

## OFT Issues short-form opinion in record time

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### Short-form opinion on rural broadband wayleave rates

On 23 August the Office of Fair Trading (OFT) issued a non-binding short-form opinion on proposals by the National Farmers' Union (NFU) and the Country Land and Business Association (CLA). The NFU and CLA propose to recommend to their rural members a 'reference rate' for the grant of access to their land for the purposes of laying and servicing broadband cables.

In its opinion, the OFT has confirmed that, in principle, the recommendation of such a fixed reference rate would be anti-competitive. However, the OFT is of the opinion that the benefits to the provision of high speed broadband in rural areas outweigh the negative effects on competition of having a fixed reference rate. As such, the proposal for a reference rate could meet the criteria for an exemption from the provisions of the UK Competition Act 1998 (CA '98).

The OFT makes clear that the purpose of the short-form opinion is not to provide clearance for the parties' proposals but rather to assist them in elements of their self-assessment of whether the proposals would be anti-competitive.

In their self-assessment, now with the benefit of the OFT's opinion, the NFU and CLA will need to consider carefully whether the proposed agreement as to the reference rate will fall within an exemption in the CA '98.

### Short-form opinions

When assessing whether proposed cooperation agreements or arrangements are anti-competitive, if businesses encounter situations where they, or their advisers, are not able to confirm whether such agreements or arrangements fall outside the ambit of UK and EU competition law, businesses should consider seeking a short-form opinion from the OFT. The types of cooperation agreement or arrangement on which the OFT will provide a short-form opinion include research and development, production, purchasing and commercialisation. Such agreements or arrangements are likely to include terms as to price, product and information sharing.

Some businesses and their advisers believe that the short-form opinion process is too slow. In this most recent short-form opinion, only the second since their introduction in 2010, the OFT has shown that it can produce a useful opinion in very quick time, only 34 days after the parties had requested it formally.

Short-form opinions are not individual exemptions from competition law, as are available in some jurisdictions - Denmark being a good example. Instead they are useful (and currently under-used) tools to assist businesses in determining the applicability of competition laws. The UK is not the only jurisdiction with such tools—the US DoJ will consider, and provide guidance on, proposed agreements and arrangements under its Business Review procedure.

It is clear that in carrying out the all important self-assessment of compliance with competition law, businesses should not be afraid to use all the tools at their disposal, including short-form opinions. The costs of ensuring that agreements or arrangements are compliant before they are entered into are small as compared with the potential fines that the OFT could impose for non-compliance.

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