



Ofcom Consultation

Openreach's proposed commercial offers

Virgin Media O2 response

August 2026

Non-confidential Response

Executive Summary

Openreach's latest package of commercial offers is not routine price competition. It is an incumbent leveraging its national footprint, entrenched wholesale relationships and significant market power to defend the customers and volumes that competing networks need to achieve scale and become sustainable competitors.

The offers take different forms, but their commercial direction is consistent. For ISPs, they make continued reliance on Openreach more attractive and make entering into or giving effect to meaningful commitments to rival networks harder. At a critical point for UK fibre competition, Openreach is seeking to prevent competing networks from converting coverage into customers, take-up and sustainable wholesale scale.

Ofcom is right to intervene against the National NTO Offer. Its analysis demonstrates that the discounted prices could not be matched sustainably by a reasonably efficient established altnet. Allowing the offer into the market would deprive competing networks of the new customers they need to grow, recover their investment and become effective long-term constraints on Openreach.

However, Ofcom's analytical framework is not complete. Ofcom's final decision should strengthen that conclusion by addressing prospective wholesale entry. Doing so would be consistent with its duty to promote competition (rather than just protect competition as we experience it today).

A network may have been built and is capable of supplying wholesale services without yet having secured an operational agreement with a major ISP. The National NTO Offer places an additional obstacle in the path of prospective entrants. An ISP which places demand with a new wholesale provider may put its performance against the Openreach baseline at risk. An entrant with a narrower footprint may then need to compensate the ISP for Openreach rebates forgone across demand which it cannot itself serve.

Even leaving the ISP financially indifferent will not be enough. A new entrant must overcome Openreach's national coverage, incumbent relationships and existing operational integration.

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Ofcom should reflect this dynamic analysis in its final reasoning. It reinforces the case for withdrawal and will reduce the scope for Openreach to return with a modified offer which preserves the same underlying competitive mechanism. Failure to address the question of the impact on new wholesale entrants would both undermine the completeness of the current analysis and risk signalling to Openreach that Ofcom's future analysis will focus only on existing competitors and the status quo.

VMO2 disagrees with Ofcom's proposed consent for the Geographic NTO Offer.

Openreach has targeted the Geographic NTO Offer explicitly at areas associated with VMO2's network and has provided no cost or other objective justification for doing so. Ofcom has identified no corresponding benefit to network competition. The Geographic NTO Offer is a targeted payment for placing contestable customers back with the incumbent.

Ofcom's assessment also focuses on the wrong competitive relationship. It treats VMO2 principally as an established retail operator. The relevant question is whether the Geographic NTO Offer impedes VMO2's emergence as a direct wholesale competitor, something that is central to the objectives of the Telecoms Access Review.

[3<] The Geographic NTO Offer targets precisely those areas in which that new constraint can emerge, before it has had a fair opportunity to become established. Preventing the development of potential competition can be just as damaging as weakening a constraint which already exists. Ofcom should not be picking winners, but by ignoring prospective entry in its analysis, it risks being overly reliant on existing players to achieve its policy objectives.

The Consultation also understates the commercial force of the £50 connection rebate and places too much weight on whether Openreach's estimated price remains above the midpoint of the REO cost range.

The REO range estimates the costs of a reasonably efficient operator. It does not measure the additional discount required to persuade an ISP to move demand away from Openreach. A new rival may be able to recover its modelled costs and still be unable to offer the price needed to win a new meaningful wholesale agreement.

Ofcom should therefore refuse consent for the Geographic NTO Offer. Openreach has not justified the discrimination, Ofcom has identified no benefit capable of supporting it, and its assessment understates the effect on wholesale entry and the price at which an altnet can compete effectively.

Consent would also create a dangerous precedent. It would signal that Openreach can target areas by reference to a rival network footprint without objective justification, provided each individual discount is calibrated to appear tolerable when assessed on a standalone basis. The present Geographic NTO Offer could then become a temporary floor based on which Openreach progressively widens or deepens future geographic discounts. At what point will Ofcom step in to deal with the cumulative effects of such behaviour? Openreach, wholesale providers and ISPs currently have nothing on which to base their future decision making.

In VMO2's view, Ofcom should take account of the wider market effects arising from repeated offers being made in quick succession when assessing the current Special Offers.

Openreach has introduced, extended or amended a succession of commercial arrangements in a short period of time. Their different regulatory classifications should not obscure their wider commercial effect. Repeated interventions encourage ISPs to preserve flexibility in anticipation of further or improved Openreach terms. Openreach benefits from the delay whilst competing wholesale networks bear the cost through lost time, take-up and commercial certainty.

The Consultation acknowledges concerns regarding the repeated use of special offers, including the signalling effects such conduct may create and the resulting uncertainty for market participants. However, Ofcom has not yet explained how those concerns could and should be reflected in the assessment of individual offers. While it is clearly necessary to consider the cumulative pricing effects of concurrent discounts, the competitive concern extends beyond price alone. The frequency, timing and sequencing of Openreach's offers, and the expectations created by that pattern of conduct, materially influence investment decisions, commercial negotiations and competitive dynamics across the market.

That broader context should inform Ofcom's final assessment of the Special Offers. Evaluating each offer in isolation risks understating the competitive significance of a sustained and evolving pattern of discounting.

More generally, VMO2 considers that the issues raised by recurring and evolving Openreach offers warrant a clearer and more systematic approach. Ofcom should therefore also use its Competition Supervision Programme to develop guidance or other outputs, separate from the assessment of any individual notification, on how the effects of Openreach's repeated special offers will be assessed in future. Such an approach would provide greater regulatory certainty, improve transparency for market participants and help ensure that the broader competitive implications of Openreach's conduct are appropriately addressed.

Ofcom's provisional decision in relation to the National NTO Offer demonstrates that it recognises the threat Openreach's conduct can pose to developing network competition. It should now follow that logic through.

Ofcom should maintain and strengthen its intervention against the National NTO Offer and refuse consent for the Geographic NTO Offer. More broadly, its final statement must explain how Openreach's wider pattern of conduct will inform future assessments, rather than examining each offer in isolation until the opportunity for stronger wholesale competition has already been lost.

Ofcom has spent years creating the conditions in which rival networks can develop into material and sustainable competitors. It should not now permit Openreach to close off that opportunity through a succession of targeted discounts and incremental changes, or leave open the

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possibility of Openreach gaming this review process to create market uncertainty which limits competitive pressure at a pivotal moment in market development.

1. Introduction

1. Virgin Media O2 (“**VMO2**”) welcomes the opportunity to respond to Ofcom’s Consultation (“**Consultation**”) on Openreach’s proposed commercial offers (the “**Offers**”). The Consultation assesses the Incremental New to Openreach Customer Offer (“**National NTO Offer**”), the Incremental New Openreach Customer Offer in VMO2 areas (“**Geographic NTO Offer**”), the Incremental Ethernet Net Demand Offer, the six-month extension to the Equinox 550Mb incentive (“**550Mb Extension**”), the Frontbook ARPU share offer and Box Swap offer (the “**Frontbook ARPU Share Offer**” and “**Box Swap Offer**”).¹ Additionally, Ofcom invited stakeholders to provide comments separately or via responses to this Consultation regarding Openreach’s announced expansion of the Equinox Offer Area (“**Equinox Area Expansion**”).
2. VMO2 supports Ofcom’s provisional decision to direct Openreach to withdraw the National NTO Offer. Ofcom is right to conclude that the discounted prices are not fair and reasonable and risk undermining the ability of established wholesale altnets to compete. As set out in this response, that conclusion is further reinforced when the National NTO Offer is assessed from the perspective of prospective wholesale entrants which have built competing networks but have not yet secured operational wholesale agreements.
3. However, VMO2 disagrees with Ofcom’s proposed consent for the Geographic NTO Offer. Openreach has provided no objective justification for pricing targeted by reference to VMO2’s network footprint and Ofcom has not identified any corresponding benefit to network competition. In our view, Ofcom’s assessment also understates VMO2’s position as a nascent wholesale competitor, the effect of the Geographic NTO Offer on ISP incentives and the price at which a reasonably efficient altnet can compete effectively with Openreach.
4. More broadly, the Special Offers form part of an emerging pattern of overlapping and evolving Openreach commercial arrangements. Their competitive significance is not confined to the standalone price effect of each offer. Ofcom must also consider how their frequency, timing and interaction affect access seeker behaviour, the development of rival wholesale agreements and the opportunity for competing networks to achieve

¹ Collectively we refer to Openreach’s Wholesale Local Access (“**WLA**”) offers notified in June 2026 as the “**Special Offers**”.

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sustainable scale. This response therefore addresses both Ofcom's assessment of the individual Special Offers and the wider implications of Openreach's commercial strategy.

5. The remainder of this response is structured as follows:
 - Section 2 sets out VMO2's views on two key aspects of the regulatory process;
 - Section 3 sets out a range of our overarching concerns regarding the Special Offers;
 - Sections 4–6 address specific concerns about the Special Offers;
 - Section 7 states VMO2's overall conclusions; and
 - Annex 1 presents VMO2's responses to Ofcom's Consultation questions.

2. Procedural Concerns and Safeguards

Procedural concerns regarding the Equinox Area Expansion

6. On 30 July 2026, Openreach notified Ofcom of yet another amendment to Equinox 2. This time, the Equinox Area Expansion amendment is designed to extend the geographic scope of the Equinox 2 offer.
7. The Equinox Area Expansion is characterised by Openreach and Ofcom as both a conditional and geographic offer. As a result, Openreach has provided Ofcom with 120 days' notice in accordance with Significant Market Power ("**SMP**") Condition 8.6 and has also sought Ofcom's consent for the geographic aspects of the proposal pursuant to SMP Condition 4. Ofcom has requested that third parties identify any specific competition concerns in relation to the Equinox Area Expansion as part of their response to the Consultation in relation to the other Special Offers.
8. The process adopted by Ofcom raises important procedural questions.

Requirement to consult and Legitimate Expectations

9. In the Telecoms Access Review ("**TAR26**") Statement, Ofcom set out the approach it expected to follow when assessing both geographic and conditional offers. In each case, Ofcom indicated that it would first gather information and views from stakeholders before reaching a provisional assessment of the proposed offers². In relation to geographic offers, Ofcom went further given the per se prohibition imposed on such offers and stated that it would then expect to consult for one month on its provisional assessment before determining whether consent should be granted³.
10. The consultation framework described in the TAR26 Statement serves an important purpose. It ensures that stakeholders have a meaningful opportunity to understand, analyse and comment on Ofcom's provisional assessment before a final decision is reached. Where proposals are complex and potentially far-reaching in their competitive effects, observance of that process is particularly important in order to ensure that

² TAR26 Statement, paragraphs 9.148(f) and 9.214(f).

³ TAR26 Statement, paragraph 9.148(g)

Ofcom has gathered sufficient evidence and properly tested competing views before reaching a conclusion.

11. VMO2 considers that the procedural approach adopted by Ofcom should be informed by established public law principles. As a public authority exercising a regulatory function, Ofcom is under a duty to act fairly, transparently and rationally in the conduct of its decision-making processes. In circumstances where it has previously set out the process it expects to follow for the assessment of geographic offers, stakeholders have a legitimate expectation that Ofcom will adhere to that process absent clear and compelling reasons for departing from it.

Ofcom must adequately consult on the Equinox Area Expansion amendment

12. VMO2 therefore seeks confirmation that Ofcom intends to follow the transparent process it set out in the TAR26 Statement rather than rush through a decision which does not afford stakeholders the rights associated with the duty to consult. In particular, VMO2 would expect Ofcom to review stakeholder responses, reach a provisional view on the Equinox Area Expansion and then consult separately on that provisional view before reaching any final determination on whether consent should be granted.
13. The timing of Openreach's proposal makes this procedural safeguard particularly important. Openreach chose to notify this amendment more than two months after the announcement of the wider package of commercial offers currently under consultation. As a consequence, interested parties are now required to assess an additional amendment within an already compressed timetable, over the summer holidays. While VMO2 recognises the administrative efficiencies that may arise from Ofcom gathering initial stakeholder views as part of its Consultation regarding the wider suite of Special Offers, this should not come at the expense of a full and transparent process in respect of the Equinox Area Expansion itself.
14. Indeed, Ofcom has already acknowledged that “the complexity of offers – both standalone and as a result of any interaction with existing and proposed offers – makes them more difficult to understand and assess in a timely manner”⁴. The proposed amendment introduces further complexity because it alters a key parameter of the Equinox 2 offer and therefore changes the competitive and economic assessment that third parties must undertake. Stakeholders require a reasonable opportunity to analyse

⁴ Ofcom Consultation, paragraph 7.11

both the amendment itself and its interaction with the broader suite of Openreach Special Offers.

15. Given VMO2's legitimate expectation established in the TAR26 Statement, any departure from the established process would require clear justification and should not be driven by the timing of Openreach's own notification strategy. To do otherwise would risk undermining stakeholder confidence in the regulatory framework and could create incentives for future proposals to be structured in a manner that compresses regulatory scrutiny and stakeholder engagement.
16. Accordingly, VMO2 requests confirmation that Ofcom will, in respect of the Equinox Area Expansion: (i) fully consider the responses received in relation to this amendment; (ii) publish its provisional assessment for consultation in accordance with the process contemplated in the TAR26 Statement; and (iii) allow stakeholders an adequate opportunity to comment before reaching any final determination regarding consent.

The Equinox Area Expansion is symptomatic of a wider pattern of incremental and ongoing change

17. More fundamentally, VMO2 is concerned that permitting substantive amendments to be introduced on a piecemeal basis, especially whilst Ofcom is already in the midst of a complex investigation, risks undermining regulatory and commercial certainty.
18. The European Court of Justice has held that gaming a regulatory procedure may be abusive where carried out by a dominant undertaking to exclude competitors.⁵
19. This amendment is the latest example of Openreach incrementally introducing changes to its commercial arrangements, making it difficult for stakeholders to plan investments, allocate resources and implement operational changes efficiently. Such an approach risks frustrating effective regulatory scrutiny by requiring stakeholders and Ofcom to assess interrelated proposals over multiple overlapping processes and timeframes. The cumulative effect of these successive changes is disproportionately burdensome and risks increasing costs and uncertainty for industry participants, contrary to the objective of promoting a predictable and stable regulatory environment.

⁵ Case C-457/10P AstraZeneca v Commission, paragraph 134. See also European Commission decision in Case AT.40588 Teva Copaxone, in which Teva was found to have abused a dominant position by misusing the divisional patent filing system by recurrently filing and withdrawing patents to prolong legal uncertainty about the validity of its exclusive rights to delay generic entry.

Preventing circumvention of Ofcom's intervention

20. VMO2 welcomes Ofcom's provisional decision to direct Openreach to withdraw the National NTO Offer.
21. However, VMO2 is concerned that Openreach will re-notify a slightly modified version of the offer (possibly repeatedly) until it reaches a position that is acceptable to Ofcom. For example, Openreach could keep amending/increasing the pricing until it found the "price floor" that Ofcom will tolerate. This would have a chilling effect on wholesale network competition as ISPs would rationally wait until it is clear that the offer has been settled and is in final form before assessing whether it would be commercially advantageous to use rival networks. No decision to use a rival network will be made in circumstances in which the ISP anticipates that a further modified offer might be announced by Openreach in the foreseeable future.
22. VMO2 notes that the TAR26 framework is founded on the principle that ex ante regulation is necessary where Openreach holds SMP and where reliance on ex post competition law alone would not adequately prevent harm to competition, investment and consumers. In that context, where Ofcom concludes that a notified offer gives rise to material competition concerns and should not be implemented, the effectiveness of the regulatory regime would be significantly undermined if Openreach were able immediately to re-notify a substantially similar offer containing only limited or cosmetic modifications.
23. As noted above, the European Court of Justice has held that gaming a regulatory procedure may be abusive where carried out by a dominant undertaking to exclude competitors.
24. In light of the chilling effect identified above, Ofcom should consider whether a decision requiring Openreach to withdraw the offer should trigger a defined period during which Openreach may not re-notify a substantially similar offer. Such an approach would be analogous to mechanisms used in other regulated contexts to prevent repetitive applications or re-filings. Without such a safeguard, there is a significant risk of regulatory circumvention, repeated re-notification of offers, and the erosion of the practical effectiveness of Ofcom's ex ante oversight.
25. A requirement for an appropriate period before Offers of a similar character or type may be re-notified would represent a proportionate means of ensuring that Ofcom's decisions have practical effect, while preserving Openreach's ability to bring forward genuinely new proposals. It would also reduce the scope for repeated or incrementally

modified notifications to recreate the same complexity and uncertainty that Ofcom has already recognised can make Offers more difficult to understand and assess in a timely manner.⁶ Ex ante intervention is considerably better placed to prevent that harm than an investigation undertaken after uncertainty has already affected market conduct.

⁶ Ofcom Consultation, paragraph 7.11

3. Overarching Offer Concerns

The offers must be considered both individually and holistically

26. VMO2 welcomes Ofcom's recognition that overlapping offers must be considered in the round. We also agree with the order in which Ofcom has undertaken its pricing analysis.
27. In particular, Ofcom has reflected the Frontbook ARPU Share Offer, Box Swap Offer and 550Mb Extension in the prices used to assess the National and Geographic NTO Offers. This avoids assessing the later offers against an Openreach price that is no longer available in practice.
28. However, incorporating existing discounts into the effective price is only one aspect of a holistic assessment. Openreach's offers also interact through their design, scope and application to the demand for which Openreach and competing networks are seeking to compete.
29. In our view, this is important because different arrangements do not need to share the same legal form in order to reinforce one another. A national volume-based conditional offer, a geographically targeted rebate and an amendment to an existing framework engage different regulatory processes. In practice, they can still affect overlapping customers and volumes and therefore alter the commercial context in which each arrangement operates, through their cumulative effect.
30. VMO2 does not suggest that these wider considerations should displace the assessment of each offer on its own facts. Ofcom must continue to consider the nature, scale, duration and likely effect of the individual arrangement. That analysis should then be supplemented by consideration of how the offer operates alongside Openreach's other commercial terms.
31. An offer also remains part of the relevant context after Ofcom has decided not to intervene or has permitted it to take effect. Where Openreach subsequently introduces an arrangement that interacts with an existing offer, the new proposal must be assessed against the commercial environment access seekers face in practice. Earlier regulatory treatment should not exclude existing pricing or incentives from that assessment.
32. The remainder of this section addresses the principal wider effects that should inform that assessment. These include the implications of repeated offers for market

expectations, the effect on rival wholesale agreements, and the significance of Openreach's incumbency advantages. We then consider how Ofcom's regulatory framework will ensure that those matters influence its assessment in practice.

Repeated offers, signalling and market uncertainty

33. VMO2 welcomes Ofcom's recognition that Openreach's flexibility to change prices creates "uncertainty about future pricing", that the announcement of offers which warrant intervention "can undermine investor confidence", as well as Ofcom's acknowledgement that the announcement of complex offers can affect the market as stakeholders undertake the work necessary to understand and assess them.⁷
34. We set out our concerns regarding signalling and repeated notifications in detail in our response to the Call for Inputs ("**Cfi**").⁸ Those concerns were not limited to the direct effect of the Special Offers notified on 1 June. They concerned the expectations created by the wider pattern through which Openreach discusses, introduces, extends and amends its commercial terms.
35. We agree with Ofcom that price changes and uncertainty are not inherently problematic. Openreach is entitled to compete on price and access seekers will naturally take account of prospective changes to wholesale terms. The concern, however, arises from the particular market context in which that uncertainty is created.
36. Openreach retains SMP, an entrenched position and a national footprint. Rival wholesale competition is still developing. Against that background, a continuing series of targeted or evolving offers can signal that Openreach is willing and able to adjust its terms as competing networks begin to attract demand.
37. Ofcom states⁹ that it would be concerned if Openreach repeatedly proposed schemes that warrant intervention under the regulatory framework. In our view that does not fully address the issue. A pattern of offers can shape expectations even where each individual proposal is ultimately permitted. The signal to access seekers is created by Openreach's repeated pattern of introducing, refining or extending preferential terms, whether or not they are approved, prohibited or modified by Ofcom.
38. This conduct should be distinguished from a direct competitive response to prices already offered in the market by altnets. It is not competition on the merits. Instead this

⁷ Ofcom Consultation, paragraphs 7.9 and 7.11

⁸ VMO2, Cfi response, paragraphs 40–63

⁹ Ofcom Consultation, paragraphs 7.11–7.13

conduct seeks to create an enduring expectation, in advance of any ISP reaching terms with an altnet, that Openreach is likely to introduce subsequent offers that will, or may, be more commercially beneficial for the ISP than those currently offered by Openreach. By doing so, Openreach ensures that ISPs never have a stable counterfactual against which the future benefits of an offer from a rival altnet can be assessed.

39. The practical consequence is that preserving flexibility with Openreach has value to ISPs in its own right. An access seeker can reasonably take account of the possibility that further or improved terms will follow, particularly where Openreach has already introduced several different arrangements in close succession. [3<]
40. This concern does not depend on an access seeker believing that its own ordering behaviour will persuade Openreach to extend a particular offer. We note Ofcom's conclusion that it has not seen evidence of that narrower behaviour.¹⁰ [3<]
41. Developments since the Cfl reinforce that concern. Openreach notified the further Equinox Area Expansion while Ofcom was still considering the earlier package of Special Offers. As explained in Section 2, that amendment has its own procedural concerns. For present purposes, it provides further evidence that Openreach's recent interventions are not confined to a single package or form of offer.
42. Ofcom should take this developing record into account in its final assessment. In particular, it should recognise that repeated offers can influence market behaviour before implementation and without any individual offer being sufficient, viewed alone, to explain the resulting change in expectations. Later in this section we explain why Ofcom should also provide greater clarity on how these wider effects will inform its future assessment of Openreach's conduct.

Effects on rival wholesale agreements

43. Ofcom recognises that, if Openreach's Offer prices are "significantly closer to (or even lower than) altnet prices for a meaningful proportion of volumes, ISPs may be less willing to incur the costs of onboarding an additional wholesale network". It therefore concludes that there is "a plausible risk that the offer prices could affect altnets' ability to secure future wholesale agreements, limiting take-up and weakening competition in the long term".¹¹

¹⁰ Ofcom Consultation, paragraph 7.8, footnote 189

¹¹ Ofcom Consultation, paragraphs 4.116–4.118

44. This supports the risks set out in VMO2's Cfl response.¹² [§<]
45. However, Ofcom's analysis appears to focus principally on whether an ISP is willing to onboard an additional network. That is an important step, but it does not capture the full commercial process through which a rival network becomes an effective wholesale constraint.
46. In practice, an agreement must be concluded, operationalised and then used at sufficient scale. Its competitive value will depend on the scope and duration of the arrangement, the volumes the ISP is prepared to commit and the speed with which those volumes are placed through the rival network. [§<]
47. [§<]
48. The resulting harm would not necessarily appear as an immediate loss of existing altnet volumes. Instead, Openreach's conduct could prevent prospective competition from becoming actual competition. By the time Ofcom is able to observe an established wholesale constraint being weakened, the opportunity for that constraint to emerge may already have been materially curtailed or been removed.
49. Ofcom's recognition of the risk to future wholesale agreements is therefore welcome, but its final assessment should reflect the full range of decisions through which those agreements translate into take-up. [§<]

Loyalty effects and Openreach's incumbency advantages

50. VMO2 welcomes Ofcom's recognition that Openreach benefits from material incumbency advantages which a reasonably efficient altnet does not share. That finding is central to Ofcom's assessment of the National NTO Offer and supports its decision to focus on the prices available for above-baseline NTO customers.
51. Ofcom identifies several relevant advantages.¹³ Openreach has longstanding wholesale relationships with major ISPs, a wider footprint and more customers in areas where it faces limited or no wholesale network competition. By contrast, wholesale altnets face competition from Openreach across most of their footprints and have needed to offer long-term discounted pricing to persuade ISPs to use their networks. Those contracts can then constrain the ability of altnets to respond to new Openreach offers.

¹² See VMO2, Cfl response, paragraphs 69–73 and [§<]

¹³ Ofcom Consultation, paragraphs 4.67–4.74

52. These findings should not be confined to Ofcom's consideration of the National NTO Offer. They also explain why Openreach's other commercial offers can exert loyalty-enhancing effects that competing networks cannot readily neutralise.
53. An ISP providing services nationally will, through necessity, continue to depend on Openreach in areas where no competing wholesale network is available. Openreach therefore remains an unavoidable trading partner even where that ISP also uses another network. This gives Openreach an established commercial relationship and a continuing flow of demand across which it can structure its terms.
54. Openreach can also target discounts at contestable customers while recovering higher margins elsewhere. It can spread the commercial effect of those discounts across a much larger and more entrenched base. Rival networks do not have the same freedom. Their addressable footprints are narrower, their customer bases are less established and a greater proportion of the demand they serve remains exposed to competition from Openreach.
55. An access seeker that retains flexibility over its contestable demand remains better placed to benefit from Openreach's present and future offers. A provider that has already placed demand with another network has fewer volumes available to redirect. The value of maintaining alignment with Openreach therefore stems not only from the terms of one rebate, but from Openreach's ability to offer targeted benefits across a wholesale relationship that the access seeker must retain in any event.
56. In our view, Ofcom's analysis does not yet give sufficient weight to this distinction. It addresses whether the conditionality of each Special Offer imposes a direct penalty for using a rival network. It does not fully address whether the package of terms, viewed against Openreach's incumbency advantages, provides a positive and continuing inducement to retain significant contestable demand with the incumbent.
57. That omission is important. Ofcom has accepted that a Reasonably Efficient Operator ("REO") cannot necessarily replicate Openreach's pricing structure, offset low margins across a comparable base or identify and target the same categories of demand. It would be inconsistent to recognise those disadvantages in the price analysis but then assume that rival networks can respond sufficiently to neutralise the commercial pull of Openreach's offers.
58. This asymmetry is particularly significant in relation to the largest access seekers. Ofcom has recognised that terms which encourage the largest and most valuable telecoms providers to remain with Openreach can remove an important opportunity for rival

networks to win volumes and thereby undermine the long-term development of network competition.¹⁴ Those volumes are among the limited sources of demand capable of supporting wholesale entry at scale. Ofcom should therefore consider whether the Special Offers, individually or in combination, encourage the providers whose contestable demand matters most to the development of rival networks to preserve that demand with Openreach. Ofcom recognises Openreach's incumbency advantages in its assessment of the prices that altnets may need to offer in order to win ISP volumes. Its final statement should also explain how those advantages inform its assessment of the loyalty-enhancing effects of the Special Offers, both individually and in the round. In particular, the absence of a conventional loyalty penalty does not establish that the Special Offers have no effect on access seekers' incentives to retain significant contestable demand with Openreach.

Ofcom's framework must provide an effective response

59. Ofcom states that its Competition Supervision function will "continue to monitor what is happening in practice", including through its formal information-gathering powers, and that this will include "considering the impact of offers individually and cumulatively with other Openreach offers".¹⁵ Those commitments are important, but the Consultation does not provide any guidance on how the evidence gathered through that process will, in practice, be taken into account as part of its individual assessment of specific offers.
60. Ofcom's cumulative pricing analysis only provides one part of the answer. In assessing the National and Geographic NTO Offers, Ofcom takes account of existing Openreach discounts when estimating the prices against which rival networks must compete. That is both necessary and appropriate.
61. However, as explained above (see paragraphs 33–58), the concern extends beyond the direct pricing effects of individual offers or the simple aggregation of overlapping discounts. The frequency, timing and sequencing of Openreach's Special Offers form part of a broader pattern of conduct that can affect market behaviour, competitive incentives and commercial decision-making. In that context, Ofcom should therefore ensure that its assessment is not confined to the standalone effects of the notified offers, but also reflects the wider competitive implications of Openreach's repeated use of evolving discount mechanisms so as to ensure the overall pattern of conduct is consistent with the objectives of promoting sustainable competition and investment.

¹⁴ TAR26 Statement, Annex 8, paragraph A8.75

¹⁵ Ofcom Consultation, paragraph 7.13

62. Ofcom's framework necessarily begins with the terms and likely impact of the individual offer under scrutiny. That is a reasonable starting point, but the assessment is incomplete if it gives insufficient weight to the offer's place within a wider and repeated pattern of Openreach conduct.
63. The assessment of the Geographic NTO Offer is illustrative of this issue. Ofcom provisionally concludes that the Geographic NTO Offer's conditionality does not itself create a potential barrier to using competing networks because an ISP would lose the rebate only on the relevant volumes that it chooses not to place with Openreach.
64. Such analysis therefore only considers the immediate operation and effects of the individual offer. It does not consider whether the offer signals that Openreach may continue to introduce new offers, thereby increasing the option value of delaying making commitments to a rival wholesale provider, or increasing the uncertainty created by previous and prospective interventions. Those effects need not depend on the latest offer independently imposing a wider penalty across the access seeker's existing Openreach volumes.
65. Ofcom's monitoring commitment is therefore important but requires further explanation of how it will be implemented in practice. As the Competition Appeal Tribunal set out in its 2022 judgment, "[...], a lack of clarity and consistency in implementation has significant consequences and is therefore to be avoided. Regulators like Ofcom are afforded the discretion to make expert judgements in the expectation that they will provide clear and consistent guidance to those they are regulating."¹⁶ In particular, Ofcom should identify the evidence it will seek, how it will assess effects arising before formal notification and how the findings from that monitoring will inform its assessment of later offers. It should also explain the circumstances in which the frequency or sequencing of offers, or their effect on wholesale negotiations and investment expectations, could alter the outcome that would otherwise follow from consideration of the latest offer in isolation.
66. VMO2 is not asking Ofcom to treat ordinary price competition or uncertainty as inherently problematic. Nor are we asking Ofcom to fetter its discretion by defining in advance a rigid threshold at which a sequence of offers must be prohibited. The concern is that an offer-by-offer framework should not allow a wider pattern of conduct to fall outside effective scrutiny merely because an individual element may not be sufficient, viewed in isolation, to trigger intervention.

¹⁶ *CityFibre v Ofcom*, [2022] CAT 33, paragraph 146

67. Whilst VMO2 considers that Ofcom should consider the wider context with respect to the current Special Offers, it also acknowledges that these overarching matters would benefit from separate consideration outside the context of a live offer notification. A separate process would allow Ofcom, Openreach and other stakeholders to examine the relevant principles, evidence and analytical framework without being constrained by the immediate question of whether a particular offer should take effect. It would also provide greater scope to develop an approach capable of consistent application across different forms of Openreach conduct.
68. Establishing a settled approach would provide greater regulatory certainty and transparency for Openreach, access seekers and competing networks, while ensuring that future offer assessments are informed by a clear and consistent analytical starting point.
69. Ofcom should therefore use its Competition Supervision Programme to undertake own-initiative work on the wider competitive effects of repeated and evolving Openreach Offers. That work should draw on evidence obtained through Ofcom's monitoring and information-gathering powers and consider the history, scale, frequency, sequencing and interaction of Openreach's offers, their effects before and after implementation, and their impact on ISP behaviour, wholesale negotiations and investment expectations.
70. Ofcom should also set out how it intends to engage stakeholders in that programme of work. This might include the publication of a discussion document identifying the factors that Ofcom considers relevant, consultation on a proposed statement of principles or analytical framework, or an explanation as to the methodology and evidence base that Ofcom expects to apply when assessing these issues. The appropriate output may also include guidance or a position paper setting out Ofcom's considered approach. The precise form of the output is ultimately a matter for Ofcom, but the process should produce a published reference point capable of informing future offer assessments and guiding market participants.
71. Importantly, such work would not prejudice the outcome of any future offer assessment. Rather, it would provide a transparent mechanism through which concerns that Ofcom recognises in principle can be given meaningful effect in practice, ensuring that the cumulative consequences of repeated and evolving Offers are properly reflected in the regulatory framework.

4. National NTO Offer

73. Ofcom provisionally concludes that the prices under the National NTO Offer are not fair and reasonable.¹⁷ It states that in WLA Area 2, the risk that the offer ‘could have a significant adverse effect on take-up and/or prices for altnets, which would affect altnets’ ability to exert an effective competitive constraint in the long term, is plausible enough to justify intervention’.¹⁸ It provisionally concludes that in WLA Area 3, that ‘the prices in the bottom half of the REO cost range (and that may fall below that range) may not provide a sufficient margin in line with the opportunity for market entry that existed when altnets made their investment in WLA Area 3 and therefore are not fair and reasonable’.¹⁹ Ofcom therefore proposes to direct Openreach to withdraw the National NTO Offer.²⁰
74. VMO2 agrees with Ofcom’s provisional conclusion that Openreach’s prices including the National NTO Offer rebate are not fair and reasonable, and with the basis on which it reached this conclusion. Notably, we agree with Ofcom that the appropriate output increment across which to assess the level of Openreach’s prices is the segment of ‘above baseline NTO customers’ for the reasons that it sets out.
75. The structure of the offer, and the incentives it provides for ISPs, mean that an altnet with one or more existing wholesale agreements in place (an “**established wholesale altnet**”) will need, at the very least, to match Openreach’s prices including the full NTO rebate in order to win new connections that would otherwise be NTO lines. This is because, for the reasons set out by Ofcom across Figures 4.2 and 4.3 in its Consultation,²¹ the NTO lines that would have otherwise been placed with the established wholesale altnet are likely to be above-baseline NTO lines (if they were to be placed with Openreach).²² Therefore, when competing for these prospective NTO lines, the Openreach price that the established wholesale altnet must compete against will likely reflect the full National NTO rebate. This is significant given that prospective

¹⁷ Ofcom Consultation, paragraph 4.119

¹⁸ Ofcom Consultation, paragraph 4.123

¹⁹ Ofcom Consultation, paragraph 4.124

²⁰ Ofcom Consultation, paragraph 4.125

²¹ See also Ofcom Consultation, paragraphs 4.50–4.57

²² As Ofcom notes, evidence from market participants supports Ofcom’s assumption that where an ISP has an existing wholesale agreement with an altnet, it will place the majority of their newly acquired customers with that altnet in the areas in which it has coverage (Ofcom Consultation, paragraph 4.53).

NTO customers represent an important customer segment that altnets are competing for.²³

76. In addition, an established wholesale altnet's existing wholesale base would be prospective NTO lines from the perspective of an ISP. As Ofcom recognises, these lines would likely be above-baseline NTO lines if switched to Openreach and, therefore, each and every line could attract the full National NTO rebate.²⁴ In order to retain its existing wholesale customer base, established wholesale altnets would need to compete against Openreach's prices inclusive of the full National NTO rebate to retain these customers.
77. We generally agree with Ofcom's decision not to expand the output increment to include other customer segments for the same reasons it sets out.²⁵
78. We recognise that, in principle, an established wholesale altnet might compete across a broader mix of customers. It could offer a higher price for non-NTO or Openreach backbook lines, which do not attract the National NTO rebate, and use the resulting margin to support a lower price for prospective NTO lines. That strategy could be sustainable only if the altnet could win enough of the broader customer mix to leave the ISP no worse off while still recovering its own costs.²⁶
79. However, there are likely to be many reasons that make 'winning' lines from the Openreach backbook challenging in practice. Ofcom identifies several practical obstacles to that strategy.²⁷ Openreach already has wholesale agreements with the major ISPs; switching customers already served over Openreach Fibre to the Premises ("FTTP") involves friction and cost; and altnets cannot readily replicate Openreach's pricing structure. An altnet is therefore likely to need to offer significant further discounts to induce an ISP to move those customers from Openreach.
80. In light of the above, we agree with Ofcom's methodology for assessing the level of Openreach's prices, in particular that this should focus on the marginal price available to above-baseline NTO lines. Given its finding that this price level would not enable a reasonably efficient (established) altnet to compete effectively with Openreach for new

²³ Ofcom Consultation, paragraph 4.52

²⁴ Ofcom Consultation, paragraph 4.59

²⁵ Ofcom Consultation, paragraphs 4.63–4.74

²⁶ The point in the REO benchmark range that this weighted average effective price per line will fall depends on how many non-NTO lines can be acquired, but there will be circumstances in which the scale of the altnet simply prevents it from being able to supply enough new lines overall such that the weighted average effective price falls above the lower half of the REO cost range.

²⁷ Ofcom Consultation, paragraphs 4.67–4.74

lines and/or retain its existing wholesale bases, the National NTO Offer risks undermining a central objective of Ofcom, to promote sustainable network competition.²⁸ Therefore, Ofcom is right to intervene and prevent the National NTO Offer from being brought to market.

Ofcom should also consider a more ‘dynamic’ assessment

81. Ofcom’s assessment of the level of Openreach’s prices focuses on a scenario that considers Openreach and an ‘established’ wholesale altnet. This provides a static view of wholesale competition, focussing only on those operators that are currently ‘active’ in the provision of wholesale services. This is clearly a valid and important scenario for Ofcom to consider, so as to understand how established wholesale altnets may be affected by Openreach’s proposed offer.
82. However, in addition to this scenario, Ofcom should consider the potential impact from a more dynamic perspective that takes into account the potential effect on altnets that plan to enter the wholesale market (or have already done so) but do not yet have existing wholesale agreements with ISPs in place—for example, if they are in the process of negotiating such agreements (we refer to such a player as a “**wholesale entrant**”). An assessment of this scenario would be in line with Ofcom’s statutory duty and objective to promote sustainable network competition,²⁹ and would recognise that it ‘takes time for new networks to build customer bases and achieve scale and for competition to become established and sustainable’.³⁰

A dynamic assessment demonstrates that the offer has the potential to generate loyalty-enhancing effects

83. A dynamic assessment of the National NTO Offer, which takes into account potential entry by altnet wholesale providers, reveals that the conditionality of the offer has the potential to generate further loyalty-enhancing effects and may create a barrier to using altnets over and above the analysis presented in the Consultation. In the analysis that follows, we build on Ofcom’s existing stylised example to illustrate how the loyalty-enhancing effects of the offer impact on the scenario where an ISP is considering an agreement with a new wholesale network entrant.

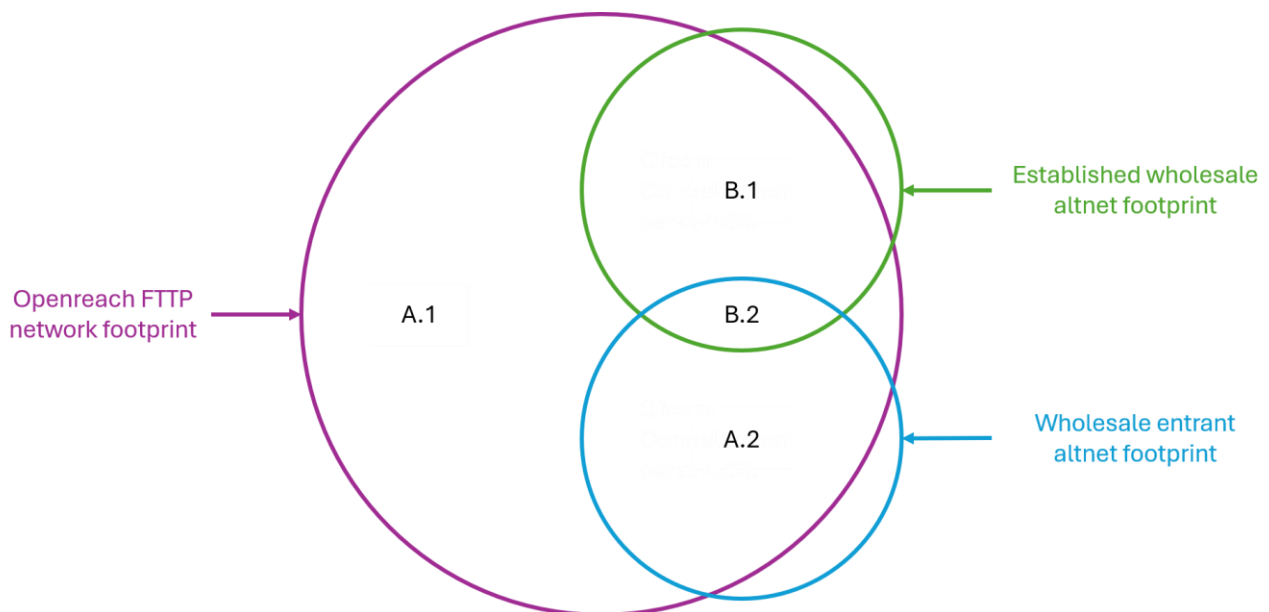
²⁸ TAR26 Statement, Volume 1, paragraphs 1.10 and 2.47

²⁹ TAR26 Statement, Volume 1, paragraphs 1.10 and 2.47

³⁰ TAR26 Statement, Volume 1, paragraph 1.9

84. Suppose there is a wholesale entrant, which has an FTTP network that overlaps to some degree with Openreach's FTTP and other wholesale altnets. The figure below shows how this might look, with reference to Ofcom's Area A and Area B as set out in Figures 4.2 and 4.3 in Ofcom's Consultation:

- Area A, which includes:
 - Area A.1 = Openreach-only areas
 - Area A.2 = where Openreach AND a wholesale entrant have overlapping (wholesale-ready) footprints, but the wholesale entrant does not (yet) have any existing agreements in place with any ISP
- Area B, which includes:
 - Area B.1 = Openreach AND an established wholesale altnet have overlapping (wholesale-ready) footprints
 - Area B.2 = where the wholesale entrant and the established wholesale altnet have an overlapping (wholesale-ready) footprint (that also falls within the Openreach footprint)



85. A key difference between this set up and that considered in Figures 4.2 and 4.3 in the Consultation, is that the wholesale entrant would be able to supply and, therefore, in principle, compete against Openreach for a share of the 100 lines within Area A (i.e. the share indicated by Area A.2 above).

86. While the wholesale entrant may not have had any agreements in place in 'period 1' (i.e. the period in which the baseline is set: April 2026) it may be continuing negotiations with ISPs to strike an agreement which could come into place in 'period 2' (i.e. the NTO offer

eligibility period: October 2026 to March 2027). Therefore, Ofcom's assumption that the ISP maintains a 'steady run rate', such that it replicates its period 1 performance in period 2 and the baseline is necessarily met with Openreach lines in Area A,³¹ could be undermined by the presence of a wholesale entrant with a network footprint in Area A.

87. In this case, if the ISP chooses to place at least some of the lines within Area A.2 with the wholesale entrant instead of Openreach, there are scenarios in which this puts at risk its ability to achieve (and exceed) the baseline and, therefore, its ability to qualify for the National NTO Offer rebate. This stems from the structure of Openreach's proposed offer—specifically, the fact that the discount provided is made conditional on meeting a threshold volume of lines (i.e. the baseline).
88. In this case, ISPs are likely to be more reluctant to take lines from the wholesale entrant in Area A.2 in order to maintain a steady run rate with Openreach, and instead may prioritise placing lines with Openreach so as to meet (and, indeed, exceed) the baseline. Therefore, the introduction of the National NTO Offer will, in principle, make it more difficult for wholesale entrants to strike agreements with ISPs in those areas where its network overlaps with Openreach (Area A.2).
89. These dynamic considerations illustrate that the National NTO Offer could in fact create loyalty-enhancing effects, which would act as a barrier to using rival networks, in contrast to the conclusions reached by Ofcom in paragraphs 4.21–4.30 of its Consultation.
90. Importantly, Ofcom should not presume that the lines in its defined Area A should be "reserved" for Openreach, particularly when there is a real possibility that a reasonably efficient wholesale entrant could—in principle—contest for these lines. Ignoring the dynamic impact of the Special Offers risks ossifying the market based on existing participants and would be incompatible with Ofcom's duty to promote competition (whether new or existing). Ofcom has a duty to ensure that the 100 lines in hypothetical Area A remain contestable by all wholesale competitors, existing and potential.

³¹ Ofcom Consultation, paragraph 4.56

There are credible scenarios where a wholesale entrant would be unable to compete with Openreach for NTO lines

91. When considering whether the Openreach prices under the National NTO Offer are 'fair and reasonable' from the perspective of a wholesale entrant, there are two possible scenarios to consider.
92. **Scenario 1:** An ISP's prospective NTO demand is distributed across Area A and Area B, and it has met the baseline requirement (in period 2) by taking some combination of NTO eligible lines in Area A and in Area B from Openreach. Any additional NTO demand in Area A.2 for which the wholesale entrant is competing will, therefore, need to be competed for at the Openreach marginal price set at the above-baseline customer price. As established by Ofcom in its Consultation, this price falls in the lower half of the REO range and therefore cannot be considered 'fair and reasonable'. This reinforces Ofcom's proposal to prevent the National NTO Offer from coming into force.
93. **Scenario 2:** An ISP's prospective NTO demand is such that, entering into an agreement with a wholesale entrant (in period 2) and taking some of these (prospective NTO) lines on the wholesale entrant network, puts the ability to meet the baseline requirement (in period 2) at risk. In this scenario, the relevant output increment may be broader than just the above-baseline NTO customers, but we set out below how, even in this narrow scenario, the effective price the wholesale entrant would need to set is likely still in the bottom half of the REO range, further reinforcing the finding that prices under the National NTO Offer are not fair or reasonable.

Scenario 2

94. Suppose that an ISP's baseline is set at 100 lines (based on period 1 demand) and that in period 2, its total prospective NTO demand is 110 lines. Suppose also that these lines are focused in Area A (A.1 and A.2) where Openreach and (in area A.2) the wholesale entrant are present.³²
95. In this scenario, if the ISP chooses to use Openreach exclusively in Area A, it will pay:

³² An implicit, simplifying assumption, is that there is no prospective NTO demand in Area B, or that the established altnet in Area B has managed to successfully defend its wholesale base. We explore the impact of relaxing this assumption below.

- the prices available under Openreach's Equinox 2 scheme for the 100 below-baseline lines;³³
- the prices available under Openreach's Equinox 2 scheme minus the National NTO Offer monthly rental rebate for the 10 above-baseline lines.³⁴

96. In order to incentivise the ISP to place lines with it, the wholesale entrant must ensure that the ISP is at least as well-off as if all 110 lines were placed with Openreach. This is the 'effective price' that would, in theory,³⁵ make the ISP indifferent between choosing Openreach or the wholesale entrant.

97. In practice, this would mean that the wholesale entrant would need to offer the ISP an effective price at a level that compensates the ISP for the value of the rebate it would forgo on prospective above-baseline NTO lines. That is, where taking a certain number of lines with the wholesale entrant will result in the access seeker 'losing' the National NTO Offer rebate, the value of that rebate must be compensated for by the wholesale entrant, by spreading the value of the rebate over the total number of lines it supplies.

98. If the wholesale entrant has the coverage/capacity to provide *all* 110 lines, in principle, it would be able to compete against Openreach for the ISP's total prospective NTO demand. In this stylised example where the entrant can supply 110 lines, we estimate

³³ In our analysis, we take into account the monthly rental prices available under Openreach's Equinox 2 offer as of 1 April 2026 and the rebate available under the ARPU share mechanism (see: Openreach (2026), 'Full Fibre broadband (FTTP) pricing for service prices: From 1st April 2026', accessed 12 August 2026). We do not take into account the additional discount available under the 550Mb incentive under Equinox 2, but note that doing so would *further* reduce the Openreach price against which the wholesale entrant would need to compete. Nor do we take into account the Frontbook ARPU Share Offer, which the ISP may receive instead of the Equinox ARPU share mechanism. However, as above, if this offer was applicable to the ISP in question, this would *further* reduce the Openreach price against which the wholesale entrant would need to compete.

³⁴ These prices are determined by the prices available under Equinox (with the exceptions set out in footnote 33 above) minus the £9.50 monthly rental charge rebate available under the National NTO Offer. As explained below, the connection rebate available under the National NTO offer is captured by Ofcom's adjusted REO range.

³⁵ This analysis does not capture the various reasons why a rival might have to offer an effective price *below* Openreach's discounted price, as is acknowledged by Ofcom (Ofcom Consultation, paragraph 4.70).

that it would need to offer an effective price of (at most) £19.18.³⁶ This price sits in the upper half of Ofcom’s adjusted REO range of £14.45–22.23.³⁷

99. However, in practice, wholesale entrants are likely to have a smaller network footprint than Openreach and, therefore, would be able to supply only a sub-set of the 110 lines (i.e. the case where Area A.2 is only a subset of Area A). In this case, the relevant increment is not all NTO demand, but only a subset.

100. The worked example below shows how an effective price for the lines it provides the ISP must be calculated to ensure that the ISP is at least as well-off as if all 110 lines were placed with Openreach.

Worked example: Effective price where the wholesale entrant can supply only part of the ISP’s demand

- Suppose the ISP has prospective NTO demand focussed in Area A and has a total prospective NTO demand of 110 lines (with a baseline of 100).
- Suppose the wholesale entrant can only serve a fraction of these lines due to its smaller footprint. Say, 20 lines in Area A.2.
- To compete with Openreach for these 20 lines, the wholesale entrant would have to ‘compensate’ the ISP for the value of the discount lost on the 10 above-the-baseline lines, while also being priced attractively for the 10 below-the-baseline lines.
- This would require an effective price per line equivalent to a weighted average price of 10 lines at the Equinox 2 price of £19.49,³⁸ and 10 lines at the National NTO Offer price (for the relevant duration of the ACL), where the price for the first 5 lines above

³⁶ We estimate the weighted average price across the pool of 100 below-baseline and 10 above-baseline lines (see footnotes 33 and 34). Consistent with Ofcom’s approach, we assess this across a five-year Average Customer Lifetime (“**ACL**”) (see Ofcom Consultation, paragraph 4.86). As per the tiered structure of the National NTO Offer, we assume that the first five above-baseline lines would receive the discount for 18 months of the ACL, and the next five above-baseline lines would receive the discount for 24 months of the ACL. To construct the average price across the FTTP download speeds, and calculate the ARPU share mechanism rebate, we produce a weighted average price across Openreach’s FTTP portfolio based on [§<]. As this data captures copper, FTTC and FTTP, it is likely to over-weight slower download speeds relative to what would be expected for an FTTP-specific distribution and, therefore, reduces the estimated effective price.

³⁷ This is based on Ofcom’s REO range in the TAR26 Statement, adjusted for: the connection charges available under Equinox 2 as of April 1 2026, the rebate available under Openreach’s Box Swap offer, and the £35 connection rebate on above-baseline customers available under the National NTO Offer (see Ofcom Consultation, paragraphs 3.23–3.26 and 4.94).

³⁸ This price is determined using the assumptions outlined in footnote 33. To calculate the price across Openreach’s portfolio, we [§<], as explained in footnote 36.

the baseline is £16.64 and the price for the second 5 lines above the baseline is £15.69.³⁹

- This would be an effective price per line across the 20 lines of £17.82.
- This effective price sits in the lower half of Ofcom's REO range of £14.45–22.23, where the mid-point is £18.34

101. We estimate that, under the scenario set out above, if the wholesale entrant is only able to supply a maximum of 26% of the 110 lines (29 lines) or less, it would need to set a price that is (at most) *in the lower half of Ofcom's REO range*, which Ofcom makes clear as being of a particular concern.⁴⁰

102. Furthermore, the greater the extent to which the ISPs' prospective NTO demand exceeds the baseline, the larger the share of those prospective NTO lines that the altnet must supply in order to be able to set an effective price that is above the mid-point of Ofcom's REO range (£18.34).⁴¹ This is because as the ISP's performance relative to the baseline increases, the cumulative value of the discount that the wholesale entrant must compensate for, across the lines it serves, increases.

103. The table below shows the minimum share of prospective NTO demand the entrant must be able to supply before it can leave the ISP financially indifferent at a price equal to the REO cost midpoint. If the entrant cannot serve that share, the price required to compensate the ISP falls below the midpoint. If the wholesale entrant cannot supply this critical share, e.g. if its network footprint is not large enough, the effective price it would need to set would fall in the lower half of Ofcom's REO range, which Ofcom makes clear as being of a particular concern.⁴²

Performance relative to baseline	Critical share where effective price = REO range mid-point
Baseline + 5%	13 lines (9%)
Baseline + 10%	29 lines (26%)

³⁹ This price is determined using the assumptions outlined in footnotes 34 and 36. Notably, we reflect the different discount durations that apply to the first 5 and second 5 above-baseline lines when calculating the average price across the five-year ACL. In addition, in order to calculate the price across Openreach's portfolio, we [§<].

⁴⁰ Ofcom Consultation, paragraph 4.37

⁴¹ Ofcom Consultation, paragraph 4.95

⁴² Ofcom Consultation, paragraph 4.37

Baseline + 15%	50 lines (43%)
Baseline + 20%	71 lines (59%)

104. Importantly, the analysis above assumes that setting an effective price that ensures that the ISP is indifferent (in price terms) between splitting its demand across the wholesale entrant and Openreach, and placing all lines with Openreach, would be sufficient. However, in practice, the wholesale entrant may need to set an even lower price to convince the ISP to place lines with it over Openreach given Openreach's incumbency advantages, as is acknowledged by Ofcom.⁴³ This suggests the required price would sit even lower in the REO range, thus reinforcing Ofcom's finding that prices are not fair and reasonable and that the National NTO Offer should not be allowed.

105. It is, of course, important to understand the likely share of lines in Area A that wholesale entrants would, in practice, be capable of contesting for (represented by Area A.2), and how this compares to the critical threshold(s) set out above. This will be informative of the degree of risk that reasonably efficient entrants are unable to compete against Openreach's proposed National NTO Offer (i.e. the effective price required to compete would at most be in the lower half of Ofcom's REO range).

106. [REDACTED]

Worked example: [REDACTED]

- [REDACTED]⁴⁴
- [REDACTED]^{45 46 47}
- [REDACTED]
- [REDACTED]
- [REDACTED]

Scenario 2: Impact of prospective NTO demand in Area B

⁴³ Ofcom Consultation, paragraph 4.70

⁴⁴ [REDACTED]

⁴⁵ [REDACTED]

⁴⁶ [REDACTED]

⁴⁷ [REDACTED]

107. In the scenario 2 analysis above, it is assumed that no prospective NTO demand arises in Area B. If we relax this assumption, the NTO lines in Area B may contribute to the ISP's performance against the baseline. Indeed, in the presence of Openreach's proposed National NTO Offer, whether the ISP decides to place its prospective lines with Openreach or the established wholesale altnet depends on whether the established wholesale altnet can effectively compete at Openreach's prices including the National NTO Offer rebate. Ofcom (correctly) concludes that the established wholesale altnet would not be able to do so.
108. The example above assumes that the ISP places no prospective NTO demand with Openreach in Area B. If it does so, those Area B lines will contribute to performance against the national baseline before the ISP decides where to place contestable Area A.2 demand.
109. To the extent that Area B demand enables the ISP to meet the baseline, more of the subsequent Area A.2 lines will attract the full National NTO rebate if placed with Openreach. The entrant would then compete against the above-baseline Openreach price for a greater share of the lines it can serve. If the baseline has already been met, the analysis becomes equivalent to Scenario 1.
110. The analysis above is conservative because it uses the midpoint of Ofcom's REO range as the relevant reference point. That midpoint reflects the modelled costs of a reasonably efficient operator. It does not include the further discount required to overcome Openreach's incumbency advantages and persuade an ISP to use a smaller or less established wholesale network. A wholesale entrant may therefore be unable to compete sustainably even where the effective price it must offer remains in the upper half of the REO range.

Summary and conclusion

111. We support Ofcom's conclusion that established wholesale altnets will not be able to compete with the National NTO Offer, given the price they would have to set is at most within the lower half of the benchmark REO range.
112. Ofcom should bolster its conclusion by considering the effect on prospective wholesale competition. As set out above, if Ofcom considers the impact of the offer on wholesale entrants, it will find instances where the structure of the offer could have loyalty-enhancing effects, which make it more difficult for wholesale entrants to strike an agreement with ISPs within the Openreach footprint. This inevitably would act as a barrier to an ISP using rival networks. Ofcom should be concerned about an offer that

forecloses competition for lines within the Openreach footprint that would otherwise be contestable.

113. Furthermore, there are clear scenarios where the wholesale entrant competing with Openreach would also be required to set an effective price that falls within the lower half of the REO range, which Ofcom makes clear is particularly concerning.⁴⁸
114. In all of these cases, it is evident that simply ‘matching’ the effective price—such that the ISP is indifferent (in price terms) between splitting its demand across the wholesale entrant and Openreach, and placing all lines with Openreach—would not be sufficient to incentivise the ISP to place lines with a wholesale altnet, and particularly one for which a new agreement would be required. In practice, Ofcom’s evidence is that altnets “often need to price below Openreach in order to win volumes from ISPs” and have had to agree long-term contracts “with pricing at a significant discount to Openreach” to convince an ISP to place lines with them over Openreach, given Openreach’s incumbency advantages.⁴⁹ This suggests the required price would sit even lower in the REO range, thus reinforcing Ofcom’s finding that prices are not fair and reasonable and that the National NTO Offer should not be allowed.
115. Ofcom should maintain its provisional decision to direct Openreach to withdraw the National NTO Offer.

⁴⁸ Ofcom Consultation, paragraph 4.37

⁴⁹ Ofcom Consultation, paragraphs 4.70 and 4.100

5. Geographic NTO Offer

The Geographic NTO Offer is discriminatory, not objectively justified and does not entail benefits

116. Given Openreach's position in the market and its SMP, it has a special responsibility not to behave in a way that restricts or distorts competition.
117. The Geographic NTO Offer is, by definition, geographically targeted at VMO2 and rival alternative network operators. The offer areas are explicitly defined by reference to VMO2's legacy cable footprint and Project Lightning expansion. As other altnets have recognised, targeting VMO2's network areas will also target the urban areas which have been, and continue to be, the focus for investment by altnets, in particular in deploying FTTP i.e. in targeting VMO2, Openreach is creating a spillover impact on altnets. Geographic targeting of this type can be indicative of anticompetitive intent on the part of an undertaking with SMP. There must therefore necessarily be a higher standard of scrutiny for introducing such targeted offers than for offers which are conditional on the volume and/or range of services purchased, but which are not targeted at specific rivals.
118. It is precisely because of this concern that SMP Condition 4 automatically deems Openreach to have shown undue discrimination (in itself an abuse under Chapter 2 Competition Act 1998) if it charges different prices in different geographic areas. Openreach is prohibited from unduly discriminating in relation to the provision of network access, except where Ofcom otherwise consents. Ofcom has the power to consent to geographic price discrimination only by exception, "in recognition that in some cases there could be benefits from geographic pricing"⁵⁰.
119. Ofcom has provided guidance on what it would consider when deciding whether to consent to geographically targeted offers. Ofcom sets out a two-stage test:

"a) whether there is any objective justification provided by Openreach for the differential pricing; and

b) if not, whether it is consistent with our overarching policy objectives, including our strategy to promote network competition. In this respect, we would consider

⁵⁰ TAR26 Statement, Volume 3, Section 9, paragraphs 9.5 and 9.36.

whether the differential pricing is capable of harming competition in the long term."⁵¹.

120. By analogy with Chapter 2 Competition Act 1998 / Article 102 of the Treaty on the Functioning of the European Union, a dominant firm may only escape liability for *prima facie* abusive discrimination by showing it is objectively justified (i.e. that it is objectively necessary or that it generates sufficient efficiencies to outweigh the restriction of competition).

121. Ofcom's guidance on undue discrimination by SMP providers states that "in most cases competition tends to be restricted by differences in transaction conditions that do not reflect differences in customers' circumstances, unless those differences lead to a substantial expansion of overall demand in a market or open up new market segments, relative to the position in the absence of such differences"⁵². Benefits such as a substantial expansion of overall demand in a market or opening up new market segments are likely to be factors consistent with Ofcom's overarching policy objectives that would justify discrimination by Openreach even in the absence of objective justification.

122. Ofcom has not applied this test correctly in the Consultation.

123. In relation to the first limb of the test, Ofcom acknowledges that Openreach has provided no evidence of any objective justification for the geographic price discrimination (i.e. it does not reflect differences in costs).⁵³

124. Against that background, Ofcom may only consent to the Geographic NTO Offer if it is satisfied that the discrimination is consistent with its overarching policy objectives, including its strategy to promote network competition. Whether the Geographic NTO Offer is capable of harming competition in the long term is relevant to that assessment, but it is not the entirety of the test. In particular, an absence of sufficiently demonstrated harm would not, of itself, establish that the discrimination is consistent with Ofcom's objectives. Ofcom must also identify some plausible benefit to, or promotion of, network competition capable of supporting consent.

125. The Consultation does not undertake that assessment. Ofcom focuses exclusively on whether the Geographic NTO Offer is capable of harming competition in the long term. It does not identify any benefit to network competition arising from the Geographic NTO

⁵¹ TAR26 Statement, Volume 3, Section 9, paragraphs 9.5 and 9.36

⁵² Ofcom Guidance 'Undue discrimination by SMP providers', 15 November 2005, paragraph 5.15

⁵³ Ofcom Consultation, paragraph 5.24

Offer, or explain why pricing targeted by reference to VMO2's footprint is otherwise consistent with its overarching policy objectives. Ofcom has therefore not established the basis necessary to consent to the Geographic NTO Offer.

126. In summary, in assessing the Geographic NTO Offer, Ofcom has failed to apply its own test for assessing whether it should consent to that offer. In particular, in circumstances in which the Consultation recognises that Openreach has not sought to provide any objective justification for the Geographic NTO Offer, Ofcom:

- has failed to assess whether the Geographic NTO Offer is consistent with Ofcom's overarching policy objectives, including its strategy to promote network competition;
- has not identified in the Consultation any benefits or promotion of network competition stemming from the Geographic NTO Offer that might justify consenting to that offer; and
- has impermissibly reduced the second limb of its own test to a consideration only of whether the offer is capable of harming competition in the long term.

Ofcom has failed to assess VMO2 as a nascent wholesale competitor in the limited analysis it has undertaken

127. Turning to the question of whether the differential pricing is capable of harming competition in the long term, the assessment is fundamentally flawed as Ofcom has failed to consider VMO2's position as a nascent competitor at the wholesale level.

128. Ofcom's provisional assessment is that "VMO2's large existing network footprint and established customer base mean geographically targeted pricing is unlikely to negatively impact the long-term competitive constraint that it exerts on Openreach"⁵⁴. For the purposes of the Consultation, this characterisation results in Ofcom misdirecting itself as it fails to have regard to the fact that VMO2 is a nascent, new-entrant wholesale competitor [3<]. For the purposes of considering network competition at the wholesale level, it is VMO2's position as a potential new entrant that is key, and not its established position in the retail market.

129. Ofcom's discussion of "how the offer is targeted geographically"⁵⁵ does not acknowledge that VMO2 is in precisely the position, envisaged in TAR26 Statement⁵⁶, as

⁵⁴ Ofcom Consultation, paragraph 5.30

⁵⁵ Ofcom Consultation, paragraphs 5.27–5.31

⁵⁶ TAR26 Statement, Annex 8, paragraphs A8.27–A8.28

a rival network that may be able to compete with Openreach's wholesale prices once it has overcome temporary barriers by reaching agreements to supply ISPs and/or operationalising those deals so that ISPs may place a substantial volume of orders. Although Openreach characterises VMO2's entry as a "longer-term, speculative possibility of future wholesaling"⁵⁷, Ofcom's assessment does not explain why VMO2's present position should fall outside the concern it has identified where a rival network is present but not yet ready to compete at the wholesale level.

130. The Geographic NTO Offer is therefore capable of harming competition because it is targeted at areas where VMO2's network is present but not yet ready to compete at the wholesale level.

131. Ofcom's failure to have adequate regard to VMO2's status as a potential new entrant at the wholesale level, has caused it to undertake a deeply flawed assessment of the potential for the Geographic NTO Offer to harm competition. In practice, Ofcom discounts the risks posed by the Geographic NTO Offer to the emergence of wholesale competition in a single paragraph of the Consultation⁵⁸ and on the basis of the limited price discount and limited duration of the Geographic NTO Offer. This analysis is flawed for the following reasons.

The Geographic NTO Offer distorts ISP incentives and impedes new wholesale agreements

132. [REDACTED]

133. [REDACTED]

Ofcom understates the competitive significance of the connection rebate

134. The Geographic NTO Offer provides a £50 connection rebate. This is significant in the context of ISP negotiations as it is an immediate, up-front discount, rather than a reduction linked to future usage or demand commitments. In certain cases, it appears the value of the rebate exceeds the applicable connection charge, resulting in a net payment to the ISP. This feature materially alters the commercial incentives associated with the offer and amplifies its attractiveness relative to that which can be provided by alternative wholesale providers. Ofcom reflects the £50 rebate in its REO analysis⁵⁹ using

⁵⁷ Ofcom Consultation, paragraph 5.13

⁵⁸ Ofcom Consultation, paragraph 5.55

⁵⁹ Ofcom Consultation, paragraphs 5.43–5.46

a five-year ACL and concludes that the resulting price remains above the midpoint of the REO cost range. Ofcom's decision to amortise the rebate over five years obscures its immediate competitive impact on ISP incentives and cash flow, which is likely to be relevant to live negotiations and switching or multi-homing decisions.

135. The choice of lifetime is material to its conclusion and should be subject to sensitivity analysis.
136. Ofcom's own evidence indicates that the five-year assumption is not universal. It records that "some ISPs told us they use shorter time horizons as part of their assessment of what network to place a customer on", including a two-year ACL in one case. Ofcom also recognises that a shorter lifetime increases the proportion of the customer relationship during which the rebate applies and therefore reduces the average lifetime rental.⁶⁰
137. The Geographic NTO Offer provides an immediate and certain connection rebate. The longer the period over which that benefit is spread, the smaller its apparent monthly value becomes. Before allowing for discounting, a £50 rebate is equivalent to approximately £2.08 per month over two years, £1.39 per month over three years and £0.83 per month over five years.
138. A five-year assumption may also obscure the circumstances in which some competing networks are currently seeking to establish sustainable scale. This is particularly relevant to smaller vertically integrated altnets which rely principally on their own retail brands, rather than wholesale agreements with major ISPs, to generate network take-up. A number of those operators have used aggressive retail pricing to enter the market, establish their brands and build customer bases. Ofcom should not assume without further analysis that those prices, or the customer relationships acquired on those terms, will remain unchanged over a five-year period.
139. There is also a potential selection effect which Ofcom's use of an industry-wide average does not address. For smaller vertically integrated altnets, the customer's selection of the retail provider will generally also determine the network over which the service is supplied. Customers choosing those providers are therefore not randomly allocated between the incumbent network and newer competing networks. They have selected a newer provider, potentially in response to its brand, price, speed, service quality or local proposition.

⁶⁰ Ofcom Consultation, paragraph 4.87

140. That choice provides a reasonable basis for Ofcom to test whether customers acquired by smaller vertically integrated altnets may, as a cohort, differ from the average UK broadband customer in their responsiveness to subsequent changes in price or proposition. If they do, their expected tenure may also differ from the market-wide assumption used by Ofcom.
141. VMO2 does not suggest that every customer of a vertically integrated altnet is particularly price-sensitive, or that the existence or direction of any difference in ACL can be established without evidence. The point is that Ofcom should not assume that an industry-wide average is necessarily representative of this distinct cohort without testing the evidence available to it.
142. The commercial strategies of those operators may also evolve over the period assumed by Ofcom. Smaller vertically integrated altnets are at different stages in moving from network deployment and customer acquisition towards sustainable take-up and returns. Changes in financing, ownership or commercial strategy may lead some operators to increase retail prices, introduce end-of-term price changes or reduce promotional activity. Those developments may affect churn, expected customer tenure and the period over which operators seek to recover acquisition and service costs.
143. Ofcom need not predict the strategy of any individual operator. It should, however, test whether current acquisition pricing and customer behaviour provide a reliable basis for assessing the competitive constraint that this wider cohort can exert throughout the assumed five-year period.
144. This matters to both elements of Ofcom's analysis. First, if the relevant ACL is shorter than five years then, even ignoring the short term impacts of the offer, the Openreach rebate has a greater equivalent monthly value. Second, if current altnet prices reflect an entry or customer-acquisition strategy that is subsequently revised, that period may not provide a reliable indication of the competitive constraint the operator will exert throughout the customer lifetime.
145. Ofcom's comparison may therefore understate the relative significance of the Geographic NTO Offer. It may also overstate the durability of the current price differential between Openreach and altnets in the targeted areas.
146. However, that does not mean that Ofcom should disregard characteristics that may be relevant to the cohort of operators against which Openreach competes, especially where they relate to a stage in the business lifecycle common to firms seeking to become sustainable competitors to Openreach.

147. The altnet sector includes a significant number of smaller, vertically integrated operators that are still seeking to establish scale and have adopted pricing strategies designed to support market entry and customer acquisition. If those common characteristics make shorter ACL more plausible for the relevant competitive cohort, it is appropriate for Ofcom to reflect that possibility through sensitivity analysis. Doing so would not amount to modelling individual competitors. It would test whether Ofcom's REO assessment remains robust to a plausible feature of the market in which the Geographic NTO Offer will operate.
148. Ofcom should therefore test whether its conclusions remain robust across a reasonable range of ACLs. It should also consider evidence from smaller vertically integrated altnets on customer tenure, churn, acquisition pricing, end-of-term price changes and the period over which current retail prices can reasonably be expected to remain available. The financial horizons over which those operators assess take-up and the recovery of incremental investment would also inform whether Ofcom's five-year assumption is representative of the competitive conditions in which the Geographic NTO Offer will operate.
149. If those sensitivities materially increase the relative significance of the immediate Openreach rebate, Ofcom should reflect that in its assessment of whether the Geographic NTO Offer is capable of harming competition in the long term.

Ofcom places too much weight on the midpoint of the REO range

150. Ofcom describes the REO cost range as an important benchmark rather than a bright-line test. We agree. However, its assessment of the Geographic NTO Offer appears in practice to place considerable weight on whether the estimated Openreach price remains above the midpoint of that range.
151. In our view, based on Ofcom's own analysis and conclusions set out in the Consultation, this risks asking the wrong question.
152. The REO cost range estimates the costs of a reasonably efficient operator. It does not measure the additional discount an altnet must offer to persuade an ISP to move demand away from Openreach.
153. Ofcom's wider market evidence recognises the commercial distinction. It finds that altnets often need to price below Openreach to win ISP volumes, reflecting Openreach's established relationships, wider footprint and operational position. An ISP considering whether to switch to another wholesale network must also take account of the

wholesale altnet's coverage, the costs and complexity of onboarding and the risks associated with changing supplier. An altnet must therefore do more than match Openreach's price.

154. [REDACTED]

155. [REDACTED]

156. Ofcom's analysis does not appear to reflect that commercial reality. Matching a price in the upper half of the REO range may provide sufficient margin over an altnet's modelled costs, but still leave that operator unable to offer the discount needed to win demand while recovering those costs.

157. The REO midpoint should therefore not operate as the dividing line between Openreach prices that do and do not raise concern. Ofcom should consider the further discount a reasonably efficient altnet would need to offer below Openreach's effective price to overcome its incumbency advantages, and whether the resulting price would still allow that altnet to recover its efficiently incurred costs.

158. This is particularly important for the Geographic NTO Offer. Ofcom relies on the estimated Openreach price remaining above the midpoint of the adjusted REO cost range. That does not answer whether a reasonably efficient altnet can price sufficiently below Openreach to attract the relevant customers and still recover its costs.

159. In its final assessment, Ofcom should test the Geographic NTO Offer against a range of points within the REO cost range. It should also reflect the evidence on the actual discounts required by ISPs when considering rival wholesale propositions. Without that analysis, Ofcom would treat a cost benchmark as though it were a complete measure of the price at which effective competition can occur. That would not provide the reasonable opportunity to compete which the REO framework is intended to protect and therefore it risks failing in its duty to promote competition.

The Geographic NTO Offer would create a harmful precedent

160. If Ofcom consents to a geographically targeted offer that is explicitly defined by reference to a named rival's footprint and lacks any cost (or other) justification, it will set a precedent that Openreach may target competitors' areas with impunity provided any individual discount is "small". This incentivises Openreach to engage in a pattern of conduct that continually tests the boundaries of such discounts and which act as a continuing signal to ISPs not to switch away from Openreach. In addition, it would further disincentivise ISPs from signing up to a new wholesale provider, if the limit of "small" in

Ofcom's eyes was repeatedly tested. Ofcom should therefore refuse its consent for the Geographic NTO Offer.

161. If Ofcom nevertheless, having conducted a fuller analysis, consents to the Geographic NTO Offer, it should define the limits of that decision clearly. Ofcom's provisional conclusion places material weight on the scale and duration of the present offer. It follows that any consent must be confined to the particular rebate, geographic scope, duration and market evidence now before it. It should not establish a more general tolerance for Openreach targeting areas by reference to a rival network footprint.
162. That clarification is particularly important because the relevant Openreach arrangements contemplate further geographic offers or changes to the areas in which geographic terms apply. Any extension, repetition or materially modified offer would change the competitive context and require a fresh assessment. Openreach should not be permitted to treat consent to the Geographic NTO Offer as a reference point from which it can progressively widen or deepen targeted discounts, or to rely on the present decision as evidence that geographic discrimination against competing network areas is acceptable in principle.

Ofcom should refuse consent for the Geographic NTO Offer

163. Openreach has provided no objective justification for pricing targeted by reference to VMO2's network footprint. Ofcom therefore needs to establish that permitting the Geographic NTO Offer is consistent with its overarching policy objectives, including its strategy to promote network competition. The Consultation does not do so.
164. Instead, Ofcom relies on its provisional conclusion that the Geographic NTO Offer does not pose a sufficiently plausible risk of causing long-term harm to network competition. For the reasons set out above, that conclusion follows from an incomplete assessment of the relevant competitive effects.
165. Ofcom has assessed VMO2 primarily as an established retail operator rather than as a nascent wholesale competitor. It has understated the effect of the offer on ISP incentives, the immediate significance of the £50 connection rebate and the price at which a reasonably efficient altnet can compete effectively with Openreach. It has also failed to give sufficient weight to the precedent created by permitting an operator with SMP to target areas by reference to a competing network's footprint without any objective justification.

166. These are not peripheral considerations. They go directly to whether the Geographic NTO Offer is consistent with Ofcom's objective of allowing rival networks to develop into material and sustainable competitive constraints. An offer which makes it harder for a new wholesale competitor to secure demand at the point of market entry cannot be justified by observing that its established retail business will remain intact.
167. Nor is the limited duration of the Geographic NTO Offer a sufficient safeguard. The harm arises through the commercial decisions taken while the Geographic NTO Offer is available and through the expectations created by Ofcom permitting targeted geographic discrimination of this kind. A six-month offer can affect agreements and customer volumes whose competitive significance extends well beyond the offer period.
168. Ofcom has therefore not established a proper basis for departing from the prohibition on geographic discrimination. Openreach has not justified the Geographic NTO Offer, Ofcom has identified no corresponding benefit to network competition, and the available evidence gives rise to credible concerns that the Geographic NTO Offer will impede the emergence and strengthening of wholesale competition.
169. Ofcom should refuse consent for the Geographic NTO Offer.

6. Frontbook ARPU Share Offer, Box Swap Offer and extension of existing Equinox incentives

Frontbook ARPU Share Offer and Box Swap Offer

170. VMO2 welcomes Ofcom's decision to assess the Frontbook ARPU Share Offer and Box Swap Offer in response to the concerns raised through the Cfl. We also agree that, since those offers are already in effect, their pricing consequences form part of the relevant baseline for assessing the later National and Geographic NTO Offers.⁶¹
171. However, VMO2 maintains⁶² its concern that the Frontbook ARPU Share Offer is conditional in economic substance on the range of services purchased. Ofcom's assessment does not, in our view, give sufficient weight to the way in which the ARPU threshold operates across an ISP's portfolio of new and upgrading connections.
172. Ofcom considers that the offer is not conditional because it does not specify a volume or range target that an ISP must meet. It also notes that an ISP which purchases only a product priced above the ARPU threshold can qualify for the rebate regardless of volume and without purchasing a range of services. In other cases, Ofcom characterises the ISP's choice of product mix as voluntary.⁶³
173. We do not consider that the absence of an express product-mix target resolves the issue. The rebate is calculated by reference to the average revenue generated by the ISP's purchases. Where an ISP purchases a portfolio of bandwidths, lower-priced products reduce that average and higher-priced products increase it. The availability and value of the rebate are therefore conditional on the composition of the services purchased, even though Openreach has expressed the mechanism as an ARPU threshold rather than a prescribed purchasing target.
174. Ofcom's single-product example demonstrates that it is possible to construct a purchasing scenario in which the ISP does not buy a range of services. It does not address the operation of the offer for ISPs purchasing a normal portfolio across several

⁶¹ Ofcom Consultation, paragraphs 2.37–2.38 and 3.4

⁶² VMO2 Cfl response, paragraphs 19–31

⁶³ Ofcom Consultation, paragraphs 3.14–3.17

bandwidths. In those circumstances, the mechanism changes the relative commercial value of the available product mix and rewards a greater concentration of higher-bandwidth purchases.

175. Nor does the fact that these purchasing decisions remain voluntary determine whether the offer is conditional. An ISP is free to choose a product mix which does not maximise the rebate, just as it is free not to pursue a discount attached to an express volume threshold. The relevant question is whether the financial benefit depends on the purchasing outcome. Under the Frontbook ARPU Share Offer, that outcome is determined by the range and relative proportion of services purchased across the relevant portfolio.
176. VMO2 also maintains that Ofcom should address the interaction between the Frontbook ARPU Share Offer and Equinox 2. The Frontbook mechanism uses the applicable Equinox rental prices and requires Openreach to compare the benefit available under the two ARPU Share mechanisms. Where the Frontbook ARPU Share Offer produces the better result, the ISP is treated as having temporarily waived its Equinox ARPU Share entitlement for the relevant frontbook circuits. In our view, this is not simply a standalone price reduction operating independently of Equinox 2. It modifies the operation of an arrangement that Ofcom has previously assessed as a conditional Offer and should itself have been notified under SMP Condition 8.6.
177. VMO2 notes Ofcom's provisional conclusion that the effective higher-bandwidth price and estimated average FTTP rental charge sit above the midpoint of the adjusted REO cost range.⁶⁴ However, the portfolio average does not fully answer the concern that the Frontbook ARPU Share Offer changes incentives within the product range and targets higher-bandwidth demand where altnets have sought to differentiate their retail propositions.
178. Ofcom should therefore distinguish clearly between its conclusions on price level and the separate questions raised by the structure of the Frontbook ARPU Share Offer. In its final statement, it should address whether the product-mix mechanism is conditional in economic substance, explain why voluntary purchasing choice is determinative of that classification, and respond expressly to the interaction with Equinox 2.

Extension of the existing Equinox 550Mb incentive

⁶⁴ Ofcom Consultation, paragraphs 3.22–3.32

179. The present notification extends the Equinox 550Mb Try-before-you-Buy incentive for a further six months on unchanged terms. Ofcom relies on its earlier Equinox decisions and subsequent monitoring to conclude that the extension does not create a potential barrier to using competing networks. It also finds that the resulting price remains above the midpoint of the adjusted REO cost range.
180. That conclusion focuses on whether the same incentive, operating on the same terms, raises concerns when considered as a standalone offer. It does not, however, address the wider point raised by VMO2.
181. The 550Mb incentive was introduced as a temporary enhancement. Its repeated extension means that it increasingly operates as an established feature of the effective Equinox pricing framework rather than a short-lived promotion. Openreach retains the competitive benefit of the discounted higher-speed rental, while preserving discretion over whether that pricing will continue, be amended or be allowed to expire.
182. Ofcom records VMO2's concern regarding repeated extensions but refers it to the wider discussion in Section 7 of the Consultation. The offer-specific assessment does not explain how the incentive's cumulative duration, or the pattern created by successive extensions, affects Ofcom's conclusion. Nor does Ofcom set out what its monitoring has shown about the incentive's practical operation and whether that evidence supports its continued treatment as a temporary measure.
183. This illustrates the wider issue identified in Section 3. Ofcom's framework assesses only the individual extension offer and, unsurprisingly, reaches a similar conclusion where previously approved terms are extended without amendment. Ofcom has failed to consider whether the series of individual extensions has in fact changed the commercial character of the offer or indeed the wider competitive significance of the arrangement.
184. VMO2 does not suggest that every extension requires Ofcom to reopen the Equinox framework from first principles. However, previous approval cannot provide a complete answer each time an offer is extended or modified. Ofcom needs to adopt a rational and reasonable approach for each review to ensure that it takes account of the period for which the incentive has operated, the reason for its continued extension, the evidence obtained through monitoring and its interaction with the other Openreach terms then in effect.

7. Conclusion

Conclusions and actions requested of Ofcom

185. Ofcom is right to conclude that the National NTO Offer is not fair and reasonable and should be withdrawn. VMO2's additional analysis reinforces that conclusion. The offer is liable to affect not only established wholesale altnets but also prospective wholesale entrants seeking to conclude and operationalise new ISP agreements. Ofcom should reflect that dynamic assessment in its final reasoning.
186. Ofcom should also ensure that the practical effect of its intervention is not eroded by Openreach introducing a rapid succession of alternative or amended notifications which would have a chilling effect on wholesale competition. Ofcom should instead introduce a proportionate safeguard of an appropriate period before offers of a similar character or type may be re-notified which would ensure Ofcom's decisions have practical effect while preserving Openreach's ability to bring forward genuinely new proposals.
187. Ofcom should refuse consent for the Geographic NTO Offer. Openreach has provided no objective justification for discrimination targeted by reference to VMO2's footprint, and Ofcom has not identified any benefit to network competition capable of justifying that treatment.
188. The competitive assessment does not cure that defect. It underestimates VMO2's position as a nascent wholesale entrant, the effect of the offer on ISP incentives and the immediate significance of the connection rebate. It also places excessive weight on whether Openreach's estimated price remains above the midpoint of the REO range, without adequately reflecting the further discount an altnet must offer to overcome Openreach's incumbency advantages and win demand.
189. Ofcom should address VMO2's remaining concerns regarding the Frontbook ARPU Share Offer and the Equinox 550Mb incentive. In particular, it should consider the economic substance of the Frontbook product-mix mechanism and the competitive significance of repeatedly extending a temporary Equinox incentive.
190. This response also identifies a wider issue. Openreach has introduced a succession of differently structured, overlapping and evolving arrangements. Those arrangements influence the commercial environment in which ISPs assess competing wholesale networks and can affect market expectations before an individual Offer is implemented.

191. Ofcom accepts that repeated Offers, signalling and uncertainty can matter. It also recognises the complexity created by the interaction between existing and proposed Offers. However, the Consultation does not explain how those wider effects influence the outcome of an individual Offer assessment in practice.
192. Ofcom should take the developing pattern of Openreach conduct duly into account when reaching its final decisions on the present Special Offers. Its assessment should extend beyond the arithmetic effect of overlapping discounts to consider the frequency, timing, sequencing and interaction of the Special Offers, and their effects on ISP expectations, wholesale negotiations and commitments to competing networks.
193. The present Special Offers also demonstrate the need for a clearer and more systematic approach to repeated and evolving Openreach offers. Ofcom should therefore use its Competition Supervision Programme to commence an own-initiative programme of work to identify and analyse those wider competitive effects, drawing on its monitoring and information-gathering powers and engaging relevant stakeholders. In our view, that work should commence following the final decisions in this Consultation rather than awaiting the notification of the next Openreach offer.
194. The precise form of the output is ultimately a matter for Ofcom, but there should be a published approach capable of informing future offer assessments and giving market participants greater clarity about how the cumulative consequences of repeated Openreach interventions will be assessed in practice.
195. Accordingly, Ofcom should:
- maintain the proposed direction requiring withdrawal of the National NTO Offer and strengthen its final reasoning to reflect the effect on prospective wholesale entry;
 - refuse consent for the Geographic NTO Offer;
 - follow the process set out in the TAR26 Statement when considering the Equinox Area Expansion, including consultation on Ofcom's provisional assessment;
 - address VMO2's remaining Frontbook ARPU Share Offer and 550Mb Extension concerns in the context of the wider suite of Openreach terms;
 - take account of the frequency, timing, sequencing and interaction of Openreach's offers when reaching its final decisions in this Consultation;

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- undertake an own-initiative workstream as part of the Competition Supervision Programme focused on the wider competitive effects of repeated and evolving Openreach offers;
- use its monitoring and information-gathering powers and engage relevant stakeholders in that work, with a view to producing a published approach capable of informing future offer assessments and providing greater levels of transparency for all stakeholders; and
- ensure that intervention against a harmful offer cannot be rendered ineffective through repeated or rapid successor notifications.

196. The emergence of wholesale competition remains critical to the development of material and sustainable network competition. Ofcom's present decisions should protect the opportunity for that competition to strengthen. The further work identified above would provide Ofcom and market participants with a clearer and more predictable basis on which to assess future Openreach offers before the same concerns arise again.

Annex 1. Responses to Ofcom's Consultation Questions

Question 3.1: Do you agree with our assessment of the Frontbook ARPU share offer and the Box Swap offer as set out above?

VMO2 agrees that the Frontbook ARPU Share Offer and Box Swap Offer should be reflected in the pricing baseline against which Openreach's subsequent offers are assessed. However, we do not agree with Ofcom's conclusion that the Frontbook ARPU Share Offer is not conditional in economic substance on the range of services purchased.

The availability and value of the rebate depend on the composition of an ISP's purchases across the relevant portfolio. Lower-priced products dilute the applicable ARPU, while higher-priced products increase it. The absence of an express product-mix target, and the fact that ISP purchasing decisions remain voluntary, do not resolve that concern.

Ofcom should also address the interaction between the Frontbook ARPU Share Offer and the existing conditional Equinox 2 framework.

Question 4.1: Do you agree with our assessment of the Incremental New to Openreach Customer Offer as set out above and our proposal to direct Openreach to withdraw the offer?

VMO2 agrees with Ofcom's provisional conclusion that the discounted prices under the National NTO Offer are not fair and reasonable and with its proposal to direct Openreach to withdraw the Offer.

Ofcom is right to conduct a pricing assessment on above-baseline NTO customers and to conclude that the resulting prices would not allow a reasonably efficient established wholesale altnet to compete sustainably.

Ofcom's final assessment should, however, also reflect the impact on prospective wholesale entrants. The National NTO Offer can create loyalty-enhancing effects and impede entry where an ISP's use of a new wholesale network would place its Openreach baseline or rebates at risk. A wholesale entrant may also need to price materially below Openreach to overcome its incumbency advantages. These additional considerations reinforce the case for withdrawal.

Question 5.1: Do you agree with our assessment of the Geographic Incremental New to Openreach Customer Offer as set out above?

VMO2 does not agree with Ofcom's assessment and considers that Ofcom should refuse consent for the Geographic NTO Offer.

Openreach has provided no objective justification for pricing targeted by reference to VMO2's network footprint. Ofcom has also failed to identify any benefit to network competition capable of justifying that discrimination.

Ofcom's competitive assessment is materially incomplete. It treats VMO2 principally as an established retail operator rather than as a nascent wholesale competitor, understates the immediate significance of the £50 connection rebate and places excessive weight on the midpoint of the REO cost range.

The Offer is capable of impeding the emergence and strengthening of wholesale competition and would create a harmful precedent for further targeted geographic offers.

Question 6.1: Do you agree with our assessment of the Incremental Ethernet Net Demand Offer as set out above?

VMO2 has no material comments on this question at this time.