headings. So, income from an administration cost intensive project should largely benefit administration cost expenditure. Income from a project with mixed administration and non-administration costs will benefit administration and non-administration cost expenditure. Because some projects may have startup costs that fall under one heading but ongoing costs that fall under another heading, the annual apportionment is calculated on the basis of total inputs over the project lifetime or five years, whichever is the shorter. So:

- a. in approving Estimates the Treasury will allow administration costs-related income to be offset against administration costs limits. Other income may be offset against the appropriate (Request for Resource) heading. However these guidelines will not affect departments existing discretion within individual lines to vire between non-administration cost headings or to vire out of administration costs;
- b. the proportion of each year's income which can be allocated to administration costs and offset against administration costs limits will be determined by the proportion of administration costs in the department's expenditure over the lifetime of the project or the first five years, whichever is shorter;
- c. departments with projects with an estimated life time in excess of five years will need to agree reassessed income apportionments in proportion to forecast cost by subheading at the end of each five year period;

## **ANNEX E PARTNERSHIPS UK WIDER MARKETS REVIEW: COVERAGE**

**Note: this list is illustrative and the aspects to be covered in a review will depend on the nature of the project and its stage of development.**

### ***Option appraisal***

Is the choice of commercialisation vehicle appropriate

### ***Business case***

Overall strength of the business case

Has the business case adequately addressed:

- Market analysis
- Financial analysis
- Technical analysis
- Evidence of interest from partners
- Definition of partner's role and responsibilities

### ***Risk analysis***

Have risks been identified and responsibilities agreed for managing risks.

Have potential liabilities to the public sector been identified and where appropriate the need for commercial insurance considered.

### ***Project management***

Has a realistic timetable been prepared.

Does the project team have an appropriate range of skills, whether from in house team or advisers.

### ***Partner selection***

Is there an adequate process and approach for partner selection (if relevant).

### ***Policy framework***

Is the project in line with wider markets policy.

Have other relevant policy considerations been taken into account, e.g. Vires, Fees and Charges guide, competition policy, applicability of procurement law etc.

Please note that the review will not generally cover:

- whether the project is a good opportunity (i.e. whether the data and assumptions in market, technical and financial etc are accurate); and
- how the wider markets project relates to the department's broader policy and strategic objectives.

## **ANNEX F: AUDIT AND ACCOUNTING TREATMENT OF PUBLIC PRIVATE PARTNERSHIPS.**

1. The provision of access for auditors will need to be kept in mind when establishing a Public Private Partnership. There is a variety of possible situations: access for the Department's internal auditors; access for the auditors appointed by the Department; and access for the Comptroller and Auditor General (C&AG). The need to provide access for the C&AG should always be considered.
2. The government's approach is that public bodies audited by the Comptroller and Auditor General should ensure that he has appropriate access to contractors' records where necessary for purposes connected with the auditing of the public body concerned. For services or functions provided to departments under contract, an agreed contract clause is set out in the Treasury Central Unit on Procurement's Guidance on Model Conditions of Contract (No 59D: Documentation: Model Conditions of Contract). The relevant extract is set out below.

For the purposes of:

- a) the examination and certification of the Authority's accounts; or
  - b) any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority has used its resources, the Comptroller and Auditor General may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Contractor and may require the Contractor to provide such oral and/or written explanations as he considers necessary. This condition does not constitute a requirement or agreement for the examination, certification or inspection of the accounts of the Contractor under Section 6(3)(d) and (5) of the National Audit Act 1983.
3. The clause above should be used where the relationship is contractual and NAO access is necessary for the audit of the Department. Other forms of partnership, such as Joint Ventures, may need a different approach. The Treasury Officer of Accounts team in the Treasury will advise on individual cases. The NAO should also be consulted.
  4. The Government's policy is that the C&AG's access to documents, held by contractors providing goods and/or services to Government that relate to the financial accounts of departments and NDPBs should be put on a statutory basis. That policy was set out in the Government's response to Lord Sharman's report "Holding to Account". The policy will come into effect once an Order under the Government Resources and Accounts Act 2000 providing the C&AG with statutory access to documents held by bodies and individuals contracted to provide goods and/or services to central government has been made. The Order is expected to be made in time for the C&AG's audit work in departments and NDPBs on the financial accounts for 2003-04. Similar access is to be provided to documents held by the same contractors in relation to value for money studies carried out by the C&AG in departments and NDPBs. These changes will not provide the C&AG with the ability to carry out audits or value for money studies of contractors themselves.

## **Classification Treatment of Joint Ventures**

5. The accounting treatment of joint ventures and other joint arrangements is covered by Financial Reporting Standard, FRS 9, “Associates and Joint Ventures”. It distinguishes between different types of interests in joint bodies and their accounting treatment. Public bodies should make themselves aware of the accounting treatments and consequences of each at an appropriately early stage in project development.
6. Joint venture companies will be classified for national accounts and public expenditure purposes according to who owns and controls them, including indirect control. Where the department owns or controls the joint venture company, the whole of the company will be treated as a public sector body. In these cases, the joint venture company’s dealings with the outside world will score in Departmental Expenditure Limits. So any expenditure financed by borrowing, including borrowing from the department’s private sector partner, will score against the department’s control total. If the joint venture company is classified to the private sector, only the department’s dealings with the joint venture company score in public expenditure.
7. Further guidance on classification issues for joint venture companies can be found in “A Guidance Note for Public Sector Bodies forming Joint Venture Companies with the Private Sector” ([www.partnershipsuk.org.uk/news/JVGsummary.htm](http://www.partnershipsuk.org.uk/news/JVGsummary.htm)).