RURAL BROADBAND WAYLEAVE RATES

Short-form Opinion of the Office of Fair Trading:
Guidance to facilitate self-assessment under
the Chapter I prohibition of the Competition Act 1998 and/or
Article 101 of the Treaty on the Functioning of the European Union

1 EXECUTIVE SUMMARY

1.1 This Short-form Opinion has been requested by the National Farmers’ Union (NFU) and the Country Land and Business Association (CLA) (together the Parties) who propose to recommend a reference rate to their members for the grant of wayleaves for broadband in rural areas (the Rate Recommendation). The Short-form Opinion provides guidance as to the application of competition law to the Rate Recommendation, to facilitate the Parties’ self-assessment. In addition, the general principles set out below may assist other associations of undertakings considering making similar recommendations to their members.

1.2 This Short-form Opinion should be read in conjunction with the Office of Fair Trading’s (OFT) approach to Short-form Opinions, set out in Annexe A. It should also be read in conjunction with the Parties’ Statement of Facts at Annexe B. The purpose of the Short-form Opinion is not to opine on the legality of the Rate Recommendation, but to provide guidance on aspects of the analysis to assist the Parties in their detailed self-assessment of the proposed Rate Recommendation. As explained in Annexe A, the OFT prepares Short-form Opinions on the basis of the parties’ statements of facts and does not verify or market-test the statements and assessments they contain.

1.3 A wayleave agreement grants access to private land in return for an annual or one-off fee paid to a landowner by an infrastructure provider, who needs to gain access to the land to install, maintain and repair infrastructure, in this case for rural broadband infrastructure schemes (RBI Schemes).

1.4 In response to concerns that delays in the roll out of RBI Schemes have in part been caused by problems agreeing wayleave rates, the Parties intend to recommend that their landowner members grant wayleaves for free or in exchange for a payment at a recommended reference rate. The aim of the
1.5 The proposed Rate Recommendation is, according to the Parties, designed to speed up the negotiation of wayleave agreements by managing landowners’ expectations as to wayleave rates downwards towards rates which are more appropriate for RBI Schemes and by providing a degree of certainty for rural broadband infrastructure providers (RBI Providers) as to the rates that they will need to pay for a rural broadband wayleave.

1.6 The OFT was asked to consider whether the proposed Rate Recommendation would fall within the scope of section 2 CA98 (Chapter I)/Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and if so, whether the proposed Rate Recommendation would be construed as a restriction of competition by object or effect.

1.7 The OFT was also asked to consider whether the benefits set out in the Parties’ Statement of Facts would be considered to be relevant benefits under section 9(1) CA98/Article 101(3) TFEU. The OFT was further asked to consider whether the Rate Recommendation imposes restrictions which are indispensable or make it possible for the undertakings concerned to eliminate competition in respect of a substantial part of the products in question under section 9(1)(b) CA98.

1.8 The general principles considered and applied in this Short-form Opinion are as follows.

- In general the OFT considers that a price recommendation creates a serious risk that price competition between competitors would be restricted.
- A rate recommendation by an association of undertakings addressed to competitors providing substitutable products in the same relevant market would normally fall within the scope of Chapter I CA98 and would likely be construed as a restriction of competition by object, depending on the legal and economic context of the recommendation.
- In the OFT’s opinion, a rate recommendation by an association of undertakings addressed to members who are not competitors, but offer complementary products in different geographic markets, will not ordinarily have the object of restricting competition. Such
recommendations will only fall within the scope of Chapter I CA98 where they have the effect of restricting, distorting or preventing competition, for example on downstream markets.

- Where such a recommendation is addressed both to competing and non-competing undertakings, any restrictions of competition falling within Chapter I CA98 will be prohibited unless the exemption criteria in section 9 CA98 are met.

- In assessing the appreciability of a restriction of competition which has different impacts on different local markets, the OFT would not weigh the number of local markets where there is likely to be scope for competition against the number of local markets where there is no competition. Instead, the OFT would consider the extent of the likely impact of the restriction in those local markets where there is scope for competition.

- When considering whether a restrictive recommendation contributes to improving production or distribution or promotes technical or economic progress, the parties to the agreement may consider the efficiencies generated by the agreement in certain other related markets where it may also have beneficial effects, not just in those markets where there is a restriction of competition.

- A restriction of competition can be considered indispensable if it allows an activity to be performed more efficiently than would likely have been the case in its absence, if more efficiencies are produced with the restriction in place than without it and if there are no other economically practicable and less restrictive means of achieving those efficiencies.

- In assessing whether there is a risk that competition would be eliminated by a non-binding rate recommendation, the parties need to consider, among other matters, whether the level of the rate, by acting as a focal point, creates a risk of collusion which outweighs the incentives to compete.

1.9 Section 9 of this document sets out the conclusions drawn from applying these principles to the specific questions and facts of this Short-form Opinion request. In summary, it is the OFT’s opinion that the reference rate recommended to landowners for the grant of wayleaves for rural broadband, designed to facilitate the roll out of RBI Schemes, may provide a rare example of a price recommendation that is beneficial in terms of the technical and economic progress that it is likely to stimulate and could therefore be capable of meeting the criteria for individual exemption in
section 9 CA98.

2 SHORT-FORM OPINION REQUEST

2.1 Following a number of discussions with the OFT regarding prioritisation and scope, on 19 July 2012 the Parties submitted a Statement of Facts requesting a Short-form Opinion from the OFT. The Parties have requested guidance on the following questions:

- Whether the proposed Rate Recommendation would fall within the scope of Chapter I CA98 /Article 101 TFEU.
- If so, whether the proposed Rate Recommendation would be construed as a restriction of competition by object or effect.
- Whether the benefits set out in the Parties’ Statement of Facts would be considered to be relevant benefits under section 9(1)(a) CA98/Article 101(3) TFEU in so far as they contribute to improving the production or distribution of goods or to promoting the development of technical and economic progress.
- If so, whether in accordance with section 9(1)(b) CA98, the proposed Rate Recommendation does not:
  - impose restrictions which are not indispensable to the attainment of those objectives, and
  - afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

2.2 The OFT was not asked to give an opinion on the application of competition law to a recommendation made jointly by two trade associations. Furthermore, the OFT was not asked to give an opinion on the level of the Rate Recommendation or the calculation of the Rate Recommendation or to consider any of the other standard terms and conditions the Parties intend to propose to their members as part of the Rural Land Agreement. As regards the analysis to be carried out by the Parties under Section 9 CA98, the OFT was not asked to provide guidance as to whether a fair share of the benefits generated by the Rate Recommendation would be passed on to consumers.
2.3 The OFT considers that the conditions set out in paragraphs 7.5 to 7.7 of its Modernisation guideline\(^1\) are met so it may consider this request for a Short-form Opinion.\(^2\)

3 BACKGROUND FACTS PROVIDED BY THE PARTIES

The Parties

3.1 The NFU represents approximately 56,000 farmers and growers and 40,000 countryside members across England and Wales. The CLA represents approximately 34,000 members in England and Wales active in a range of areas from agriculture and tourism to renewable energy and the environment. The Parties confirm that there may be some overlap in their membership but the Parties’ Statement of Facts suggests that together their members own a significant amount of rural land in England and Wales.\(^3\)

Background

3.2 The Parties’ Statement of Facts submits that between 15 and 20 per cent of rural areas in the United Kingdom (UK) have little or no access to effective broadband.\(^4\) The Government has committed £530 million of funding to help stimulate investment in the provision of broadband in areas of the UK where there is a weak or non-existent business case for commercial investment by the main broadband infrastructure providers.\(^5\)

3.3 The Department for Business, Innovation and Skills and the Department for Culture, Media and Sport published a report in December 2010 entitled *Britain’s Superfast Broadband Future*, a copy of which has been provided by the Parties as a part of their Statement of Facts.\(^6\) The report explains that communications networks often travel across private land. In order to gain access to private land to install, maintain and repair infrastructure, an infrastructure provider must negotiate an agreement with the landowner which is known as a wayleave. A wayleave agreement grants access to

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\(^1\) OFT442 *Modernisation* (December 2004).

\(^2\) See also the OFT’s approach to Short-form Opinions, set out in *Annexe A*.

\(^3\) Parties’ Statement of Facts, paragraphs 1.1 to 1.3.

\(^4\) Parties’ Statement of Facts, paragraph 2.7.

\(^5\) Parties’ Statement of Facts, paragraph 2.7.

\(^6\) Parties’ Statement of Facts, Annexe 2.
land in return for an annual or one-off fee negotiated between a landowner, or their agent, and the infrastructure provider.7

3.4 The negotiation of wayleave agreements is recognised as a barrier to the roll out of RBI Schemes as this process can be very time consuming. The Parties state that this is due to uncertainty as to the appropriate level of wayleave rates. The Parties submit that wayleaves are not the core business of landowners. As rural landowners have little experience with wayleaves, the Parties submit that they are unsure as to the appropriate rate to seek in exchange for the grant of a right.8

3.5 Two types of cable are laid by RBI Providers: (i) the backhaul connection, which connects the community cabinet to the main trunk point, and (ii) local cable, which passes from the community cabinet to individual homes.9 It is apparent that the Parties consider that it is the backhaul connection, which will usually need to travel 3.5 to five kilometres,10 that typically presents the greatest challenge to the roll out of rural broadband cable.

3.6 In the event of a dispute regarding wayleaves, an infrastructure provider can make an application to the County Court under the Electronic Communications Code11 for a wayleave to be granted at a rate to be determined by the court. However, the Parties submit that this process is expensive, time consuming and provides unpredictable outcomes both for infrastructure providers and for landowners.

3.7 The Parties have noted that although some case law on wayleave rates is available, this provides little guidance on the appropriate rates to seek in rural and remote areas.12

3.8 The Parties note the need to manage landowners’ expectations downwards from rates which other landowners have agreed with commercial

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7 Parties’ Statement of Facts, paragraph 2.10 and Annexe 4.
8 Parties’ Statement of Facts, paragraph 2.13.
12 Parties’ Statement of Facts, paragraph 2.13.
broadband infrastructure providers\textsuperscript{13} as commercial wayleave rates\textsuperscript{14} are not appropriate for rural broadband wayleaves. This is necessary because RBI Schemes may only be feasible where their roll out can be subsidised by the provision of public funds.\textsuperscript{15}

The proposed Rate Recommendation

3.9 The Parties state that the aim of the Rate Recommendation is to facilitate the roll out of RBI Schemes, to benefit their members and all consumers in rural areas.\textsuperscript{16} The Parties are seeking to achieve this by recommending a reference rate to their members for rural broadband wayleaves which manages landowners’ expectations downwards from typical commercial rates. The Rate Recommendation is intended to speed up the negotiation of wayleave agreements between landowners and RBI Providers and avoid the need for lengthy court proceedings which can result in proposed schemes being abandoned. The Rate Recommendation also aims to provide a degree of certainty for RBI Providers as to the rate that they will need to pay for a rural broadband wayleave which will help them estimate the costs of rolling out a RBI Scheme.\textsuperscript{17}

3.10 The Parties intend to recommend to their members that they shall either grant the wayleave in exchange for a minor consideration, such as a broadband connection, or for a per-metre annual or one-off rate which has been calculated by a committee consisting of wayleave experts from the Parties. According to the Parties’ Statement of Facts, this calculation involves discounting the typical commercial rates used in rural areas. The proposed rate has not been the subject of consultation with RBI Providers.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{13} The parties have given examples of the wayleave rates which have typically have been paid to landowners by Energis/Cable & Wireless and BT Openreach in their Statement of Facts. Parties’ Statement of Facts, paragraphs 3.3.2 and 3.4.
\item \textsuperscript{14} By commercial wayleave rate here, the OFT means the rate that a landowner would receive from the provider of a commercial (as opposed to publicly-subsidised) broadband infrastructure scheme, for example, BT Openreach.
\item \textsuperscript{15} Parties’ Statement of Facts, paragraph 2.7. A consideration of the legality of proposed State Aid, which is determined by the European Commission in accordance with Article 107-109 TFEU, does not fall within the scope of this Short-form Opinion and does not affect the OFT’s antitrust analysis of the Parties’ proposed Rate Recommendation.
\item \textsuperscript{16} Parties’ Statement of Facts, paragraphs 2.2 and 3.7.
\item \textsuperscript{17} Parties’ Statement of Facts, paragraph 3.2.
\item \textsuperscript{18} Parties’ Statement of Facts, paragraph 3.4.
\end{itemize}
3.11 The Parties intend to publish the Rate Recommendation so that it will be accessible to all landowners, whether or not they are members of the NFU or CLA, as well as to RBI Providers seeking to tender for RBI Schemes.19

3.12 Further details of the terms of the proposed Rate Recommendation can be found in the Parties’ Statement of Facts, in Annexe B. Figure 1 below depicts the proposed Rate Recommendation by the Parties to their members. Their members may then use the Rate Recommendation as part of an individual bilateral wayleave agreement with a RBI Provider.

Figure 1: Rate Recommendation by the Parties to their members

Other features relevant to the assessment of the Rate Recommendation

3.13 The Parties’ Statement of Facts demonstrates that the context of the proposed Rate Recommendation is rather unusual. The OFT wishes to highlight a number of these unusual features, which may be relevant to the analysis of the Rate Recommendation.

a) The Rate Recommendation is made to landowners who are potentially downstream customers of broadband services as well as the suppliers of wayleaves. The OFT also notes that the Parties represent their members’ interests in both these capacities.

19 Parties’ Statement of Facts, paragraph 3.9.
b) Whilst the grant of a wayleave for consideration is an economic activity, it is only incidental to the main commercial activities of rural landowners. As granting a wayleave can be undesirable and inconvenient and a wayleave rate may be seen as akin to compensation for this inconvenience,\textsuperscript{20} it is unlike many other forms of economic activity where suppliers actively compete with one another to supply a product or service.

c) A paucity of information about past comparable wayleave rates agreed or imposed through court proceedings and the lack of guidance as to the appropriate rates for wayleaves in rural areas can prevent a wayleave agreement from being reached and/or result in high negotiating costs for both landowners and RBI Providers. These factors are capable of frustrating or preventing the roll out of RBI Schemes altogether. This is further exacerbated by the fact that each RBI Scheme will require wayleave agreements to be reached with a number of independent landowners.

d) The Rate Recommendation is being made in the context of RBI Schemes which are not commercially viable without government subsidies. If the Rate Recommendation fails to produce the intended results of facilitating wayleave negotiations by removing this obstacle to the roll out of RBI Schemes, some such schemes may not proceed at all, given the lack of a commercial case for investment.

3.14 The context of this agreement, and the relative balance between the restrictions and benefits that may arise, is therefore very different to that in which many price recommendations may be made by trade associations, which might be intended or expected to raise prices, to prevent price reductions or to limit discounts.

4 OVERVIEW OF THE APPLICABLE LEGAL FRAMEWORK

4.1 Chapter I CA98 prohibits agreements or concerted practices between undertakings and decisions of associations of undertakings (collectively \textbf{Agreements}) which have as their object or effect an appreciable prevention, restriction or distortion of competition within the UK or a part of it and may affect trade within the UK or a part of it, unless they fall

\textsuperscript{20} Parties’ Statement of Facts, paragraph 4.4.2.
within an excluded category or are exempt. Any Agreement which falls within the Chapter I prohibition and is not exempt is void and unenforceable.\(^{21}\)

4.2 The European equivalent of the Chapter I prohibition is Article 101 TFEU. When the OFT applies Chapter I to an Agreement that has the potential to affect trade between EU Member States, it is required also to apply Article 101 TFEU to that Agreement.\(^{22}\)

4.3 Under section 60 CA98, when determining a question arising under Part 1 of the CA98, the OFT must ensure that, having regard to any relevant differences between the provisions concerned, there is no inconsistency with the principles laid down by the and any relevant decision of the European Courts.\(^{23}\) It must also have regard to any relevant decision or statement of the European Commission.

4.4 Therefore, in this case, the OFT considers it appropriate to have regard to the Commission Notice: Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements\(^{24}\) (EU Horizontal Guidelines) and the Commission Notice: Guidelines on the application of Article 101(3) of the Treaty (Article 101(3) Guidelines).\(^{25}\)

4.5 The Office of Communications (Ofcom), the sectoral regulator for the communications sector, has concurrent powers under CA98 and TFEU to deal with anti-competitive behaviour in broadcasting, spectrum and telecommunications.\(^{26}\) As wayleave agreements for broadband infrastructure could therefore fall within Ofcom’s remit, the OFT informed Ofcom that it intended to issue a Short-form Opinion in this matter. The OFT has kept Ofcom informed throughout the preparation of this Short-form Opinion.\(^{27}\)

\(^{21}\) Section 2(4) CA98.

\(^{22}\) Article 3 of Regulation 1/2003, 2003 OJ L1/1, at page 8.

\(^{23}\) The European Courts are together the Court of Justice and the General Court (formerly the Court of First Instance).

\(^{24}\) 2011 OJ C 3/02.

\(^{25}\) 2004 OJ C 101/97.

\(^{26}\) Communications Act 2003 c.21, sections 369 to 372. OFT405 Concurrent Application to Regulated Industries (December 2004) paragraph 1.1, Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives, Ofcom, July 2004, paragraph 1.

\(^{27}\) OFT442 Modernisation (December 2004) paragraph 7.9.
5 MARKET DEFINITION

5.1 When applying the Chapter I prohibition and/or Article 101, the OFT is only obliged to define the relevant market where it is not possible, without such a definition, to determine whether an Agreement is liable to affect trade in the UK and/or between Member States, and whether it has as its object or effect the prevention, restriction or distortion of competition.28

5.2 In this case, the purpose of considering the relevant markets is to assess the extent to which there is any competition that may be restricted by the Rate Recommendation. In a situation where there is only one viable route, crossing the land of more than one landowner, along which a broadband cable could be laid, there may be no actual or potential competition between the landowners being approached for the grant of a wayleave. However, in other situations where there is the possibility for the cable to take a number of alternative routes, actual or potential competition may be feasible and could potentially be restricted by the Rate Recommendation.

5.3 A definitive determination of the scope of each relevant market is not necessary in this case, and indeed is not feasible within the scope of this Short-form Opinion given the large number of potential schemes that may be affected and the lack of significant empirical evidence of factors such as landowners’ costs and the costs of switching by RBI Providers.

5.4 In this context, the OFT has confined itself to looking more generally at:

- whether RBI Providers see other means of delivering broadband services, for example satellite technology, as being close substitutes at present for gaining access to land for laying the relevant infrastructure (relevant product market), and
- the circumstances in which neighbouring landowners might be in competition with each other to grant wayleaves to RBI Providers (relevant geographic market).

The relevant product market

5.5 On the basis of the information submitted in the Parties’ Statement of Facts, a RBI Provider seeking to install the infrastructure for a RBI Scheme will need to negotiate with a number of different landowners and then conclude separate wayleave agreements with each one. As such, the OFT considers that the focal product is each individual landowner’s supply of access to his land for the purposes of installing the relevant infrastructure.

5.6 In order to determine the scope of the product market, the relevant question is whether a RBI Provider would consider alternative methods of serving its potential customers as being close substitutes to laying an underground cable. In practice, the question is whether using satellite technology or existing mobile telephone infrastructure, neither of which requires the laying of cable, would become an attractive option if all landowners were to raise wayleave rates by five to 10 per cent above competitive levels across all landowners. If these alternatives are either significantly more expensive or of poorer quality in terms of the services provided, then these would not be considered close substitutes and the product market would be no wider than access to land for the installation of broadband cables.

5.7 The Parties’ Statement of Facts outlines why these alternatives are not currently close substitutes to laying broadband cables:

‘...while broadband can be accessed in rural areas through satellite and mobile phone networks both means of connection have disadvantages and are not widely seen as long term alternatives to fixed line broadband. Satellite tends to be more expensive, requires a dish to be fixed to the premises, suffers signal delay (latency) and is adversely affected in poor weather. Mobile broadband relies on an effective and reliable mobile phone signal which is often a problem in rural areas.’

On the basis of the evidence provided and for the purposes of this Short-form Opinion, the OFT considers the relevant product market is likely to be no wider than access to land for the installation of broadband cables.

29 Parties’ Statements of Facts, paragraph 2.1.
30 OFT403 Market Definition (December 2004) paragraphs 2.5 to 2.13.
31 Parties’ Statement of Facts, paragraph 2.4.
The relevant geographic market

5.8 Having determined the likely scope of the relevant product market, assessing the scope of the relevant geographic market requires a consideration of whether each landowner along the chosen route faces actual or potential competition from neighbouring landowners.

5.9 Undertakings are treated as actual competitors if they are active on the same relevant market. An undertaking may be treated as a potential competitor of another undertaking if, in the absence of the co-operation between them, it would enter into the same relevant market in response to a small but significant non-transitory increase in price.\(^{32}\)

5.10 The Parties submit that competition between landowners is very limited indeed. The Parties' view of the scope of the relevant geographic market is summed up in their statement that:

‘It is not realistic to consider that there is a market on which rival pieces of land compete for the same wayleave. Rather, the ‘market’ for the wayleave is limited to the particular piece of land required for the infrastructure and the broadband project.’\(^{33}\)

5.11 The Parties state that the provision of access to land for RBI Providers is incidental to the business of their respective members. The income they obtain from such wayleaves is ‘low, uncertain and sporadic’. The Parties note that a wayleave for 100 metres would only generate a tiny annual revenue stream which is entirely incidental to the landowner’s principal activities.\(^{34}\)

5.12 The Parties have stated that the route of a RBI Scheme is planned by the RBI Provider during the initial stages of scheme development. The RBI Provider will choose the most suitable route based on the location of the properties that it intends to serve.\(^{35}\) Only after the route has been planned will landowners be approached for the grant of wayleaves. The Parties’ Statement of Facts notes that rural broadband infrastructure providers will

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\(^{32}\) EU Horizontal Guidelines, paragraph 10.

\(^{33}\) Parties’ Statement of Facts, paragraph 4.4.1.

\(^{34}\) Parties’ Statement of Facts, paragraph 4.3.

\(^{35}\) Parties’ Statement of Facts, paragraph 4.4.1.
only rarely deviate from their chosen route. They note that a route would be diverted in the event of negotiation difficulties with landowners, which may be for reasons other than the rate.36

5.13 The Parties state that in general it is difficult to divert a route to other private land, ‘as the landowner concerned will own large areas of land to either side of the optimal route.’ This is likely to occur for example in relation to the backhaul route. In this situation, if negotiations with the incumbent landowner are very prolonged or unsuccessful, the abandonment of the project may be the most likely outcome. The situation is slightly different in relation to end user connections, where diversion to the public highway for short distances may be a viable alternative if agreement with a private landowner is not possible. The Parties submit that diversions in almost all future projects are likely to be to the public highway rather than to another landowner’s land.37

5.14 The significant issues for RBI Providers who may need to divert a cable route are the time and expense of putting such a diversion in place. In terms of time, negotiations with landowners themselves involve considerable time and delay, as landowners want to be reassured that they are being offered a fair rate.38

5.15 In terms of expense, it is apparent from the Parties’ Statement of Facts, and Annexe 6 in particular, that any significant re-routing of a broadband cable is likely to increase costs substantially. The Parties acknowledge that in some circumstances, it may be possible for the RBI Provider to re-route where the route passes along a parallel boundary with neighbouring land. However, they state that ‘any diversion that involves more than minor additional distances is unlikely to be economically viable.’ They consider that occasions where re-routing is viable will be ‘rare’.39

5.16 In terms of empirical evidence of re-routing, one RBI Provider reported that re-routing has taken place in relation to approximately three per cent40 of

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37 Parties’ Statement of Facts, paragraph 2.14.5.
39 Parties’ Statement of Facts, paragraph 4.4.3.
40 In the OFT’s view, this should not be interpreted as saying that there is competition in three per cent of local markets. The true number may be higher, as the fact that three per cent of landowners were bypassed represents a lower bound on the number of landowners who faced competitive constraints on their wayleave pricing and where broadband infrastructure providers may have had alternative land they could have used. The true number could also be lower, as in
the landowners with whom it has dealt. The Parties state that this relates to two RBI Schemes involving 300 landowners.\textsuperscript{41} The OFT does not have information as to whether the diversions relate to local connections or the trunk route. However, in these cases re-routing was not across the land of an alternative landowner, but instead along the public highway.\textsuperscript{42} This is in spite of the fact that installing cable in the public highway is significantly more expensive than the cost of installing cable in private land.\textsuperscript{43}

5.17 Re-routing possibilities between neighbouring landowners may be rare, but given that: (a) the Parties cannot confirm that such possibilities do not exist; and (b) re-routing, even to the more expensive public highway, does appear to have taken place in relation to a minority of landowners, the OFT cannot, on the basis of the facts presented, proceed on the assumption that neighbouring landowners never compete with each other for wayleaves.

5.18 Rather than mechanically applying the formal hypothetical monopolist test in this case,\textsuperscript{44} the OFT considers that it may be most instructive to consider a hypothetical situation which identifies both the factors that are likely to determine the scope of the relevant market and illustrates how the level of the competitive rate in such a market would be set.

\textsuperscript{41} Parties’ Statement of Facts, paragraph 2.14.4.

\textsuperscript{42} A separate statutory right is available which allows infrastructure providers to install and maintain infrastructure provided they make good the resulting damage to the highway. The parties have informed us that the cost of making good this damage far exceeds the cost of obtaining a wayleave over private land. The parties submit that infrastructure providers would therefore prefer to route their scheme across private land wherever possible and that in rural areas substitutable parcels of privately owned land are rarely available along the route chosen for the broadband scheme. See parties’ Statement of Facts, paragraph 4.4.1.

\textsuperscript{43} In some cases, as the parties’ evidence demonstrates, re-routing along the public highway could also fall within the relevant geographic market, though we note the potentially high cost to rural broadband infrastructure providers of using a public highway. See, for example, the re-routing costs in Annex 6 of the Statement of Facts.

\textsuperscript{44} See the dicta of the Competition Appeal Tribunal in \textit{The Racecourse Association and Others v Office of Fair Trading} [2005] CAT 29 at 139-143 in this regard. In the context of this Short-form Opinion, the OFT’s view is that mechanically applying the formal hypothetical monopolist test would neither be necessary nor feasible. The intention of the market definition analysis here is not to define specific individual local markets. This is not necessary in order to assess whether the proposed rate recommendation has as its object or effect the prevention, restriction or distortion of competition. Further, this is not feasible, as there is a lack of significant empirical evidence on, for example, landowners’ costs and the costs of switching by rural broadband providers, in specific candidate markets. As such, it is not possible for the OFT to provide detailed guidance on the application of a formal hypothetical monopolist test to candidate geographic markets in this case.
5.19 In a hypothetical situation where two routes are equally efficient for a RBI Provider, there are two alternative landowners who would be willing to provide access to their land if the wayleave rate compensates them for the costs imposed on them by the installation and maintenance of the infrastructure. In this situation, the landowner for whom the costs imposed by the installation of the cable is lower will be willing to offer the lower wayleave rate, a rate that will reflect the costs imposed on the landowner. A wayleave rate that approximates the cost imposed on the respective landowners by the installation of the infrastructure may be considered, in this context, to be the competitive level.

5.20 On the basis of the Parties’ Statement of Facts, it appears that instances in which two alternative equally efficient routes are available to a RBI Provider are likely to be quite rare. It also appears that RBI Providers place significant emphasis on the most efficient route, without giving much consideration to how much landowners will charge for the grant of the wayleave. RBI Providers do not appear to base their routing decisions on their perception of how easy or difficult it will be to negotiate a wayleave with a particular landowner.\textsuperscript{45} The Parties also state that RBI Providers will determine the optimal route before engaging with local landowners.\textsuperscript{46}

5.21 This position is consistent with the information presented in Annexe 6 to the Statement of Facts. Although the information provided in Annexe 6 is general in nature, it is possible to discern from this that increases in the length of cable to be laid and/or re-routing over more expensive surfaces may amount to significant switching costs for RBI Providers.\textsuperscript{47} The additional management time required to initiate additional negotiations with other landowners may also contribute to potential switching costs.

5.22 In such situations RBI Providers may not be sensitive to wayleave rates set above the competitive level. Where the costs of re-routing are high, the wayleave rate that a commercial broadband infrastructure provider may be willing to pay may be well in excess of the costs imposed on the

\textsuperscript{45} Parties’ Statement of Facts, paragraph 4.4.1.

\textsuperscript{46} Parties’ Statement of Facts, paragraph 4.4.1 and Annexe 6.

\textsuperscript{47} Where switching costs are significant this would tend to make switching to an alternative, neighbouring landowner or to a public highway unattractive to a rural broadband infrastructure provider. As such, this would mean that a neighbouring landowner is less likely to impose a competitive constraint on the landowner over whose property the initial route is planned. As a result, significant switching costs are likely to result in geographic markets that are narrow and which may often be no wider than the single landowner whose land is initially chosen.
landowner. Where the threat of substitution to alternative landowners is weak, the landowner is an effective monopolist on the market and there is little or no effective competition to restrict. From the Parties’ Statement of Facts, it appears that the geographic scope of a large majority of markets is likely to be no wider than the land over which the initial route is planned.

5.23 There may, however, be some circumstances where re-routing costs are low. The Parties acknowledge that there may be occasions where the route that the RBI Provider has chosen passes close to the boundary with another landowner’s land. In such situations there may well be greater scope for re-routing to a neighbouring landowner’s property. Some local markets may therefore be wider than the landowner on the original route and would include two or more neighbouring landowners where re-routing was feasible.

5.24 On the basis of the Parties’ submissions set out in paragraphs 5.11 to 5.17 above, the OFT considers that the incidence of such competition between neighbouring landowners is likely to be low. The Parties submit that many routes will run across the middle of the landowner’s land. This means that diversions would require significant additional lengths of cable. On the occasions where the route of a cable does run along a parallel boundary with a neighbouring landowner, competition between the landowners is likely to be dampened if the RBI Provider approaches only one landowner, with a view to concluding an agreement, without openly considering the use of neighbouring land. The RBI Provider may not be sensitive to a wayleave rate above the competitive level, even if an alternative is available, if the extra management time and cost involved in running a bidding process outweighs the savings generated by the use of a recommended rate.

5.25 Taking all of the above into consideration, whilst it appears to the OFT that competition between neighbouring landowners is likely to be relatively rare, the scenario where re-routing to adjacent land is possible cannot be ruled out. Therefore on the facts available, it is not possible for the OFT to provide an opinion on the basis that the Rate Recommendation is only addressed to landowners offering complementary, non-competing products. The application of the Rate Recommendation to competing landowners must therefore also be considered.
5.26 The OFT’s view of the relevant product and geographic market, on the basis of the information provided by the Parties, and for the purposes of this Short-form Opinion, is that:

- Other current means of providing rural broadband are unlikely to be close substitutes to laying underground cables.
- In the majority of local markets, it is likely that the individual landowner on the chosen route does not face competition from neighbouring landowners and, as such, the relevant market is no wider than that individual landowner’s land.
- There are likely to be a minority of local markets where neighbouring landowners could compete with each other to offer access to their land for rural broadband infrastructure. In such cases the geographic market would be wider and would include two or more neighbouring landowners’ land.

6 EFFECT ON TRADE BETWEEN MEMBER STATES

6.1 It may be possible for a recommendation by an association to fall within both the Chapter I prohibition and Article 101 TFEU. Article 101(1) TFEU prohibits Agreements which may affect trade between Member States as incompatible with the internal market.

6.2 The Parties propose that the Rate Recommendation will be applied to a collection of small local markets in various rural areas of England and Wales. In light of the inherently local nature of the markets for wayleaves, with many local markets being no wider than the land of one or two landowners, it does not appear, on the basis of the information available, that the proposed Rate Recommendation is capable of affecting trade between Member States.

6.3 As such, the compliance of the Rate Recommendation with Article 101 TFEU will not be considered further in this Short-form Opinion.

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48 OFT 408 Trade associations, professions and self-regulating bodies (December 2004) at paragraph 2.4.
49 Commission Notice (guidelines on the effect on trade concept) 2004 OJ C 101/07 at paragraph 91.
7 APPLICATION OF THE CHAPTER I PROHIBITION TO PRICE RECOMMENDATIONS BY TRADE ASSOCIATIONS

7.1 The Chapter I prohibition applies to co-operation between undertakings, such as landowners and farmers, where they are engaged in an economic activity. This is the case, even where the co-operation between them does not relate to their principal business activity and is not necessarily motivated by the pursuit of profits.

7.2 The OFT also notes that even where public authorities encourage undertakings to coordinate their activities, such co-operation remains subject to scrutiny under CA98.

7.3 As noted above, Chapter I CA98 applies to decisions by associations of undertakings. The case law of the European Courts classes a recommendation by a trade association as a decision by an association of undertakings, even where it is stated to be non-binding.

7.4 Section 2(2)(a) CA98 states that the general prohibition in Chapter I applies, in particular, to Agreements which directly or indirectly fix prices.

7.5 The European Courts have held that certain forms of Agreement between undertakings can be regarded, by their very nature as being injurious to the proper functioning of competition. These restrictions, which include price fixing, market sharing and restrictions of output, are classed as restrictions of competition by object.

50 See generally OFT1289 Land Agreements: The application of competition law following the revocation of the Land Agreements Exclusion Order (March 2011) and OFT740rev How competition law applies to co-operation between farming businesses: Frequently asked questions (November 2011).
51 Case C-41/90 Hofner and Elser v Macrotron GmbH [1991] ECR1-1979 at paragraph 21 and Case C-180/98 Pavlov and Others v Stichting Pensioenfonds Medische Specialisten [2000] ECR I-6451 at paragraph 75 ‘The notion of economic activity can encompass any activity consisting in offering goods or services’.
53 EU Horizontal Guidelines, paragraph 22.
54 OFT401 Agreements and Concerted Practices (December 2004) at paragraph 2.9.
56 Case C-8/08 T-Mobile Netherlands and Others v NMa, CJ judgment of 4 June 2009 at paragraphs 28 to 30.
7.6 The case law of the European Courts confirms that even a non-binding recommendation by a trade association of fixed prices to its members can be construed as a restriction of competition by object.\textsuperscript{57}

7.7 A recommendation of a fixed wayleave rate by associations of undertakings to their members would appear to restrict price competition between members on this basis. Indeed, the EU Horizontal Guidelines note that the recommendation of standard terms relating to price creates a serious risk that price competition between competitors would be restricted\textsuperscript{58} and that any standard terms containing provisions which directly influence the prices charged to customers, such as recommended prices, would constitute restrictions of competition by object.\textsuperscript{59}

Objective aims of the Rate Recommendation in its legal and economic context

7.8 In considering whether the Rate Recommendation has as its object the prevention, restriction or distortion of competition, the OFT would consider the aims of the Rate Recommendation, in the legal and economic context in which it is to be applied.\textsuperscript{60}

7.9 The object of an Agreement is not assessed by reference to the parties’ subjective intentions when they enter into it, but rather by reference to an objective analysis of its aims.\textsuperscript{61} However, the OFT may take into account evidence of the parties' subjective intentions when assessing whether the Agreement has as its object the prevention, restriction or distortion of competition.\textsuperscript{62}

\textsuperscript{57} Case C-45/85 Verband der Sachversicherer e.V v Commission [1987] ECR 405 at paragraph 43.
\textsuperscript{58} EU Horizontal Guidelines, paragraph 271. In providing this Short-form Opinion, the OFT has considered section 6 of the EU Horizontal Guidelines regarding Commercialisation Agreements and section 7 regarding Standardisation Agreements and notes that both of these sections provide useful guidance. However, the OFT also notes that a mechanical application of the guidance or an overly rigid classification of an agreement of being of a particular type may not always be appropriate, as each individual case should be assessed on the basis of its own specific facts, as highlighted in the EU Horizontal Guidelines at paragraph 7.
\textsuperscript{59} EU Horizontal Guidelines, paragraph 276.
\textsuperscript{60} Case C-501/06 P GlaxoSmithKline Services Unlimited v Commission [2009] ECR I-9291 at paragraph 58.
7.10 The Parties’ Statement of Facts highlights that the purpose of the reference rate is to facilitate the roll out of RBI Schemes which will benefit both its landowner members, who may receive wayleave payments and/or broadband connections, and its non-landowner members, who may receive broadband connections as a result of the roll out of RBI Schemes. In addition, the Parties state that the much wider population of all actual and potential consumers of broadband services in rural areas would also be likely to benefit from the implementation of the Rate Recommendation.

7.11 The Parties’ Statement of Facts notes that their aims in making the proposed Rate Recommendation are twofold: to manage landowners’ expectations as to wayleave rates downwards towards rates which are more appropriate for RBI Schemes and to provide a degree of certainty as to the costs of wayleaves to potential RBI Providers.

7.12 On the basis of the information provided, the overarching aim or objective of the Rate Recommendation could therefore be seen to be the promotion of social, economic and technological development in rural areas.

7.13 With regards to the legal and economic context of the Rate Recommendation, the Statement of Facts notes that there is a lack of available guidance for landowners as to the appropriate rates to seek for rural broadband wayleaves. Furthermore, as granting wayleaves is not the main commercial business of the Parties’ members, landowners have very limited incentives to engage in extensive or difficult and time consuming negotiations in order to grant a wayleave to a RBI Provider.

7.14 The Parties’ Statement of Facts demonstrates that the market for rural broadband wayleaves is only just starting to develop. Rural broadband infrastructure schemes have not been attractive to established commercial broadband infrastructure providers to date as they are often not commercially viable. This is because the number of potential subscribers in rural areas is lower than in urban areas and in some cases is not sufficient to justify the cost of rolling out a RBI Scheme.

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63 Parties’ Statement of Facts, paragraph 3.7.
64 Parties’ Statement of Facts, paragraph 3.7.
65 Parties’ Statement of Facts, paragraphs 3.2 and 3.3.
66 Parties’ Statement of Facts, paragraph 3.3.
67 Parties’ Statement of Facts, paragraph 4.3.
7.15 Although the market is now starting to develop, this development has only been stimulated by the offer of government incentives, namely potential financial support in the form of State aid or Rural Community Broadband Fund funding.68

7.16 The fact that the nascent market for rural broadband wayleaves is only now developing with government incentives means that the legal and economic context of the Rate Recommendation must be considered largely in the absence of empirical evidence of competitive interaction between landowners, as little has taken place to date. The impact of a rate recommendation in such a market will likely be different from the impact that a rate recommendation would have on an already established market, especially if such a recommendation were above prevailing rates.

7.17 On the basis of the information provided, the OFT considers that the legal and economic context of the Rate Recommendation will differ according to whether or not landowners face competition for wayleaves.

Markets where landowners do not compete

7.18 In the majority of local markets, the OFT considers it likely that the individual landowners on the chosen route for a RBI Scheme do not face competition from neighbouring landowners and, as such, the relevant market is no wider than that individual landowner’s land. A set of neighbouring landowners with land located along the route of a proposed RBI Scheme could be viewed as offering a set of complementary wayleaves, as the RBI Provider would need to enter into a series of wayleave agreements to install cable in the land of each landowner in order to roll out a new scheme.

7.19 In those markets where there is no actual or potential competition, there is unlikely to be any restriction of competition of a horizontal nature,69 which is the usual concern in relation price-fixing recommendations by associations. The EU Horizontal Guidelines note that where the Parties to commercialisation agreements are not potential competitors, there is no restriction of competition within the meaning of Article 101(1) TFEU.70

68 Parties’ Statement of Facts, paragraph 2.7.
70 EU Horizontal Guidelines, paragraph 237. This paragraph also notes that, a commercialisation agreement is not likely to give rise to competition concerns if it is objectively necessary to allow
Taking the whole context of the Rate Recommendation into account, if the recommendation were made exclusively to non-competing landowners, the OFT would not consider that it would be detrimental to competition by its very nature. In that scenario, the OFT would therefore not find that the Rate Recommendation constituted a restriction of competition by object.

Instead, in that scenario, the OFT would further need to consider whether the Rate Recommendation would be likely to have restrictive effects on competition. Given the absence of competition between those landowners, in this context the assessment of effects would focus on the downstream market for the supply of rural broadband. The OFT would consider both the actual and the potential effects of the Rate Recommendation when compared to the counterfactual of how the market would function in the absence of the Rate Recommendation.

Such an effects analysis is outside the scope of this Short-form Opinion and is not necessary in order to provide guidance to the Parties, given that the OFT must also consider the legal and economic context of the Rate Recommendation in markets where landowners may compete.

Markets where landowners could compete

As noted above, competition between neighbouring landowners cannot be ruled out and so it is also necessary to assess whether the Rate Recommendation has as its object the restriction of competition in those markets where the Rate Recommendation is addressed to landowners who are actual or potential competitors.

The OFT would normally consider that even a non-binding recommendation by a trade association of fixed prices to its competing members can be construed as a restriction of competition by object. The stated intention of the Parties to manage price expectations downwards does not, in itself,
alter this conclusion, as the Rate Recommendation may still be expected to weaken price competition.\(^{74}\)

7.25 Where there is scope for actual or potential competition between landowners, a rate recommendation has the potential to act as a focal point, which could facilitate collusion between potentially competing landowners. In particular, due to the application of a single national reference rate to multiple local markets, there may be some local markets where the Rate Recommendation will be higher than rates that might otherwise have been offered by landowners to RBI Providers. In those cases, the Rate Recommendation could become a focal point for collusion, even though this is not the Parties’ stated intention.\(^{75}\)

7.26 In light of this risk, the OFT would likely consider that the Rate Recommendation would restrict competition by its very nature when made to members who could provide substitutable wayleaves in the same geographic market, notwithstanding the Parties’ objective aims.

7.27 Neither the objective aims, nor the features of the legal and economic context of the Rate Recommendation, nor the fact that the Rate Recommendation will be addressed for the most part to non-competing undertakings, would be likely to alter the conclusion that a rate recommendation by an association addressed to its members who are actual or potential competitors should be viewed as a restriction of competition by object. Given that it is not possible to separate out any part of the Rate Recommendation that applies to non-competing landowners from its application to competing landowners, the OFT would therefore be likely to consider that the recommendation of a fixed wayleave rate by the

\(^{74}\) Insofar as it may prevent the Parties’ members from determining independently the pricing policy which they intend to adopt. See Joined cases C-40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging Suiker Unie UA and others v Commission* [1975] ECR 1663 at paragraph 173-175. See also Case T-224/00 *Archer Daniels Midland and Archer Daniel Midlands Ingredients v Commission* [2003] ECR II-2597 at paragraph 120. In particular, the Rate Recommendation may serve to restrict further price reductions below the recommended rate.

\(^{75}\) The OFT notes that any competition between landowners in relation to agreeing wayleaves is likely to be a one-off transaction, as the infrastructure for any broadband scheme is only installed once. This is quite different from a market where there are multiple transactions and where suppliers repeatedly interact, allowing all suppliers to benefit from a collusive price and allowing suppliers that deviate from a collusive agreement to be punished. In this case, collusion between competing landowners could be facilitated by the use of side payments. This form of collusion is only likely to be feasible if the Rate Recommendation that is used in the wayleave agreement significantly exceeds the costs of the landowner that concludes the agreement. Collusion could also be aided by the fact that neighbouring landowners are likely to interact in other product markets, for example, agricultural products, and in other ways that could help to sustain collusion.
Parties would, by its very nature, restrict competition, and would likely be classed as a restriction of competition by object.

7.28 Where a restriction of competition by object is found, the effect of the Agreement does not need to be further analysed under Chapter I CA98.76

Appreciability of object restrictions

7.29 The OFT will generally regard any Agreement which directly or indirectly fixes prices as being likely appreciably to restrict competition,77 regardless of the Parties' market shares.78

7.30 As outlined above, while it appears that there are many local markets where neighbouring landowners are not in competition, it seems likely that there are some local markets where neighbouring landowners could compete with each other. In assessing the appreciability of a restriction of competition in such circumstances, the OFT would not weigh the number of local markets where there is likely to be scope for competition against the number of local markets where there is no competition. Instead, the OFT would consider the extent of the likely impact of the restriction in those local markets where there is scope for competition.

7.31 In those local markets where there is scope for competition between neighbouring landowners, the OFT takes the view that any restriction of price competition between landowners is likely to be appreciable, as it appears that price is the key parameter on which landowners would compete for the grant of a wayleave.

7.32 The OFT takes the view that, in these circumstances, price fixing recommendations made by an association to its members are inherently likely79 to appreciably restrict competition.


77 OFT408 Trade Associations, Professions and Self-Regulating Bodies (December 2004) at paragraph 3.3.

78 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU (de minimis) 2001 OJ C 368/07 at paragraph 11. OFT401 Agreements and Concerted Practices (December 2004), at paragraph 2.17.

8 ELIGIBILITY FOR INDIVIDUAL EXEMPTION UNDER SECTION 9 CA98

8.1 The Parties to an Agreement which is deemed to create an appreciable restriction of competition within the meaning of the Chapter I prohibition may be able to demonstrate that their Agreement is eligible for individual exemption under section 9 CA98.\(^{80}\)

8.2 Section 9(1) CA98 provides that an Agreement will be exempt from the Chapter I prohibition if it:

(a) contributes to
  i. improving production or distribution, or
  ii. promoting technical or economic progress,
while allowing consumers a fair share of the resulting benefit,
and

(b) does not -
  i. impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or
  ii. afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

8.3 Section 9(2) CA98 states that the Parties claiming the benefit of exemption under section 9(1) CA98 bear the burden of proving that its conditions are satisfied.

8.4 In the event that the OFT considers that the Rate Recommendation falls within the scope of Chapter I CA98, the Parties have asked the OFT to provide guidance as to whether the benefits they have identified are relevant to the assessment to be carried out under section 9(1)(a) CA98\(^{81}\) and whether the Rate Recommendation could satisfy the conditions of section 9(1)(b).

8.5 The OFT notes that if it were to consider the application of section 9 CA98 during the course of an enforcement case, it would expect to be provided

\(^{80}\) OFT401 Agreements and Concerted Practices (December 2004) at paragraphs 5.1-5.5 and Article 101(3) Guidelines at paragraph 41.

\(^{81}\) The Parties have not requested guidance as to whether a fair share of the efficiencies claimed by the Parties would be passed on to consumers.
with detailed evidence from the Parties in support of efficiency claims. For the purposes of this Short-form Opinion, the OFT will provide general guidance as to the kind of analysis it would be likely to carry out. This should help the Parties to carry out their own self-assessment to determine whether the proposed Rate Recommendation is eligible for individual exemption.

8.6 Applying the criteria set out in Section 9 CA98 allows parties to a restrictive Agreement to assess whether the pro-competitive benefits produced by their Agreement outweigh the anti-competitive effects generated by the restriction of competition it creates. Only if an Agreement can satisfy all four of the criteria set out in section 9 CA98, will it be exempt from the Chapter I prohibition.

Improving production or distribution or promoting technical or economic progress

8.7 Where an Agreement relates to multiple markets, and its competitive impact may vary between different markets, the question arises whether the section 9 CA98 assessment of restrictions and benefits needs to be conducted separately for each affected market or whether the wider impact of the agreement may be taken into account.

8.8 Where markets are related, efficiencies achieved on these markets can be taken into account provided that the group of consumers affected by the restriction are substantially the same.

8.9 Any given RBI Scheme will cross several local markets, which may well include both markets where there is no scope for competition between landowners and some where landowners could compete. As the consumer, here the same RBI Provider, will need to enter into a wayleave agreement in each of these local markets in order to roll out a scheme, the two types of markets are related. For this reason, the OFT would be likely

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82 Article 101(3) Guidelines, paragraph 11.
83 Joined Cases C-56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, at 349. See also Article 101(3) Guidelines, paragraph 34.
85 An effects analysis would likely be needed to determine whether the application of the Rate Recommendation in these markets would have the effect of restricting, distorting or preventing competition, for example on downstream markets or other related markets. See paragraph 7.21.
86 A restriction of competition by object is likely in these markets. See paragraph 7.26.
87 The analysis is the same whether the consumer is considered to be the RBI Provider or the group of end-consumers who receive broadband connections via the RBI Scheme.
to consider that the benefits generated in all markets affected by any given RBI Scheme should be taken into account when assessing whether the Rate Recommendation contributes to improving production or distribution or technical or economic progress.

8.10 The Parties would therefore be able to weigh whatever pro-competitive benefits the Rate Recommendation generates for each RBI Scheme as a whole against any anti-competitive impact arising in those markets where the Rate Recommendation has the object or effect of restricting competition.

8.11 The Parties should only take into account objective benefits\(^88\) when assessing potential efficiency gains under this condition and as such, would need to demonstrate not only the nature of the claimed efficiencies, but also the causal link between the restrictive agreement and the efficiencies, the likelihood and magnitude of each claimed efficiency and how and when each claimed efficiency would be achieved.\(^89\)

8.12 The Parties can take into account benefits which result in improvements in the quality or efficiency of any service which might be improved by the existence of the agreement.\(^90\) Where the Parties claim that the efficiencies are new or improved products or services, they must explain the nature of these efficiencies and how and why they constitute an objective economic benefit. In the case of prospective agreements, the Parties should take into account the date from which the efficiencies will become operational so as to have a significant positive impact in the market.\(^91\)

8.13 The Parties submit that the Rate Recommendation will facilitate the investment in, and more rapid provision of, rural broadband infrastructure\(^92\) by providing guidance to landowners and to RBI Providers as to the appropriate wayleave rate to be used in rural areas.\(^93\)

8.14 In the Statement of Facts the Parties claim that the Rate Recommendation could generate efficiencies by speeding up the roll out of individual RBI

\(^89\) Article 101(3) Guidelines, paragraph 51.
\(^91\) Article 101(3) Guidelines, paragraphs 57-58.
\(^92\) Parties’ Statement of Facts, paragraph 3.7.
\(^93\) Parties’ Statement of Facts, paragraphs 3.2-3.3.
Schemes by approximately 30 per cent. The Parties claim that these efficiencies will in turn facilitate the roll out of broadband projects by 2015 and that as a consequence of access to effective broadband, the production or distribution of goods and services in rural areas will be improved.

8.15 For the purposes of this Short-form Opinion, the OFT would consider that for RBI Providers, the Rate Recommendation is capable of generating a number of relevant benefits. These would be the reduction in negotiation costs and increased predictability of roll out costs for those RBI Providers considering tendering for schemes.

8.16 On the basis of the Parties’ Statement of Facts, the OFT would also consider that the Rate Recommendation is capable of generating benefits for landowners. These would be shorter negotiations, savings on negotiation costs, and increased certainty as to the appropriate rate to seek for rural broadband wayleaves, and the resulting access to effective broadband that they would receive.

8.17 Furthermore, the OFT considers that the impact that these efficiencies will then have on the roll out of effective broadband schemes in rural areas should also be taken into account by the Parties in conducting their self-assessment.

8.18 In considering the extent to which the Rate Recommendation is likely to achieve the claimed efficiencies, the OFT notes that the level of the Rate Recommendation would be relevant to the assessment to be carried out by the Parties. The Parties state that their intent is to recommend a rate that is below the commercial or market rate. However, as there are numerous local markets for wayleaves and as landowners’ costs will vary in different local markets, setting a single national rate which is lower than

95 Parties’ Statement of Facts, paragraphs 5.9-5.13.
96 See the concerns regarding the lack of effective broadband highlighted in the OFT’s call for evidence, OFT1420 Price and Choice in Remote Communities (June 2010) at paragraph 3.19.
97 See footnote 14, above.
98 By market rate here, the OFT means the rate that a landowner and a RBI Provider would agree absent any rate recommendation.
99 The market rate is likely to differ widely across different areas for numerous reasons, including land values, local population density affecting the commercial viability of the scheme, local geography and so on. The ‘market’ value is likely to differ across landowners within the same area too, for example, due to difference in agricultural land use – whether the land is used for grazing,
all possible market rates and yet attractive enough for the Rate Recommendation to have traction with the majority of landowners could be difficult.

8.19 In any local markets where the Recommended Rate is higher than the local market rate, the benefits to RBI Providers in terms of quicker, cheaper negotiation of wayleave rates might be largely obviated by the payment of higher rates. In the OFT’s view, the higher the Recommended Rate is above typical market rates, the harder it is likely to become for the Parties to demonstrate that the Rate Recommendation generates an improvement in production or distribution, or promotes technical or economic progress.

8.20 When assessing the extent and the likelihood of the claimed efficiencies arising, the OFT notes that absent the Rate Recommendation, landowners may seek to negotiate a wayleave agreement from expectations based on typical commercial rates which are likely to be above the Rate Recommendation,\(^{100}\) leading to more situations where the RBI Scheme does not proceed at all.

8.21 In the OFT’s view, if the Rate Recommendation were set at a higher level than a RBI Provider could afford to pay given the weak commercial case for many RBI schemes, then it would not be likely to generate relevant benefits, as successful negotiations would be more likely to be hindered than helped by such a rate.\(^{101}\) However, the OFT recognises that even if the Rate Recommendation were higher than the market rate in some local markets, significant efficiencies may still be achieved if those higher rates are outweighed by the advantages of shorter negotiations and increased cost certainty for RBI Providers.

8.22 The OFT would therefore be likely to consider that the Rate Recommendation could be capable of contributing to improving production or distribution or to promoting technical or economic progress in the circumstances outlined above. The OFT would however encourage the

growing cereals, root vegetable or prize roses is likely to affect a farmer’s willingness to have a trench dug across his land.

\(^{100}\) Parties’ Statement of Facts, paragraph 3.4.

\(^{101}\) There is another ‘business chilling’ risk here: if the recommended rate is set at a level that is too low, then it may be below the costs that installing the infrastructure would impose on some landowners. In this case, they may be unwilling to conclude wayleave agreements, hence delaying or preventing some rural broadband schemes.
Parties to consider the impact of the level of the Rate Recommendation in conducting their own self-assessment.

Allowing consumers a fair share of the resulting benefit

8.23 The Parties have not requested guidance as to how the OFT would consider this limb of Section 9 CA98. However, by way of guidance, the OFT would note that the concept of consumers for the purposes of this section means all direct and indirect users of the products covered by the Agreement.102 The Parties should therefore consider the impact of the efficiencies generated by the proposed Rate Recommendation on their immediate customers in the market for wayleaves, namely RBI Providers, as well as the ultimate consumers of the resulting rural broadband services.

Indispensability of the restriction

8.24 To be eligible for exemption under section 9 CA98, the Agreement must not impose any restrictions which are not indispensable to the attainment of the efficiencies it creates. This condition implies a two-fold test. First, the restrictive agreement must be reasonably necessary in order to achieve the efficiency gains claimed by the Parties. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.103

8.25 In conducting the first assessment, the Parties should consider whether or not the proposed Rate Recommendation makes it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the Rate Recommendation and should consider whether more efficiencies are produced with the Rate Recommendation than without it.104

8.26 In determining whether the Rate Recommendation and the restrictions of competition it creates are reasonably necessary, the Parties must satisfy themselves that the efficiencies claimed are specific to the Rate Recommendation and that there are no other economically practicable and less restrictive means of achieving them.105 The Parties should therefore

102 Article 101(3) Guidelines, paragraph 84.
103 EU Horizontal Guidelines, paragraph 314. Article 101(3) Guidelines, paragraph 73.
104 Article 101(3) Guidelines, paragraph 74.
105 Article 101(3) Guidelines, paragraph 75.
examine whether the claimed efficiencies could be achieved by another less restrictive type of arrangement.\(^\text{106}\)

8.27 As the conditions in Section 9 CA98 are cumulative, this assessment of the indispensability of the restriction by the Parties would need to take into account the specific level of the rate recommended, which must have been set within an appropriate range to ensure relevant benefits are generated for the purposes of section 9(1)(a) CA98.\(^\text{107}\)

8.28 In considering whether a restriction of competition is indispensable, the OFT notes that it is unlikely for a price fixing clause to be considered indispensable.\(^\text{108}\) However, that is not to say that such restrictions can never be considered indispensable, as each case needs to be assessed on the basis of its own specific facts.

8.29 The Parties submit that making the Rate Recommendation is the least restrictive means of providing guidance to landowners and certainty of costs to RBI Providers that will facilitate rural broadband roll out.\(^\text{109}\)

8.30 In the absence of the Rate Recommendation, landowners do not have sufficient guidance to help them negotiate appropriate wayleave rates with RBI Providers. This makes the negotiation of wayleave rates costly and time consuming. The OFT considers that this is relevant to the consideration of whether the Rate Recommendation makes it possible to grant wayleaves more efficiently.

8.31 In considering whether more efficiencies are generated with the Rate Recommendation in place than without it, the Parties should consider whether certainty as to appropriate wayleave rates in rural areas created by the Rate Recommendation would lead to the faster roll out of effective broadband in rural areas.

8.32 In this case, the Parties have identified a number of reasons why there is no less restrictive means of creating the efficiencies they claim. The OFT considers the following factors to be particularly relevant to their assessment:

\(^{106}\) Article 101(3) Guidelines, paragraph 76.
\(^{107}\) As noted in paragraphs 8.18 to 8.21 above, the appropriate level would need to be one that is not so high or so low as to impede rather than promote the roll out of broadband in rural areas.
\(^{108}\) Article 101(3) Guidelines, paragraph 79.
- Alternative dispute resolution would be less restrictive of competition, but would not be as effective in facilitating the roll out of RBI Schemes, as it still, like the court route, involves significant cost and delay for landowners and RBI Providers.

- A published register of previous rural wayleave rates\textsuperscript{110} may assist in the future, but may also raise some of the same concerns as a single reference rate, such as the risk of creating focal points for collusion where landowners adopt a precedent from a case with a higher market rate than their own market. Moreover, such a register would not be a source of guidance now as it would take several years to compile, given that RBI Schemes are, for the most part, only in the planning stages now.

- The Rate Recommendation is not binding. This would be less restrictive of competition than a binding Agreement or an Agreement with an enforcement mechanism which imposes penalties for deviating from an agreed rate.

8.33 The OFT considers that the assessment of alternative rate recommendations should also form part of the Parties’ self-assessment. In particular, the OFT notes that alternatives could include the recommendation of a national range of rates, several regional rates or rates which differ by land use to reflect differences in market rates.\textsuperscript{111} However, these alternatives would not necessarily be any less restrictive of competition than the Rate Recommendation as it appears that they may still encourage the adoption of uniform rates in any given market. Moreover, the complexity of calculating such differentiated rates and uncertainty as to the correct application of the range of rates or categorisation of an individual piece of land may significantly reduce the effectiveness of such a recommendation when compared to a single national rate.

8.34 On the basis of these factors and the information available, the OFT would be likely to consider that the non-binding Rate Recommendation would make the roll out of RBI Schemes more likely than in its absence and that the Rate Recommendation also appears likely to be more effective than the alternative means of providing guidance to landowners and RBI Providers outlined above. In the absence of any clear, realistic, attainable alternatives

\textsuperscript{110} Parties’ Statement of Facts, paragraph 5.19.

\textsuperscript{111} See footnote 98 above.
that would achieve equivalent efficiencies in these circumstances, the OFT would be likely to consider that the restriction could be considered indispensable.

No elimination of competition in respect of a substantial part of the products concerned

8.35 When considering whether competition would be eliminated in respect of a substantial part of the products concerned, the Parties should only consider the impact of the Rate Recommendation on competition in the relevant markets where appreciable restrictions of competition by object or by effect have been identified.\textsuperscript{112} This assessment depends on the degree of competition existing on these individual markets prior to the Rate Recommendation and the reduction in competition the recommendation is likely to create on these markets.\textsuperscript{113}

8.36 The Parties should conduct an analysis of the various sources of actual and potential competition in the market, the level of competitive constraint that they impose on the Parties’ members and the impact of the Rate Recommendation on any competitive constraints.\textsuperscript{114}

8.37 The OFT notes that this condition of section 9 CA98 will not be satisfied if the agreement eliminates competition in one of its most important expressions, such as price.\textsuperscript{115}

8.38 The Parties submit that the Rate Recommendation is not capable of eliminating competition as the reference rate would not be binding and will be issued for guidance purposes only. The OFT, however, notes that it could be possible to eliminate competition with a non-binding or unenforceable agreement

8.39 The Parties would need to look at the actual market conduct of their members, their past competitive interaction, substitutability and potential competition in assessing whether competition would be eliminated in respect of a substantial part of the products concerned.\textsuperscript{116}

\textsuperscript{113} Article 101(3) Guidelines, paragraph 107.
\textsuperscript{114} Article 101(3) Guidelines, paragraph 108.
\textsuperscript{115} Article 101(3) Guidelines, paragraph 110.
\textsuperscript{116} Article 101(3) Guidelines, paragraph 111.
8.40 As outlined above, it appears that competition between landowners for wayleaves only occurs where the land of two or more landowners is seen as substitutable by a RBI Provider due to ease of re-routing. In these markets, price competition appears to be the key parameter on which landowners could compete in the absence of the recommendation. As identified above, in these markets, despite the non-binding nature of the Rate Recommendation, there is potential to restrict or even eliminate competition between landowners, where it acts as a focal point for collusion.

8.41 The extent to which a recommended rate could provide a focal point for collusion depends on a number of factors which determine the balance of competitors’ incentives to compete weighed against their ability and incentives to collude.

8.42 In terms of incentives to compete, a recommended rate that was set below, or close to, competitive levels (as discussed in Section 5 above) would be unlikely to create a risk of collusion, as there is likely to be little incentive to collude on a rate that is not much above landowners’ costs.

8.43 In terms of incentives to collude, the OFT notes that a recommended rate that is significantly higher than local market rates absent the recommendation may incentivise collusion. While a low rate would not be an attractive rate on which to collude, a high rate could allow collusion between competing landowners, for example, facilitated by the use of side payments. This form of collusion is only likely to be feasible if the rate recommendation that is used in the wayleave agreement significantly exceeds the costs of the landowner that successfully concludes the agreement. In this way, both landowners have an incentive to collude and share a high wayleave rate, compared to a situation where they both compete and bid the wayleave rate down as a result, with the unsuccessful landowner receiving nothing.

8.44 Other relevant factors that the Parties should consider in conducting this assessment include the extent to which competing landowners interact in other unrelated product markets, for example the supply of agricultural products.117

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117 Typically, situations where competitors repeatedly interact over multiple transactions and/or in multiple markets are more likely to be conducive to collusion. This is because such repeated
8.45 The OFT has insufficient evidence to assess the risk that competition would be eliminated. In order to assess the compliance of the Rate Recommendation with this condition of section 9 CA98, the Parties should consider the likely effects of the Rate Recommendation on any competitive interactions between its members. The Parties should also consider setting the rate at a level that minimises the scope for collusion between landowners.

9 CONCLUSION

9.1 Having considered the available information on the background to and features of the Rate Recommendation, it appears to the OFT that the Rate Recommendation would be likely to fall within the Chapter I CA98 prohibition. A careful assessment of the likely restrictions of competition and benefits arising from the Agreement will therefore be required in order to determine whether the criteria for individual exemption in section 9 CA98 are met.

9.2 The OFT would be likely to analyse the Parties’ Rate Recommendation as a decision of associations of undertakings with the object of restricting competition, taking into account the objective aims and the legal and economic context of the proposed Rate Recommendation and noting in particular the existence of some local markets where neighbouring landowners could compete to grant wayleaves to a RBI Provider.

9.3 In local markets where each landowner is effectively a monopolist, offering complementary, rather than competing, products, the OFT would be unlikely to view the Rate Recommendation as an object restriction. If the Rate Recommendation were to be addressed exclusively to non-competing landowners, the effects of the Rate Recommendation would need to be analysed in order to determine whether the Rate Recommendation could restrict competition in the downstream market for the provision of rural broadband, or in other related markets.

9.4 However, the Rate Recommendation in this case will also be addressed to competing landowners. As it is not possible to separate out any part of a recommendation that applies to non-competing landowners from its interaction allows all suppliers to benefit from a collusive price and allows suppliers that deviate from a collusive agreement to be punished.
application to competing landowners, the OFT would therefore be likely to consider that the recommendation of a fixed wayleave rate by the Parties would, by its very nature, restrict competition, and would likely be classed as a restriction of competition by object.

9.5 As the restriction of competition created by the Rate Recommendation is inherently likely to be appreciable in those markets affected, the Parties will need to assess whether the Rate Recommendation is capable of individual exemption under section 9 CA98.

9.6 The assessment of relevant benefits under section 9(1)(a) CA98 may take into account that the Rate Recommendation brings about significant time and cost savings and increased certainty for RBI Providers and for landowners. This will help promote technical and economic progress by bringing effective broadband to rural areas. As any given RBI Scheme has the same consumers, benefits from the application of the Rate Recommendation on all related markets affected by the scheme may be set against any restrictions arising in those markets.

9.7 On the basis of the available facts, it appears that there is no less restrictive alternative that could generate the benefits identified. In the absence of any such alternative, the Rate Recommendation could be considered indispensable.

9.8 Whether or not the Rate Recommendation may lead to an elimination of competition in some local markets will depend on the level of the rate and other factors influencing the ability of and incentives for landowners to compete or collude, which will need to be the subject of self-assessment by the Parties.

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