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CityFibre response to Ofcom's consultation on Openreach's Equinox offer

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1. Introduction and summary

- 1.1 This is CityFibre’s response to Ofcom’s consultation on Openreach’s Equinox offer dated 6 August 2021 (the **Consultation**).¹ The offer has been notified under SMP Condition 8.6, which requires Openreach to give not less than 90 days’ notice of any amendment involving new or existing network access where the price or other contractual conditions are conditional on the volume and/or the range of services purchased.
- 1.2 As Ofcom rightly recognised in the WFTMR Statement, any such conditionality in Openreach’s terms of dealing carries real risks for the development of network-based competition in the UK and therefore requires careful prospective scrutiny. Given its ubiquitous network and established relationships with ISPs, Openreach has significant incumbency advantages and will remain a necessary trading partner for ISPs for the foreseeable future. By virtue of its privileged position in the market, Openreach has the ability to undermine network-based competition by using conditional contractual terms to win ISPs’ loyalty, inducing them to focus their efforts on selling services which use Openreach’s network rather than competing networks.
- 1.3 To protect against this risk, Ofcom laid down a stringent framework in the WFTMR Statement for assessing the likely impacts on network competition of any conditional terms of dealing that Openreach proposed to introduce. Under the WFTMR framework, (1) Ofcom is required to assess whether the offer potentially creates a barrier to the use of alternative network operators. If so, the offer may only come into effect if Ofcom concludes (2) that the impact is unlikely to have a material impact on nascent network competitors; and (3) that the offer will generate clear and demonstrable benefits.
- 1.4 This framework reflects Ofcom’s conclusions, consistent with its statutory duties, that:
- the promotion of network-based competition should be the “guiding principle” in assessing any commercial terms proposed by Openreach;²
 - *ex post* competition law is insufficient to promote network-based competition and support the emergence of new entry;³ and

¹ See https://www.ofcom.org.uk/data/assets/pdf_file/0032/222989/Equinox-condoc.pdf.

² WFTMR Statement, Volume 3, paragraph 7.159.

³ See e.g. WFTMR Statement, Volume 3, paragraph 7.54: “*Competition law addresses anti-competitive behaviour after it has happened and, in this context, we do not consider it is a sufficiently timely deterrent to stop Openreach from acting in a way that deters new network rollout.*”

- the “*key concern*” is to prevent Openreach from introducing commercial terms that could “*undermine investor confidence in new network build and impact rollout plans*”, for example by discouraging ISPs from switching demand to alternative networks.⁴

1.5 As Ofcom recognises in the Consultation, anything that undermines new network build is likely to be detrimental to long-term consumer interests.⁵ The analytical framework laid down in the WFTMR Statement should therefore be applied carefully by Ofcom in order to ensure that Openreach does not use conditional contractual terms to block the emergence of network-based competition at scale in the UK.

1.6 As set out below, CityFibre considers that Ofcom’s provisional assessment in the Consultation falls short of the required analysis. Ofcom proposes to find that the Equinox offer lacks even the *potential* to serve as a barrier to using alternative network operators. Ofcom therefore makes no attempt to assess the materiality of the offer’s impact on nascent network competitors or to examine whether the conditional aspect of Openreach’s pricing has any legitimate justification.

1.7 Ofcom’s analysis in the Consultation is not well-founded. It lacks any properly reasoned basis and it is inconsistent with Ofcom’s own underlying analysis of the potential effects of the Equinox offer on ISPs’ incentives. In summary:

- (i) The Equinox offer involves substantial discounts that are conditional on the range of services purchased by ISPs. Specifically, ISPs receive a large price reduction on all the Openreach FTTP products they purchase from Openreach provided that they achieve at least 80% of new sales orders after the first year on FTTP as opposed to FTTC in areas where FTTP is available. Ofcom refers to these targets as ‘Order Mix Targets’.
- (ii) The Order Mix Targets have a clear potential to incentivise ISPs to purchase network access from Openreach rather than alternative network operators in areas of overlap. This conclusion follows straightforwardly from Ofcom’s findings in the Consultation.

⁴ WFTMR Statement, Volume 3, paragraph 7.159. See also paragraph 7.50 of Volume 3: “[i]f Openreach is able to deprive new networks of demand, they will fail.”

⁵ Consultation, paragraph 2.18.

- (iii) First, the discounts if the Order Mix Targets are met could be substantial, generating strong incentives to ensure that they are achieved.⁶ Ofcom estimates that the total value of the discounts could be as high as 15-30% across a customer lifetime compared to list prices.⁷
- (iv) Secondly, on Ofcom's assessment, there is "*considerable uncertainty*" as to how ISPs will perform against the Order Mix Targets.⁸ Under 'plausible scenarios', Ofcom considers that at least some ISPs may struggle to meet all of the Order Mix Targets, particularly over the next few years.⁹ Some ISPs (including TalkTalk and Vodafone) resell access purchased from Openreach to smaller ISPs downstream and there is a risk that only a low proportion of the downstream ISPs' orders are for FTTP.¹⁰ ISPs may also face consumer resistance to FTTP, leading them to place more legacy broadband orders in order to maintain sales.¹¹
- (v) Thirdly, those ISPs who fear that they may miss the Order Mix Targets will have very powerful incentives to focus on selling Openreach FTTP products rather than alternative networks' products in areas of network overlap. The Equinox discounts apply to all Openreach FTTP products sold by an ISP including in the many areas where Openreach will be the only available choice for ISPs. To win the business of such ISPs in overlap areas, it would not be sufficient for alternative network operators to match the (already substantial) discounts on each unit supplied. They would also need to compensate the ISPs for the loss of discounts on all of the units sold by Openreach across the rest of the country. In Ofcom's terms, the Equinox offer "*effectively make[s] discounts in areas [...] where ISPs are dependent on Openreach for FTTP [...] conditional on ISPs not using altnets elsewhere in Openreach's FTTP footprint*".¹² Indeed any targets set in a commercial contract are not designed to be easily met; rather they are designed to drive customers to change their behaviour and this is precisely the outcome Ofcom has identified, driving ISPs away from alternative networks.
- (vi) Fourthly, this gives rise to a real and immediate threat to competition. Based on network operators' stated intentions, Ofcom estimates that alternative network operators that provide wholesale access to ISPs may come to be present in approximately a third of Openreach's

⁶ Consultation, paragraph 2.46.

⁷ Consultation, paragraph A6.17.

⁸ Consultation, paragraph A7.13.

⁹ Consultation, paragraph 2.47(b).

¹⁰ Consultation, paragraph A7.12, A7.13(b).

¹¹ Consultation, paragraph A7.13(b).

¹² Consultation, paragraph A8.1(b).

FTTP footprint.¹³ The extent to which overlaps will emerge in the short term depends on “*the extent to which Openreach prioritises overbuilding altnets in some areas*” in pursuit of its strategic objectives, a matter on which Ofcom professes to be “*uncertain*”.¹⁴

- (vii) Given the above findings, it is difficult to understand how Ofcom could rationally conclude that there is not even the *potential* for the Equinox offer to create barriers to the use of alternative networks. While some matters are uncertain, the basic loyalty-inducing mechanism of the Order Mix Targets is straightforward. The only way of avoiding the logic of Ofcom’s analysis would be if the Order Mix Targets could not possibly be met by ISPs; or if they will easily be met by ISPs; or if there is no potential for geographical overlaps. Ofcom does not suggest, however, that the Order Mix Targets are unachievable; it specifically finds that there are plausible scenarios in which major ISPs may struggle to meet the targets; and it recognises that there is clear scope for overlaps to emerge. The potential for the offer to create barriers to the use of alternative networks is therefore clear and obvious from the Consultation itself.

- (viii) It is no answer for Ofcom to say that it expects any such effects to be “*temporary*”,¹⁵ lasting for only “*a few years*”,¹⁶ on the basis that “*the proportion of FTTP orders would be likely to rise over time*”¹⁷ and that regulated stop-sell will be triggered “*in due course*”.¹⁸ There is still a clear potential for the Equinox offer to create barriers to the use of alternative networks for at least the next few years, during a crucial period for alternative networks if they are to maintain investor confidence in the large-scale rollout that is necessary to deliver the scale of network competition that Ofcom has identified as its policy goal.

- (ix) Under its own analytical framework, Ofcom is therefore required to consider the effects and justification of the Equinox offer. The offer should only be permitted to proceed if its effects on alternative network build are likely to be immaterial and if there is a good justification for placing conditionality at the core of the offer, matters which Ofcom has not yet attempted to explore.

¹³ Consultation, paragraph A8.4.

¹⁴ Consultation, paragraph A8.5.

¹⁵ Consultation, paragraph 2.47(c).

¹⁶ Consultation, paragraph 2.47(b).

¹⁷ Consultation, paragraph A7.13(c).

¹⁸ Consultation, paragraph 2.52(c).

- (x) In assessing the materiality of the effects, Ofcom should carefully consider the immediate impacts of the offer on ISPs' conduct. Given the severe cost consequences of missing the Order Mix Targets, ISPs who consider that there is even a risk of this happening will do all that they can to redirect their resources and investments to ensure that this does not happen. They will, for example, focus upon integrating Openreach systems, with ensuing delays in integration with alternative networks resulting in significantly reduced take-up of rival services. This effect is reinforced by the other conditions of the Equinox offer. For example, it is a condition that ISPs fully integrate their systems with Openreach to ensure automated online customer journeys.¹⁹ In consequence, alternative network operators are denied a level playing field. For infrastructure providers such as Openreach and CityFibre, being first to the FTTP ISP customer is essential, given the very low levels of fibre-to-fibre switching that are envisaged, particularly in the network deployment phase of the next 2-5 years. The Equinox offer confers a substantial advantage on Openreach in winning customers during that crucial period.
- (xi) As regards the justification for the Equinox offer, there is no consideration in the Consultation of why Openreach needs the conditionality that forms an integral part of the Equinox offer. It could equally well drive consumer demand for FTTP products by competing on the merits by means of appropriate plain vanilla discounts, without the exclusionary effects on rival network operators that attach to the current configuration of the offer.

1.8 In the remainder of this response, CityFibre proceeds as follows:

- (i) Section 2 below considers the impact of the Equinox conditionality on network-based competition in the UK. It explains why there is a clear potential barrier to the use of rival networks' products arising from the Order Mix Targets. The impact of those Order Mix Targets on alternative networks is exacerbated by various other features of the offer, which appear to have been carefully calibrated to leverage Openreach's market power to the detriment of competition and contrary to the long-run interests of consumers in the UK.
- (ii) Section 3 proceeds to consider the materiality of the effects, based on CityFibre's experience. [§<].

¹⁹ See Openreach briefing on the Equinox offer (NGA2017/21 GEA-FTTP): "*Further conditions apply to benefit from discounts in full: [...] - The use of the correct order journeys [...]*". See <https://www.openreach.co.uk/cpportal/updates/briefings/ultrafast/nga201721>.

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- (iii) Section 4 sets out CityFibre's conclusions. As explained there, CityFibre considers that the only proper and lawful course of action available to Ofcom is to use its direction-making powers to issue a direction ordering Openreach to remove the Order Mix Targets and the new-to-network discounts from the offer.

2. Impact of the Equinox conditionality on network-based competition

Ofcom's analytical framework

2.1 The analytical framework for assessing the impact of the Equinox offer is summarised at paragraph 2.38 of the Consultation.²⁰ Ofcom has sought to apply this framework through the following three questions:

- (i) Question 1: Does the Equinox offer potentially create a barrier to using alternative networks?
- (ii) Question 2: Is the Equinox offer likely or unlikely to have a material impact on nascent network competitors?
- (iii) Question 3: Is the Equinox offer likely to generate clear and demonstrable benefits?

2.2 Given the overarching policy objective of promoting network competition,²¹ Ofcom has set itself a simple 'gating' question: if there is the potential for Equinox to create a barrier, Ofcom must go on to consider the effects of, and justifications for, the offer under Questions 2 and 3. Question 1 does not require the identification of an actual barrier.

2.3 Surprisingly, however, the Consultation presents a truncated analysis, which does not address either Question 2 or Question 3 at all. This is because Ofcom reaches the extraordinary conclusion that the Order Mix Targets²² are not capable of even potentially creating a barrier to the use of alternative networks.²³ This conclusion is not supported by the evidence set out in the Consultation.²⁴

Equinox incentivises ISPs to choose Openreach over alternative networks in areas of overlap

2.4 Ofcom states that:

- (i) the discounts available if the Order Mix Targets are met could be substantial;²⁵

²⁰ The framework itself is set out at paragraph 7.154 of Volume 3 of the WTMR.

²¹ Consultation, paragraph 2.42.

²² As defined in paragraph 2.4 of the Consultation.

²³ Consultation, paragraph 2.54.

²⁴ There are numerous redactions from the Consultation and accompanying annexes that make it difficult to follow the reasoning, but CityFibre has set out below its understanding based on the material that is visible to it.

²⁵ Consultation, paragraph 2.46.

- (ii) as a result, ISPs could be strongly incentivised to meet them;²⁶ and
- (iii) there are plausible scenarios where at least some ISPs may struggle to meet the Order Mix Targets, particularly in the next few years.²⁷

2.5 Against that backdrop, there is a clear potential for the Equinox offer to create barriers to ISPs using alternative network operators instead of Openreach. As Ofcom recognises, “*if an ISP is likely to be close to [the Order Mix Targets], it is more important to consider how its mix of orders from Openreach may be affected by using an altnet.*”²⁸ There is no evidence in the Consultation to suggest that ISPs are bound to fail to meet the Order Mix Targets, but Ofcom recognises that they may plausibly struggle to meet them. Some or all ISPs may therefore plausibly find themselves to be in the danger zone where the loyalty-inducing effect of the Order Mix Targets can be expected to bite.

2.6 Given Openreach’s ubiquitous network, ISPs will have no alternative to purchasing Openreach products in many parts of the country. The Equinox discounts, once triggered, will apply to all of the FTTP products purchased by an ISP across the country. In consequence, an ISP which identifies even a modest risk of missing the Order Mix Targets will be very reluctant to place FTTP orders with a rival network operator in areas where Openreach’s FTTP product is available. The conditions contained in the Equinox offer mean that ISPs will face a cliff-edge price increase across all their Openreach FTTP purchases nationally where they miss the Order Mix Targets. This is precisely the type of loyalty-inducing mechanism, leveraging Openreach’s network reach to induce loyalty, which led Ofcom to introduce *ex ante* controls on the use of conditionality by Openreach in the terms offered to ISPs.

2.7 As explained below:

- (i) Ofcom is right to conclude that it is plausible that ISPs may struggle to meet the Order Mix Targets in coming years. Openreach may have sought to present the Equinox offer as a means of bringing forward the copper ‘stop sell’ date. In reality, however, there are a number of reasons why ISPs may be unable or unwilling to control their order mix by ceasing to sell FTTC products in FTTP areas. In conditions of uncertainty as to their ability to meet the Order Mix Targets, ISPs will err on the side of caution given the substantial penalty to which they will be subject if the Targets are missed and will prioritise the sale of Openreach FTTP products in all areas.

²⁶ Consultation, paragraph 2.46.

²⁷ Consultation, paragraph 2.47(b).

²⁸ Consultation, paragraph A7.2.

- (ii) It is no answer to say that the resulting barriers to ISPs using alternative networks will be “*temporary*” in nature. This conclusion is not adequately explained or explored in the Consultation, and Ofcom recognises that barriers could exist for several years. This must be seen in the context of the UK Government’s target for at least 85% of UK premises to have access to gigabit-broadband by 2025 and Openreach’s stated objective to have completed 85% of its fibre roll-out by 2025. In those circumstances, Ofcom is duty-bound to consider the effects of such barriers on alternative network build and whether the conditionality that forms an integral part of the Equinox offer is properly justified.
- (iii) The cliff-edge effect on ISPs’ incentives is obvious and powerful. It requires proper consideration under the analytical framework laid down in the WFTMR.
- (iv) The impact of the Order Mix Targets is liable to be exacerbated by the new to network discounts, which provide an additional incentive to using Openreach FTTP products rather than a new network operator’s products in areas where Virgin Media, Openreach and the rival operator compete for customers.

The existence of plausible scenarios in which ISPs will struggle to meet the Order Mix Target

- 2.8 As Ofcom notes in paragraph A7.12 of Annex 7, ISPs are not in full control of their order mix, which can have a significant impact on their ability to hit the Order Mix Targets. This is because they may sell downstream access to other ISPs, with no control over what proportion of orders are FTTP and FTTC. This appears to be the case for at least two of the five large national ISPs, TalkTalk and Vodafone.
- 2.9 Moreover, Ofcom also recognises that some consumers may be unable to take FTTP, for example because they live in multi-dwelling units (MDUs) where installation is difficult; and that other consumers may prefer to order a legacy broadband product whether because they prefer cheaper broadband or they wish to avoid the installation process required for FTTP. As Ofcom acknowledges, ISPs (whether they purchase Openreach products directly or through another reselling ISP) will want to continue to meet this demand as part of their national offer “*in order to retain sales*”.²⁹
- 2.10 On its own analysis, therefore, Ofcom has identified plausible scenarios where an ISP might struggle to meet the Order Mix Targets. As explained further below, ISPs’ choices on future FTTP orders will be affected by the loyalty-inducing conditionality of Equinox – and specifically by the risk of a ‘cliff-edge’ effect which has the potential to deprive ISPs of discounts across their entire FTTP base. On

²⁹ Consultation, paragraphs A7.1, A7.13.

that basis, the test that Ofcom has set itself under Question 1 – namely whether Equinox could potentially create a barrier – is clearly met.

- 2.11 In paragraph A7.13(a) of Annex 7, Ofcom sets out an alternative scenario, which it also regards as plausible, that (some or all) ISPs might surpass the Order Mix Targets such that the Equinox offer has no effect.
- 2.12 The fact that there is a plausible scenario where ISPs might surpass the Order Mix Targets does not alter the fact that there are plausible scenarios where they do not. By its own test, Ofcom must recognise that the Equinox offer is therefore capable of potentially operating as a barrier to the use of alternative networks.
- 2.13 In any event, the basis for this alternative scenario is not adequately supported in the Consultation and, insofar as it can be understood, is dubious:
- (i) The evidence in support of this alternative scenario is almost entirely redacted and CityFibre is not able to identify even the gist of Ofcom's reasoning in support of it. CityFibre is therefore unable to respond meaningfully to this aspect of the Consultation.
 - (ii) Insofar as Ofcom's reasoning can be discerned at all, it appears to be partly based on the experience of stop-sell in one location, Salisbury³⁰, where almost all new orders were for FTTP rather than FTTC. CityFibre does not consider that this is a relevant or reliable comparator for the purposes of drawing national conclusions.
 - (iii) CityFibre understands that Salisbury was selected as the copper switchover test-bed by Openreach on the basis that it did not present particular operational challenges to the deployment of fibre. For example, it has a particularly low number of multi-dwelling units. The specific pattern of sales by ISPs in Salisbury is therefore not a valid basis to determine likely patterns of sales within the overall footprint in which the Equinox offer is available. Ofcom must ensure that any analysis is robust and not based on selective examples which are unlikely to be representative.
 - (iv) In assessing the impact of the Equinox offer, it is also important to appreciate the immediate effects of the offer on ISPs' incentives when deciding what investments to make and contractual commitments to assume in relation to promoting rival networks' products. In conditions of uncertainty where there is at least some risk of the Order Mix Targets not being met, ISPs are

³⁰ Whilst the text is redacted in the main body of the Consultation document, there are references to Salisbury in the Annexes.

likely to adopt a cautious strategy with a view to avoiding the significant adverse consequences that would attach to missing out on the conditional discounts across their entire Openreach FTTP customer base. The uncertainty is therefore likely to have an asymmetric impact, tipping ISPs towards prioritising the sale of Openreach products even where alternative networks' products are also available.

The potential barriers cannot be dismissed on the basis that they may prove ‘temporary’

- 2.14 Ofcom’s sole basis for dismissing this potential barrier is to say that such “*challenges*” may be “*temporary*”.³¹ Ofcom does not explain what period of time it has in mind. It makes no effort to assess the extent of any such temporary challenges. It does not consider the lasting impact that even a temporary challenge could have on the rollout of alternative networks. Ofcom merely notes that the challenges could plausibly last for “*the next few years*”.³²
- 2.15 In the context of the “*small window of opportunity*” to encourage alternative network build identified in the WFTMR³³, a barrier that persists for a “*few years*” risks having a material impact on the scale of alternative network build (see also paragraph 2.7(ii) above). Given the low levels of end-customer switching from one fibre network to another that can be reasonably expected, particularly in the crucial network deployment phase of the next 2-5 years, CityFibre and Openreach are in a race to build. If Openreach wins that race in a large number of locations, it will be extremely difficult for CityFibre to gain any meaningful penetration in those locations and the small window of opportunity will close for good.

Cliff edge effect of Equinox

- 2.16 CityFibre is concerned that Ofcom has not taken proper account of the implications of the Equinox offer applying the discounts available under the Order Mix Targets across the entirety of an ISP’s Openreach FTTP user base. In addition, Equinox cannot be combined with any other offer³⁴, such that the effect of missing the Order Mix Targets will be that the ISP has to pay list prices across its entire Openreach FTTP user base.

³¹ Consultation, paragraph 2.47(c).

³² Consultation, paragraph 2.49.

³³ WFTMR, Volume 3, paragraph 7.56.

³⁴ There are some circumstances in which it can be combined with the GEA volume offer, for example for BDUK, new and legacy pre-July 1998 sites. CityFibre understands that for the vast majority of FTTP areas, ISPs will be faced with either Equinox or list prices.

- 2.17 Missing the Order Mix Targets as a result of decisions taken in one (contestable) area will therefore have a much broader impact because the ISP will be aware that the (substantial) discounts will cease to apply across its entire FTTP user base. This could even mean that an alternative network would need to offer *negative* prices in order to persuade an ISP to choose the alternative network over Openreach for marginal customers where the Order Mix Targets are at risk.
- 2.18 To illustrate this, consider an area where Openreach has an FTTP product available before any alternative network. Once the alternative network is available as a choice in that area, there will be the following pool of potential customers for each ISP:
- (i) Existing ISP legacy³⁵ customers seeking an upgrade to FTTP;
 - (ii) New ISP customers on legacy Openreach FTTC products with a rival ISP³⁶; and
 - (iii) New to the Openreach network customers (i.e. new builds, those without a prior broadband connection and any Virgin Media customers).³⁷
- 2.19 In order to hit the Order Mix Targets, the ISP must ensure that across its entire user base, at least 80%³⁸ of Openreach orders are FTTP. For every customer choosing FTTP that the ISP places with CityFibre, this will alter the ISP's performance against the Order Mix Targets by reducing the pool of potential Openreach FTTP customers. The conditionality plainly has a causal effect as each customer connected to an alternative network is removed from the counterfactual of being a potential Openreach FTTP connection:
- (i) Assume a pool of 1,000 customers to an ISP.³⁹ This means 1,000 potential FTTP orders. In order to hit the Order Mix Targets after the first year, the ISP must ensure that at least 80% of all orders placed with Openreach are FTTP;
 - (ii) Assume that CityFibre is an alternative provider to 300 of those 1,000 customers. If the ISP chooses to place all those orders with CityFibre, those 300 customers are lost from both sides

³⁵ FTTC and MPF.

³⁶ Whilst new to the ISP, not all of these customers would choose to upgrade to FTTP and some will choose FTTC connections.

³⁷ There may additionally be existing FTTP customers (i.e. those who have already upgraded to FTTP but who might be persuaded to switch to a rival network), but CityFibre expects switching between FTTP networks to be very limited in the initial period, both as a result of ISP contracts likely committing users to a 24 month contract and because there is currently a limited base of existing FTTP customers.

³⁸ After the first year - there is a lower target of 75% initially.

³⁹ This could include new customers to the ISP and existing ISP customers upgrading to FTTP.

of the equation (i.e. both the denominator and the numerator) and there is now a reduced pool of only 700 potential Openreach FTTP orders⁴⁰ with an Order Mix Target of 560 (i.e. 80% of 700)

- (iii) Furthermore, those 300 customers are, by definition, those most open to a FTTP order as they have chosen to take a full fibre service. The remaining pool of 700 customers will contain a mix of customers, including some who will also be open to FTTP and others who are not;
- (iv) Ofcom accepts this in the Consultation, identifying both some customers who will choose not to upgrade to FTTP even where it is available and a number of customers where the choice will be entirely outside the control of the ISP.⁴¹ Every customer falling into this category will have a direct negative impact on the ISP's ability to hit the Order Mix Target, both by reducing the pool of potential connections and by increasing the proportion of copper Openreach connections. If just over 20% (141) of the potential pool of 700 fall into this category, the ISP will not be able to hit the 80% target as fewer than 560 potential users will remain.

2.20 As is clear from the above, given that ISPs will expect that they will need to continue to meet a proportion of legacy copper orders over FTTC, they risk missing the 80% Equinox threshold if they choose to order any FTTP connections from alternative networks where an Openreach FTTP product is available. In other words, the Equinox conditions operate to impose a severe financial penalty in a number of plausible scenarios (identified by Ofcom) which generate powerful incentives for ISPs to purchase all or most of their FTTP requirements from Openreach to avoid the risk of missing out on the substantial discounts available across their entire FTTP base.⁴²

New-to-network discounts

2.21 In its response to the Call for Inputs, Virgin Media raises a concern that the new-to-network element of the Order Mix Targets is particularly problematic. This element of the Equinox offer results in an ISP unlocking two additional discounts:

- (i) a 50% discount on connection charges to residential premises within Area 2, which applies in full once FTTP connections account for 90% or more of an ISP's Openreach connections; and

⁴⁰ Note that there will always be a proportion of customers for whom legacy products are more desirable. Whilst this proportion may be unknown, the 300 alternative network customers in this example will always account for more than 30% of the total potential FTTP customers (i.e. because fewer than 1,000 would choose to upgrade to FTTP given a choice).

⁴¹ i.e. where the ISP has reseller arrangements with smaller ISPs downstream (Consultation, paragraph 2.53).

⁴² In addition, Equinox may favour larger ISPs over smaller local ISPs on a discriminatory basis. This is because it may be more difficult for smaller ISPs to meet the 80% target as a result of the particular socio-economic and geographic characteristics of their user bases.

(ii) an additional discount for rentals to the 550/75 product made before September 2026.⁴³

- 2.22 Ofcom largely dismisses the 550/75 additional new-to-network discount as likely only to have a “*relatively minor*” impact because it expects sales of 550/75 to represent a “*modest proportion*” of overall sales.⁴⁴ However, Ofcom has not properly assessed the additional incentives of ISPs, particularly in those areas currently serviced by Virgin Media. In those areas which overlap between Virgin Media and CityFibre’s announced plans, CityFibre considers that the new-to-network discounts will have a very strong loyalty-inducing effect which is both targeted on Virgin Media’s existing customers (i.e. those will be new to the Openreach network) and heavily weighted towards choosing the Openreach FTTP product rather than a competing available alternative network such as CityFibre. Virgin Media customers are precisely the higher value customers for whom higher speeds might be more attractive – the effect of the new-to-network conditions of Equinox is therefore precisely to operate as a barrier to the use by an ISP of CityFibre’s network when seeking to switch consumers from Virgin Media to new FTTP products.
- 2.23 As Ofcom acknowledges at paragraphs A6.16-20 of the Consultation, it is the cumulative effect of the discounts once the conditions have been satisfied that matters when considering the incentives for an ISP to focus efforts on meeting (at least) the 80% target set out in the Equinox offer. As noted above, the cumulative effect of the new-to-network additional discounts is plainly targeted at inducing ISPs to place new FTTP network connections with Openreach, to the detriment of alternative networks. This will particularly be the case when ISPs are seeking to win new customers in existing Virgin Media areas. Ofcom has presented no evidence or analysis as to Openreach’s rationale for these discounts. Given that they plainly have the potential to act as a barrier to the use of alternative networks, they fail Ofcom’s Question 1 and should also be removed from the Equinox offer.
- 2.24 Within Ofcom’s framework of analysis set out in the Consultation, it is not possible to judge whether the conditionality has any objective justification by way of offsetting economic welfare-enhancing effects. If Ofcom accepts that it needs to reconsider the effects of Equinox in the round, it should also examine these specific features of the offer to determine whether such objective justifications exist.

⁴³ This is a discount for 12 months from connection, reducing the price paid for the 550/75 orders to the level of the 160/30 product, i.e. incentivising ISPs to upsell consumers onto higher speed products.

⁴⁴ Consultation, paragraph A6.13.

3. The importance of network competition and the impact of Equinox on CityFibre’s build plans

- 3.1 Ofcom has recognised that FTTP roll-out offers a unique opportunity to break the status quo that exists in copper and that, if successful, “*the resulting network competition should benefit consumers in the long term*”.⁴⁵ This is predicated on there being at least three significant FTTP infrastructure providers in a given area before that area can be considered effectively competitive. Anything less would simply be replicating the position in copper: a ubiquitous Openreach offering and a more geographically limited Virgin Media network.
- 3.2 In its Consultation, Ofcom recognises the vulnerability of the alternative network build plans upon which its strategy to promote network competition relies. It acknowledges that “*there is uncertainty about the extent to which these plans will come to fruition*” and that “*altnet plans may change as views about the commercial environment evolve*”.⁴⁶ However, Ofcom appears not to see the potential downscaling of alternative network build plans as a genuine threat, stating: “*assuming that these announced plans are realised, then this suggests that in the longer term altnets that provide wholesale access to ISPs may be present in approximately a third of Openreach’s FTTP footprint*” (emphasis added).⁴⁷
- 3.3 Ofcom is wrong to underplay concerns around the implementation of build plans by “*assuming*” that such plans will be realised. [3<]. The *ex ante* framework set out in the WFTMR is essential to protect network build and promote network competition in the long term.

CityFibre is essential to achieving effective fibre network competition

- 3.4 CityFibre is the only viable competitor capable of offering an effective scale third network after those of Openreach and Virgin Media.⁴⁸ In the WFTMR, Ofcom defined the relevant geographic markets by reference to the areas “*planned to be covered by 2026 by Virgin Media or CityFibre*”⁴⁹, explicitly noting that other smaller alternative networks will have a much smaller competitive impact. Ofcom also recognises that Virgin Media is currently a weak constraint on Openreach.⁵⁰ For Ofcom to deliver on

⁴⁵ Consultation, paragraph 2.17.

⁴⁶ Consultation, paragraph A8.3.

⁴⁷ Consultation, paragraph A8.4.

⁴⁸ WFTMR Statement, Volume 2, paragraph 7.39: “*the likely competitive constraint on BT posed by each of Virgin Media and CityFibre is clearly an order of magnitude different from that posed by the other smaller altnets.*”

⁴⁹ WFTMR Statement, Volume 2, paragraph 7.23.

⁵⁰ WFTMR Statement, Volume 2, paragraph 5.23: “*We have explained here and in earlier sections why we consider Virgin Media and other network providers to be a weak constraint on Openreach.*”

its policy objectives as set out in the WFTMR, both Virgin Media and CityFibre must be given a fair chance to build effective and wide-scale alternative networks to Openreach.

- 3.5 In March 2020 CityFibre announced that it was increasing its network rollout ambition from 5 million to 8 million premises.⁵¹ The expansion of CityFibre's network to 8 million premises would potentially enable CityFibre to go further, extending its footprint to adjacent areas through participation in Building Digital UK's 'outside-in' funding programme (the **BDUK Programme**). [REDACTED].

Equinox will result in a delay to ISP take-up on alternative networks

- 3.6 In paragraph A7.11 of Annex 7 to the Consultation, Ofcom acknowledges that ISPs will likely need to change how they market and sell broadband services within the Openreach FTTP footprint as a result of the Equinox offer. As explained in **Confidential Annex A**:
- (i) CityFibre's experience is that Equinox is already having an effect on how ISPs are marketing FTTP services [REDACTED].
 - (ii) Migrating customers onto a new alternative network such as CityFibre requires significant, unavoidable upfront investment and commitment of scarce technical expertise by ISPs, over and above that required to migrate customers from Openreach's copper onto fibre. Whilst CityFibre has sought as far as possible to minimise the cost to the ISP of migration, the fact remains that the ISP must take the steps to adjust its own systems and processes to consume and sell alternative full fibre inventory.
 - (iii) [REDACTED].

The impact of Equinox on CityFibre's build plans

- 3.7 As a wholesale-only network provider, CityFibre relies on communications providers – and ISPs in particular – to make use of its network. As explained in **Confidential Annex B**, before construction contracts are signed, Board approval is required in each individual location based on the build plan for that location.
- 3.8 These build plans are highly sensitive to expected levels of ISP penetration in each city within the 8 million target footprint. [REDACTED].

⁵¹ See <https://www.cityfibre.com/news/cityfibre-completes-acquisition-fibrenation-increasing-rollout-plans-pass-8-million-premises/>.

3.9 **Confidential Annex C** and its supporting annexes set out [redacted].

4. Conclusion

- 4.1 CityFibre welcomes fair competition on price⁵². Openreach could have sought to adopt a plain vanilla discount scheme to make its FTTP offering more attractive to ISPs. It did not, instead choosing to design a complex offer with myriad layers of discounts contingent on meeting various conditions. Ofcom appears not to have considered the rationale for this conditionality. As noted in section 1, the Order Mix Targets are specifically designed to change the behaviour of ISPs, driving them away from alternative networks as Ofcom has itself acknowledged.
- 4.2 When considered in the round, the Equinox offer and its conditionality aspects in particular have the capacity to foreclose efficient competitors such as CityFibre, acting as a barrier to network competition. In the WFTMR, Ofcom recognised the need to look beyond short-term effects in order to promote a much-needed structural change in the market.⁵³ It is vital that Ofcom does not shy away from using all the *ex ante* tools at its disposal to ensure that proper network competition materialises in the longer term. Ofcom has itself recognised the inadequacy of the *ex post* competition regime in addressing issues which impair nascent network competition.⁵⁴
- 4.3 Allowing the Equinox offer to be implemented in its current form risks unjustifiably prioritising Openreach's commercial flexibility over long-term network competition. Ofcom posed three questions in the Consultation, but then answered only Question 1 in the negative, obviating the need to address Questions 2 and 3. Looking at the three questions in the light of Ofcom's overarching policy objectives and based on the evidence supporting this submission, CityFibre considers that the answers to the three questions are as follows:
- (i) Equinox does potentially create a barrier to using alternative networks, both as regards the conditional aspects and when properly assessed as a multi-faceted offer.
 - (ii) Equinox is likely to have a material impact, at least on CityFibre's network build. This is the case as regards the offer alone, although the effects are magnified when considered alongside the impact of Openreach's overbuild announcements.

⁵² Openreach should not be permitted to set prices (including if introduced via a series of consequential price reductions) at a level where efficient entrants are unable to compete fairly with the incumbent.

⁵³ *"We accept that our regulation will reduce Openreach's commercial flexibility over this review period. However, we consider that our strategy will lead to greater network competition in the long term to the benefit of consumers."* WFTMR Statement, Volume 3, paragraph 7.103.

⁵⁴ In the WFTMR, Ofcom cited the case of *Royal Mail/Whistl* and stated that it was *"concerned that a similar scenario could arise in relation to ultrafast network rollout if we were to rely solely on ex post competition law"*. WFTMR Statement, Volume 3, paragraph 7.55.

(iii) Even if Ofcom disagrees about the magnitude of the impact, the conditional aspects of the offer are neither necessary to achieve lower prices, nor essential to Openreach's business case for fibre rollout. Indeed, in relation to the latter, Openreach argued in the context of the WFTMR against regulated price caps to give it the necessary margin to take investment decisions.

4.4 For the reasons set out above and on the basis of the supporting evidence in the Confidential Annexes to this submission, CityFibre's answer to the consultation question set out at Annex A4 of the Consultation is therefore that CityFibre strongly disagrees with Ofcom's assessment of the Equinox offer.

4.5 The correct course for Ofcom is to conclude that the Equinox Offer *does* create potential barriers to the use of alternative networks; and to assess properly and carefully the evidence as to the extent of those barriers (which CityFibre considers to be material) and the justification for the conditional aspects of Openreach's offer.

4.6 Ofcom should therefore issue a direction ordering Openreach to remove the Order Mix Targets and the new-to-network discounts from the offer. For Ofcom to conclude otherwise would put at risk the network competition that Ofcom professes to desire. CityFibre considers that such an outcome would be inconsistent with the findings of the Consultation itself; the policy objectives set out in the WFTMR; and Ofcom's statutory duties.